



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

4TH ST.

C.C. & P.R.R.

LENGTH 910'

CAP. 7 CARS

LENGTH 910'

CAP. 8 CARS

LENGTH 910'

CAP. 7 CARS

LENGTH 910'

CAP. 8 CARS

LENGTH 910'

CAP. 7 CARS

LENGTH 910'

CAP. 12 CARS

TRANSFER PLATFORM

ENCLOSURE FOR...

# The Northeastern reporter

West Publishing Company

Transfer Platform

ENCLOSURE FOR...

Digitized by Google

*The Northeastern reporter*  
West Publishing Company

Transfer platform

Transfer Platform

10000 lbs

10000 lbs

~~PROPERTY~~

LMR



HARVARD LAW SCHOOL  
LIBRARY













THE  
NORTHEASTERN REPORTER,  
(ANNOTATED),  
VOLUME 86.

CONTAINING ALL THE CURRENT DECISIONS OF THE

SUPREME COURTS OF MASSACHUSETTS, OHIO, ILLINOIS, INDIANA,  
APPELLATE COURT OF INDIANA, AND THE COURT  
OF APPEALS OF NEW YORK.

PERMANENT EDITION.

DECEMBER 18, 1908—FEBRUARY 23, 1909.

ST. PAUL:  
WEST PUBLISHING CO.  
1909.

**COPYRIGHT, 1908,  
BY  
WEST PUBLISHING COMPANY.**

---

**COPYRIGHT, 1909,  
BY  
WEST PUBLISHING COMPANY.**

**(86 N.E.)**

# JUDGES

OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME.

## ILLINOIS—Supreme Court.

JAMES H. CARTWRIGHT, CHIEF JUSTICE.

JUSTICES.

WM. M. FARMER.

ALONZO K. VICKERS.

ORRIN N. CARTER.

GUY C. SCOTT

FRANK K. DUNN.

JOHN P. HAND.

## INDIANA—Supreme Court.<sup>1</sup>

JAMES H. JORDAN, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

OSCAR H. MONTGOMERY.

JOHN V. HADLEY.

LEANDER J. MONKS.

JOHN H. GILLET.<sup>2</sup>

QUINCY A. MYERS.<sup>3</sup>

## INDIANA—Appellate Court.<sup>1</sup>

WARD H. WATSON, CHIEF JUDGE.

ASSOCIATE JUDGES.

CASSIUS C. HADLEY.

DAVID A. MYERS.

DANIEL W. COMSTOCK.

FRANK S. ROBY.

JOSEPH M. RABB.

### Division No. 1.<sup>1</sup>

WARD H. WATSON, CHIEF JUDGE.

ASSOCIATE JUDGES.

CASSIUS C. HADLEY.

DAVID A. MYERS.

### Division No. 2.<sup>1</sup>

DANIEL W. COMSTOCK, PRESIDING JUDGE.

ASSOCIATE JUDGES.

FRANK S. ROBY.

JOSEPH M. RABB.

## MASSACHUSETTS—Supreme Judicial Court.

MARCUS P. KNOWLTON, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

JAMES M. MORTON.

JOHN WILKES HAMMOND.

WILLIAM CALEB LORING.

HENRY K. BRALEY.

HENRY N. SHELDON.

ARTHUR P. RUGG.

<sup>1</sup> Beginning November 23, 1908, to May 24, 1909.

<sup>2</sup> Term ends January 4, 1909.

<sup>3</sup> Term begins January 4, 1909.

**NEW YORK—Court of Appeals.****EDGAR M. CULLEN, CHIEF JUDGE.****ASSOCIATE JUDGES.****JOHN C. GRAY.****WILLIAM E. WERNER.****EDWARD T. BARTLETT.****WILLARD BARTLETT.****ALBERT HAIGHT.****FRANK H. HISCOCK.****IRVING G. VANN.****EMORY A. CHASE.****OHIO—Supreme Court.****JAMES L. PRICE, CHIEF JUSTICE.<sup>4</sup>****JUDGES.****WILLIAM B. CREW.****WILLIAM T. SPEAR.****AUGUSTUS N. SUMMERS.****WILLIAM Z. DAVIS.****JOHN A. SHAUCK.**

<sup>4</sup> Became Chief Justice April 22, 1908.

# CASES REPORTED.

Page		Page
	A. B. Meyer & Co., Potter Mfg. Co. v. (Ind.).....	463
	Adams Dry Goods Co., Ford v. (N. Y.).....	980
	Adams v. Young (Mass.).....	985
	Advisory Board of Coal Creek Tp., Montgomery County v. Levandowsky (Ind. App.).....	598
	Agnew, Firestone Tire & Rubber Co. v. (N. Y.).....	1130
	Ahearn, People v. (N. Y.).....	801
	Aldrich v. Aldrich (N. Y.).....	1073
	Allott v. American Strawboard Co. (Ill.).....	1131
	Allyn, Hubbard v. (Mass.).....	828
	Alsduff v. McCambridge (Ill.).....	1122
	Amacher, Johnson v. (Ind.).....	1122
	Ambach & Co., McMahon v. (Ohio).....	1122
	Ambler v. Glos (Ill.).....	Bigelow, Old Dominion Copper Mining & Smelting Co. v. (Mass.).....
	Ambre v. Postal Telegraph Cable Co. (Ind. App.).....	690
	American Car & Foundry Co. v. Inzer (Ind. App.).....	1130
	American Glue Co., Deane v. (Mass.).....	1131
	American Publishers' Ass'n, Straus v. (N. Y.).....	1131
	American Rolling Mill, Knox v. (Ill.).....	Bivens v. Henderson (Ind. App.).....
	American Steel & Wire Co., Mattson v. (Mass.).....	426
	American Strawboard Co., Allott v. (Ill.).....	1065
	A. N. Chamberlain Medicine Co. v. H. A. Chamberlain Medicine Co. (Ind. App.).....	72
	Anderson v. United Realty Co. (Ohio).....	Blake, People v. (N. Y.).....
	Appleton, Helms v. (Ind. App.).....	1129
	Argo, People v. (Ill.).....	Bliss v. Attleboro (Mass.).....
	Arnold, Brimson v. (Ill.).....	299
	Arnold v. National Starch Co. (N. Y.).....	Block Amusement Co., King v. (N. Y.).....
	Artman, Town of Scott v. (Ill.).....	1128
	Attleboro, Bliss v. (Mass.).....	Bloomington Library Ass'n, Mason v. (Ill.).....
	Atton v. South Chicago City R. Co. (Ill.).....	931
	Axtell v. State (Ind. App.).....	Board of Assessors of City of Buffalo, People v. (N. Y.).....
	Axtell v. State (Ind. App.).....	466
	Ayer, South Park Com'rs v. (Ill.).....	Board of Com'rs of Cass County, Overmeyer v. (Ind. App.).....
		77
		Board of Education and Trustees of School Dist. No. 1 of Town of Haverstraw, People v. (N. Y.).....
		1130
		Board of Education of City of New York, Sheehan v. (N. Y.).....
		1133
		Board of Education of District No. 24, etc., Scott County, People v. (Ill.).....
		206
		Board of Sup'rs of Erie County, People v. (N. Y.).....
		348
		Boccleri v. New York Contracting & Trucking Co. (N. Y.).....
		1122
		Bond v. Moore (Ill.).....
		386
		Bonney v. Bonney (Ill.).....
		1048
		Booth, Doherty v. (Mass.).....
		945
		Boston, Cobb v. (Mass.).....
		785
		Boston, Cutter v. (Mass.).....
		798
		Boston, Minot v. (Mass.).....
		783
		Boston, Oelschleger v. (Mass.).....
		883
		Boston Elevated R. Co., Beattie v., two cases (Mass.).....
		920
		Boston Elevated R. Co., Callaghan v. (Mass.).....
		767
		Boston Elevated R. Co., Carroll v. (Mass.).....
		798
		Boston Elevated R. Co., Eastman v. (Mass.).....
		798
		Boston Elevated R. Co., Lockwood v. (Mass.).....
		934
		Boston Elevated R. Co., McGilvery v. (Mass.).....
		893
		Boston Mut. Life Ins. Co., Kane v. (Mass.).....
		302
		Boston & M. R. R., Lynch v. (Mass.).....
		781
		Boston & M. R. R., Skinner v. (Mass.).....
		772
		Boston & N. St. R. Co., Lanen v. (Mass.).....
		776
		Boswell v. Security Mut. Life Ins. Co. (N. Y.).....
		532
		Bowden v. Brown (Mass.).....
		351
		Bowie v. Coffin Valve Co. (Mass.).....
		914
		Bowie v. Fitchburg Steam Engine Co. (Mass.).....
		914
		Bowler v. Pacific Mills (Mass.).....
		767
		Boyd Coal & Ooke Co., McGuire v. (Ill.).....
		174
		Boynton, Bamford v. (Mass.).....
		900
		Bradbury v. Vandalia Levee & Drainage Dist. (Ill.).....
		163
		Braman, Farra v. (Ind.).....
		843

	Page		Page
Brandt v. State (Ind.).....	337	Cincinnati, H. & D. R. Co., Cincinnati Northern Traction Co. v. (Ohio).....	987
Branson, Indianapolis & W. R. Co. v. (Ind.).....	834	Cincinnati Northern Traction Co. v. Cincinnati, H. & D. R. Co. (Ohio).....	987
Brenneman, Zeigler v. (Ill.).....	597	Cincinnati Northern Traction Co. v. Pittsburgh, C. & St. L. R. Co. (Ohio).....	987
Brett, City of Mt. Vernon v. (N. Y.).....	6	City of Amboy v. Illinois Cent. R. Co. (Ill.).....	238
Briggs, People v. (N. Y.).....	522	City of Chicago v. Gage (Ill.).....	633
Brimson v. Arnold (Ill.).....	254	City of Chicago v. Wells (Ill.).....	197
Brogan Const. Co., Rooney v. (N. Y.).....	814	City of Chicago v. West Side Metal Refining Co. (Ill.).....	744
Brooklyn Citizen, Butler v. (N. Y.).....	1122	City of Earlville v. Radley (Ill.).....	624
Brooklyn Distilling Co. v. Standard Distilling & Distributing Co. (N. Y.).....	564	City of Laporte v. Osborn (Ind. App.).....	995
Brooklyn Union Elevated R. Co., Wells v. (N. Y.).....	1184	City of Mt. Vernon v. Brett (N. Y.).....	6
Brooks v. Fitchburg & L. St. R. Co. (Mass.).....	289	City of New York v. New York City R. Co., three cases (N. Y.).....	565
Brown, Bowden v. (Mass.).....	851	City of Terre Haute v. Sachs (Ind.).....	45
Buckley, Commonwealth v. (Mass.).....	910	City Trust Co., Dunham v. (N. Y.).....	1123
Buckley, Hassell v. (N. Y.).....	1125	Clark v. Vandalia R. Co. (Ind.).....	851
Buffalo, L. & R. R. Co., Ellis v. (N. Y.).....	1124	Clark v. West (N. Y.).....	1
Buffalo, Moest v. (N. Y.).....	1128	Clarke, Hinman v. (N. Y.).....	1125
Burgard, O'Connor v. (N. Y.).....	1128	Clarke v. Loyties (N. Y.).....	1123
Burgard-Wise Const. Co., Sullivan v. (N. Y.).....	1133	Clement, In re (N. Y.).....	1123
Burnett v. Potts (Ill.).....	258	Clement, H. Koehler & Co. v. (N. Y.).....	1125
Burrell Mfg. Co., Eckhart v. (Ill.).....	199	Cleveland, C. & St. L. R. Co. v. Beale (Ind. App.).....	431
Burt v. Garden City Sand Co. (Ill.).....	1055	Cleveland, C. & St. L. R. Co. v. Cyr (Ind. App.).....	868
Burton Co. v. Chicago (Ill.).....	93	Cleveland, C. & St. L. R. Co., Dukeman v. (Ill.).....	712
Bushe v. Wright, two cases (N. Y.).....	1122	Cleveland, C. & St. L. R. Co., Etter v. (Ind.).....	1020
Butler v. Brooklyn Citizen (N. Y.).....	1122	Cleveland, C. & St. L. R. Co., Henry v. (Ill.).....	231
Butt v. Ifert (Ind.).....	961	Cleveland, C. & St. L. R. Co. v. Hilligoss (Ind.).....	485
Buzzell v. Tobin (Mass.).....	923	Cleveland, C. & St. L. R. Co. v. Lynn (Ind.).....	1017
Byard, Commonwealth v. (Mass.).....	285	Cleveland, C. & St. L. R. Co. v. Perkins (Ind.).....	405
Byrne v. Marshall Field & Co. (Ill.).....	743	Cleveland, C. & St. L. R. Co. v. Swango (Ind. App.).....	1000
		Cleveland & S. W. Traction Co., McGill v. (Ohio).....	989
Cahill, People v. (N. Y.).....	39	Cobb v. Boston (Mass.).....	785
Calro, V. & C. R. Co., People v. (Ill.).....	721	Cobb, Marvel v. (Mass.).....	390
Callaghan v. Boston Elevated R. Co. (Mass.).....	767	Cobe v. Guyer (Ill.).....	1071
Cambridge Electric Light Co., Ralph v., two cases (Mass.).....	922	Cobe v. Guyer (Ill.).....	1088
Campbell, Korn v. (N. Y.).....	1126	Cobre Grande Copper Co., Grant v. (N. Y.).....	34
Campbell, O'Neill v. (N. Y.).....	1128	Coe Co., Ristau v. (N. Y.).....	1132
Cannon, People v. (Ill.).....	215	Coe v. Hill (Mass.).....	949
Carney, Myers v. (Ind.).....	400	Coey, Johnson v. (Ill.).....	678
Carney's Estate, In re (Ind.).....	400	Coffin Valve Co., Bowie v. (Mass.).....	914
Carroll v. Boston Elevated R. Co. (Mass.).....	793	Cole v. New England Trust Co. (Mass.).....	902
Carr, Silverman v. (Mass.).....	898	Collier, State v. (Ind.).....	1015
Car Trust Inv. Co., Miller v. (N. Y.).....	1127	Columbus, Columbus St. Ry. & Light Co. v. (Ind. App.).....	83
Casey v. Chicago City R. Co. (Ill.).....	606	Columbus St. Ry. & Light Co. v. Columbus (Ind. App.).....	83
Cashman v. Bangs (Mass.).....	932	Columbus Trust Co. v. Mosher (N. Y.).....	1123
Cashman v. Proctor (Mass.).....	284	Commercial Co. of Salonica, Isaacs v. (N. Y.).....	1125
Caywood v. Supreme Lodge of Knights & Ladies of Honor (Ind.).....	482	Commercial Loan & Trust Co. v. Mallers (Ill.).....	728
Central Accident Ins. Co., Spence v. (Ill.).....	104	Commonwealth v. Buckley (Mass.).....	910
Central Trust Co., Nichols v. (Ind. App.).....	878	Commonwealth v. Byard (Mass.).....	285
Chamberlain Medicine Co., A. N. Chamberlain Medicine Co. v. (Ind. App.).....	1025	Commonwealth v. Edgarton (Mass.).....	763
Chamberlain Medicine Co. v. H. A. Chamberlain Medicine Co. (Ind. App.).....	1025	Commonwealth Loan & Savings Ass'n of Indiana, Wiley v. (Ind. App.).....	1032
Chappell v. Chappell (N. Y.).....	1122	Commonwealth Trust Co. v. Coveney (Mass.).....	895
Charles P. Parish & Co., Smythe v. (Ill.).....	754	Congress Hotel Co., Rockhill v. (Ill.).....	740
Chicago, B. & Q. R. Co., Black v. (Ill.).....	1065	Connecticut Fire Ins. Co., Cunningham v. (Mass.).....	787
Chicago City R. Co., Casey v. (Ill.).....	606	Consolidated Coal Co. of St. Louis v. Miller (Ill.).....	205
Chicago City R. Co., Devine v. (Ill.).....	689	Consolidated Gas Co. of New York, Robinson v. (N. Y.).....	805
Chicago City R. Co., Venner v. (Ill.).....	268	Continuous Rail Joint Co. of America, Riley v. (N. Y.).....	1132
Chicago City R. Co., Ward v. (Ill.).....	1111	Conway v. Chicago (Ill.).....	619
Chicago, Conway v. (Ill.).....	619	Cooksey, Hensan v. (Ill.).....	1107
Chicago, Gathman v. (Ill.).....	152	Coombs v. Phelps (Ill.).....	245
Chicago, I. & L. R. Co. v. Sanders (Ind. App.).....	430	Cortelyou v. Barnsdall (Ill.).....	200
Chicago, J. Burton Co. v. (Ill.).....	93		
Chicago, Landberg v. (Ill.).....	638		
Chicago, Lehigh Valley Transp. Co. v. (Ill.).....	1093		
Chicago, Maegerlein v. (Ill.).....	670		
Chicago, M. & St. P. R. Co., Houren v. (Ill.).....	611		
Chicago, P. & St. L. R. Co., Smith v. (Ill.).....	150		
Chicago, Sturges v. (Ill.).....	683		
Chicago Terminal Transfer R. Co. v. Preucil (Ill.).....	117		
Chicago Title & Trust Co. v. Danforth (Ill.).....	364		
Chicago & A. R. Co., Hampton v. (Ill.).....	243		
Christie, Lawrence v. (N. Y.).....	1128		
Churchman, Fraser v. (Ind. App.).....	1029		

	Page		Page
Coveney v. Commonwealth Trust Co. (Mass.)	895	El. R. Darlington Lumber Co., Superior Coal Co. v. (Ill.)	180
Cox, Vandalia R. Co. v. (Ind. App.)	1032	Erie Crawford Oil Co. v. Jones (Ind. App.)	1027
Craig v. State (Ind.)	397	Etter v. Cleveland, C., C. & St. L. R. Co. (Ind.)	1020
Crane v. Little (Mass.)	294	Evansville Gas & Electric Light Co., Raley v. (Ind. App.)	863
Crane v. Roselle (Ill.)	181	Evening American Pub. Co., Ball v. (Ill.)	1097
Cranfill, Rozell v. (Ind. App.)	864	Fahnestock, Wilson v. (Ind. App.)	1037
Crawford, McCarthy v. (Ill.)	750	Fall River Iron Works Co., Ryan v. (Mass.)	810
Cronin v. Barry (Mass.)	953	Farmer, Wood v. (Mass.)	297
Crossman, Dunn v. (Mass.)	313	Farmers' & Merchants' Nat. Bank of Wabash, First Nat. Bank v. (Ind.)	417
Crowley v. McCambridge (Ill.)	725	Farra v. Bramer (Ind.)	843
Crucible Steel Co. of America, Paragon Plaster Co. v. (N. Y.)	1129	Farrenkoph v. Holm (Ill.)	702
Crystal, Kirk v. (N. Y.)	1126	Feinberg, People v. (Ill.)	584
Cummings, Dolan v. (N. Y.)	1123	Fells Ice Co., Hilliard v. (Mass.)	773
Cummings Co., Tubbs v. (Mass.)	921	Ferguson, Pittsburgh Amusement Co. v. (N. Y.)	1131
Cunningham v. Connecticut Fire Ins. Co. (Mass.)	787	Ferris, State v. (Ind.)	993
Curtis v. Moore (Ill.)	884	Field & Co., Byrne v. (Ill.)	748
Custer, Hoffman v. (Ill.)	737	Field & Co., Kehoe v. (Ill.)	1054
Cutter v. Boston (Mass.)	798	Fifth Ave. Coach Co. v. New York (N. Y.)	824
Cutter v. Wells, Fargo & Co. (Ill.)	695	Findlay, Village of Downers Grove v. (Ill.)	732
Cycle Trade Pub. Co., Skakel v. (Ill.)	1058	Finucane v. Warner (N. Y.)	1118
Cyr, Cleveland, C., C. & St. L. R. Co. v. (Ind. App.)	868	Fireman's Ins. Co. of Newark, New Jersey, Lite v. (N. Y.)	1127
Dailey v. State (Ind. App.)	493	Firestone Tire & Rubber Co. v. Agnew (N. Y.)	1118
Dale v. Modern Woodmen of America (Ill.)	1065	First Nat. Bank v. Farmers' & Merchants' Nat. Bank of Wabash (Ind.)	417
Danforth, Chicago Title & Trust Co. v. (Ill.)	364	Fiske v. Wright (N. Y.)	1122
Darlington Lumber Co., Superior Coal Co. v. (Ill.)	180	Fitchburg Steam Engine Co., Bowie v. (Mass.)	914
Davidson v. Stewart (Mass.)	779	Fitchburg & L. St. R. Co., Brooks v. (Mass.)	289
Davitt, Moffatt v. (Mass.)	929	Fitzpatrick, Ex parte (Ind.)	964
Dealy, People v. (N. Y.)	1130	Flaherty v. Milliken (N. Y.)	558
Deane v. American Glue Co. (Mass.)	890	Flanagan v. Wells Bros. Co. (Ill.)	609
De Grasse v. H. W. Gossard Co. (Ill.)	176	Fleet, Bernstein v. (N. Y.)	1122
Deluce, People v. (Ill.)	1080	Floyd, Wright v. (Ind. App.)	971
Depew, People v. (Ill.)	1090	Ford v. Adams Dry Goods Co. (N. Y.)	1124
De Ponta v. Driscoll (Mass.)	308	Ford, De Wolf v. (N. Y.)	527
Deputy v. Dollarhide (Ind. App.)	344	Ford v. Hine Bros. Co. (Ill.)	1051
Derry, State v. (Ind.)	482	Fould de Grasse v. H. W. Gossard Co. (Ill.)	176
Devine v. Chicago City R. Co. (Ill.)	689	France v. New York Cent. & H. R. R. Co. (N. Y.)	1124
Dewey, Houdlette v. (Mass.)	790	Frankenberg, People v. (Ill.)	128
De Wolf v. Ford (N. Y.)	527	Franklin Square House, Thornton v. (Mass.)	909
Dloska, Lizotte v. (Mass.)	774	Fraser v. Churchman (Ind. App.)	1029
Dodge, Harrigan v. (Mass.)	780	Frick, Sterling v. (Ind.)	65
Doherty v. Booth (Mass.)	945	Frisch v. Wells (Mass.)	775
Dolan v. Cummings (N. Y.)	1123	Frost v. McCarthy (Mass.)	918
Dollarhide, Deputy v. (Ind. App.)	344	Fuller Co., Rutzler v. (N. Y.)	1132
Dolobacs v. Riter-Conley Mfg. Co. (N. Y.)	1123	Fulton Oil & Gas Co., Gillespie v. (Ill.)	219
Donaldson v. Donaldson (Ill.)	604	Furber v. National Metal Co. (N. Y.)	1124
Donnan v. Donnan (Ill.)	279	Gage, City of Chicago v. (Ill.)	633
Donovan, Village of Donovan v. (Ill.)	575	Galligan v. McDonald (Mass.)	804
Dooling, People v. (N. Y.)	1130	Garden City Sand Co., Burt v. (Ill.)	1055
Drainage Com'rs of Dist. No. 8 in Town of Oakwood v. Knox (Ill.)	636	Garlick v. Mutual Loan & Building Ass'n (Ill.)	236
Driscoll, De Ponta v. (Mass.)	308	Gastel v. New York (N. Y.)	833
Duel, Saylor v. (Ill.)	119	Gathman v. Chicago (Ill.)	152
Duffy-McInerney Co., People v. (N. Y.)	1129	George A. Fuller Co., Rutzler v. (N. Y.)	1132
Duffy, Stephen v. (Ill.)	1082	Gibson, Kunkalman v. (Ind.)	850
Dukeman v. Cleveland, C., C. & St. L. R. Co. (Ill.)	712	Gifford, Rowell v. (Mass.)	901
Duncan v. State (Ind.)	641	Gillespie v. Fulton Oil & Gas Co. (Ill.)	219
Dunham v. City Trust Co. (N. Y.)	1123	Gilmore v. Lee (Ill.)	568
Dunham v. Lowell (Mass.)	951	Gims, Mirick v. (Ohio)	880
Dunham, Smallwood v. (Ind. App.)	489	Glen Park, Steele v. (N. Y.)	26
Dunlop, In re (N. Y.)	1123	Glos, Ambler v. (Ill.)	1113
Dunn v. Crossman (Mass.)	813	Glos, Bauer v. (Ill.)	116
Durkee v. Hudson Valley R. Co. (N. Y.)	537	Glos, Jones v. (Ill.)	282
Durkee v. Retsof Min. Co. (N. Y.)	1123	Glos, Lister v. (Ill.)	180
Eastman v. Boston Elevated R. Co. (Mass.)	793	Glos, Warden v. (Ill.)	116
Easthart v. Burrell Elev. Co. (Ill.)	199	Glowacki, People v. (Ill.)	868
Edgerton, Commonwealth v. (Mass.)	768	Goar, Indianapolis & El. R. Co. v. (Ind. App.)	968
Edwards, Le Sourd v. (Ill.)	212	Goodrum v. Mitchell (Ill.)	217
E. Frank Coe Co., Ristau v. (N. Y.)	1132	Gossard Co., Fould de Grasse v. (Ill.)	176
Eisner v. Horton (Mass.)	892	Gould, Murdock v. (N. Y.)	12
Electric Fireproofing Co. v. Smith (N. Y.)	1124	Gouwens v. Gouwens (Ill.)	1067
Electric Welding Co. v. Prince (Mass.)	947		
Ellis v. Buffalo, L. & R. R. Co. (N. Y.)	1124		
Emerich Outfitting Co. v. Siegel, Cooper & Co. (Ill.)	1104		
Engel, Reed v. (Ill.)	1110		
Equitable Life Assur. Soc. of the United States, Peters v. (Mass.)	885		

	Page		Page
Governale, People v. (N. Y.)	554	Hilligoss, Cleveland, C. C. & St. L. R. Co. v. (Ind.)	485
Grace, People v. (Ill.)	628	Hinckley v. Schwarzschild & Sulsberger Co. (N. Y.)	1125
Grant v. Cobre Grande Copper Co. (N. Y.)	84	Hine Bros. Co., Ford v. (Ill.)	1051
Griffin's Will, In re (N. Y.)	1124	Hinman v. Clarke (N. Y.)	1125
Grosvenor's Estate, In re (N. Y.)	1124	Hirsh v. Beard (Mass.)	954
Grote v. Grote (N. Y.)	1124	H. Koehler & Co. v. Clement (N. Y.)	1125
Grote, Holland v. (N. Y.)	30	H. K. Webster Co., Whitmore v. (Mass.)	305
Grubbs, Town of New Castle v. (Ind.)	757	Hoag v. South Dover Marble Co. (N. Y.)	1125
Guarantee Const. Co., Schlichter v. (N. Y.)	1132	Hoffner v. Custer (Ill.)	737
Gude Co. v. Reiser (N. Y.)	1128	Hohenadel v. Steele (Ill.)	717
Gumaerd Lead & Zinc Co., In re (N. Y.)	1124	Holland v. Grote (N. Y.)	30
Gunderson v. Roebing Const. Co. (N. Y.)	807	Holm, Farrenkoph v. (Ill.)	702
Gunzenhauser, People v. (Ill.)	689	Holt, Shaughnessy v. (Ill.)	256
Guswelle, St. Louis & I. B. Ry. v. (Ill.)	230	Horton, Eisner v. (Mass.)	892
Guyer, Cobe v. (Ill.)	1071	Houdlette v. Dewey (Mass.)	790
Guyer, Cobe v. (Ill.)	1088	Houran v. Chicago, M. & St. P. R. Co. (Ill.)	611
Gwinn v. Wright (Ind. App.)	453	Howland v. Parker (Mass.)	287
Haas Electric & Mfg. Co. v. Springfield Amusement Park Co. (Ill.)	248	Hoyt v. Woodbury (Mass.)	772
H. A. Chamberlain Medicine Co., A. N. Chamberlain Medicine Co. v. (Ind. App.)	1025	Hubbard v. Allyn (Mass.)	356
Hagens, Pierce v. (Ohio)	519	Hudson v. Hudson (Ill.)	661
Hagenow, People v. (Ill.)	370	Hudson Valley R. Co., Durkee v. (N. Y.)	537
Hagen v. Schleuter (Ill.)	112	Hughes, Haire v. (N. Y.)	1124
Haire v. Hughes (N. Y.)	1124	Hulin, People v. (Ill.)	666
Halberstadt v. New York Life Ins. Co. (N. Y.)	801	Hunt, Pittsburgh, C. O. & St. L. R. Co. v. (Ind.)	328
Hall v. Hall (Mass.)	363	Huntington Consol. Lime Co. v. Powhatan Coal Co. (Ind. App.)	857
Hall v. New York, C. & St. L. R. Co. (N. Y.)	1125	Huntington Light & Power Co., Lowery v. (N. Y.)	1127
Hampton v. Chicago & A. R. Co. (Ill.)	243	Hurd, Heath Dry Gas Co. v. (N. Y.)	18
Hampton v. Murphy (Ind. App.)	436	H. W. Gossard Co., Fould De Grasse v. (Ill.)	176
Hanberg, Northwestern University v. (Ill.)	734	Ianne v. United States Gypsum Co. (N. Y.)	809
H. A. Peterson Mfg. Co., Beck Coal & Lumber Co. v. (Ill.)	715	Iffert, Butt v. (Ind.)	961
Hardy v. Martin (Mass.)	939	Illinois Cent. R. Co., City of Amboy v. (Ill.)	238
Hargreaves, Leslie E. Keeley Co. v. (Ill.)	132	Illinois Cent. R. Co., People v. (Ill.)	720
Harman v. Illinois & Eastern Coal Co. (Ill.)	625	Illinois Cent. R. Co., People v. (Ill.)	724
Harper, Vernon v. (Ohio)	882	Illinois Cent. R. Co., Ragsdale v. (Ill.)	214
Harrigan v. Dodge (Mass.)	780	Illinois Cent. Traction Co., Mann v. (Ill.)	161
Harriott, Owen v. (Ind. App.)	446	Illinois & Eastern Coal Co., Harman v. (Ill.)	625
Harris v. Martindale (Ind. App.)	494	Incorporated Town of Rochester, Martindale v. (Ind.)	321
Harris, Miller v. (N. Y.)	1127	Indiana Natural Gas & Oil Co. v. Wilhelm (Ind. App.)	86
Hartley v. Rotman (Mass.)	903	Indianapolis Northern Traction Co., Mellette v. (Ind. App.)	432
Harty Bros. & Harty Co. v. Polakow (Ill.)	1085	Indianapolis & C. Traction Co. v. Smith (Ind. App.)	498
Harty, McIntyre v. (Ill.)	581	Indianapolis & E. R. Co. v. Goar (Ind. App.)	968
Hasell v. Buckley (N. Y.)	1125	Indianapolis & W. R. Co. v. Branson (Ind.)	834
Haskell v. Manson (Mass.)	937	Indianapolis & W. R. Co. v. Hill (Ind.)	414
Hasseltine, Union Trust Co. v. (Mass.)	777	Indianapolis & W. R. Co. v. Ragan (Ind.)	966
Hastings, Tousey v. (N. Y.)	831	Indiana & C. Interurban R. Co., Toledo & I. Traction Co. v. (Ind.)	54
Haverhill, G. & D. St. R. Co., Lanen v. (Mass.)	776	Inland Steel Co. v. Yedinak (Ind. App.)	503
Hawkins v. Hawkins (N. Y.)	468	Inzer, American Car & Foundry Co. v. (Ind. App.)	444
Hawkins v. Rudolph (N. Y.)	1125	Isaacs v. Commercial Co. of Salonica (N. Y.)	1125
Hayes, People v. (N. Y.)	1131	Israel's v. MacDonald (N. Y.)	1128
Heath Dry Gas Co. v. Hurd (N. Y.)	18	Jacobsen v. Heywood & Morrill Rattan Co. (Ill.)	110
Helms v. Appleton (Ind. App.)	1023	Januszewicz v. Leicht (N. Y.)	1126
Henderson, Bivens v. (Ind. App.)	426	Janvrin, Miles v. (Mass.)	785
Hennessey, Taylor v. (Mass.)	318	J. Burton Co. v. Chicago (Ill.)	93
Henning v. Sampson (Ill.)	274	J. C. Walsh Co., Thornley v. (Mass.)	355
Henry v. Cleveland, C. C. & St. L. R. Co. (Ill.)	231	Jellison, C. C. & St. L. R. Co. v. (Ind. App.)	501
Henry v. Herrington (N. Y.)	29	Jenkins v. Weston (Mass.)	955
Henry, People v. (Ill.)	195	Jewett v. Jewett (Mass.)	308
Hensan v. Cooksey (Ill.)	1107	John Mohr & Sons, Martewicz v. (Ill.)	202
Herlihy v. Little (Mass.)	294	Johnson v. Amacher (Ind.)	1014
Hernly v. Pierce (Ind. App.)	443	Johnson v. Coey (Ill.)	678
Herrington, Henry v. (N. Y.)	29	Johnson, People v. (Ill.)	676
Hesseltine, Boardman v. (Mass.)	931	Johnson County Sav. Bank v. Kramer (Ind. App.)	84
Hewitt, Lindsey v. (Ind. App.)	446	Johnston v. Syracuse Lighting Co. (N. Y.)	539
Hewitt v. State (Ind.)	63	Joliet, Sings v. (Ill.)	663
Heywood & Morrill Rattan Co., Jacobsen v. (Ill.)	110		
Hicks, Morgantown Mfg. Co. v. (Ind. App.)	856		
Hill, Coe v. (Mass.)	949		
Hill, Indianapolis & W. R. Co. v. (Ind.)	414		
Hill v. Kerstetter (Ind. App.)	858		
Hill v. Kerstetter (Ind. App.)	997		
Hill, Levin v. (N. Y.)	1127		
Hill v. Rauhan Arre (Mass.)	924		
Hilliard v. Fells Ice Co. (Mass.)	773		

	Page		Page
Jones, Erie Crawford Oil Co. v. (Ind. App.)	1027	Lindsey v. Hewitt (Ind. App.)	446
Jones v. Glos (Ill.)	282	Lingler v. Wesco (Ohio)	1004
Jones, People v. (N. Y.)	810	Lister v. Glos (Ill.)	180
Jones v. Supreme Lodge Knights of Honor (Ill.)	191	Lite v. Firemen's Ins. Co. of Newark, New Jersey (N. Y.)	1127
Jordan v. Logansport (Ind.)	47	Little, Crane v. (Mass.)	294
Jumel Realty & Construction Co., Niagara Wood Working Co. v. (N. Y.)	1128	Little, Herlihy v. (Mass.)	294
Kamaiky, Sarasohn v. (N. Y.)	20	Liverpool & L. & G. Ins. Co., Sergeant v. (N. Y.)	1133
Kane v. Boston Mut. Life Ins. Co. (Mass.)	802	Lizotte v. Dloska (Mass.)	774
Kankakee & S. W. R. Co., People v. (Ill.)	742	Lockwood v. Boston Elevated R. Co. (Mass.)	934
Keeley Co. v. Hargreaves (Ill.)	132	Logansport, Jordan v. (Ind.)	47
Kehoe v. Marshall Field & Co. (Ill.)	1054	Long v. Barton (Ill.)	127
Kelth, Ulrey v. (Ill.)	696	Lord, Bergmann v. (N. Y.)	828
Keller, Nagle v. (Ill.)	694	Louisville & S. I. Traction Co. v. Worrell (Ind. App.)	78
Kelley, Sherlag v. (Mass.)	298	Lovell, Perry v. (N. Y.)	1131
Kelly v. Beers (N. Y.)	980	Lowe Supply Co., Belleveau v. (Mass.)	801
Kelly v. Beers (N. Y.)	985	Lowell, Dunham v. (Mass.)	951
Kelly Coal Co., Olson v. (Ill.)	88	Lower, People v. (Ill.)	577
Kelso v. Kelso (Ind. App.)	1001	Lowery v. Huntington Light & Power Co. (N. Y.)	1127
Kemp, Yanthis v. (Ind. App.)	451	Lumaghi Coal Co., Bartlett v. (Ill.)	587
Kenyon Paper Co., Wright v. (N. Y.)	1134	Lumaghi, Scott v. (Ill.)	384
Keogh, In re, two cases (N. Y.)	1126	Luyties, Clarke v. (N. Y.)	1123
Kerstetter, Hill v. (Ind. App.)	858	Lynch v. Boston & M. R. R. (Mass.)	781
Kerstetter, Hill v. (Ind. App.)	997	Lynch v. Lynn Box Co. (Mass.)	659
King v. Will J. Block Amusement Co. (N. Y.)	1126	Lynn Box Co., Lynch v. (Mass.)	659
Kirby v. Kirby (Ill.)	259	Lynn, Cleveland, C. & St. L. R. Co. v. (Ind.)	1017
Kirk v. Crystal (N. Y.)	1126	Lynn, Rogers v. (Mass.)	889
Kirkpatrick, McFall v. (Ill.)	139	Maag, National Surety Co. v. (Ind. App.)	862
Kitchen, Thayer v. (Mass.)	952	McAulinch, Vandalia R. Co. v. (Ind. App.)	1031
Knickerbocker Trust Co. v. O'Rourke Engineering Const. Co. (N. Y.)	1126	McCambridge, Alsdurf v. (Ill.)	725
Knickerbocker Trust Co., People v. (N. Y.)	1129	McCambridge, Crowley v. (Ill.)	725
Knox v. American Rolling Mill (Ill.)	90	McCarthy v. Crawford (Ill.)	750
Knox, Drainage Com'rs of Dist. No. 8 in Town of Oakwood v. (Ill.)	636	McCarthy, Frost v. (Mass.)	918
Koehler & Co. v. Clement (N. Y.)	1125	McCrea, Becker v. (N. Y.)	463
Korn v. Campbell (N. Y.)	1126	McCreery, Pitzer v. (Ind. App.)	990
Kramer, Johnson County Sav. Bank v. (Ind. App.)	84	McDonald, Galligan v. (Mass.)	304
Krueger, People v. (Ill.)	617	MacDonald, Israels v. (N. Y.)	1126
Kunkalman v. Gibson (Ind.)	850	McFall v. Kirkpatrick (Ill.)	139
Lacey, MacKeown v. (Mass.)	799	McGill v. Cleveland & S. W. Traction Co. (Ohio)	989
Lafayette Gas Co., Scott v. (Ind. App.)	495	McGilvery v. Boston Elevated R. Co. (Mass.)	893
Lake Erie & W. R. Co. v. Seeley (Ind. App.)	1002	McGuire v. Boyd Coal & Coke Co. (Ill.)	174
Lake Erie & W. R. Co., Village of East Peoria v. (Ill.)	634	McIntyre v. Harty (Ill.)	531
Lake Shore Sand Co. v. Lake Shore & M. S. R. Co. (Ind.)	754	MacKeown v. Lacey (Mass.)	799
Lake Shore & M. S. R. Co., Lake Shore Sand Co. v. (Ind.)	754	McLaughlin, People v. (N. Y.)	1119
Lamphear v. New York Cent. & H. R. R. Co. (N. Y.)	1115	McMahon v. Ambach & Co. (Ohio)	512
Landberg v. Chicago (Ill.)	638	McMillan, In re (N. Y.)	1127
Landon, Remm v. (Ind. App.)	973	McNew v. Vert (Ind. App.)	969
Lanen v. Boston & N. St. R. Co. (Mass.)	776	MacRae, Van Orden v. (N. Y.)	1134
Lanen v. Haverhill, G. & D. St. R. Co. (Mass.)	776	McReynolds v. Smith (Ind.)	1009
Larson v. Metropolitan Stock Exch. (Mass.)	940	Maegerlein v. Chicago (Ill.)	670
Lauenstein, Miedreich v. (Ind.)	963	Magruder, People v. (Ill.)	615
Lawrence v. Christlieb (N. Y.)	1126	Mahan v. Schroeder (Ill.)	97
Leeds v. Warren-Scharf Asphalt Pav. Co., two cases (Ind. App.)	510	Maisch v. New York (N. Y.)	458
Lee, Gilmore v. (Ill.)	568	Mallers, Commercial Loan & Trust Co. v. (Ill.)	728
Lee, People v. (Ill.)	573	Malone v. Provident Inst. for Sav. in Boston (Mass.)	912
Lehigh Valley Transp. Co. v. Chicago (Ill.)	1093	Mann v. Illinois Cent. Traction Co. (Ill.)	161
Leicht, Janusiewicz v. (N. Y.)	1126	Mann, State v. (Ind. App.)	976
Leimgruber v. Leimsgruber (Ind.)	73	Manning, Sweetser v. (Mass.)	897
Leslie E. Keeley Co. v. Hargreaves (Ill.)	132	Manake, In re (N. Y.)	1127
Le Sourd v. Edwards (Ill.)	212	Manson, Haskell v. (Mass.)	937
Levandowsky, Advisory Board of Coal Creek Tp., Montgomery County v. (Ind. App.)	1024	Marshall Field & Co., Byrne v. (Ill.)	748
Levin v. Hill (N. Y.)	1127	Marshall Field & Co., Kehoe v. (Ill.)	1054
Lewis v. Lewis (Ill.)	635	Marshall v. Matson (Ind.)	339
Light v. Schneck's Estate (Ind. App.)	442	Martell, Mutual Loan Co. v. (Mass.)	916
Lima & Toledo Traction Co., Toledo Ry. & Terminal Co. v. (Ohio)	515	Martewicz v. John Mohr & Sons (Ill.)	202
		Martin Emerich Outfitting Co. v. Siegel, Cooper & Co. (Ill.)	1104
		Martin, Hardy v. (Mass.)	889
		Martindale, Harris v. (Ind. App.)	494
		Martindale v. Incorporated Town of Rochester (Ind.)	321
		Marvel v. Cobb (Mass.)	360
		Mason v. Bloomington Library Ass'n (Ill.)	1044
		Mason Stable Co., Young v. (N. Y.)	15
		Matson, Marshall v. (Ind.)	839

	Page		Page
Mattingly, State v. (Ohio).....	353	New York Cent. & H. R. R. Co., France v. (N. Y.).....	1124
Mattson v. American Steel & Wire Co. (Mass.).....	896	New York Cent. & H. R. R. Co., Lamphear v. (N. Y.).....	1115
Mayer v. New York (N. Y.).....	553	New York Cent. & H. R. R. Co., People v. (N. Y.).....	1130
Melch v. Pottinger (Ill.).....	627	New York City R. Co., City of New York v., three cases (N. Y.).....	565
Mellette v. Indianapolis Northern Traction Co. (Ind. App.).....	432	New York Contracting & Trucking Co., Boccieri v. (N. Y.).....	1122
Merced County v. Wolf (Ill.).....	708	New York, C. & St. L. R. Co., Hall v. (N. Y.).....	1125
Merchant Underwriters at the Indemnity Exchange, Parkhurst-Davis Mercantile Co. v. (Ill.).....	1062	New York Life Ins. Co., Halberstadt v. (N. Y.).....	801
Metropolitan Stock Exch., Larsson v. (Mass.).....	940	New York Life Ins. Co., White v. (Mass.).....	928
Mettler v. Wunderlich (N. Y.).....	1127	New York, N. H. & H. R. Co., White v. (Mass.).....	928
Metz, People v. (N. Y.).....	986	Niagara Paper Mills, Snell v. (N. Y.).....	490
Metz, Thomas v. (Ill.).....	184	Niagara Wood Working Co. v. Jumel Realty & Construction Co. (N. Y.).....	1128
Metzger, Rucker v. (Ind.).....	403	Nichols v. Central Trust Co. (Ind. App.).....	878
Meyer & Co., Potter Mfg. Co. v. (Ind.).....	837	Northwestern University v. Hanberg (Ill.).....	734
Michigan Mut. Life Ins. Co. v. Thompson (Ind. App.).....	503	Nylin, People v. (Ill.).....	156
Midland Tel. Co. v. National Tel. News Co. (Ill.).....	107	O'Connor v. Burgard (N. Y.).....	1128
Miedreich v. Lauenstein (Ind.).....	963	Oelschleger v. Boston (Mass.).....	838
Milbourn v. Baugher (Ind. App.).....	874	Ohio Oil Co., Smith v. (Ind. App.).....	1027
Miles v. Janvrin (Mass.).....	785	Oil Well Supply Co., Pelow v. (N. Y.).....	812
Milford & U. St. R. Co., Tognazzi v. (Mass.).....	799	O. J. Gude Co. v. Reiser (N. Y.).....	1128
Miller v. Car Trust Inv. Co. (N. Y.).....	1127	Old Colony St. R. Co., Sullivan v. (Mass.).....	511
Miller, Consolidated Coal Co. of St. Louis v. (Ill.).....	205	Old Dominion Copper Mining & Smelting Co. v. Bigelow (Mass.).....	600
Miller v. Harris (N. Y.).....	1127	Olenick, Thomas v. (Ill.).....	592
Miller v. State (Ind. App.).....	493	Olenick, Thomas v. (Ill.).....	598
Milliken, Flaherty v. (N. Y.).....	558	Olson v. Kelly Coal Co. (Ill.).....	88
Mills, In re (N. Y.).....	1128	O'Neill v. Campbell (N. Y.).....	1128
Milton Water Co., Welsh v., two cases (Mass.).....	779	O'Rourke Engineering Const. Co., Knickerbocker Trust Co. v. (N. Y.).....	1128
Minot v. Boston (Mass.).....	783	Orser v. New York (N. Y.).....	523
Mirick v. Gims (Ohio).....	880	Orth, State v. (Ohio).....	476
Mitchell, Goodrum v. (Ill.).....	217	Osborn, City of Laporte v. (Ind. App.).....	995
Modern Wopdmen of America, Dale v. (Ill.).....	1065	Overmeyer v. Board of Com'rs of Cass County (Ind. App.).....	77
Moest v. Buffalo (N. Y.).....	1128	Owen v. Harriott (Ind. App.).....	446
Moffatt v. Davitt (Mass.).....	929	Pacific Coast Borax Co. v. Waring (N. Y.).....	1128
Mohr & Sons, Martewicz v. (Ill.).....	202	Pacific Mills, Bowler v. (Mass.).....	767
Monona Co., Strasbourger v. (N. Y.).....	476	Paragon Plaster Co. v. Crucible Steel Co. of America (N. Y.).....	1129
Montgomery, Walker v. (Ill.).....	240	Parish & Co., Smythe v. (Ill.).....	754
Moore, Bond v. (Ill.).....	386	Parker, Howland v. (Mass.).....	287
Moore, Curtis v. (Ill.).....	386	Parkhurst-Davis Mercantile Co. v. Merchant Underwriters at the Indemnity Exchange (Ill.).....	1062
Morgantown Mfg. Co. v. Hicks (Ind. App.).....	856	Paul B. Pugh & Co., Sagehomme v. (N. Y.).....	1132
Morrall v. Morrall (Ill.).....	578	Pavek, United States v. (N. Y.).....	1134
Morris, Williams v. (Ill.).....	729	Peach, Smith v. (Mass.).....	908
Morrison Co. v. Williams (Mass.).....	838	Pelow v. Oil Well Supply Co. (N. Y.).....	812
Morrison, People v. (N. Y.).....	1120	Penn American Plate Glass Co. v. Rugg (N. Y.).....	1129
Morton v. Pusey (Ill.).....	661	Penney, Sanders v. (Ohio).....	988
Mosher, Columbus Trust Co. v. (N. Y.).....	1123	Pennsylvania Co., Toledo, Fostoria & F. R. Co. v. (Ohio).....	515
Mullery, Richardson v. (Mass.).....	319	People v. Ahearn (N. Y.).....	474
Murdock v. Gould (N. Y.).....	12	People v. Argo (Ill.).....	679
Murphy, Hampton v. (Ind. App.).....	436	People v. Barrios (Ill.).....	1075
Mutual Loan Co. v. Martell (Mass.).....	916	People v. Beaudoin (N. Y.).....	1129
Mutual Loan & Building Ass'n, Garlick v. (Ill.).....	236	People v. Bell (Ill.).....	593
Mutual Reserve Life Ins. Co. v. Ross (Ind. App.).....	506	People v. Bell (N. Y.).....	1130
Myers v. Carney (Ind.).....	400	People v. Bingham (N. Y.).....	1130
Nagle v. Keller (Ill.).....	694	People v. Bingham (N. Y.).....	1131
National Metal Co., Furber v. (N. Y.).....	1124	People v. Blake (N. Y.).....	1129
National Starch Co., Arnold v. (N. Y.).....	815	People v. Board of Assessors of City of Buffalo (N. Y.).....	466
National Surety Co. v. Maag (Ind. App.).....	862	People v. Board of Education and Trustees of School Dist. No. 1 of Town of Haverstraw (N. Y.).....	1130
National Tel. News Co., Midland Tel. Co. v. (Ill.).....	107	People v. Board of Education of District No. 24, etc., Scott County (Ill.).....	206
Nesbitt v. Nesbitt (Ind. App.).....	867	People v. Board of Sup'rs of Erie County (N. Y.).....	348
Newell v. Newell (N. Y.).....	1128	People v. Briggs (N. Y.).....	522
New England Trust Co., Cole v. (Mass.).....	902		
New York, Betz v. (N. Y.).....	1122		
New York, C. & St. L. R. Co. v. Rhodes (Ind.).....	840		
New York, Fifth Ave. Coach Co. v. (N. Y.).....	824		
New York, Gastel v. (N. Y.).....	883		
New York, Maisch v. (N. Y.).....	458		
New York, Mayer v. (N. Y.).....	553		
New York, Orser v. (N. Y.).....	523		
New York, Purdy v. (N. Y.).....	560		
New York, Triest v. (N. Y.).....	549		

Page	Page
People v. Cahill (N. Y.)..... 89	Police Court of City of Rochester, People v. (N. Y.)..... 1129
People v. Cairo, V. & C. R. Co. (Ill.)..... 721	Pool v. Bents (N. Y.)..... 1131
People v. Cannon (Ill.)..... 215	Pope Motor Car Co., Turner v. (Ohio)..... 651
People v. Dealy (N. Y.)..... 1130	Posey Tp., Franklin County v. Senour (Ind. App.)..... 440
People v. Deluce (Ill.)..... 1080	Postal Telegraph Cable Co., Ambre v. (Ind. App.)..... 871
People v. Depew (Ill.)..... 1090	Potter v. Barringer (Ill.)..... 233
People v. Dooling (N. Y.)..... 1180	Potter Mfg. Co. v. A. B. Meyer & Co. (Ind.)..... 837
People v. Duffy-McInnerney Co. (N. Y.)..... 1129	Pottinger, Melch v. (Ill.)..... 627
People v. Feinberg (Ill.)..... 584	Potts, Burnett v. (Ill.)..... 258
People v. Frankenberg (Ill.)..... 128	Powers v. Sturtevant (Mass.)..... 789
People v. Glowacki (Ill.)..... 368	Powhatan Coal Co., Huntington Consol. Lime Co. v. (Ind. App.)..... 857
People v. Governale (N. Y.)..... 554	Preucil, Chicago Terminal Transfer R. Co. v. (Ill.)..... 117
People v. Grace (Ill.)..... 628	Prince, Electric Welding Co. v. (Mass.)..... 947
People v. Gunzenhauser (Ill.)..... 669	Probst, People v. (Ill.)..... 588
People v. Hagenow (Ill.)..... 370	Proctor, Cashman v. (Mass.)..... 284
People v. Hayes (N. Y.)..... 1131	Provident Inst. for Sav. in Boston, Malone v. (Mass.)..... 912
People v. Henry (Ill.)..... 195	Public Service Commission of Second District, People v. (N. Y.)..... 1131
People v. Hulin (Ill.)..... 666	Puffer Mfg. Co., Wilson v. (Mass.)..... 317
People v. Illinois Cent. R. Co. (Ill.)..... 720	Pugh & Co., Sagehomme v. (N. Y.)..... 1132
People v. Illinois Cent. R. Co. (Ill.)..... 724	Purdy v. New York (N. Y.)..... 560
People v. Johnson (Ill.)..... 676	Pusey, Morton v. (Ill.)..... 601
People v. Jones (N. Y.)..... 810	Pusey, Peterson v. (Ill.)..... 692
People v. Kankakee & S. W. R. Co. (Ill.)..... 742	Quimby, Rollins v. (Mass.)..... 350
People v. Knickerbocker Trust Co. (N. Y.)..... 1129	Rackemann v. Tilton (Ill.)..... 168
People v. Krueger (Ill.)..... 617	Radley, City of Earlville v. (Ill.)..... 624
People v. Lee (Ill.)..... 573	Ragan, Indianapolis & W. R. Co. v. (Ind.)..... 966
People v. Lower (Ill.)..... 577	Ragsdale v. Illinois Cent. R. Co. (Ill.)..... 214
People v. McLaughlin (N. Y.)..... 1119	Raley v. Evansville Gas & Electric Light Co. (Ind. App.)..... 863
People v. Magruder (Ill.)..... 615	Ralph v. Cambridge Electric Light Co., two cases (Mass.)..... 922
People v. Metz (N. Y.)..... 986	Ratner, Schneider v. (N. Y.)..... 1132
People v. Morrison (N. Y.)..... 1120	Rauhan Arre, Hill v. (Mass.)..... 924
People v. New York Cent. & H. E. R. Co. (N. Y.)..... 1130	Reed v. Engel (Ill.)..... 1110
People v. Nylia (Ill.)..... 156	Regadans v. State (Ind.)..... 449
People v. Police Court of City of Rochester (N. Y.)..... 1129	Reiser, O. J. Gude Co. v. (N. Y.)..... 1128
People v. Probst (Ill.)..... 588	Reiter v. Standard Scale & Supply Co. (Ill.)..... 745
People v. Public Service Commission of Second District (N. Y.)..... 1131	Remm v. Landon (Ind. App.)..... 973
People v. Schwank (Ill.)..... 631	Retsos Min. Co., Durkee v. (N. Y.)..... 1123
People v. Silbertrust (Ill.)..... 203	Reynolds v. Bingham (N. Y.)..... 1131
People v. Small (Ill.)..... 733	Reynolds, Phillips v. (Ill.)..... 193
People v. Smith (Ill.)..... 167	R. Haas Electric & Mfg. Co. v. Springfield Amusement Park Co. (Ill.)..... 248
People v. State Board of Tax Com'rs (N. Y.)..... 1180	Rhodes, New York, C. & St. L. R. Co. v. (Ind.)..... 840
People v. Town Board of Town of Hamburg (N. Y.)..... 1130	Richardson v. Mullery (Mass.)..... 319
People v. Waite (Ill.)..... 572	Ridgely v. Talbot J. Taylor & Co. (N. Y.)..... 1132
People v. Weinstock (N. Y.)..... 547	Riley v. Continuous Rail Joint Co. of America (N. Y.)..... 1132
People v. Wells (N. Y.)..... 1129	Ristau v. E. Frank Coe Co. (N. Y.)..... 1132
People v. Weston (Ill.)..... 188	Ritter-Conley Mfg. Co., Dolobacs v. (N. Y.)..... 1123
People v. Wilcox (Ill.)..... 672	R. M. Willson Mfg. Co., Swarts v. (N. Y.)..... 1133
People v. Willison (Ill.)..... 1094	Roberts, Southern Indiana Loan & Savings Inst. v. (Ind. App.)..... 490
People v. Wintermute (N. Y.)..... 818	Robinson v. Consolidated Gas Co. of New York (N. Y.)..... 305
People, Woodruff v. (N. Y.)..... 562	Rocker v. Metzger (Ind.)..... 403
People v. Young (Ill.)..... 589	Rockhill v. Congress Hotel Co. (Ill.)..... 740
People v. Zito (Ill.)..... 1041	Roebbling Const. Co., Gunderson v. (N. Y.)..... 807
Perkins, Cleveland, C. C. & St. L. R. Co. v. (Ind.)..... 405	Rogers v. Lynn (Mass.)..... 889
Perry v. Lovell (N. Y.)..... 1131	Rohrig, Velleman v. (N. Y.)..... 476
Perry v. Van Norden Trust Co. (N. Y.)..... 1131	Rollins v. Quimby (Mass.)..... 350
Peters v. Equitable Life Assur. Soc. of the United States (Mass.)..... 885	Romaine, State v. (Ind.)..... 73
Peterson Mfg. Co., Beck Coal & Lumber Co. v. (Ill.)..... 715	Rooney v. Brogan Const. Co. (N. Y.)..... 814
Peterson v. Pusey (Ill.)..... 692	Root Mfg. Co. v. Warren-Scharf Asphalt Pav. Co. (Ind. App.)..... 511
Phelps, Coombs v. (Ill.)..... 245	Roselle, Crane v. (Ill.)..... 181
Phillips v. Reynolds (Ill.)..... 193	Rosenberg v. Schraer (Mass.)..... 316
Picquett v. Wellington-Wild Coal Co. (Mass.)..... 899	Ross, Mutual Reserve Life Ins. Co. v. (Ind. App.)..... 508
Pierce v. Hagans (Ohio)..... 519	Roth, United Merchants' Realty & Improvement Co. v. (N. Y.)..... 544
Pierce, Hernly v. (Ind. App.)..... 443	Rotman, Hartley v. (Mass.)..... 903
Pitser v. McCreery (Ind. App.)..... 980	Rowell v. Gifford (Mass.)..... 901
Pittsburgh Amusement Co. v. Ferguson (N. Y.)..... 1131	
Pittsburg, C. C. & St. L. R. Co., Cincinnati Northern Traction Co. v. (Ohio)..... 987	
Pittsburgh, C. C. & St. L. R. Co. v. Hunt (Ind.)..... 828	
Pittsburg, C. C. & St. L. R. Co. v. Jellison (Ind. App.)..... 501	
Pogue v. Rowe (Ill.)..... 207	
Polakow, Harty Bros. & Harty Co. v. (Ill.)..... 1085	

	Page		Page
Rowe, Pogue v. (Ill.).....	207	Spencer's Estate, In re (N. Y.).....	1133
Rozell v. Cranfill (Ind. App.).....	864	Spencer, State v. (Ind. App.).....	492
Rudolph, Hawkins v. (N. Y.).....	1125	Sperb, Salomon v. (N. Y.).....	1132
Rugg, Penn American Plate Glass Co. v. (N. Y.).....	1129	Springer, Schwitters v. (Ill.).....	102
Rutizer v. George A. Fuller Co. (N. Y.).....	1132	Springfield Amusement Park Co., R. Haas Electric & Mfg. Co. v. (Ill.).....	248
Ryan v. Fall River Iron Works Co. (Mass.)	310	Standard Distilling & Distributing Co., Brooklyn Distilling Co. v. (N. Y.).....	564
Sachs, City of Terre Haute v. (Ind.)....	45	Standard Scale & Supply Co., Reiter v. (Ill.).....	745
Sagehomme v. Paul B. Pugh & Co. (N. Y.).....	1132	State, Axtell v. (Ind. App.).....	999
St. Louis & I. B. Ry. v. Guswelle (Ill.)...	230	State, Axtell v. (Ind. App.).....	1000
Salomon v. Sperb (N. Y.).....	1132	State, Barnhardt v. (Ind.).....	481
Sampsell, Henning v. (Ill.).....	274	State, Black v., three cases (Ind.).....	72
Sanders, Chicago, I. & L. R. Co. v. (Ind. App.).....	430	State, Brandt v. (Ind.).....	337
Sanders v. Penney (Ohio).....	988	State v. Collier (Ind.).....	1015
Sarasohn v. Kamalky (N. Y.).....	20	State, Craig v. (Ind.).....	397
Saylor v. Duel (Ill.).....	119	State, Dailey v. (Ind. App.).....	498
Schleuter, Hagen v. (Ill.).....	112	State v. Derry (Ind.).....	482
Schlichter v. Guarantee Const. Co. (N. Y.).....	1132	State, Duncan v. (Ind.).....	641
Schneck's Estate, Light v. (Ind. App.)....	442	State v. Ferris (Ind.).....	993
Schneck's Estate, Scholz v. (Ind. App.)....	443	State, Hewitt v. (Ind.).....	63
Schneider v. Ratner (N. Y.).....	1132	State v. Mann (Ind. App.).....	976
Schofield v. Thomas (Ill.).....	122	State v. Mattingly (Ohio).....	353
Scholz v. Schneck's Estate (Ind. App.)....	443	State, Miller v. (Ind. App.).....	493
School City of South Bend, Slatery v. (Ind. App.).....	860	State v. Orth (Ohio).....	476
Schraer, Rosenberg v. (Mass.).....	316	State, Regadanz v. (Ind.).....	449
Schroeder, Mahan v. (Ill.).....	97	State v. Romaine (Ind.).....	73
Schwank, People v. (Ill.).....	631	State v. Scott (Ind.).....	409
Schwarschild & Sulzberger Co., Hinckley v. (N. Y.).....	1125	State v. Spencer (Ind. App.).....	492
Schwitters v. Springer (Ill.).....	102	State, Teeple v. (Ind.).....	49
S. C. Lowe Supply Co., Bellevue v. (Mass.)	301	State, Walker v. (Ind. App.).....	502
Scott v. Lafayette Gas Co. (Ind. App.)....	495	State, Ward v. (Ind.).....	994
Scott v. Lumaghi (Ill.).....	384	State v. Willett (Ind.).....	68
Scott, State v. (Ind.).....	409	State Board of Tax Com'rs, People v. (N. Y.).....	1130
Security Mut. Life Ins. Co., Boswell v. (N. Y.).....	532	Steele v. Glen Park (N. Y.).....	28
Seeley, Lake Erie & W. B. Co. v. (Ind. App.).....	1002	Steele, Hohenadel v. (Ill.).....	717
Senour, Posey Tp., Franklin County v. (Ind. App.).....	440	Stephen v. Duffy (Ill.).....	1082
Sergeant v. Liverpool & L. & G. Ins. Co. (N. Y.).....	1133	Sterling v. Frick (Ind.).....	65
Shackleford v. Bennett (Ill.).....	1073	Stevens v. Strout (Mass.).....	907
Shattuck's Will, In re (N. Y.).....	455	Stewart, Davidson v. (Mass.).....	779
Shaughnessy v. Holt (Ill.).....	256	Stivers v. Stivers (Ill.).....	209
Sheehan v. Board of Education of City of New York (N. Y.).....	1133	Stone, Barlow Mfg. Co. v. (Mass.).....	306
Sherlag v. Kelley (Mass.).....	293	Strasbourg v. Monona Co. (N. Y.).....	476
Siegel, Cooper & Co., Martin Emerich Outfitting Co. v. (Ill.).....	1104	Straus v. American Publishers' Ass'n (N. Y.).....	525
Sienbida v. Tonawanda Board & Paper Co. (N. Y.).....	1133	Strout, Stevens v. (Mass.).....	907
Silbertrust, People v. (Ill.).....	203	Stull v. Veatch (Ill.).....	227
Silverman v. Carr (Mass.).....	898	Sturges v. Chicago (Ill.).....	683
Sings v. Joliet (Ill.).....	663	Sturtevant, Powers v. (Mass.).....	789
Skakel v. Cycle Trade Pub. Co. (Ill.).....	1058	Sullivan v. Burgard-Wise Const. Co. (N. Y.).....	1133
Skinner v. Boston & M. R. R. (Mass.).....	772	Sullivan v. Old Colony St. R. Co. (Mass.)...	511
Slatery v. School City of South Bend (Ind. App.).....	860	Sunday Creek Co. v. Woodworth (Ohio)...	880
Small, People v. (Ill.).....	733	Superior Coal Co. v. E. R. Darlington Lumber Co. (Ill.).....	180
Smallwood v. Dunham (Ind. App.).....	489	Supreme Lodge Knights of Honor, Jones v. (Ill.).....	191
Smith v. Chicago, P. & St. L. R. Co. (Ill.)	150	Supreme Lodge of Knights & Ladies of Honor, Caywood v. (Ind.).....	482
Smith, Electric Fireproofing Co. v. (N. Y.).....	1124	Surman, Yale Wonder Clock Co. v. (N. Y.)...	1135
Smith, Indianapolis & C. Traction Co. v. (Ind. App.).....	498	Swango, Cleveland, C. & St. L. R. Co. v. (Ind. App.).....	1000
Smith, McReynolds v. (Ind.).....	1009	Swarts v. R. M. Wilson Mfg. Co. (N. Y.)...	1133
Smith v. Ohio Oil Co. (Ind. App.).....	1027	Sweetser v. Manning (Mass.).....	897
Smith v. Peach (Mass.).....	908	Syracuse Lighting Co., Johnston v. (N. Y.)...	539
Smith, People v. (Ill.).....	167	Syracuse Rapid Transit R. Co., Weller v. (N. Y.).....	1134
Smythe v. Charles P. Parish & Co. (Ill.)...	754	Talbot J. Taylor & Co., Ridgely v. (N. Y.)...	1132
Snell v. Niagara Paper Mills (N. Y.).....	460	Taylor v. Bankers' Loan & Investment Co. (N. Y.).....	1133
Snell, Young v. (Mass.).....	282	Taylor v. Hennessey (Mass.).....	318
South Chicago City R. Co., Atton v. (Ill.)...	277	Taylor & Co., Ridgely v. (N. Y.).....	1132
South Dover Marble Co., Hoag v. (N. Y.)...	1125	Teeple v. State (Ind.).....	49
South Park Com'rs v. Ayer (Ill.).....	704	Thayer, In re (N. Y.).....	462
Southern Indiana Loan & Savings Inst. v. Roberts (Ind. App.).....	490	Thayer v. Kitchen (Mass.).....	952
Spears, Weed v. (N. Y.).....	10	Thomas v. Metz (Ill.).....	184
Spence v. Central Accident Ins. Co. (Ill.)	104	Thomas v. Olenick (Ill.).....	592
		Thomas v. Olenick (Ill.).....	593
		Thomas, Schofield v. (Ill.).....	122
		Thomas, Wyeth v. (Mass.).....	925
		Thompson v. Beatty (Ind.).....	361

	Page		Page
Thompson, Michigan Mut. Life Ins. Co. v. (Ind. App.)	503	Warren-Scharf Asphalt Pav. Co., Woodson v. (Ind. App.)	510
Thorndy v. J. C. Walsh Co. (Mass.)	355	Warrum v. White (Ind.)	959
Thornton v. Franklin Square House (Mass.)	909	Watson, In re (N. Y.)	1134
Tilton, Rackemann v. (Ill.)	168	Webster Co., Whitmore v. (Mass.)	305
Timmermann, Zimmermann v. (N. Y.)	540	Weed v. Spears (N. Y.)	10
Tobin, Buzell v. (Mass.)	923	Weller v. Syracuse Rapid Transit R. Co. (N. Y.)	1134
Tognazzi v. Milford & U. St. R. Co. (Mass.)	799	Weinstock, People v. (N. Y.)	547
Toledo, Fosteria & F. R. Co. v. Pennsylvania Co. (Ohio)	515	Wellington-Wild Coal Co., Picquett v. (Mass.)	899
Toledo Ry. & Terminal Co. v. Lima & Toledo Traction Co. (Ohio)	515	Wells v. Brooklyn Union Elevated R. Co. (N. Y.)	1134
Toledo & C. Interurban R. Co. v. Wilson (Ind. App.)	508	Wells, City of Chicago v. (Ill.)	197
Toledo & I. Traction Co. v. Indiana & C. Interurban R. Co. (Ind.)	54	Wells, Fargo & Co., Cutter v. (Ill.)	695
Tonawanda Board & Paper Co., Sienbida v. (N. Y.)	1133	Wells, Frisch v. (Mass.)	775
Tousey v. Hastings (N. Y.)	831	Wells, People v. (N. Y.)	1129
Town Board of Town of Hamburg, People v. (N. Y.)	1130	Wells Bros. Co., Flanagan v. (Ill.)	609
Town of Newcastle v. Grubbs (Ind.)	757	Welsh v. Milton Water Co., two cases (Mass.)	779
Town of Scott v. Artman (Ill.)	595	Wesco, Lingler v. (Ohio)	1004
Triest v. New York (N. Y.)	549	West, Clark v. (N. Y.)	1
Trombly v. Turner (N. Y.)	1134	Western Union Tel. Co., Union Savings Bank & Trust Co. v. (Ohio)	478
Truelove v. Truelove (Ind. App.)	1000	Weston, Jenkins v. (Mass.)	955
Truelove v. Truelove (Ind.)	1018	Weston, People v. (Ill.)	188
Tubbs v. Cummings Co. (Mass.)	921	West Side Metal Refining Co., City of Chicago v. (Ill.)	744
Tuning, Yeager v. (Ohio)	657	White v. New York Life Ins. Co. (Mass.)	928
Turner v. Pope Motor Car Co. (Ohio)	651	White v. New York, N. H. & H. R. Co. (Mass.)	923
Turner, Trombly v. (N. Y.)	1134	White, Warrum v. (Ind.)	959
Ulrey v. Keith (Ill.)	696	Whitmore v. H. K. Webster Co. (Mass.)	305
Union Savings Bank & Trust Co. v. Western Union Tel. Co. (Ohio)	478	Wilcox, People v. (Ill.)	672
Union Trust Co. v. Hasseltine (Mass.)	777	Wiley v. Commonwealth Loan & Savings Ass'n of Indiana (Ind. App.)	1032
United Merchants' Realty & Improvement Co. v. Roth (N. Y.)	544	Wilhelm, Indiana Natural Gas & Oil Co. v. (Ind. App.)	86
United Realty Co., Anderson v. (Ohio)	644	Willett, State v. (Ind.)	68
United States Gypsum Co., Ianne v. (N. Y.)	809	Williams v. Morris (Ill.)	729
United States v. Pavak (N. Y.)	1134	Williams, Morrison Co. v. (Mass.)	888
Vandalia Levee & Drainage Dist., Bradbury v. (Ill.)	163	Willison, People v. (Ill.)	1094
Vandalia R. Co. v. Cox (Ind. App.)	1032	Will J. Block Amusement Co., King v. (N. Y.)	1126
Vandalia R. Co., Clark v. (Ind.)	851	Wilson v. Fahnestock (Ind. App.)	1037
Vandalia R. Co. v. McAninch (Ind. App.)	1031	Wilson v. Puffer Mfg. Co. (Mass.)	317
Van Norden Trust Co., Perry v. (N. Y.)	1131	Wilson, Toledo & C. Interurban R. Co. v. (Ind. App.)	508
Van Nostrand v. Van Nostrand (N. Y.)	1134	Wilson Mfg. Co., Swarts v. (N. Y.)	1133
Van Orden v. MacRae (N. Y.)	1134	Wintermute, People v. (N. Y.)	818
Veatch, Stull v. (Ill.)	227	Wolff, Mercer County v. (Ill.)	708
Velleman v. Rohrig (N. Y.)	476	Wood v. Farmer (Mass.)	297
Venner v. Chicago City R. Co. (Ill.)	266	Woodbury, Hoyt v. (Mass.)	772
Vernon v. Harper (Ohio)	882	Woodruff v. People (N. Y.)	562
Vert, McNew v. (Ind. App.)	969	Woodson v. Warren-Scharf Asphalt Pav. Co. (Ind. App.)	510
Village of Donovan v. Donovan (Ill.)	575	Woodworth, Sunday Creek Co. (Ohio)	880
Village of Downers Grove v. Findlay (Ill.)	732	Worrell, Louisville & S. I. Traction Co. v. (Ind. App.)	78
Village of East Peoria v. Lake Erie & W. R. Co. (Ill.)	634	Wright, Bushe v., two cases (N. Y.)	1122
Vreeland v. Warren-Scharf Asphalt Pav. Co. (Ind. App.)	510	Wright, Fiske v. (N. Y.)	1122
Wabash, Barber Asphalt Pav. Co. v. (Ind. App.)	1034	Wright v. Floyd (Ind. App.)	971
Walker v. Montgomery (Ill.)	240	Wright, Gwinn v. (Ind. App.)	453
Walker v. State (Ind. App.)	502	Wright v. Kenyon Paper Co. (N. Y.)	1134
Walsh Co., Thornley v. (Mass.)	355	Wunderlich, Mettler v. (N. Y.)	1127
Ward v. Chicago City R. Co. (Ill.)	1111	Wyeth v. Thomas (Mass.)	925
Ward v. State (Ind.)	994	Yale Wonder Clock Co. v. Surman (N. Y.)	1135
Warden v. Glos (Ill.)	116	Yanthys v. Kemp (Ind. App.)	451
Waring, Pacific Coast Borax Co. v. (N. Y.)	1128	Yeager v. Tuning (Ohio)	657
Warner, Finucane v. (N. Y.)	1118	Yedinak, Inland Steel Co. v. (Ind. App.)	603
Warren-Scharf Asphalt Pav. Co., Leeds v., two cases (Ind. App.)	510	Young, Adams v. (Mass.)	942
Warren-Scharf Asphalt Pav. Co., Root Mfg. Co. v. (Ind. App.)	511	Young v. Mason Stable Co. (N. Y.)	15
Warren-Scharf Asphalt Pav. Co., Vreeland v. (Ind. App.)	510	Young, People v. (Ill.)	589
		Young v. Snell (Mass.)	282
		Zeigler v. Brenneman (Ill.)	597
		Zimmermann v. Timmermann (N. Y.)	540
		Zito, People v. (Ill.)	1041



THE  
NORTHEASTERN REPORTER.  
VOLUME 86.

(198 N. Y. 349)

**CLARK v. WEST.**

(Court of Appeals of New York. Nov. 10, 1908.)

**1. CONTRACTS (§ 221\*)—CONSTRUCTION—CONDITIONS.**

A contract, whereby plaintiff agreed to write certain law books for defendant, stipulated that the work was to be done to the satisfaction of defendant, and that plaintiff was not to write anything that would interfere with the sale of books covered by the contract, unless requested so to do by defendant, in which event he was to be paid for that particular work by the year. It further provided that "the first party (plaintiff) agrees to totally abstain from the use of intoxicating liquors during the continuance of this contract, and that the payment to him in accordance with the terms of this contract of any money in excess of \$2 per page is dependent on the faithful performance of this as well as the other conditions of this contract. \* \* \*"

A later paragraph recited that, "in consideration of the above promises of the first party, the second party agrees to pay to the first party \$2 per page, \* \* \* on each book prepared by the first party under this contract and accepted by the second party, and if said first party abstains from the use of intoxicating liquor and otherwise fulfills his agreements as hereinbefore set forth, he shall be paid an additional \$4 per page in manner hereinbefore stated." *Held*, that the stipulation against the use of intoxicating liquor was not the consideration for the contract, but merely a condition precedent, intended to work a forfeiture of the additional compensation in case of a breach.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 221.\*]

**2. CONTRACTS (§ 227\*)—CONDITIONS—WAIVER.**

Where a particular stipulation in a contract is not the consideration therefor, but simply one of its conditions, as where one stipulates not to use intoxicating liquors during the performance of a contract to write certain books, such condition may be waived, and when the waiver is acted upon it prevents a forfeiture for nonperformance.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1039; Dec. Dig. § 227.\*]

**3. CONTRACTS (§ 316\*)—WAIVER OF BREACH—COUNTERCLAIM FOR DAMAGES.**

Though a party to a contract has waived a breach for which he might have insisted on a forfeiture, he may still counterclaim for any damages sustained in consequence of the breach.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1489; Dec. Dig. § 316.\*]

**4. CONTRACTS (§ 227\*)—WAIVER OF CONDITION—WHAT CONSTITUTES.**

Where plaintiff's contract to write certain law books for defendant stipulated that defend-

ant was to pay plaintiff \$2 per page on each book prepared by plaintiff and accepted by defendant, and that, if plaintiff abstained from the use of intoxicating liquor and otherwise fulfilled his agreement, he should be paid an additional \$4 per page, no waiver of the stipulation as to use of intoxicating liquors could be implied from defendant's mere acceptance of the books and his payment of the sum of \$2 per page without objection.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1039; Dec. Dig. § 227.\*]

**5. WORDS AND PHRASES—"WAIVER."**

A waiver is the voluntary and intentional relinquishment of a known right, and implies an election to dispense with something of value or forego some advantage which the party waiving it might, at his option, have demanded or insisted upon.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 8, pp. 7375-7381, 7831, 7832.]

**6. PLEADING (§ 214\*)—DEMURRER—EFFECT AS ADMISSION.**

A demurrer not only admits the truth of the allegations, but also all that can by reasonable and fair intendment be implied therefrom.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 525-534; Dec. Dig. § 214.\*]

**7. PLEADING (§ 16\*)—CONSTRUCTION.**

Pleadings are not to be construed against the pleader, but averments which sufficiently point out the nature of the plaintiff's claim are sufficient, if under them he would be entitled to give the necessary evidence.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 82; Dec. Dig. § 16.\*]

**8. CONTRACTS (§ 332\*)—COMPLAINT—WAIVER OF CONDITION.**

The contract sued on stipulated against the use of intoxicating liquors by plaintiff during its continuance, and the complaint alleged: that defendant, with full knowledge of plaintiff's use of intoxicating liquors, repeatedly avowed and represented to plaintiff that he was entitled to and would receive payment on performance of the contract; that plaintiff believed and relied on said representations, and in reliance thereon continued in the performance of said contract; and that at all times during the performance by plaintiff it was mutually understood, agreed, and intended by the parties that, notwithstanding plaintiff's said use of intoxicating liquors, he was entitled to receive the compensation provided in the contract. *Held*, that this was a sufficient allegation of an express waiver by defendant of the stipulation.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 332.\*]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by William L. Clark against John

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
86 N.E.—1

B. West. From a judgment of the Appellate Division of the Supreme Court reversing an interlocutory judgment overruling a demurrer to the complaint and sustaining the demurrer (125 App. Div. 654, 110 N. Y. Supp. 110), plaintiff, by permission, appeals, and the Appellate Division certifies questions. Reversed, and interlocutory judgment affirmed.

On February 12, 1900, the plaintiff and defendant entered into a written contract, under which the former was to write and prepare for publication for the latter a series of law books, the compensation for which was provided in the contract. After the plaintiff had completed a three-volume work known as "Clark & Marshall on Corporations," the parties disagreed. The plaintiff claimed that the defendant had broken the contract by causing the book to be copyrighted in the name of a corporation which was not a party to the contract, and he brought this action to recover what he claims to be due him, for an accounting and other relief. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The Special Term overruled the demurrer, but upon appeal to the Appellate Division that decision was reversed and the demurrer sustained.

Those portions of the contract which are germane to the present stage of the controversy are as follows: The plaintiff agreed to write a series of books relating to specified legal subjects. The manuscript furnished by him was to be satisfactory to the defendant. The plaintiff was not to write or edit anything that would interfere with the sale of books to be written by him under the contract, and he was not to write any other books unless requested so to do by the defendant, in which latter event he was to be paid \$3,000 a year. The contract contained a clause which provided that "the first party (the plaintiff) agrees to totally abstain from the use of intoxicating liquors during the continuance of this contract, and that the payment to him in accordance with the terms of this contract of any money in excess of \$2 per page is dependent on the faithful performance of this as well as the other conditions of this contract. \* \* \*" In a later paragraph it further recited that, "in consideration of the above promises of the first party (the plaintiff), the second party, (the defendant) agrees to pay to the first party \$2 per page, \* \* \* on each book prepared by the first party under this contract and accepted by the second party, and if said first party abstains from the use of intoxicating liquor and otherwise fulfills his agreements as hereinbefore set forth, he shall be paid an additional \$4 per page in manner hereinbefore stated." This was followed by a specification of the method and times of payment, in which it was agreed that: "When a completed chapter or completed chapters amount-

ing to not less than 125 pages, to be delivered to the second party each month, are so delivered, the second party shall pay to the first party \$2 per page, but he shall not be required to pay more than \$250 in any one month prior to the acceptance by him of a completed book. These advance payments are to be made as soon as the completed chapters are delivered as above stated, but if, after such delivery and payment, the manuscript shall not be regarded by the second party as satisfactory, no further payment shall be made until the first party shall have made the same satisfactory to the second party. All payments on account of parts of books are to be treated as payments on account, against the books previously completed and accepted. They are for accommodation of first party only. After the publication of any book or books prepared by the first party under this contract, he shall at the end of every six months be entitled to receive, and the second party agrees to pay him, an amount equal to one-sixth of the net receipts from the combined sales of all books which shall have been prepared by the said first party and published by the said second party under this contract, less any and all payments previously made, said first party and all money then due the second party from the first party, until the amount of \$6 per page of each book shall have been paid, after which the first party shall have no right, title or interest in said books or the receipts from the sale thereof."

The plaintiff in his complaint alleges completion of the work on Corporations and publication thereof by the defendant, the sale of many copies thereof from which the defendant received large net receipts, the number of pages it contained (3,469), for which he had been paid at the rate of \$2 per page, amounting to \$6,938, and that defendant has refused to pay him any sum over and above that amount, or any sum in excess of \$2 per page. Full performance of the agreement on plaintiff's part is alleged, except that he "did not totally abstain from the use of intoxicating liquor during the continuance of said contract; but such use by the plaintiff was not excessive and did not prevent or interfere with the due and full performance by the plaintiff of all the other stipulations in said contract." The complaint further alleges a waiver on the part of the defendant of the plaintiff's stipulation to totally abstain from the use of intoxicating liquors, as follows: "(12) That defendant waived plaintiff's breach of the stipulation to totally abstain from the use of intoxicating liquors during the continuance of said contract; that long prior to the completion of said manuscript on Corporations, and its delivery to and acceptance by the defendant, the defendant had full knowledge and well knew of plaintiff's said use of intoxicating liquor during the continuance of said contract, but nevertheless acquiesced in and failed to object thereto, and

did not terminate the contract on account thereof; that with full knowledge of said breach by the plaintiff defendant continued to exact and require of the plaintiff performance of all the other stipulations and conditions of said contract, and treated the same as still in force, and continued to receive, and did receive, installments of manuscript under said contract, and continued to make and did make payments to plaintiff by way of advancements, and finally accepted and published said manuscript as aforesaid; that at no time during the performance of said contract by the plaintiff did the defendant notify or intimate to the plaintiff that defendant would insist upon strict compliance with said stipulation to totally abstain from the use of intoxicating liquor, or that defendant intended to take advantage of plaintiff's said breach, and on account and by reason thereof refuse to pay plaintiff the royalty stipulated in said contract; that, on the contrary, and with full knowledge of plaintiff's said use of intoxicating liquors, defendant repeatedly avowed and represented to the plaintiff that he was entitled to and would receive said royalty payment, and plaintiff believed and relied on said representation, and in reliance thereon continued in the performance of said contract until the time of the breach thereof by the defendant, as hereinafter specifically alleged, and at all times during the writing of said treatise on Corporations, and after as well as before publication thereof, as aforesaid, it was mutually understood, agreed, and intended by the parties hereto that, notwithstanding plaintiff's said use of intoxicating liquors, he was nevertheless entitled to receive and would receive said royalty as the same accrued under said contract." The defendant's breach of the contract is then alleged, which is claimed to consist in his having taken out a copyright upon the plaintiff's work on Corporations in the name of a publishing company which had no relation to the contract, and the relief asked for is that the defendant be compelled to account, and that the copyright be transferred to the plaintiff, or that he recover its value.

The appeal is by permission of the Appellate Division, and the following questions have been certified to us: (1) Does the complaint herein state facts sufficient to constitute a cause of action? (2) Under the terms of the contract alleged in the complaint, is the plaintiff's total abstinence from the use of intoxicating liquors a condition precedent which can be waived so as to render defendant liable upon the contract notwithstanding plaintiff's use of intoxicating liquors? (3) Does the complaint herein allege facts constituting a valid and effective waiver of plaintiff's nonperformance of such condition precedent?

William B. Hale, for appellant. H. V. Rutherford, for respondent.

WERNER, J. (after stating the facts as above). The contract before us, stripped of all superfluous verbiage, binds the plaintiff to total abstinence from the use of intoxicating liquors during the continuance of the work which he was employed to do. The stipulations relating to the plaintiff's compensation provide that if he does not observe this condition he is to be paid at the rate of \$2 per page, and if he does comply therewith he is to receive \$6 per page. The plaintiff has written one book under the contract, known as "Clark & Marshall on Corporations," which has been accepted, published, and copies sold in large numbers by the defendant. The plaintiff admits that while he was at work on this book he did not entirely abstain from the use of intoxicating liquors. He has been paid only \$2 per page for the work he has done. He claims that, despite his breach of this condition, he is entitled to the full compensation of \$6 per page, because the defendant, with full knowledge of plaintiff's nonobservance of this stipulation as to total abstinence, has waived the breach thereof and cannot now insist upon strict performance in this regard. This plea of waiver presents the underlying question which determines the answers to the questions certified.

Briefly stated, the defendant's position is that the stipulation as to plaintiff's total abstinence is the consideration for the payment of the difference between \$2 and \$6 per page, and therefore could not be waived except by a new agreement to that effect based upon a good consideration; that the so-called waiver alleged by the plaintiff is not a waiver, but a modification of the contract in respect of its consideration. The plaintiff, on the other hand, argues that the stipulation for his total abstinence was merely a condition precedent, intended to work a forfeiture of the additional compensation in case of a breach, and that it could be waived without any formal agreement to that effect based upon a new consideration.

The subject-matter of the contract was the writing of books by the plaintiff for the defendant. The duration of the contract was the time necessary to complete them all. The work was to be done to the satisfaction of the defendant, and the plaintiff was not to write any other books except those covered by the contract, unless requested so to do by the defendant, in which latter event he was to be paid for that particular work by the year. The compensation for the work specified in the contract was to be \$6 per page, unless the plaintiff failed to totally abstain from the use of intoxicating liquors during the continuance of the contract, in which event he was to receive only \$2 per page. That is the obvious import of the contract construed in the light of the purpose for which it was made, and in accordance with the ordinary meaning of plain language. It is not a contract to write books

in order that the plaintiff shall keep sober, but a contract containing a stipulation that he shall keep sober so that he may write satisfactory books. When we view the contract from this standpoint, it will readily be perceived that the particular stipulation is not the consideration for the contract, but simply one of its conditions which fits in with those relating to time and method of delivery of manuscript, revision of proof, citation of cases, assignment of copyrights, keeping track of new cases and citations for new editions, and other details which might be waived by the defendant, if he saw fit to do so. This is made clear, it seems to us, by the provision that, "in consideration of the above promises," the defendant agrees to pay the plaintiff \$2 per page on each book prepared by him, and if he "abstains from the use of intoxicating liquor and otherwise fulfills his agreements as hereinbefore set forth, he shall be paid an additional \$4 per page in manner hereinbefore stated." The compensation of \$2 per page, not to exceed \$250 per month, was an advance or partial payment of the whole price of \$6 per page, and the payment of the two-thirds, which was to be withheld pending the performance of the contract, was simply made contingent upon the plaintiff's total abstinence from the use of intoxicants during the life of the contract. It is possible, of course, by segregating that clause of the contract from the context, to give it a wider meaning and a different aspect than it has when read in conjunction with other stipulations; but this is also true of other paragraphs of the contract. The paragraph, for instance, which provides that after the publication of any of the books written by the plaintiff he is to receive an amount equal to one-sixth of the net receipts from the combined sales of all the books which shall have been published by the defendant under the contract, less any and all payments previously made, "until the amount of \$6 per page of each book shall have been paid, after which the first party (plaintiff) shall have no right, title, or interest in said books or the receipts from the sales thereof." That section of the contract, standing alone, would indicate that the plaintiff was to be entitled, in any event, to the \$6 per page to be paid out of the net receipts of the copies of the book sold. The contract, read as a whole, however, shows that it is modified by the preceding provisions, making the compensation in excess of the \$2 per page dependent upon the plaintiff's total abstinence, and upon the performance by him of the other conditions of the contract. It is obvious that the parties thought that the plaintiff's normal work was worth \$6 per page. That was the sum to be paid for the work done by the plaintiff, and not for total abstinence. If the plaintiff did not keep to the condition as to total abstinence, he was to lose part of that sum. Precisely the same situation would have arisen if the plaintiff

had disregarded any of the other essential conditions of the contract. The fact that the particular stipulation was emphasized did not change its character. It was still a condition which the defendant could have insisted upon, as he has apparently done in regard to some others, and one which he could waive just as he might have waived those relating to the amount of the advance payments, or the number of pages to be written each month. A breach of any of the substantial conditions of the contract would have entailed a loss or forfeiture similar to that consequent upon a breach of the one relating to total abstinence, in case of the defendant's insistence upon his right to take advantage of them. This, we think, is the fair interpretation of the contract, and it follows that the stipulation as to the plaintiff's total abstinence was nothing more nor less than a condition precedent. If that conclusion is well founded, there can be no escape from the corollary that this condition could be waived; and, if it was waived, the defendant is clearly not in a position to insist upon the forfeiture which his waiver was intended to annihilate. The forfeiture must stand or fall with the condition. If the latter was waived, the former is no longer a part of the contract. Defendant still has the right to counterclaim for any damages which he may have sustained in consequence of the plaintiff's breach, but he cannot insist upon strict performance. *Dunn v. Steubing*, 120 N. Y. 232, 24 N. E. 315; *Parke v. Franco-American Trading Co.*, 120 N. Y. 51, 56, 23 N. E. 996; *Brady v. Cassidy*, 145 N. Y. 171, 39 N. E. 814.

This whole discussion is predicated, of course, upon the theory of an express waiver. We assume that no waiver could be implied from the defendant's mere acceptance of the books and his payment of the sum of \$2 per page without objection. It was the defendant's duty to pay that amount in any event after acceptance of the work. The plaintiff must stand upon his allegation of an express waiver, and if he fails to establish that he cannot maintain his action.

The theory upon which the defendant's attitude seems to be based is that, even if he has represented to the plaintiff that he would not insist upon the condition that the latter should observe total abstinence from intoxicants, he can still refuse to pay the full contract price for his work. The inequity of this position becomes apparent when we consider that this contract was to run for a period of years, during a large portion of which the plaintiff was to be entitled only to the advance payment of \$2 per page; the balance being contingent, among other things, upon publication of the books and returns from sales. Upon this theory the defendant might have waived the condition while the first book was in process of production, and yet, when the whole work was completed, he would still be in a position to insist upon the

forfeiture because there had not been strict performance. Such a situation is possible in a case where the subject of the waiver is the very consideration of a contract (*Organ v. Stewart*, 60 N. Y. 418, 420), but not where the waiver relates to something that can be waived. In the case at bar, as we have seen, the waiver is not of the consideration or subject-matter, but of an incident to the method of performance. The consideration remains the same. The defendant has had the work he bargained for, and it is alleged that he has waived one of the conditions as to the manner in which it was to have been done. He might have insisted upon literal performance, and then he could have stood upon the letter of his contract. If, however, he has waived that incidental condition, he has created a situation to which the doctrine of waiver very precisely applies.

The cases which present the most familiar phases of the doctrine of waiver are those which have arisen out of litigation over insurance policies where the defendants have claimed a forfeiture because of the breach of some condition in the contract (*Insurance Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Kiernan v. Dutchess Co. Mut. Insurance Co.*, 150 N. Y. 190, 44 N. E. 698), but it is a doctrine of general application which is confined to no particular class of cases. A "waiver" has been defined to be the intentional relinquishment of a known right. It is voluntary and implies an election to dispense with something of value, or forego some advantage which the party waiving it might at its option have demanded or insisted upon (*Herman on Estoppel & Res Adjudicata*, vol. 2, p. 954; *Cowenhoven v. Ball*, 118 N. Y. 234, 23 N. E. 470), and this definition is supported by many cases in this and other states. In the recent case of *Draper v. Oswego Co. Fire R. Ass'n*, 190 N. Y. 12, 16, 82 N. E. 765, Chief Judge Cullen, in speaking for the court upon this subject, said: "While that doctrine and the doctrine of equitable estoppel are often confused in insurance litigation, there is a clear distinction between the two. A 'waiver' is the voluntary abandonment or relinquishment by a party of some right or advantage. As said by my Brother Vann in the *Kiernan Case*, 150 N. Y. 190, 44 N. E. 698: 'The law of waiver seems to be a technical doctrine, introduced and applied by the court for the purpose of defeating forfeitures. \* \* \* While the principle may not be easily classified, it is well established that, if the words and acts of the insurer reasonably justify the conclusion that with full knowledge of all the facts it intended to abandon or not to insist upon the particular defense afterwards relied upon, a verdict or finding to that effect establishes a waiver, which, if it once exists, can never be revoked.' The doctrine of equitable estoppel, or estoppel in pais, is that a party may be precluded by his acts and conduct from asserting a right to the detriment

of another party who, entitled to rely on such conduct, has acted upon it. \* \* \* As already said, the doctrine of waiver is to relieve against forfeiture. It requires no consideration for a waiver, nor any prejudice or injury to the other party." To the same effect, see *Knarston v. Manhattan Life Ins. Co.*, 140 Cal. 57, 73 Pac. 740.

It remains to be determined whether the plaintiff has alleged facts which, if proven, will be sufficient to establish his claim of an express waiver by the defendant of the plaintiff's breach of the condition to observe total abstinence. In the 12th paragraph of the complaint, the plaintiff alleges facts and circumstances which we think, if established, would prove defendant's waiver of plaintiff's performance of that contract stipulation. These facts and circumstances are that, long before the plaintiff had completed the manuscript of the first book undertaken under the contract, the defendant had full knowledge of the plaintiff's nonobservance of that stipulation, and that with such knowledge he not only accepted the completed manuscript without objection, but "repeatedly avowed and represented to the plaintiff that he was entitled to and would receive said royalty payments (i. e., the additional \$4 per page), and plaintiff believed and relied upon such representations, \* \* \* and at all times during the writing of said treatise on Corporations, and after as well as before publication thereof as aforesaid, it was mutually understood, agreed, and intended by the parties hereto that, notwithstanding plaintiff's said use of intoxicating liquors, he was nevertheless entitled to receive and would receive said royalty as the same accrued under said contract." The demurrer not only admits the truth of these allegations, but also all that can by reasonable and fair intentment be implied therefrom. *Marie v. Garrison*, 83 N. Y. 14; *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60, 51 N. E. 408, 43 L. R. A. 854, 68 Am. St. Rep. 749; *Ahrens v. Jones*, 169 N. Y. 555, 559, 62 N. E. 666, 88 Am. St. Rep. 620. Under the modern rule, pleadings are not to be construed against the pleader, but averments which sufficiently point out the nature of the plaintiff's claim are sufficient, if under them he would be exonerated to give the necessary evidence. *Rochester v. Co. v. Robinson*, 133 N. Y. 242, 246, 30 N. E. 1008; *Coatsworth v. Lehigh Valley R. R. Co.*, 156 N. Y. 451, 51 N. E. 301. Tested by these rules, we think it cannot be doubted that the allegations contained in the twelfth paragraph of the complaint, if proved upon the trial, would be sufficient to establish an express waiver by the defendant of the stipulation in regard to plaintiff's total abstinence.

The three questions certified should be answered in the affirmative, the order of the Appellate Division reversed, the interlocutory judgment of the Special Term affirmed, with costs in both courts, and the defendant be

permitted to answer the complaint within 20 days upon payment of costs.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

Order reversed, etc.

(193 N. Y. 276)

CITY OF MT. VERNON v. BRETT et al.  
(Court of Appeals of New York. Oct. 23, 1908.)

**1. MUNICIPAL CORPORATIONS (§ 978\*)—RECEIVERS OF TAXES—BONDS—LIENS.**

Laws 1892, p. 360, c. 182, § 27, requires the receiver of taxes of Mt. Vernon to give a bond "before assuming his duties," "in a sum not less than \$20,000 to be fixed by the council," which bond must be approved by the council and filed with the clerk. Section 44 requires the receiver "within fifteen days after his election" to give a bond for "\$20,000," "to be approved and filed before he assumes his duties," and makes the bond a lien on his and his sureties' land. Public Officers Law (Laws 1892, p. 1656, c. 681), § 11, validates certain defective bonds as to the sureties' personal liability. Section 12 makes sureties liable for antecedent acts of the principal. Section 15 (Laws 1894, p. 841, c. 403), validates acts of de facto officers. A receiver gave a bond for \$25,000 as fixed by the council, it being executed, approved, and filed according to section 27, and not according to section 44. *Held*, that the bond was not a lien on the sureties' land for failing to conform to section 44; the public officers law not giving a lien on the sureties' property.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 978.\*]

**2. BONDS (§ 62\*)—LIEN UPON LAND—REQUISITES.**

No bond is a lien on the promisor's property, unless expressly made so by statute or covenant.

[Ed. Note.—For other cases, see Bonds, Dec. Dig. § 62.\*]

**3. OFFICERS (§ 124\*)—BONDS—STATUTES—CONSTRUCTION.**

Under the rule of strict construction Public Officers Law (Laws 1892, p. 1656, c. 681, as amended by Laws 1894, p. 841, c. 403), validating defective official bonds, cannot be judicially extended by implication beyond the letter of its command.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 218; Dec. Dig. § 124.\*]

**OFFICERS (§ 124\*)—BONDS—STATUTES—CONSTRUCTION.**

§ 6 per statute making an official bond a lien of the obligors' land, though neither filed nor recorded, where evidence of liens on lands is present, should be strictly construed.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 218; Dec. Dig. § 124.\*]

**5. BONDS (§ 50\*)—COMMON-LAW AND STATUTORY BONDS, DISTINGUISHED—“COMMON-LAW BONDS”—“STATUTORY BONDS.”**

"Common-law bonds" and "statutory bonds" are to be distinguished, in that the latter conform to a statute, while the former do not, though so intended.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 53; Dec. Dig. § 50.\*]

For other definitions, see Words and Phrases, vol. 7, p. 6649.]

**6. BONDS (§ 50\*)—STATUTORY BONDS—APPLICATION TO STATUTE.**

When each of two sections of equal force in the same statute provides for a bond, and the provisions are at variance, the language of the bond must determine under which section it was given.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 53; Dec. Dig. § 50.\*]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by the City of Mount Vernon against John H. Brett and others. From a judgment of the Appellate Division, Second Department (115 App. Div. 882, 100 N. Y. Supp. 1110), affirming a judgment for plaintiff, defendants Andrew M. Kenlon and others appeal. Reversed, and new trial granted.

This action was brought to fix the amount due the plaintiff upon a bond given by John H. Brett, as principal, and his sureties, five in number, to secure the faithful discharge by him of the duties of his office as receiver of taxes and assessments of the city of Mt. Vernon, to establish the same as a lien upon certain real property belonging to the obligors when the bond was filed, and to foreclose the same. Brett made default, but various defendants answered, some of them alleging that they were subsequent purchasers or incumbrancers for full value, in good faith and without actual notice, of certain parcels of the land in question. John H. Brett was elected receiver of taxes and assessments of the city of Mt. Vernon on the 16th of May, 1898, for the term of two years, commencing on the 15th of June in that year. He took the oath of office prescribed by law on the 24th of May, and between that date and the 15th of June, when he entered upon the duties of his office, the common council fixed the penalty of his official bond at the sum of \$25,000. The bond in question, dated and acknowledged on the 15th of June, was "accepted" by the common council on the 6th of July, was filed with the city clerk on the 27th of July, and approved by the common council on the 2d of August, 1898. It was never filed in the office of the clerk of the county in which the city of Mt. Vernon is situated, and was neither recorded nor indexed by the city clerk, and no book was kept by him for either purpose. In May, 1900, Brett was re-elected to said office for the further term of two years, but he failed to qualify, or to give any bond for that term, although he continued to act as receiver until June 15, 1902, when his successor, who had been duly elected, qualified and assumed the duties of the office. Between the 15th of June, 1898, and the 14th of June, 1900, Brett, as receiver, collected taxes belonging to the city to the amount of \$18,765.25, and converted the same to his own use. Between the 15th of June, 1900, and the 14th of June, 1902, he collected and converted the further sum of \$5,592.55, and between the 11th of

April, 1899, and the 14th of June, 1900, the sum of \$717.09, but whether that sum was converted before or after June 15, 1900, does not appear. The trial justice found that Brett and his sureties owned 19 different parcels of land situate in the city of Mt. Vernon on the day that said bond was filed; that after that date, and before the notice of pendency herein was filed, all of said parcels were conveyed to certain of the defendants for full value, without actual knowledge and upon the usual searches made by attorneys, who failed to find said bond. Judgment was rendered, fixing the amount due on the bond at the sum of \$25,000, with interest thereon from April 9, 1903, the date when the action was commenced, adjudging said sum a lien on each of said parcels of land, and directing that as many thereof be sold, in the inverse order of alienation, as would make the amount so found due, with costs and an extra allowance. The sureties, as well as the defendants, who claim to be subsequent lienors or purchasers for value, and without notice, appealed from said judgment to the Appellate Division, which affirmed the same, on its opinion rendered upon a demurrer to the complaint. Those defendants now come here.

Joseph S. Wood and Odell B. Tompkins, for appellants. J. Mortimer Bell, for respondent.

VANN, J. (after stating the facts as above). The city of Mt. Vernon was incorporated on the 22d of March, 1892, by chapter 182, p. 355, of the laws passed in that year. By section 15 it is provided that every person elected or appointed to any office, before entering upon the same, shall take the oath of office prescribed by the Constitution, and that "every person so elected or appointed who neglects, for fifteen days after his election or appointment, to give the bond or security required by law, or by the common council under this act, or to take and file said oath of office, shall be deemed to have declined the office, and it shall be vacant."

Other sections, regarded as material on this appeal, are as follows:

"Sec. 16. Every officer shall hold his term of office until his successor shall have been elected or appointed, and shall have qualified, unless his office has become vacant, as provided in this act."

"Sec. 27. The receiver of taxes and assessments shall hold office for two years. Before entering upon the duties of his office he shall enter into a bond to the city of Mount Vernon in such penal sum as shall be fixed by the common council, but which shall not be less than twenty thousand dollars, which bond must be approved by the common council and filed in the office of the city clerk."

"Sec. 44. The receiver of taxes and assess-

ments within fifteen days after his election, shall make and execute as such a bond to the city of Mount Vernon, with sufficient sureties, who shall be freeholders within and residents of the city, in a penal sum of twenty thousand dollars, conditioned for the faithful discharge of his duties, and that he will account for and pay over all moneys received by him as such receiver, which bond must be approved by the common council and filed with the city clerk before he enters upon the duties of his office. Such bond shall be a lien upon the real estate of the said receiver and his respective sureties, until canceled and discharged. The salary of the receiver of taxes and assessments shall be at the rate of two thousand dollars per year."

The following is a copy of the bond in question: "Know all men by these presents: That we, John H. Brett, as principal, and Andrew M. Kenlon, Patrick H. Sharkey, John J. Fay, Henry Palm and Peter Sheridan, as sureties, are held and firmly bound unto the city of Mount Vernon in the penal sum of twenty-five thousand dollars, to be paid to the said city of Mount Vernon for which payment well and truly to be made we jointly and severally bind ourselves, our and each of our heirs, executors and administrators firmly by these presents. Sealed with our seals, and dated the 15th day of June in the year of our Lord one thousand eight hundred and ninety-eight. Whereas, the above bounden John H. Brett, has lately been elected to the office of receiver of taxes and assessments of the city of Mount Vernon. Now the condition of the above obligation is such, that if the said John H. Brett as receiver of taxes and assessments shall well and faithfully discharge the duties of his office and account for and pay over all moneys received by him as such receiver then the above obligation to be void, else to remain in full force and virtue." Such bond at the date thereof was signed, sealed, and acknowledged by the obligors therein named.

It is unnecessary for us to decide whether the Legislature intended that two bonds should be given, one under section 27, and the other under section 44, or whether it meant that the common council should elect under which section the bond should be drawn, for the bond in question, as we think, was given under the earlier section only. When read in connection with the public officers' law, to which we shall presently allude, it substantially conforms to section 27, but, whether read with or without that act, it fails to conform to section 44. It was given before the receiver entered upon the duties of his office, in the penal sum of \$25,000, which had been duly fixed by the common council. It was approved by that body 48 days after the receiver entered upon his duties, and filed with the city clerk 42 days after that date. Section 44 requires that the bond shall be given

within 15 days after the election of the receiver, in the penal sum of \$20,000, and approved by the common council, and filed with the city clerk before the receiver enters upon the duties of his office. "Such bond," as that section further provides, "shall be a lien upon the real estate of the said receiver and his respective sureties until canceled and discharged." The bond in question was not given by the receiver within 15 days after his election, but it was given before he entered upon the duties of his office. It was not given in the penal sum of \$20,000, which is unalterably fixed by the Legislature in section 44, but was given for the sum of \$25,000, the amount fixed by the common council, pursuant to the authority of section 27, which does not name the penalty, but authorizes the common council to determine it, subject to the limitation that it cannot be for a sum less than \$20,000. It is further to be observed that section 27 provides for a bond which must be filed in the office of the city clerk without specifying the time, while section 44 requires a bond that must be filed before the receiver enters upon the performance of his duties. Section 27 contains no provision that the bond shall be a lien upon the lands of the bondsmen, while section 44 makes the bond a lien upon the real estate of both principal and sureties until it is canceled and discharged, although there is no provision that the lien shall be specified in the bond itself.

To summarize the chief differences, the bond was given for \$25,000 as authorized by section 27, and not for \$20,000, as required by section 44. It was executed on the 15th of June, the day when the receiver assumed duty, as provided by section 27, but not within 15 days after his election, as provided by section 44. It was approved and filed within the period permitted by section 27, but not before the officer entered upon the duties of his office, as prescribed by section 44. These provisions of the two sections are equally specific, so that the rule that the particular controls the general does not apply. When the Legislature commanded, through section 44, that a bond should be given in the penal sum of \$20,000, no more and no less, and conferred no power upon the common council to increase or diminish the amount, the express command was not met by giving a bond for \$25,000. Section 27 is the only section in the charter that authorizes the common council to fix the penalty of the bond. The common council duly fixed it at the sum of \$25,000, and the bond was so written. As it conforms to section 27, but does not conform to section 44, why should it be held that it was given under the latter, and not under the former? The city could have no lien without conforming to the section which provides for a lien. If it desired a lien, it should have insisted upon a bond for \$20,000, the only amount which, as the Legislature provided, could become a lien. As it exacted a

bond with a larger penalty, the sureties are bound only by the language of the bond, and the language of the section which provides for a larger penalty, supplemented by the language of the public officers law. The bondsmen did not subject their property to a lien by signing a bond which did not provide for a lien, and which was given under a section of the charter that does not create a lien. All the sureties concede that they are liable on the bond, some because they regard it as a valid common-law bond, and others because they think it is valid as a statutory bond given pursuant to section 27. While they admit their liability, they deny that the bond imposed any lien on their lands, because it not only fails to conform to section 44, which alone provides for a lien, but actually violates it.

The bond is not a lien, unless some statute expressly makes it one, for there is no covenant to that effect. No writing obligatory, whereby the obligor simply promises to pay a sum of money to another, is a lien on the property of the promisor in the absence of a statute or covenant expressly making it a lien, and where there is such a statute, it must be strictly complied with, in order to create the lien. An important case, decided by the Kentucky Court of Appeals, is directly analogous in principle. A statute of that state made the official bond of a sheriff a lien upon his real estate. He was required to give the bond at the January or February term of the county court in each year, but in 1860 the sheriff of Wayne county did not give any bond until the month of June. It was held to be good as a common-law bond, but not as a statutory bond, and hence that it created no lien. The learned court said: "These liabilities are all created upon the part of the sheriff and his sureties by reason of the execution of his official bond as required by the statute. \* \* \* The liens, attempted to be asserted in this case by the commonwealth, must have originated from the execution of the bond by the sheriff, as required by law. This bond must have been executed either in the month of January or February; and, having been executed at a later date, viz., in June, 1860, it was no statutory bond, and its execution created no lien on Bates' property. It is true that Bates, by the execution of the bond in June, is estopped to say he was not sheriff, but this liability and estoppel did not originate by reason of his compliance with the statute or the execution of any statutory obligation, but on account of his own undertaking in the execution of a bond enabling him to collect the revenue that must be regarded as creating a common-law liability only. If Bates after his election as sheriff had acted as such, and proceeded to collect the revenues without the execution of any bond whatever, in a suit against him by the commonwealth for the moneys collected, he would have been

estopped to deny that he was sheriff, and still his acting in this official capacity would not give to the commonwealth a lien upon his estate, for the reason that it cannot exist without a compliance with the statutory enactment creating it." *Hall v. Commonwealth*, 71 Ky. 378. While in the case before us the date when the bond was given, approved, and filed may not be of controlling importance, owing to the public officers law, still the amount for which the bond was given shows that it was not a statutory obligation under the section giving a lien upon real estate. A statutory bond is not enough to support the judgment before us, unless it is such a statutory bond as becomes a lien by force of that part of the statute under which it was given. Section 44 directs that "such bond"—that is, a bond conforming to that section—shall be a lien upon the real estate of the receiver and his sureties. No lien is given by any other section, or by any other language. A searcher of titles, if he found the bond in question, could not identify it as given under that section.

The city tried to meet this situation by calling to its aid certain provisions of the public officers law. Laws 1892, p. 1656, c. 681, as amended by Laws 1894, p. 841, c. 403. Section 11 of that act provides that "every official undertaking, when required by or in pursuance of law to be hereafter executed or filed by any officer, shall be to the effect that he will faithfully discharge the duties of his office and promptly account for and pay over all moneys or property received by him as such officer, in accordance with law, or in default thereof, that the parties executing such undertaking will pay all damages, costs and expenses resulting from such default, not exceeding a sum, if any, specified in such undertaking. \* \* \* The sum specified in an official undertaking shall be the sum for which such undertaking shall be required by or in pursuance of law to be given. If no sum, or a different sum from that required by or in pursuance of law, be specified in the undertaking, it shall be deemed to be an undertaking for the amount so required. If no sum be required by or in pursuance of law to be so specified, and a sum be specified in the undertaking, the sum so specified shall not limit the liability of the sureties therein. \* \* \* The failure to execute an official undertaking in the form or by the number of sureties required by or in pursuance of law, or of a surety thereto to make an affidavit required by or in pursuance of law, or in the form so required, or the omission from such an undertaking of the approval required by or in pursuance of law, shall not affect the liability of the sureties therein."

The sum specified in the bond under consideration is the sum required by law. It is not a bond in which "no sum" is specified, or "a different sum from that required by or

in pursuance of law," for the sum of \$25,000 is specified, and that sum, as fixed by the common council, is the sum "required by or in pursuance of law." There was neither omission nor variance, for section 27 expressly authorizes the common council to fix the penalty, provided it is not less than \$20,000, and that body accordingly fixed it at \$25,000, the amount for which the bond was given. The remainder of the section, as quoted, relates simply to the personal liability of the sureties, notwithstanding certain defects, and the sureties before us admit their liability. The section contains no provision relating to liens or remedies. It simply makes valid certain defective bonds, so far as the personal liability of the sureties is concerned, but stops there and does not provide that such a bond shall be a lien on the real estate of the bondsmen, notwithstanding any such defect. It makes the sureties liable on the bond, but it does not make the bond a lien upon their property. The city gets no support for its alleged lien from this section, and none from sections 12 and 15 of the same act, which are also relied upon by its counsel. Section 12 makes the sureties personally liable for the acts and defaults of their principal done or suffered before the bond was given, even if it was given at a date later than the law requires, provided it was given during his official term. Section 15 validates the acts of a de facto officer, who, although duly chosen, enters upon the performance of the duties of the office without taking the oath or filing the undertaking required by law. It says nothing about the liability of sureties, and neither gives a remedy nor validates a lien. The public officers law simply makes a bond, that is defective in form or date, or method of execution, valid as the personal obligation of the sureties, but it goes no farther. It does not make an invalid bond a lien on real estate even after it is validated, and the rule of strict construction does not permit the courts to extend the statute by implication beyond the letter of its command. A statute that makes an official bond a lien upon the real estate of the obligors, although neither filed nor recorded in the county clerk's office, where the evidence of liens on lands is kept, should be construed *strictissimi juris*, and held down to its positive, clear, and unmistakable requirements. No attempt can be made to wrest the bond from the section under which it was given, and turn it into a bond called for by a section under which it was not given, without violating the rights of the sureties. This reasoning applies with equal force to section 729 of the Code of Civil Procedure, which goes no farther than the public officers law. Neither statute creates or validates a statutory lien; and, in this case, neither is to be read in connection with section 44 of the charter, because the bond in suit does not

purport to have been given under that section.

The learned justices below assumed, without so deciding, that the penalty of the bond could be lawfully fixed only at the sum of \$20,000, although they sanctioned its enforcement as a bond for \$25,000. They were of the opinion that the liability of the sureties is measured, "not by the language of the obligation assumed by them, but by the requirements of the statutes under which the obligation may be required, and in conformity with which it purports to have been given." *City of Mt. Vernon v. Kenlon*, 97 App. Div. 191, 197, 89 N. Y. Supp. 817, 819. This position ignores the distinction between a common-law bond and a statutory bond, for the latter is one that conforms to a statute, while the former does not, although it was so intended. Doubtless the section of the statute under which the bond was given is, by operation of law, read into the bond, but the vital question at once arises, Under which section was the bond given? The learned Appellate Division made no attempt to answer this question.

When each of two sections of equal force, in the same statute, provides for a bond, and the provisions are at variance, the language of the bond must determine under which section it was given. When the language shows that the bond could have been given under one section, which affords no lien, and that it could not have been given under another section, which provides for a lien, "the requirements" of the former measure the obligation of the sureties, not those of the latter. While section 27 of the charter does not specify the condition to be written in the bond, that defect is supplied by section 11 of the public officers law, so that no reference to section 44 of the charter need be made for any purpose. Said section 27 when read with said section 11 is complete, and the bond in question, given in conformity, is a complete statutory obligation that bounds the rights and obligations of the parties thereto. The right of the city is to enforce it as a bond for \$25,000 in the ordinary way, and the obligation of the sureties is to pay that amount, but the city has no right to a lien, and the lands of the obligors and their grantees are not incumbered by the bond.

This conclusion makes it unnecessary to consider the other questions so ably discussed by counsel.

The judgments below should be reversed, and a new trial granted, with costs to abide the event.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, WERNER, and CHASE, JJ., concur. WILLARD BARTLETT, J., not sitting.

Judgment reversed, etc.

(193 N. Y. 289)

WEED et al. v. SPEARS.

(Court of Appeals of New York. Nov. 10, 1908.)

1. CONTRACTS (§ 75\*)—CONSIDERATION—NEW PROMISE.

A new promise by one to do less than he has already agreed to do is not a sufficient consideration for the promise of another to do more than he is obliged to do.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 280; Dec. Dig. § 75.\*]

2. CONTRACTS (§ 56\*)—CONSIDERATION—MUTUAL PROMISES.

Under ordinary circumstances, mutual promises are a consideration, one for the other.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 344-353; Dec. Dig. § 56.\*]

3. CONTRACTS (§ 237\*)—MODIFICATION—CONSIDERATION.

While a written agreement may be modified by an oral agreement, yet, where the liability of a party to a contract has become fixed, he is not released from liability by a purported modification which is without consideration.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1119-1122; Dec. Dig. § 237.\*]

4. CONTRACTS (§ 75\*)—CONSIDERATION—NEW PROMISE.

Directors of a corporation mutually agreed to pay the notes of the corporation in proportion to their holdings of stock. Thereafter, two of them having become insolvent, the others, plaintiffs and defendant, agreed that plaintiffs would pay notes amounting to a specified sum and secure their release on other notes, and defendant would pay notes to a specified sum and secure his release on such other indebtedness. The amount of the indebtedness which plaintiffs undertook to satisfy and the amount which they discharged was less than they had become obligated to pay under the original agreement, and the amount which defendant agreed to pay and paid exceeded his original obligations. Defendant failed to pay one of the notes he had contracted to pay, and plaintiffs, being obliged to pay it, sued defendant therefor. *Held*, that the new agreement was without consideration, precluding a recovery.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 280; Dec. Dig. § 75.\*]

Appeal from Supreme Court, Appellate Division, Third Department.

Action by William R. Weed and another against James Spears. From a judgment of the Appellate Division (120 App. Div. 904, 105 N. Y. Supp. 1149) affirming a judgment for plaintiffs entered on the report of a referee, defendant appeals. Reversed, and new trial granted.

The action was brought to recover the sum of \$5,133.97, being the balance with interest and costs paid by the respondents on a certain note of the High Falls Sulphite Pulp & Mining Company which had been indorsed by the parties to this action, and recovery was had by virtue of a promise made by the appellant to pay said balance. It is now claimed that such promise was without consideration.

Prior to September, 1894, the parties to this action and one Usher and one Everett were stockholders in and directors of said Sulphite Pulp & Mining Company. The com-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pany was unable to borrow money for its business needs without the indorsement or other guaranty of said directors, who already at said date had become liable for a considerable indebtedness. On said date said directors entered into an agreement, one with the others, whereby it was mutually covenanted and agreed, in substance, that each of said persons was liable and "duly obligated to pay the existing notes and obligations \* \* \* upon which their names or the names of any two of them appear," and also should become liable and obligated "to pay the notes and obligations of said corporation to be executed by two or more of said persons, and to be hereafter made for the use and benefit" of said corporation in the proportion which the amount of stock held by him bore to that held by the others. Said parties owned and held stock as follows: Usher 347 shares; Everett 97 shares; William R. Weed 127 shares; Frederic A. Weed 87 shares; Spears 97 shares.

Thereafter the amount of indebtedness for which said directors concededly became responsible subject to the provisions of said agreement so increased that on January 25, 1897, when the corporation made an assignment for the benefit of creditors it amounted to \$181,160.80. In the meantime Usher and Everett had also become insolvent and unable to pay any part of said indebtedness. Under these circumstances, the respondents and the appellant in February or March, 1897, as found by the referee, made a verbal agreement with each other whereby the Weeds were to pay outstanding notes on which all of the parties were liable and which were subject to the provisions of the agreement of September 10, 1894, amounting to about \$41,500, and, in addition, were to secure their release on the best terms possible from an indebtedness also covered by the terms of said agreement amounting to \$87,100.80, and the appellant was to pay similar notes amounting to between \$50,000 and \$60,000, and also was to secure his release on the best terms possible from said indebtedness of \$87,160.80. The notes which he thus promised to pay included one held by a certain Small. The respondents carried out their part of the agreement, paying the notes which they had agreed to and paying the sum of \$19,000 to be released on the large indebtedness already mentioned. The appellant paid \$6,000 to be released from said last-mentioned indebtedness, and paid the other notes as he had agreed to, except the sum of between \$4,000 and \$5,000 on the Small note which he refused to pay, and subsequently Small brought an action and recovered that balance from the respondents who now claim, as already stated, that defendant is obliged to pay it under the verbal agreement made in 1897. The amount of indebtedness which the respondents specifically undertook to satisfy and the amount which they did pay in discharge of the outstanding indebtedness,

including the disputed balance paid to Small, was much smaller than they had become obligated to pay under the original agreement of September, 1894, and, on the other hand, the amount of indebtedness which the appellant promised to and subsequently did pay, exclusive of the balance due to Small, was much larger than he had become obligated to pay under said agreement.

Ledyard P. Hale, for appellant. Lewis B. Carr, for respondents.

HISCOCK, J. (after stating the facts as above). I do not see any theory on which the recovery by respondents over against appellant of the balance which they paid on the Small note can be sustained. The only ground on which they seek to do it is the parol agreement of 1897, whereby they and the appellant purported to apportion between themselves the notes indorsed by them for the Sulphite Pulp & Mining Company which each was to pay. At this time the respondents and appellant concededly were firmly and legally bound by the prior agreement of 1894 to pay this indebtedness in certain proportions. The second agreement now relied on by respondents assigned to them and they actually paid, including the balance on the Small note which they now seek to recover, a much smaller amount of indebtedness than they were then actually obligated to pay, and, conversely, said agreement assigned to the appellant and he actually paid independent of said Small indebtedness a much larger amount of indebtedness than he was then bound to pay. The only consideration for the promise of appellant to pay certain notes including the Small note was the new promise of respondents that they would pay certain debts amounting to less than they then could be compelled to pay under the original agreement. Thus the only question presented in this case is, whether a new promise by a party to do less than he has already agreed to do is a sufficient consideration for the promise of another party to do more than he is obliged to do. It seems to me that the negative answer to that question is so plain that there is no opportunity for doubt.

Brief reference will be made to some of the arguments advanced in behalf of the respondents in favor of a different answer. It is said that mutual promises are a consideration for an executory agreement, and that, the respondents having performed their executory agreement, it will be a perversion of the rules of law to permit the defendant now to escape performance on his part. Of course, there is no doubt that under ordinary circumstances mutual promises are a consideration, one for the other, and such was undoubtedly the effect and value of the mutual promises of these parties contained in the original written agreement. The trouble with the last mutual promises relied on by the respondents is that they afford no consideration to the appellant when measured by the obligations already resting upon the parties.

It is also true that a written agreement may be modified by an oral agreement; but, where the liability of a party has been incurred and become fixed under a valid agreement, he is not released from such liability by a purported modification which is without consideration of any kind. While, as suggested, it may have been a matter of practical convenience for the respective parties to understand what notes each should take care of as they became due, and while possibly the respondents, under the agreement reducing the amount of notes which they were to pay, have actually paid more than they would have paid under the original agreement and larger liability, these things do not furnish a legal consideration for the promise of appellant to pay more and to permit the respondents to pay less than had originally been agreed on. The law assumes that a party will perform his agreement, and at least, under the circumstances of this case, the fact that he does so does not furnish a new obligation or consideration as against the party benefited by such performance.

The judgments should be reversed and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

Judgments reversed, etc.

(193 N. Y. 369)

#### MURDOCK v. GOULD.

(Court of Appeals of New York. Nov. 10, 1908.)

##### 1. APPEAL AND ERROR (§ 273\*)—EXCEPTIONS—INSTRUCTIONS.

An exception "to the charging of all the requests presented by plaintiff" is insufficient to preserve for review objections to a particular charge.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 273; \* Trial, Cent. Dig. §§ 689-696.]

##### 2. EVIDENCE (§ 397\*)—PAROL EVIDENCE—DECLARATIONS AFFECTING WRITTEN CONTRACTS.

To apply the terms of a contract to its subject and remove any ambiguity arising from such application, declarations of the parties before, at the time of, or after, contracting may be shown, but parol evidence can neither add to nor take from a contract, and under the guise of explaining an ambiguity one may not offer parol evidence of the language of the parties contradicting, varying, or adding to that contained in the writing, nor of prior or contemporaneous declarations showing a different intention from that expressed in the instrument.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1756-1765; Dec. Dig. § 397.\*]

##### 3. EVIDENCE (§ 448\*)—PAROL EVIDENCE—CONSTRUCTION OR EXPLANATION OF WRITING.

Evidence to explain an ambiguity or technical terms, or to establish a custom, etc., is not an exception to the general rule excluding parol evidence contradicting or varying a writing, since it does not contradict or vary, but merely places the court in the position of the

parties when they contracted, and enables it to understand the words employed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2084; Dec. Dig. § 448.\*]

##### 4. EVIDENCE (§ 450\*)—PAROL EVIDENCE—WRITTEN CONTRACTS—AMBIGUITY.

Where a written contract to build a stable and a power house failed to show certainly whether they were to be united or separate structures, the contractor, in suing to recover commissions on the power house, which was not built, could show by parol evidence that he had seen and considered plans of a proposed power house, from which he could compute its character and probable cost, such evidence tending to explain an ambiguity in the contract, rather than to vary its terms.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2084; Dec. Dig. § 450.\*]

##### 5. EVIDENCE (§ 399\*)—PAROL EVIDENCE—WRITTEN CONTRACTS—ADDING TO CONTRACT.

Where a contract to erect a power house is silent as to equipment, the extent and character of work to be done in equipping the building cannot be shown by parol evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1772; Dec. Dig. § 399.\*]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Harvey Murdock against Howard Gould. From a judgment of the Appellate Division, Second Department (120 App. Div. 888, 105 N. Y. Supp. 1132), affirming a judgment for plaintiff, defendant appeals. Reversed and new trial granted, unless plaintiff consent that judgment be reduced, and, if such consent be given, judgment affirmed.

The plaintiff, a practical builder, brought this action to recover of the defendant for services rendered in building and superintending the erection of a stable, power house, and equipment. There is no dispute as to the fact that this was done pursuant to a written contract between the parties, but the plaintiff was permitted to introduce oral testimony as to the meaning of the contract in certain particulars as to which it was said to be ambiguous. The defendant objected to the introduction of any oral testimony (1) upon the ground that there was no ambiguity in the contract; and (2) that as to the power house, which had not been built when the action was commenced, the contract contained no description which was definite and certain enough to furnish a basis for proof of plaintiff's loss in not being permitted to build it. The jury awarded the plaintiff a verdict of \$65,090. Upon appeal to the Appellate Division the judgment entered upon the verdict was unanimously affirmed, and the defendant has appealed to this court upon the exceptions taken to the rulings of the trial court in overruling the objections above referred to. So much of the contract as is material to the present controversy reads as follows: "The party of the second part (plaintiff) \* \* \* doth hereby covenant, promise and agree to and with the party of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the first part (defendant) that he, the said party of the second part, shall and will for the consideration hereinafter mentioned, as fast as the reasonable progress of the work will allow, well and sufficiently erect and finish the stable and power house at Sands Point, Long Island, agreeably to the drawings and specifications made by a party to be selected by the party of the first part as architect, with such modifications thereof as may be made by the said party of the first part, within the time aforesaid, in a good workmanlike and substantial manner to the satisfaction and under the direction of the said architect, and also shall and will find and provide such good, proper and sufficient materials of all kinds whatsoever, as shall be proper and sufficient for the completion and finishing all the mason, carpenter, plumbing, heating, and other works of the said building mentioned in the various specifications, for such sum of money as the same shall actually cost the said party of the second part net, together with an additional sum or commission equal to ten per cent. of said cost, exclusive of the architect's fees, which commission is to cover and include all services, profits and compensation of the said party of the second part of every description arising from said building." The plaintiff, as stated, recovered \$65,000. The amount demanded in the complaint is \$115,000. The plaintiff's evidence tended to establish various items which amounted in all to \$102,040.70. These items may be divided into three groups as follows:

(1) Total amount due on stable on the basis of 10% of cost.....	\$ 47,882 87
Iron work on stable uncompleted.....	4,000 00
Interest on stable commissions.....	3,842 87
	<hr/>
(As to the first of the foregoing three items there is no dispute.)	\$55,885 24
(2) Commissions on power house.....	\$ 8,886 80
Commissions on equipment inside power house.....	6,000 00
Interest on commissions on power house and inside equipment.....	2,019 16
	<hr/>
(3) Commissions on equipment in Castle Gould for heating and ventilating...	\$ 12,000 00
Commissions on steam pipes and fittings.....	3,000 00
Commissions on cost of subways.....	3,600 00
Commissions on cost of greenhouse equipment.....	2,200 00
Commissions on electrical equipment inside power house.....	3,500 00
Commissions on electrical fittings in conduits.....	1,500 00
Commissions on electrical fittings of the castle.....	3,500 00
	<hr/>
Recapitulation.....	\$29,300 00
(1) .....	\$ 55,885 24
(2) .....	16,906 46
(3) .....	29,300 00
Total .....	<hr/>
	\$102,040 70

It is a conceded fact in this case that the plaintiff has been paid to apply, upon whatever may be due to him, the sum of \$12,528.77.

C. V. Anable, for appellant. Frederick R. Kellogg, for respondent.

WERNER, J. (after stating the facts as above). The only questions which, in view of the unanimous affirmance below, are directly open to review in this court are such as arise upon rulings relating to the admission of parol evidence concerning the subject-matter of the written contract, upon which the plaintiff bases his right to recover, and upon the charge of the trial court as to the plaintiff's right to recover interest. The defendant's criticism of the court's charge may at once be eliminated from the discussion, since no proper exception was taken. The record discloses that after the plaintiff's counsel had submitted five requests to charge, which were charged, and among them one to the effect that the plaintiff was entitled to recover interest upon all sums which might be awarded to him upon his contract, the defendant's counsel took an exception "to the charging of all the requests presented by the plaintiff." This was not sufficient. An exception should have been taken to each specific charge. *Newall v. Bartlett*, 114 N. Y. 399, 405, 21 N. E. 990; *Huerzeler v. Central C. T. R. R. Co.*, 139 N. Y. 490, 84 N. E. 1101.

Many exceptions were taken by the defendant to the rulings of the trial court under which the plaintiff was permitted to give parol evidence as to the character and extent of the work which, according to the claim of the plaintiff, is comprehended by the general terms of the written contract. As these exceptions all raise substantially the same question, we shall not refer to them in detail, except as we may later have occasion to do so in analyzing the various items of plaintiff's claim. It is enough for present purposes to say that the plaintiff asserted, and was accorded, the right to give parol evidence as to every one of the unconceded items of his claim, upon the theory that there were ambiguities in the written contract which it was permissible to explain by parol testimony. The defendant, on the other hand, contended that the contract was not ambiguous in any respect, although it might possibly be regarded as so indefinite and uncertain, with respect to the kind of power house that may have been in the mind of the defendant when the contract was made, as to furnish the plaintiff with no basis whatever for his claim to damages. The trial court accepted the plaintiff's view of the contract, and received parol evidence of all the items comprising his total claim.

A short statement of the law applicable to this case will enable us to discuss more specifically the various items which are the subject of this controversy. Like many rules of law which are in reality well settled, that which relates to the admissibility of parol evidence to explain ambiguous written contracts has given rise to conflicts of opinion which, superficially considered, seem to leave the law in a state of uncertainty, but which, upon closer analysis, turn out to be differences among judges as to the application of

a well-settled rule of law to a given state of facts. With reference to the particular subject under discussion, we think it may very safely be asserted that a great majority of the decisions support the rule that for the purpose of applying the terms of a contract to its subject, and removing any ambiguity which arises from such application, it is permissible to show, by the declarations of the parties before or at the time of the contract, or afterwards, what was meant by its terms. The difficulty of correctly applying this very simple rule is forcibly illustrated by the large number of decisions cited in the briefs of counsel, showing the infinite variety of circumstance and condition to which it must be adjusted. No simpler or more workable statement of the rule has found its way into the books than that enunciated by Judge Vann in *Thomas v. Scutt*, 127 N. Y. 141, 27 N. E. 961, where he says: "Evidence to explain an ambiguity, establish a custom, or show the meaning of technical terms, and the like, is not regarded as an exception to the general rule, because it does not contradict or vary the written instrument, but simply places the court in the position of the parties when they made the contract, and enables it to appreciate the force of the words they used in reducing it to writing. It is received where doubt arises upon the face of the instrument as to its meaning, not to enable the court to hear what the parties said, but to enable it to understand what they wrote as they understood it at the time." This means that "parol evidence can neither add to nor take from a contract" (*Trustees of Southampton v. Jessup*, 173 N. Y. 84, 85 N. E. 949), and that a party may not, under the guise of explaining an ambiguity, introduce "parol evidence of the language of the parties contradicting, varying, or adding to that which is contained in the written instrument, or parol evidence of prior or contemporaneous declarations showing a different intention from that expressed in the instrument" (*White's Bank of Buffalo v. Myles*, 73 N. Y. 340, 29 Am. Rep. 157). With these statements of the rule before us it becomes apparent that some of the evidence, admitted over the objection of the defendant, went so far beyond the explanation of ambiguities in the contract as to inject into the controversy some matters which are not reposed in the writing.

1. The first three items, covering commissions on cost of stable, unfinished iron work on stable, and interest on these commissions, need not be discussed, for they are practically conceded. Upon these the plaintiff was clearly entitled to recover, and he could have insisted upon the direction of a verdict in his favor if nothing else had been involved.

2. As to the fourth and fifth items relating to commissions on power house and its equipment, a different situation is presented. A power house is mentioned in the contract, but as it had not been built when this action was brought, the question arises whether it is de-

scribed in the contract with such certainty as to forbid resort to parol testimony. We think not. The language of the contract was equivocal, in that it failed to state with certainty whether the stable and power house were to be united in one building, or whether they were to be separate structures. There was no such definite description of a separate power house as to enable the court, without the aid of parol testimony, to say what kind of a power house was intended. Evidence was therefore admissible to show that the plaintiff had seen and considered plans of a proposed power house, from which he could compute its character and probable cost. We entertain no doubt that, to the extent that the parol evidence related to the power house as distinguished from its equipment, it tended to explain an ambiguity in the contract rather than to import into it an extraneous element which might be said to vary its terms.

As to the evidence relating to the power house equipment, we are not so clear. A power house without equipment is, of course, incomplete, and nothing but the installation of a power equipment can make it complete. But that is quite beside the question. A., who proposes to have a power house upon his premises, may decide to have the building erected by one contractor, and to have the equipment furnished by another. B. accomplishes the same purpose by intrusting both commissions to a single contractor. In the contract before us there is no reference to the equipment of the power house, except the suggestion that the plaintiff was to furnish the labor and materials for heating. There is parol evidence tending to show that the same boiler was to be used for both heating and power, and it is doubtless true that the same plant was to serve both purposes. The difficulty lies in the fact that there is in the contract no mention of the subject of power equipment, and parol testimony is therefore not competent, for its effect may be not merely to remove an ambiguity, but to import into the contract something that the parties did not put there.

3. All the other items are either so doubtful, or so clearly outside of any fair interpretation of the contract, that they cannot be allowed to stand, unless we are ready to hold that, under the pretext of explaining an ambiguity in a written contract, parol evidence of any extraneous matter may be given, even though it is not strictly germane to the subject-matter, or is altogether foreign thereto. It is conceivable, of course, that the parties may have intended that plaintiff should build for the defendant, not only a stable and power house, but a greenhouse, subways, electrical and ventilating apparatus for the house, with such steam and electrical fittings and attachments as to connect them all into one system, but that is not the question before us. The question is whether any of those matters are referred to in the contract, but so imperfectly as to need outside explanation before

they can be understood. Measured by that standard, all the items relating to commissions on the heating, ventilating, and electrical equipment of Castle Gould, for pipes and steam fitting, for cost of subways, for greenhouse equipment, and for electrical equipment in power house must be regarded as attempted interpolations into the contract, which are inadmissible because they go beyond the point of explanation.

The judgment herein must therefore be reversed, and a new trial granted, with costs to abide the event, unless the plaintiff within 20 days consents in writing that the judgment be reduced to the sum of \$52,192.77; and, if such consent is given, then the judgment is affirmed, without costs to either party upon this appeal.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT, and HISCOCK, JJ., concur.

Judgment accordingly.

(193 N. Y. 189)

YOUNG v. MASON STABLE CO., Limited.  
(Court of Appeals of New York. Oct. 23, 1908.)

**1. MASTER AND SERVANT (§ 278\*)—INJURIES TO SERVANT—ELEVATORS—NEGLIGENCE.**

In action by plaintiff, injured by the fall of an ordinary freight elevator in a stable, evidence held insufficient to establish defendant's negligence in the construction of the elevator.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 965; Dec. Dig. § 278.\*]

**2. MASTER AND SERVANT (§ 124\*)—INJURIES TO SERVANT—ELEVATORS—INSPECTION.**

A master maintaining a freight elevator in its stable, while required to inspect the same in order to keep it safe for the use of his servants, is not required, under all circumstances, to inspect personally, or through a representative for whose acts it is responsible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 238; Dec. Dig. § 124.\*]

**3. MASTER AND SERVANT (§ 124\*)—INJURIES TO SERVANT—DEFECT OF ELEVATOR—INSPECTION.**

Where defendant, operating a freight elevator in its stable, regularly employed a firm of recognized ability in the business to inspect and repair the machine every six months, and, from the last time it was inspected and repaired and reported to be in first class order to the time plaintiff was injured by the fall thereof, defendant had not been notified that it was not absolutely safe, defendant had thereby performed its duty of inspection to its employees.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 238; Dec. Dig. § 124.\*]

Edward T. Bartlett and Chase, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Joseph C. Young against the Mason Stable Company, Limited. From a judgment of the Appellate Division (119 App. Div. 865, 103 N. Y. Supp. 1151), overruling plaintiff's exceptions to the dismissal of his complaint at the close of the whole case,

directed to be heard at the Appellate Division in the first instance, he appeals. Affirmed.

John C. Robinson, for appellant. William Henry Corbitt, for respondent.

WILLARD BARTLETT, J. The plaintiff, a floorman in the service of the defendant corporation, was injured by the fall of a freight elevator, upon which he had just stepped in order to place thereon a carriage which he had been directed to send down from the third story of the defendant's stable, where it was kept, to the ground floor where it was needed for use. The elevator was a simple, old-fashioned structure, operated by hand power, by means of an endless rope passing over a wheel at the top of the elevator shaft. It was suspended from a wire cable three-quarters of an inch thick, the upper end of which was wound around a drum above. This cable was passed once through a ring fixed in the middle of a cross-bar at the top of the elevator, and the end was then turned back and fastened to the main cable by a single clamp. The clamp was three or four inches above the ring, and the end of the cable, where it had been bent over so as to pass through the ring, projected six or eight inches above the clamp. The accident was manifestly due to the giving way of this clamp. It does not appear to have been seen by any witness after the elevator fell, but there was no break in the cable, which remained intact, and had evidently slipped through the ring and thus allowed the elevator to descend. The contention in behalf of the plaintiff is that the evidence tended to establish negligence on the part of the defendant (1) in furnishing an insufficient and defective appliance; and (2) in failing to provide for an adequate inspection thereof.

The elevator is characterized as dangerous because the supporting cable was passed through the ring in the overhead crossbeam only once instead of twice, because the end was fastened to the main cable by only one clamp instead of two, and because there were no safety clutches. An expert witness, called in behalf of the plaintiff, testified that at the time of the accident it was usual, in the construction of such elevators, to pass the cable through the ring twice, to secure the end with two clamps, and to provide the elevator with safety clutches. Where the cable passes only once through the ring, the entire strain comes on the clamp, minus the friction of the cable against the ring. If the cable is passed through the ring twice, the clamp is relieved of three-quarters of the strain, according to this witness. On a previous trial the plaintiff obtained a judgment, which was reversed by the Appellate Division, a majority of the court holding that the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

evidence was insufficient to support the verdict, and the opinions on that appeal are printed in the record now before us. From these it appears that the evidence there under consideration must have been more favorable to the plaintiff than that on the trial now under review, for it is said in the dissenting opinion that it was testified by a mechanical engineer "that a single four-inch clamp as described was unsafe to sustain a weight over 2,000 pounds, and might not sustain that weight." There is no proof of this kind in the present record. No witness gave opinion evidence to the effect that the construction was dangerous in any respect, or that it was unsafe for the purposes for which the elevator was designed. The strongest inference that could be drawn from the testimony of the expert witness, already mentioned was that a different construction prevailed at the time of the accident, and involved less strain upon the clamp, and even he conceded that three or four tons was a safe load for a steel cable three-quarters of an inch in diameter, and that it could not come down if the single clamp was sufficiently long and absolutely secure. The combined weight of the carriage and plaintiff, when the elevator fell, could not have exceeded 1,700 pounds.

Whether we regard the elevator as an appliance or a place to work, the defendant can hardly be charged with negligence on account of any danger or defect in the original construction. Proof such as there was in this case, to the effect that freight elevators of a similar character were usually supported by cables so adjusted and clamped as to distribute the strain more evenly than it was distributed between the cable and the clamp on this elevator, does not amount to proof that this elevator was unsafe. It seems perfectly clear to me, therefore, that if there was nothing in the case except the evidence as to the character of the elevator and its method of support and operation, the accident which injured the plaintiff could not be attributed to the negligence of the defendant. There is evidence, however, to the effect that, between May 1, 1900, when the defendant moved into the stable, and the 7th day of November of that year, when the accident occurred, the elevator had broken down, so that it could not be used, and had been repaired on two occasions—one in May and the other in July. This proof, together with the circumstances attending the fall of the elevator when it was stationary and without any apparent cause, by the insufficiency of the clamp, may have been enough to call upon the defendant to give some explanation to relieve itself from responsibility for the accident, although this application of the doctrine of *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630, involves every possible assumption which could be made in favor of the plaintiff.

The testimony introduced in behalf of the defendant showed that it regularly employed the firm of James Murtaugh & Co. to inspect the elevator in question, and make all necessary repairs upon it. There appear to be two classes of firms or corporations in the city of New York who make a business of inspecting elevators; that is to say, testing them as to their carrying capacity, the weights which they will sustain, the strength of the cables, and the sufficiency of the construction generally. One class makes such inspections for purposes of insurance; the other for purposes of repair. Mr. Murtaugh's firm belonged to the latter class. It was also engaged in the manufacture of elevators and dumb-waiters, and was a responsible house, which had enjoyed a first-class reputation for many years and carried on a very extensive business. The manager of the defendant corporation testified that it usually had its elevators inspected once in six months; that Mr. Murtaugh was employed to inspect the machine, go through it thoroughly, and attend to anything that needed attention, and put it in perfect condition. He further testified that he asked Mr. Murtaugh to inspect the elevator about the middle of July, and that he inspected it personally, and subsequently sent a man named Hansen to the stable to overhaul the machinery, who came there with an assistant and worked several days in putting the elevator in order. "After they were all finished," says this witness, "Mr. Murtaugh came and made another examination. He then reported to me as to the condition of the machinery; that the elevator was in perfect condition and safe in every way. After that there was never anything brought to my notice that made me have any doubt as to the absolute safety of that machine." The mechanic who actually made the repairs, Hansen, was also called as a witness. He corroborated the testimony of the manager, described in detail the work which he did upon the elevator, and declared that when he left the machine it was in first-class order. He had been in the business of erecting and repairing elevators between 9 and 10 years, and declared that he left this elevator upon the completion of his job in first-class order, clamp and everything included, and that he did not know of anything that could have been done to make it more secure than it was. In the course of his work he had tested it twice by loading carriages upon it, and then hoisting it.

That some duty of inspection is imposed upon the master under such circumstances as are disclosed in the present case cannot be doubted; and negligence properly to inspect is the negligence of the master, whose negligence is not affected by the fact that he intrusts the function of inspection to a servant. *Byrne v. Eastman Co.*, 163 N. Y. 461, 57 N. E. 738. I do not understand, however, that the judicial declarations which may be

found to this effect involve the implication that, under all circumstances and in reference to every sort of appliance, it is the duty of the master to inspect personally, or through a representative for whose acts he is responsible, or that he may not in some cases be relieved of liability when he has entrusted the function of inspection to qualified persons of experience and recognized ability. In *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311, the defendant was a contractor who undertook to paint the inside of the dome of the Kings county courthouse. Knowing nothing of scaffold building, he employed one Stevenson, an experienced scaffold builder, to erect the necessary scaffolding. A portion of the scaffold gave way under Devlin, who was a workman in the defendant's employ, and he was killed. The action was brought to recover damages on account of his death. It was held that, inasmuch as the defendant did not know, or have reason to know, of any defect in the scaffold, it was not negligence for him to rely upon the judgment of Stevenson as to the sufficiency of the scaffold and the propriety of the mode of construction, and hence that the defendant was not liable. As was pointed out by Cullen, J., in *McGuire v. Bell Telephone Co.*, 167 N. Y. 208, 60 N. E. 483, 52 L. R. A. 437, the application of the rule that the master is responsible for negligence to inspect depends on the nature of the work and the manner in which it is conducted. That was a case in which a telephone lineman was injured by falling from a telephone pole, and in which it was held that the defendant was chargeable with the duty of reasonable inspection to see that the pole was safe, although the pole was not the property of the defendant, but belonged to another corporation. In the course of the opinion Judge Cullen said: "Had the defendant contracted with the owner of the pole for its proper inspection and repair or replacement, a different question would be presented, and it might be argued that in securing such an agreement it had exercised reasonable care to provide its workmen with a safe place and safe appliances. But, as the defendant did not contract with others to inspect and repair the pole, that duty rested upon it."

As illustrative of the proposition that circumstances may occur under which a master is justified in relying upon the care and diligence of others in the discharge of his obligations to those in his service, reference may be made to *Carlson v. Phoenix Bridge Co.*, 132 N. Y. 273, 30 N. E. 750, where it was held that a master was not liable for an injury to the servant caused by the breaking of a tool by reason of a hidden defect therein, where material of the best quality had been purchased by the master from reputable dealers as the best in the market, and the tool which broke had been constructed therefrom by competent and skilled workmen. "Reasonable care, and not the highest effi-

cy which skill and foresight can produce, is the measure of the master's liability," said Judge Brown in that case, "and he performs his whole duty by using as much care in the selection of materials for the use of his servants as a man of ordinary prudence in the same line of business would, acting in regard to his own safety, use in supplying similar things for himself were he doing the work." Upon the facts of this case it may be conceded, and indeed must be held, that the master owed the servant the duty of reasonable inspection. The question is, How far was he bound to go in the performance of that duty? If the defendant's establishment had been a factory in which the plaintiff worked upon a machine liable to get out of order, so that regular inspection was required in order to maintain it in safe condition, it is clear that the master's reliance upon the assurance that it had been properly inspected, and was in good order, by an outside expert would not relieve him from liability if the inspection as a matter of fact had been insufficient. The duty imposed upon the master in such a case would relate directly to the very work in hand which the servant was employed to do. In the case, however, of an appliance like this freight elevator, which may be regarded as an accessory to the general work of the establishment, and concerning the construction and safety of which the master can ordinarily possess no special knowledge, I think that, so far as the persons in his service are concerned, he may rely upon a regular inspection thereof by experts in elevator construction, assuming, of course, that it was originally safe and adequate, and that he promptly makes such repairs and alterations as such experts may advise. In *Stott v. Churchill*, 15 Misc. Rep. 80, 36 N. Y. Supp. 476, affirmed 157 N. Y. 692, 51 N. E. 1094, it was held that the trial court committed no error in refusing to charge that if the jury found that the elevator had been built by reputable manufacturers, and that the defendants had it regularly inspected by experts in that business, and promptly executed the repairs and changes suggested by them, they had performed their duty, and were not liable for any injury caused by the breaking of the machinery. That case, however, was an action against the lessees of a hotel by a guest who had been injured by the fall of a passenger elevator in the hotel building; and, in the opinion of the Court of Common Pleas at General Term, it is distinctly intimated that this exposition of the law, although not applicable to such an action, would have been correct if the plaintiff had been a servant seeking to recover from the master. No opinion was written upon the affirmance of the judgment in this court.

To summarize my view of this case, I think that the only possible basis for any charge of negligence against the master is the failure properly to inspect, and that up-

on the uncontradicted evidence the master's duty in this respect was fully discharged by the inspection which was provided and the repair of the elevator as the result of such inspection. It seems to me, therefore, that the judgment ought to be affirmed, with costs.

CULLEN, C. J., and HAIGHT, VANN, and WERNER, J.J., concur. EDWARD T. BARTLETT and CHASE, J.J., dissent.

Judgment affirmed.

(193 N. Y. 255)

HEATH DRY GAS CO. v. HURD et al.  
(Court of Appeals of New York. Oct. 23, 1908.)

1. PLEADING (§ 217\*)—DEMURRER TO ANSWER—EFFECT AS OPENING RECORD.

The sufficiency of the complaint may be attacked on demurrer to the answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 542; Dec. Dig. § 217.\*]

2. SALES (§ 261\*)—EXPRESS WARRANTY—FORM.

No specific words are necessary to constitute an express warranty in a contract of sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 729; Dec. Dig. § 261.\*]

3. SALES (§ 261\*)—WARRANTY—CONTRACTS—CONSTRUCTION.

It is the better rule to treat terms describing articles to be sold or manufactured as part of the contract of sale descriptive of the articles, and not as a warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 730; Dec. Dig. § 261.\*]

4. SALES (§ 273\*)—IMPLIED WARRANTIES.

In an executory contract for the manufacture of goods for future delivery, the law implies a warranty that the articles will be reasonably fit for the purposes for which they were intended, and free from latent defects produced by the process of manufacture.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 772; Dec. Dig. § 273.\*]

5. SALES (§ 260\*)—EXPRESS WARRANTY.

There was no express warranty of quality in a contract by defendant to construct carbureters for plaintiff in lots as should be ordered; the carbureters to be constructed in a careful, workmanlike, and skillful manner, since the agreement created no greater or different obligation than the law implied.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 260.\*]

Werner, J., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by the Heath Dry Gas Company against Benjamin Hurd and others.

This is an appeal by permission on a certified question from an order of the Appellate Division, and from the judgment entered thereon, affirming an interlocutory judgment of the Supreme Court sustaining plaintiff's demurrer to one of the defenses set up in defendants' answer.

The question certified is: "Does the complaint set forth facts sufficient to constitute

a cause of action?" Question answered in negative, and orders reversed.

For prior report, see 124 App. Div. 68, 108 N. Y. Supp. 410.

Harold Tappan, for appellants. Edgar T. Brackett, for respondent.

HISCOCK, J. The appellants are seeking to defend against the attack made by plaintiff's demurrer on their answer, as concededly they may do, by attacking in turn the sufficiency of the latter's complaint, and the questions thus raised are the only ones submitted to us on this appeal.

The action was brought to recover damages because, as claimed, the appellants had not fulfilled their obligations under an executory contract with respondent for the manufacture of carbureters, complaint being made as to the quality of those which were supplied. Respondent accepted and has never returned the goods thus manufactured for it, and while the learned Appellate Division thought that, notwithstanding this acceptance and retention of the goods, its complaint might be sustained if necessary as alleging a cause of action on an implied warranty, the counsel for the respondent on the argument before us expressly conceded that it must be sustained, if at all, as alleging a cause of action on an express warranty, which survived acceptance and failure to return after discovery of the defects. Therefore, the sole question has become, does the complaint allege an express warranty covering the defects in the carbureters? and the material allegations bearing on this question are as follows:

"That on or about the ——— day of April, 1906, the plaintiff and the defendants entered into a contract whereby the defendants agreed to construct carbureters for the plaintiff in such lots as should be ordered by the plaintiff: that the said carbureters were to be constructed in a careful, workmanlike, and skillful manner, and in accordance with the plans and specifications which were furnished to the defendants by the plaintiff, and at the prices quoted by the defendants to the plaintiff; \* \* \* that the defendants entered upon the performance of the aforesaid work under the said contract, and did construct 151 carbureters for the said plaintiff, and the said plaintiff, relying upon the said contract, and believing that the said carbureters were constructed in a careful, workmanlike, and skillful manner, and not otherwise, received the said carbureters under the terms of the said agreement; \* \* \* that said carbureters failed to do the work for which they were intended; that plaintiff was unable to see the defects in said carbureters at the time they were delivered; \* \* \* that plaintiff did not learn of said defects in said carbureters until it had sold a great

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

many as aforesaid; \* \* \* that by carelessness, negligence, unskillfulness, and poor workmanship on the part of the defendants and their servants, all of the said carbureters constructed by them have been improperly, carelessly, unskillfully, and negligently constructed, and made useless and valueless to the plaintiff herein, and solely because of such careless, improper, unskillful, unworkmanlike construction the said carbureters have failed in all respects to conform to the conditions of said agreement and to answer the purpose and to do the work intended to be done by them as provided in said agreement."

Amongst all of these allegations, the specific ones, of course, upon which the respondent must rely as setting forth an express warranty, are those that "the defendants agreed to construct carbureters for the plaintiff in lots as should be ordered by the plaintiff; that the said carbureters were to be constructed in a careful, workmanlike, and skillful manner and in accordance with the plans and specifications which were furnished to the defendants by the plaintiff."

It is well settled, as contended by counsel, that no specific words are necessary to constitute an express warranty, and that this complaint is not to be deemed insufficient because it does not use some particular formula.<sup>1</sup> If the requirements essential to an effective contract of express warranty are otherwise satisfied by the language which has been used, that effect will not be denied because the word "warranty" has been omitted.

We do not think that the allegation that the carbureters were to be constructed "in accordance with the plans and specifications which were furnished to the defendants by the plaintiff" helps to sustain respondent's theory. The form and purport of these plans and specifications is nowhere disclosed by the complaint, but we shall assume that they were of the usual character and served to describe and identify the articles which were to be manufactured by the appellants. No importance seems to be attached to them in connection with the question now under consideration, and there is no allegation in the complaint, as we understand it, that appellants defaulted in respect to them. But aside from this, while there may have been some difference of opinion on the subject, it is the better rule "to treat such words (that is, terms of description of the articles to be sold or manufactured) as part of the contract of sale descriptive of the articles sold and to be delivered in the future, and not as constituting that collateral obligation which sometimes accompanies a contract of sale and known as a warranty." *Carleton v. Lombard, Ayres & Co.*, 149 N. Y. 148, 43 N. E. 425; *Coplay Iron Co. v. Pope*, 108 N. Y. 232, 236, 15 N. E. 835.

Respondent's claim, therefore, of an express warranty must substantially rest upon

the agreement "that the said carbureters were to be constructed in a careful, workmanlike and skillful manner." We shall assume that the words of agreement were equivalent to those of warranty.

In this executory contract for the manufacture of goods to be delivered in the future, the law implied a warranty that the articles to be manufactured would be reasonably fit for the purposes for which they were intended, and that they should be free from latent defects produced by the process of manufacture. *Maurer v. Bliss*, 6 N. Y. St. Rep. 224, affirmed 116 N. Y. 665, 22 N. E. 1062; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Gutwillig v. Zuberbler*, 41 Hun, 361; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 13 Sup. Ct. 537, 28 L. Ed. 86.

The obligations thus implied are quite as broad as and fully equivalent to the obligations created by the words relied on as constituting the express warranty. This being so, we think that it is settled that a party cannot in such a case as this build up and secure the benefits of an express warranty simply by using words expressly stating the very obligations which the law implies without such words.

*Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305, involved the consideration of an executory contract for the sale of a growing crop of tobacco. The contract expressly provided that the tobacco was "to be delivered well cured and in good condition," and it was held that this agreement would not be interpreted as an express warranty because it created no greater or different obligation than the law implied. It appeared in that case that the vendee accepted the property, and some time thereafter brought action to recover damages because of its being improperly cured and in bad condition and in violation of the provisions of the agreement, and they were nonsuited because of their failure to return the tobacco after discovering its defects, as they were compelled to do if there was no express warranty. The court, in holding that proper disposition of the case had been made, said: "This conclusion, I think, was right. It is not claimed to be otherwise, unless there was a warranty that the tobacco when delivered should be well cured and in good condition. But the stipulation in respect to the quality and condition of the article when delivered constituted no express warranty. The contract was executory, for the sale of a growing crop of tobacco, to be delivered the spring following, well-cured and in good condition. The article bargained for and to be furnished in the future was a merchantable crop of tobacco; this was what the vendor agreed to sell, and the vendee to purchase. It was the sale of a particular thing by its proper description merely; and the descriptive words used for defining the thing agreed to be sold were of the substance of the contract, not collateral to the main object of it. \* \* \* In

an executory contract for the sale of personal property, the law implies that the article when furnished shall be of merchantable quality. \* \* \* In legal effect, therefore, the agreement as to which the breach was alleged was the same as the law would imply, in the absence of words of express contract. It would be established upon proof of a contract to sell and deliver the tobacco at a future time, and without proof of express words between the parties, and if express words were used between the parties, yet superadding to the terms of a contract words expressing an obligation which the law implies does not change the nature or extent of the obligation or the remedy upon it."

Whatever may be said for or against the principle thus enunciated as formulating one amongst other somewhat refined rules governing the subject of warranties, it seems to have been recognized and to have passed without criticism in later cases. *Foot v. Bentley*, 44 N. Y. 166, 170, 4 Am. Rep. 652; *Day v. Pool*, 52 N. Y. 416, 420, 11 Am. Rep. 719; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515, 518.

In the latter case an agreement was made to manufacture some castings which were "to be of the best quality and suitable to the purposes designed." The only objection to the castings when supplied was that they were not well or sufficiently annealed, and were not for that reason suitable for the purposes for which they were designed. The question was with reference to a warranty, and the court said: "The law would imply precisely that which the defendant's claim made a part of the express contract. This was an executory contract for the manufacture and sale of goods. \* \* \* A contract to manufacture and deliver an article at a future day carries with it an obligation that the article shall be merchantable, or, if sold for a particular purpose, that it shall be suitable and proper for such purpose. \* \* \* Incorporating into the agreement the obligation which the law implies would superadd nothing to the contract, or vary its nature or affect the remedy upon it. \* \* \* Whatever agreement there was, whether expressed or implied, was a part of the contract, and was not a special warranty or agreement collateral to it."

We do not perceive any principles which distinguish the cases cited from the present one. The burden of respondent's complaint is that the articles supplied to it were unfit for the purposes intended and valueless because of latent defects which arose in the process of manufacture, and it bases this complaint upon an express agreement to manufacture the goods in a skillful and workmanlike manner which would have avoided these defects. But, as we have seen, the law implied the very obligation which is invoked against the appellants that the

carbureters should be suitable for the purposes intended and that they should be free from defects arising in the process of manufacture, just as in the *Reed Case* the law implied an obligation that the tobacco should be free from defects arising in the process of curing, and, as it was held in that case and in the *Gaylord Manufacturing Company Case* that a vendee cannot change the nature or extent of an obligation which the law implies or the remedy upon it by adding to the terms of a contract words expressing such obligation, so we think it must be held in this case.

The orders appealed from should be reversed and demurrer overruled, with costs in all courts, with leave to plaintiff to serve an amended complaint within 20 days on payment of costs.

The question certified to us should be answered in the negative.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, and CHASE, JJ., concur. WERNER, J., dissents.

Orders reversed, etc.

(198 N. Y. 208)

SARASOHN v. KAMAIKY et al.

(Court of Appeals of New York. Oct. 23, 1908.)

1. CONTRACTS (§ 45\*)—DELIVERY—EVIDENCE—SUFFICIENCY.

The usual manner of delivery of a unilateral agreement is by physical delivery to the promisee, but a delivery of a bilateral agreement is usually evidenced by words; but it is not necessary that delivery be shown in any particular manner, the question of whether certain acts, words, and circumstances constitute delivery being one of intent, and any evidence showing that the party intended the agreement to be binding upon them is sufficient.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 213; Dec. Dig. § 45.\*]

2. CONTRACTS (§ 42\*)—DELIVERY—WHAT CONSTITUTES.

Where a contract is prepared by a scrivener and signed by the parties and left with him, such fact, if not presumptive evidence of a delivery, is important, in connection with the subsequent acts of the parties, in determining their intention in leaving the agreement with the scrivener.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 208, 209; Dec. Dig. § 42.\*]

3. EVIDENCE (§ 174\*)—BEST EVIDENCE—ORIGINAL WRITING—COUNTERPART AGREEMENTS.

Where a document is executed in counterpart, each part is regarded as an original.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 567; Dec. Dig. § 174.\*]

4. CONTRACTS (§ 42\*)—DELIVERY—SUFFICIENCY.

Plaintiff and his father signed an agreement, which was attested by a witness, by which the father agreed to pay plaintiff a certain sum monthly after his contemplated marriage, and to bequeath to him 25 per cent. of his business, the agreement reciting that the undersigned accepted the provisions of the agree-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1207 to date, & Reporter Indexes

ment with perfect understanding and a settled mind. The original agreement was left with the scrivener who attested it, but at the time of execution a copy, signed, and certified by both the father and the attesting witness to be a true copy, was delivered to plaintiff. Both parties thereafter treated the agreement as binding, and plaintiff fully performed his part thereof, but the will subsequently executed by his father did not accurately carry out the contract. *Held*, that the delivery of the certified copy of the contract to plaintiff was as binding as the delivery of a counterpart would have been, and under the circumstances, was a sufficient delivery.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 42.\*]

**5. CONTRACTS (§ 45\*)—DELIVERY—PRESUMPTIVE EVIDENCE—POSSESSION.**

Plaintiff's possession of a copy of a contract executed by himself and his father, the copy being certified by the attesting witness who drew the original, and by the father, as a true copy, was presumptive evidence that the copy was given to plaintiff by his father.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 45.\*]

**6. CONTRACTS (§ 45\*)—DELIVERY—EVIDENCE—PRESUMPTIVE EVIDENCE.**

The delivery of an agreement will be presumed where the concurrent acts of the parties recognize its binding force, in the absence of direct evidence to disprove a delivery.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 213; Dec. Dig. § 45.\*]

**7. APPEAL AND ERROR (§ 843\*)—REVIEW—QUESTIONS NECESSARY TO DECISION.**

In a suit for specific performance of an agreement to devise, made in consideration of plaintiff's agreement to marry a certain person, the agreement being made prior to plaintiff's engagement to marry, it is unnecessary to determine the validity of such an agreement made after and independent of a prior promise to marry between the parties to be married.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 843.\*]

**8. WILLS (§ 59\*)—CONTRACT TO BEQUEATH—CONSIDERATION—PROMISE TO MARRY.**

An agreement by plaintiff to marry a certain person at his father's request, accompanied by a promise to consummate the marriage thereafter, upon his father's execution of a written agreement to make him a certain allowance and devise certain property to him, the agreement recognizing plaintiff's engagement and referring to the contemplated marriage, was a valuable consideration sufficient to support his father's agreement.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 59.\*]

**9. WILLS (§ 59\*)—CONTRACT TO BEQUEATH—CONSIDERATION—RELEASE OF MORTGAGE.**

Plaintiff's agreement that a mortgage held by him on his mother's property should be void or be canceled was a valuable consideration for his father's agreement to make him an allowance and to devise certain property to him, whether the mortgage was a lien on the property or only a disputed claim constituting a cloud on the title.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 59.\*]

**10. SPECIFIC PERFORMANCE (§ 29\*) — CONTRACTS ENFORCEABLE—CERTAINTY.**

Complainant's father, who owned a third interest in a publishing business, agreed to make a will that there shall be to complainant 25 per cent. of the business, and that if on the father's death there shall not be left of him with which to satisfy his three grandchildren, that plain-

tiff shall satisfy each with \$2,000, or give them 5 per cent. of the business. *Held*, that the agreement was not too uncertain or indefinite to permit specific performance under the court's direction.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 29.\*]

**11. WILLS (§ 63\*)—CONTRACT TO BEQUEATH—CONSTRUCTION—PROPERTY AFFECTED.**

An agreement by complainant's father, who owned a one-third interest in a publishing business, to devise to complainant 25 per cent. of the said business of printing newspapers, meant that percentage of the entire business, and not merely 25 per cent. of his one-third interest.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 63.\*]

**12. SPECIFIC PERFORMANCE (§ 51\*) — CONTRACTS ENFORCEABLE—FAIRNESS OF CONTRACT—CONTRACTS TO DEVISE.**

Complainant's father had given to another son and his son-in-law each a third interest in his publishing business, and thereafter agreed to devise one-quarter of the business to complainant in consideration that complainant would marry a certain person, but obligated him to give each of the children of a deceased daughter \$2,000, or 5 per cent. of the publishing business in case the estate was insufficient to give them that amount after carrying out the contract. Complainant's mother, whose interest was the most seriously affected by the contract, knew of it during the father's lifetime, and was always satisfied with it. *Held*, that the father's agreement to devise was not unfair or unreasonable so as to prevent its specific enforcement.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 153, 154; Dec. Dig. § 51.\*]

Appeal from Supreme Court, Appellate Division, First Department.

Suit by Abraham H. Sarasohn against Rebecca Kamaiky and others. From a judgment of the Appellate Division (120 App. Div. 110, 105 N. Y. Supp. 53), affirming a judgment dismissing the complaint, complainant appealed. Reversed, and new trial ordered.

Denis O'Brien, for appellant. George H. Englehard, for respondents.

**CHASE, J.** This action is brought to enforce specifically an alleged agreement signed by the plaintiff and Kaaryl H. Sarasohn, his father, February 9, 1904. Kaaryl came to this country in 1874, and commenced the publication of a paper known as the Jewish Gazette. He had a wife, the defendant Bertha, and two sons, the defendant Ezekiel and the plaintiff, and one daughter, now deceased, the mother of the defendants Rebecca, Israel, and David Kamaiky. In 1876 Ezekiel, then about 10 years of age, came to this country, and thereafter assisted in the business of publishing and distributing said paper. In 1877 the plaintiff, then about 6 years of age, came to this country, and within a few years thereafter commenced working in connection with said business. In 1884 Kaaryl commenced the publication of the Jewish Daily News. Both Ezekiel and Abraham, except during such time as they were in school,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

were engaged in distributing papers, setting type, and soliciting advertisements and other business for their father until 1889. The plaintiff, Abraham, spent more time than his brother in school, and graduated from the law department of the University of the City of New York, and in 1889 was admitted to the bar and thereafter devoted his time to the practice of his profession. In 1889 Kasryel's daughter married one Kamaiky. She died in 1900, leaving the defendants Kamaiky, her children. About the time the plaintiff was admitted to the bar, Kasryel's said son-in-law was employed in the business of publishing said papers, and thereafter Kamaiky and Ezekiel had principal charge of such business. At some time after 1889 the name of Sarasohn & Sons was used in such publishing business, and on the 22d day of January, 1900, articles of copartnership between Kasryel, his son Ezekiel, and his son-in-law Kamaiky were prepared by the plaintiff representing them, and duly executed, by which each of the three partners was recognized as the owner of one-third of the property and business conducted in the name of Sarasohn & Sons, and the partnership business continued under such written articles of copartnership until after the death of Kasryel, which occurred January 12, 1905.

Prior to November, 1903, Kasryel expressed a desire that the plaintiff, who was then about 34 years of age, should marry. Both Kasryel and the plaintiff asked a cousin of Kasryel's wife and the mother of one Isabelle to allow Isabelle to marry the plaintiff. Before the engagement between plaintiff and Isabelle, Kasryel told one of his old employes that "Abraham would be engaged pretty soon." Subsequently the employe said to Kasryel, "Do you know Hyman (the plaintiff Abraham) is saying all the time he cannot make enough out of his professional life and he would like to have a share or interest in the Jewish Daily News and the Jewish Gazette?" and Kasryel said to him, "You go to him and tell him that I will give to one child Ezekiel one share, and my part will not be given to anybody, and I will not give that to any one except I give it to him." A few days later Kasryel said to the same person: "The time is getting short, and he would like to see him (Abraham) married. \* \* \* Go to tell him that I will give him a contract that my part of the Jewish Daily News will belong to him after I will die." This witness repeated the conversation to the plaintiff, and then returned to Kasryel and said: "He is not in a position to get married now because he does not make enough from his practice, except that you do just as you promised me as you told Abraham that you will give him your share in the Jewish Daily News and the Jewish Gazette." And he, Kasryel, said: "Go to tell him that I do not like to make any wills while I am alive, and I don't want to go to any lawyers—he used to be afraid all the time of death in making

a will—and he told me: 'Go tell Abraham I will make him a Jewish writing—a Jewish writing that the third part of my business, of my share, I will give to him after I will die.'" This conversation was repeated to plaintiff. On November 22, 1903, a formal Hebrew engagement ceremony was had between the plaintiff and Isabelle, although plaintiff testifies that the engagement was conditional upon the contract of the father being consummated.

An uncle of Isabelle had a conversation with Kasryel which he says was before the engagement, in which Kasryel promised to give Abraham his part in the business because that Abraham should get married to that young lady, and he further stated that he required Abraham to marry that girl. This witness about six weeks or two months later, and after the engagement, had a conversation with Kasryel, in which Kasryel said, "Why he did not send out the invitations for the wedding," and the witness replied, "Unless he put everything in writing the marriage will not take place." About two weeks later he met him again and Kasryel said, "That he had put in writing whatever he had promised." A short time before the writing was made Kasryel sent for the mother of Isabelle and said to her: "When would a date be set for the marriage?" and the mother replied, "I could not tell him because his father promised before he would give him a quarter interest in his business to his son, meaning Mr. Sarasohn, and Kasryel said, 'You tell my son in my name I give him a quarter interest in my newspaper business and he set the date for the marriage.' And he said within a few days he would write the papers out and would fulfill all his promises, one-quarter interest in the newspaper business." After the date of the agreement signed by Kasryel and the plaintiff the date was set for the wedding, which occurred March 7, 1904.

The alleged agreement was written in Hebrew, signed by Kasryel and by the plaintiff, and witnessed by the scrivener. The following is a translation of said agreement:

**"Memorial Words Concluded Between Rabbi  
K. H. Sarasohn and His Son  
Chaim (Hyman).**

"1. Rev. K. H. Sarasohn obligates himself to give his son above mentioned after his wedding, which will take place shortly with his bride-elect, the sum of one hundred dollars each and every month besides suitable apartments and offices in his house No. 187 East Broadway, without charge. This obligation shall continue as long as the above named Hyman has not a share in the business of publishing newspapers of the said Rev. K. H. Sarasohn.

"2. In the coming spring the said Rev. K. H. Sarasohn will go to Europe; the entire period which he shall remain in Europe his said son shall stand in the place of his fa-

ther to give (or express) his opinion in the said business of publishing newspapers above mentioned, but in all matters relating to politics and socialism he shall not have any say.

"3. The Rev. K. H. Sarasohn obligates himself to make a will, as is required, that after the passing away of the days and years there shall be to the said son Hyman above mentioned, twenty-five per cent. of the said business of printing newspapers; this share is only to Hyman personally or to his descendants; but if God forbid, it shall happen that said Hyman shall have no children surviving him, his wife shall not inherit, only the other heirs of the said Rabbi K. H. Sarasohn. And the house 185 East Broadway there shall be to him one-fourth part.

"4. If after the passing away of the days of the Rev. K. H. Sarasohn there will not be left of him what to satisfy the three grandchildren of my daughter Rebecca of blessed memory, then it is the obligation of the said Hyman to satisfy each with the sum of \$2,000 or to give them five per cent. of the said business of publishing newspapers.

"5. All the mortgage that the said Hyman holds on the mother shall be at once void (or shall be cancelled).

"All this is concluded in the presence of the undersigned.

"We the undersigned have accepted all the foregoing with our good will, with a perfect understanding and with a full and settled mind.

"Witness:

"Hyman Jacob Widrewitz,

"Of Moscow.

"We have come to this signature the twenty-third day of the month of Schebat, 5664, here in New York.

"(Signed) The words,

"Kasryel H. Sarasohn.

"(Signed) The words,

"Abraham Hyman Sarasohn."

The trial court found, among other things, as follows:

"(6) That said paper writing was written by one Widrewitz, a Hebrew rabbi, and was thereafter, and remained, in his possession until after the decease of the said Kasryel H. Sarasohn."

"(8) That on the trial of this action the plaintiff produced a copy of said paper writing and of the signatures thereto subscribed; that there were added to said copy after the copy of said signatures the words, 'Copied from the body of the writing which lies in my hand, letter for letter;' and that the paper containing said copy and said additional words bore at the foot thereof the original signature of the said Kasryel H. Sarasohn, and the words 'Chief Rabbi of America Hyman Jacob Widrewitz from Moscow' imprinted from a rubber stamp.

"(9) That the paper described in the foregoing eighth finding, with the original signature of said Kasryel H. Sarasohn thereon in-

scribed as described in the foregoing eighth finding, was at all times after the date of the said paper writing down to the date of the trial of this action in the possession of the plaintiff."

"(26) That the said Kasryel H. Sarasohn, in his lifetime and after the marriage of the plaintiff, paid to the said plaintiff the sum of \$100 a month in each and every month, and furnished the said plaintiff, without charge therefor, suitable apartments and office in the premises No. 187 East Broadway."

"(29) That the agreement of Kasryel H. Sarasohn alleged in the complaint is an agreement in consideration of marriage, but not one of mutual promises to marry."

"(34) That Bertha Sarasohn, the widow of said decedent, is satisfied with the contract so made between the said plaintiff and the said Kasryel H. Sarasohn, and is desirous of having the same in all respects carried out."

A few days before the death of said Kasryel he signed a paper purporting to be his will. Such paper was offered for probate in the Surrogate's Court by the plaintiff, to which objections were filed by said Ezekiel, and probate was refused on the ground that the decedent did not subscribe said paper in the presence of one of the persons who signed the same as a witness, and did not acknowledge the signature in his presence or declare the paper to be his last will and testament.

The respondents defend this action on substantially three grounds: (1) That said agreement was never delivered. (2) That there was no consideration therefor. (3) That it is too uncertain and indefinite in its terms to be enforced specifically.

The court dismissed the plaintiff's complaint, and further found, among other things, the following: (5) That said Kasryel H. Sarasohn did not intend that said paper writing thus subscribed by him should be effective as his agreement. (12) That the language of the third and fourth clauses of the paper writing referred to in the foregoing fourth finding is so indefinite and uncertain that their meaning cannot be ascertained. (13) That Kasryel H. Sarasohn did not make with the plaintiff any of the agreements alleged in the complaint to have been made by him. (14) That the plaintiff did not make with Kasryel H. Sarasohn any of the agreements alleged in the complaint to have been made by him. (15) That there was no consideration for any of the promises of said Kasryel H. Sarasohn alleged in the complaint. (17) That the plaintiff did not marry according to the desires of said Kasryel H. Sarasohn. (33) That the agreement of said Kasryel H. Sarasohn alleged in the complaint, to wit, that he would make and execute, in accordance with the statutes of the state of New York in such case made and provided, his last will and testament, wherein and whereby he would give, devise, and bequeath to the said plaintiff 25 per cent. of the business of printing newspapers founded, by the said Kasryel H. Sara-

sohn and an equal one-fourth part of the house known as No. 185 East Broadway, in the borough of Manhattan, city of New York, is unjust, unfair, and inequitable to said widow and to said next of kin of said Kasryel H. Sarasohn other than the plaintiff.

The conclusions of law are to the effect that Kasryel H. Sarasohn was not under any obligation to the plaintiff to make and execute a will giving to him 25 per cent. or any other share of said business of printing newspapers, that there was no consideration for said alleged promises, and that the alleged agreement is not such an agreement as entitles the plaintiff to a decree for specific performance of its terms.

All questions relating to a transfer of a one-fourth part of the property known as No. 185 East Broadway are eliminated from this controversy by stipulation.

At some time in 1893, or thereafter, the property at 185 East Broadway was owned by Kasryel's daughter, and in 1898 she gave to her mother a mortgage thereon of \$8,000. Plaintiff's mother testified that she did not pay any money for the mortgage, and further says, "Why should I give him money? The house was mine; it was my house and my husband's." Soon after the mortgage was given to her she transferred it to the plaintiff by assignment. On April 4, 1903, the plaintiff prepared and his mother signed a paper satisfying said mortgage, which he held for use in place of the assignment if he desired to use it. He testified that after the alleged agreement was signed he was at all times ready to satisfy the mortgage. A few days after Kasryel's death his son-in-law, Kamai-ky, asked the plaintiff for the paper satisfying the mortgage, and the plaintiff delivered it to him, and it was duly recorded and the mortgage satisfied.

In considering whether the essential findings of fact and conclusions of law are sustained, it is necessary for us to review briefly the principles of law that are applicable in connection with certain important undisputed facts.

Whether certain acts, words, and circumstances constitute a delivery of an agreement is a question of intent. The usual way of delivering a unilateral agreement is by physically handing the paper upon which it is written to the grantee or promisee. In case of a bilateral agreement, the delivery is usually evidenced by words. It is not necessary that a delivery be evidenced in any particular or prescribed manner. Any evidence that shows that the parties to a written instrument intend that the same should be operative and binding upon them is sufficient in an action to enforce its provisions. Where two or more persons make mutual promises and, desiring to put the same in writing, go to a scrivener for that purpose, and a writing is prepared and actually signed by the parties thereto and left with the scrivener, such fact, even if not of itself presumptive evidence of

a delivery, is an important fact in connection with the subsequent acts of the parties and the surrounding circumstances for the purpose of determining the intention of the parties in so leaving the signed paper with the scrivener.

The alleged agreement under consideration was signed by the plaintiff and his father, and so far formally executed in the presence of a witness who signed the paper in attestation of such fact. When so signed, each party was interested therein. Each was by the terms thereof to receive some benefit therefrom. Neither was entitled to the possession of the paper to the exclusion of the other. Every lawyer accustomed to prepare agreements containing mutual promises has been called upon to hold such agreements for the mutual benefit of the parties.

In the agreement now considered is the following language: "We, the undersigned, have accepted all the foregoing with our good will, with a perfect understanding and with a full and settled mind." It is true that if the agreement was left with the scrivener subject to the performance of some condition, the statement just quoted would be as ineffective as all the other provisions thereof; but in view of the undisputed surroundings, this statement in the agreement adds to the presumption that a delivery was intended.

It appears from the ninth finding of fact that we have quoted that there came into the possession of the plaintiff on the day of the date of the agreement a copy certified not only by the rabbi who acted as the scrivener, but by the plaintiff's father as being a copy of the paper, letter for letter, then remaining in the possession of the scrivener. The court has found that the copy of said agreement so certified by plaintiff's father was at all times after the date of the alleged agreement in the possession of the plaintiff. If such a copy so prepared by the scrivener had not been certified by the father, it would have been of little value as evidence of the intention of the father to be bound by the terms of the original. The possession of the copy so certified is presumptive evidence that the copy was given to the plaintiff by his father. When a document of title or obligation is made in counterpart, each counterpart is usually to be regarded as an original. 1 Greenleaf on Evidence (16th Ed.) § 563, p. 681.

The delivery of a copy of a paper certified as a copy remaining in the possession of the scrivener is as solemn a recognition of the binding force of the original as against the person so delivering such certified copy as if the same had been a counterpart. The father thus recognized that the written agreement so left with the scrivener was a completed transaction. Both of the parties to the agreement treated it as a binding contract. It appears from the twenty-sixth finding of fact that we have quoted that the fa-

ther carried out the terms of the agreement so far as it relates to the payment of a monthly sum to the plaintiff after his marriage and in furnishing him with suitable apartments and offices in the premises No. 167 East Broadway. It further appears, as we have already stated, that he thereafter executed a will. Although it does not satisfy accurately the provisions of said contract, yet in its principal features it is corroborative of the plaintiff's claim relating thereto. It cannot be assumed that the irregularity in the execution of the will was intentional; it should rather be considered as an effort in good faith by the decedent to carry out his wishes and obligations relative to his property. The evidence is uncontradicted that the plaintiff married in accordance with the wishes of his father. The mortgage referred to in the agreement, although not satisfied until after the father's death, was actually satisfied at respondent's request before probate of the will had been refused.

A delivery of an instrument will be presumed, in the absence of direct evidence, where the concurrent acts of the parties recognize the obligation thereof. *Gould v. Day*, 94 U. S. 406, 24 L. Ed. 232. The record does not sustain the fifth, thirteenth, fourteenth, and seventeenth findings of fact.

Contracts by which third persons covenant to perform certain promises in consideration of a marriage are frequently upheld. *Phalen v. U. S. Trust Co.*, 186 N. Y. 178, 78 N. E. 943, 7 L. R. A. (N. S.) 734; *Johnston v. Spicer*, 107 N. Y. 185, 13 N. E. 753. The decedent's promises were made in writing, and, in part at least were the result of plaintiff's reciprocal promise to marry that antedated the formal Hebrew ceremony of November 22, 1903, and the interesting question as to the validity of an agreement based upon a promise to marry, made after and entirely independent of a prior promise to marry as between the parties, is not now necessarily before us.

An agreement to marry entered into by the plaintiff with Isabelle at Kasryel's request, accompanied by a promise to consummate the same by marriage thereafter upon Kasryel's executing a written agreement as so promised, was a valuable consideration for the execution of such an agreement. Plaintiff testified that the marriage took place in reliance upon the agreement. The agreement postponed, at least in part, the consummation of the gift to the plaintiff to a time "after his wedding," and the agreement distinctly recognizes plaintiff's engagement and prior promise, and refers to the wedding "which will take place shortly with his bride-elect." The promise in the agreement that the mortgage therein referred to shall be void or canceled also constitutes a valua-

ble consideration for the agreement. It is a valuable consideration whether such mortgage was a recognized indebtedness and lien on the property in said mortgage described, or a disputed claim constituting an outstanding cloud on the title to such real property.

The record does not sustain the fifteenth finding of fact. We think the agreement is not too uncertain, indefinite, and unfair to permit of specific performance by direction of the court. The agreement and the provisions thereof were known to Kasryel's wife in his lifetime, and it has her approval now. Her interest in the estate is the one most seriously affected by sustaining the plaintiff's contention. It has not been suggested that Kasryel was either infirm or incompetent at the time when he signed the agreement. A competent testator not under undue influence, but upon friendly relation with his wife and children, should know what is best and equitable in a division of his property among those entitled to his bounty.

It does not seem to be disputed that Kasryel gave to Ezekiel and to his son-in-law each a third interest in the publishing business at some time prior to 1900. The financial relation of Kasryel to the several members of his family has not sufficiently shown that the agreement was unfair. We think there is no difficulty about construing the contract or its specific enforcement. The promise in the third paragraph of the agreement is to give to the plaintiff, by will, "twenty-five per cent. of the said business of printing newspapers." It refers to a per cent. "of the business of printing newspapers," and not to a percentage of any particular share thereof. The same is true of the house at 185 East Broadway. There is nothing in the contract to show that the decedent intended thereby to give the plaintiff any part of the capital stock of the Jewish Press Publishing Company. So far as appears, the decedent's only interest therein was as a stockholder.

The fourth paragraph of the agreement places upon the plaintiff an obligation to pay each of the children of the deceased daughter Rebecca \$2,000, or 5 per cent. of the business of publishing newspapers in case there is not left of his estate, after carrying out the terms of the contract with the plaintiff, a sufficient amount to pay each of them as next of kin such \$2,000 therefrom. The record, therefore, does not sustain the twelfth and thirty-third findings of fact.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, and WILLARD BARTLETT, JJ., concur.

Judgment reversed, etc.

(293 N. Y. 341)

**STEELE v. VILLAGE OF GLEN PARK**  
et al.

(Court of Appeals of New York. Nov. 10, 1908.)

**1. HIGHWAYS (§ 107\*)—IMPROVEMENT—STATUTORY SYSTEM—ADOPTION.**

Laws 1898, p. 218, c. 115, provides that county supervisors may, and on presentation of a petition must, pass a resolution that public interest demands the improvement of any public highway, or section thereof, within the county, not including any portion of a highway within the boundary of any city or incorporated village. Laws 1903, p. 1391, c. 606, provides that the boundaries of a village may be diminished by excluding from its corporate limits territory abutting on a street which is not adjacent to nor benefited by certain municipal improvements, but the provision is not to apply to any county in the state which has adopted, or may adopt, the system of highway improvements prescribed by Laws 1898, p. 218, c. 115, etc. *Held*, that the only way provided for the adoption of such system of highway improvement was by the voluntary vote of a majority of the board of supervisors of a county adopting a resolution that public interest demanded the improvement of a public highway, or section thereof, within the county, or, as authorized by Laws 1898, p. 219, c. 115, § 6, of the act, that a highway, or section thereof, approved by the state engineer should be constructed under the act, and by providing the necessary funds.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 339-345; Dec. Dig. § 107.\*]

**2. HIGHWAYS (§ 107\*)—IMPROVEMENT—STATUTES—ACCEPTANCE.**

Laws 1898, p. 219, c. 115, § 6, provide for the improvement of a section of a highway in a county, approved by the state engineer, by adoption of a resolution by the county board of supervisors, and by the provision of funds necessary to pay the county's portion thereof. *Held*, that a resolution under such section was optional with the county, and that the passage of several resolutions of that character constituted an acceptance by the county of the system of highway improvement provided by such act, within Laws 1903, p. 1391, c. 606, declaring that the authority conferred on villages to reduce their corporate limits, etc., shall not apply to any county in the state having adopted a system of highway improvement prescribed by the act of 1898.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 339-345; Dec. Dig. § 107.\*]

**3. HIGHWAYS (§ 107\*)—IMPROVEMENT—STATUTES—POWER OF VILLAGE.**

Where a county board of supervisors had accepted Act 1898, p. 218, c. 115, providing for the improvement of highways, a village in the county cannot add any part of its roads to the other roads in the county entitled to improvement under such act, by diminishing its boundaries.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 339-345; Dec. Dig. § 107.\*]

**4. SCHOOLS AND SCHOOL DISTRICTS (§ 36\*)—BOUNDARIES.**

Laws 1903, p. 299, c. 125, § 1, provides that in any common free school district, within the limits of which there shall be territory of two or more incorporated villages, the board of trustees of any village whose entire district is within the school district may call a meeting of the voters to determine whether that portion of the school district comprising the village holding the special meeting shall be separated and be a separate union free school district. *Held* that, where a county, having adopted the

system of highway improvements prescribed by Laws 1898, p. 218, c. 115, contained a union free school district including all of the village of B. and a large portion of the village of G., the officers of G. could not reduce its boundaries by excluding the portion outside of the school district for the purpose of bringing the entire village within the school district, so as to call a meeting for a vote on the question of withdrawal from the school district.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 59½; Dec. Dig. § 36.\*]

**5. MUNICIPAL CORPORATIONS (§ 124\*)—ACTS OF OFFICERS—TAXPAYERS' ACTIONS—STATUTES—REPEAL.**

Laws 1892, p. 620, c. 301, providing that officers, agents, or persons acting for a municipality may be prevented from doing or continuing illegal official acts or committing waste, and may be compelled to make good or restore any municipal funds or property unlawfully paid out or appropriated, by a taxpayer's action, has not been repealed by implication.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 124.\*]

**6. MUNICIPAL CORPORATIONS (§ 993\*)—ACTS OF OFFICERS—ILLEGALITY—RIGHT TO SUE—RESIDENCE.**

In order to entitle a taxpayer to maintain an action, under Laws 1892, p. 620, c. 301, authorizing a taxpayer's action to prevent any illegal act, or to prevent waste or injury to, or to restore any property or funds of, a state or municipality, he need not be a resident thereof.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2158; Dec. Dig. § 993.\*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Suit by Herbert G. Steele against the village of Glen Park and others, to have certain proceedings, taken by the village to diminish its boundaries by excluding from its corporate limits territory lying outside the boundaries of a union school district, declared illegal and of no effect, etc. From a judgment of the Appellate Division (119 App. Div. 918, 105 N. Y. Supp. 1144), affirming a judgment for plaintiff, defendants appeal. Affirmed.

I. R. Breen, for appellants. George H. Cobb, for respondent.

**CHASE, J.** A union free school district of the towns of Brownville and Pamela, in the county of Jefferson, includes within its boundaries all of the village of Brownville, a large portion of the village of Glen Park, and a small portion of the towns of Brownville and Pamela lying outside of said two villages. In 1903 the school district voted to purchase a lot and erect thereon a high school building. A majority of the inhabitants and of the children of school age within said district reside in the village of Brownville, but the assessment of real property in that part of the village of Glen Park included within said district exceeds that of the remaining part of said district. The village of Glen Park, after said vote of the school district, and on or about November 23, 1903, assuming and claiming to act under chapter 606, p.

1391, Laws 1903 (section 326a, Village Law), voted to diminish the boundaries of the village by excluding from its corporate limits the territory situated in said village lying outside of the bounds of said school district. Said act of 1903 provides: "The boundaries of a village may be diminished by excluding from its corporate limits, territory abutting upon a street, which is not adjacent to nor benefited by either street or sidewalk improvements, electric lights, sewers, water-works system or fire protection, when any of such benefits, improvements or system have been completed in a village: \* \* \* Provided however that this section shall not apply to any county in the state which has adopted, or may hereafter adopt, the system of highway improvement under chapter one hundred and fifteen of the laws of eighteen hundred and ninety eight or the acts amendatory thereof." It is claimed that the purpose of such vote was to enable said village of Glen Park to determine by vote whether that part of the school district comprising the village of Glen Park should be separated from said school district and be and become a separate school district, as provided by chapter 125, p. 299, Laws 1903, section 1 of which provides: "In any union free school district within the limits of which there shall be territory of two or more incorporated villages the board of trustees of any village whose entire district is within said school district may call a special meeting of the voters \* \* \* to vote at a school meeting, to determine whether that portion of any such school district comprising the village holding such special meeting shall be separated from such school district and be a separate union free school district with limits corresponding with the limits of such village. \* \* \*" An action was brought by said district to have the proceedings of the village of Glen Park, under said act, in diminishing the boundaries of said village declared illegal and of no effect. Judgment was obtained therein, declaring said proceeding illegal, and enjoining the division of said district. An appeal was taken to the Appellate Division, where the judgment was reversed, and the plaintiff's complaint dismissed. *Union Free School District v. Village of Glen Park*, 109 App. Div. 414, 96 N. Y. Supp. 428. This action was then commenced to have said proceedings declared illegal and of no effect, and to enjoin the defendants from doing anything for the purpose of diminishing the boundaries of the village of Glen Park pursuant to said chapter 606, p. 1391, Laws 1903, or for the purpose of dividing said school district pursuant to chapter 125, p. 299, Laws 1903.

The plaintiff is a resident of the village of Brownville, and assessed for real property in said village of Glen Park for an amount exceeding \$1,000, and liable to pay taxes on such assessment in said village, and he was also assessed, and paid taxes therein, upon an assessment exceeding \$1,000, within one year

previous to the commencement of said action. The act known as the Higbie-Armstrong Act (Laws 1898, p. 218, c. 115) provides for the improvement of the public highways. Our references to said act are to it as it existed November 23, 1903. By it "The board of supervisors in any county of the state may, and upon the presentation of a petition as provided in section two hereof, must pass a resolution that public interest demands the improvement of any public highway or section thereof situate within such county, and described in such resolution, but such description shall not include any portion of a highway within the boundaries of any city or incorporated village. \* \* \*" Section 1. The fact that the resolution must not include a highway within the boundaries of an incorporated village may have influenced the Legislature to include in chapter 606, p. 1391, Laws 1903, the prohibition against its applying to any county in the state which has adopted the system of highway improvement by said act of 1898. The act of 1898 provides: "The owners of a majority of the lineal feet fronting on any such public highway or section thereof in any county of the state may present to the board of supervisors of such county a petition setting forth that the petitioners are such owners and that they desire that such highway or section thereof be improved under the provisions of this act." Section 2. The resolution of the board of supervisors that public interest demands the improvement of any such public highway, or section thereof, must by the terms of the act be transmitted to the state engineer and surveyor, who upon the receipt thereof must investigate and determine whether the highway, or section thereof, sought to be improved is of sufficient public importance to come within the purposes of the act, taking into account the use, location, and value of such highway, or section thereof, for the purposes of common traffic and travel, and he thereupon must approve or disapprove the resolution. Section 3. If he approves the resolution, he must cause the highway or section thereof to be mapped both in outline and profile. He must also cause plans and specifications of such highway, or section thereof, to be thus improved to be made for telford, macadam, or gravel roadway or other suitable construction, and upon the completion of such maps, plans, and specifications the state engineer must cause an estimate to be made of the cost of construction, and transmit the same to the board of supervisors. Sections 4, 5. Upon the receipt of such report, "Upon a majority vote of such board of supervisors, it may adopt a resolution that such highway or section thereof so approved shall be constructed under the provisions of this act, or of any existing act." Section 6. The expense of the highway improvement is borne as provided by the act. Prior to November 23, 1903, 31 petitions, as provided by the act, had been filed with the

board of supervisors of the county of Jefferson. These petitions related to different pieces of highway about the county, aggregating 111 miles of road, included within 17 of the 22 towns of the county. One or more roads had been completed, and other work was in progress. Up to that time 12 final resolutions under section 6 of said act, each relating to a different road, had been adopted by the board of supervisors, and said board had appropriated or directed the treasurer of the county to pay, on account of roads, under said act, \$158,180.

The defendants contend that the act of 1898 does not give boards of supervisors any authority to adopt the system of highway improvement provided for by the act. There is no provision in said act, or in any act called to our attention, for a general resolution expressly adopting such system. The language of the Legislature in chapter 606, p. 1391, Laws 1903, that we have quoted is not, however, meaningless. It is a legislative construction of the act of 1898, as including authority for a county to adopt the system of highway improvement thereby provided. There is no provision therein for the adoption, by a board of supervisors of the act by or on behalf of certain towns or other particular portions of the county. If a resolution, generally adopting the system of highway improvement provided for by the act, was passed by a board of supervisors in behalf of the county, or of one or more of the towns thereof, it would not prevent the necessity of a vote by the board of supervisors upon each highway or section thereof proposed to be constructed under the provisions of the act. The only way provided by the act for the adoption of the system of highway improvement provided therein is by the voluntary vote of a majority of the board of supervisors adopting a resolution that public interest demands the improvement of any public highway, or section thereof, within the county, or under section 6 of said act that a highway, or section thereof, approved by the state engineer shall be constructed under the provisions of the act, and by providing the money necessary for the treasurer of the county to pay on account thereof as provided by the act. A resolution under said section 6 is not compulsory, but optional, and its passage by the board of supervisors of the county of Jefferson in the several instances mentioned was an acceptance by the county of the money of the state for highway improvement under the act, and an adoption of the system of highway improvement provided by the act, within the meaning of said chapter 606, p. 1391, Laws 1903. When the board of supervisors of any county has so accepted the provisions of the act of 1898, a village in the county cannot add any part of its roads, to the other roads of the county entitled to improvement under the act by diminishing its boundaries.

The defendants also insist that the plain-

tiff cannot maintain this action, because he is not a resident of the village of Glen Park. This court, in *Greene v. Knox*, 175 N. Y. 432, 67 N. E. 910 say: "There are three statutes which a taxpayer may invoke in aid of an action brought by him, for the public benefit, against municipal officers or agents. The first of these statutes is section 1925, Code Civ. Proc., under which a plaintiff may ask for judgment preventing waste of, or injury to, the estates, funds, or property of a municipality. The second statute is chapter 301, p. 620, Laws 1892, under which officers, agents, or persons acting, or who have acted, for a municipality may be prevented from doing or continuing illegal official acts, or committing waste, and may be compelled to make good, or restore any municipal funds or property unlawfully paid out or appropriated. The third statute is section 27, Civil Service Law (chapter 370, p. 812, Laws 1899), which provides that the right of a taxpayer to bring an action to restrain the payment of salaries out of municipal funds shall not be limited or denied because the office, place, or employment affected by the suit 'shall have been classified as, or determined to be, not subject to competitive examination.'" Said chapter 301, p. 620, Laws 1892, has not been repealed by implication. This court has, since the last amendment of the Code provision, repeatedly recognized it as in full force and effect. *Greene v. Knox*, supra; *Wenk v. City of New York*, 171 N. Y. 607, 64 N. E. 509; *Bush v. O'Brien*, 164 N. Y. 205, 58 N. E. 106; *Wallace v. Jones*, 182 N. Y. 37, 74 N. E. 576; *Stone v. Board of Supervisors of Broome Co.*, 166 N. Y. 85, 59 N. E. 708. Under the Code provision the action may be maintained by a citizen resident in the municipality, or by a corporation that is assessed for, and is liable to pay, or within one year before the commencement of the action has paid a tax therein. Under the act as amended in 1892 the action may be maintained, "By any person or corporation whose assessment, or by any number of persons or corporations, jointly, the sum of whose assessments shall amount to one thousand dollars, and who shall be liable, to pay taxes on such assessment or assessments in the county, town, village or municipal corporation to prevent the waste or injury of whose property the action is brought, or who have been assessed or paid taxes therein upon any assessment or assessments of the above-named amount within one year previous to the commencement of any such action or actions." The purposes of the acts are not identical. The purpose of the Code provision is, "To obtain a judgment, preventing waste of, or injury to, the estate, funds, or other property of a county, town, city or incorporated village of the state." The purpose of the act as amended in 1892 is, "To prevent any illegal official act \* \* \* or to prevent waste or injury to, or to restore and make good, any property, funds or estate"

of a municipality. The acts are independent each of the other, and it is not necessary that a person, bringing an action under the act of 1892 to prevent an illegal official act, should be a resident of the municipality. The history and relation of these statutes are fully and quite satisfactorily stated by Cochrane, J., in *Wey v. O'Hara*, 48 Misc. Rep. 82, 95 N. Y. Supp. 81. The village is a proper party defendant. *Wenk v. City of New York*, supra.

The judgment should be affirmed, with costs.

CULLEN, C. J., and GRAY, VANN, WEBNER, WILLARD BARTLETT, and HIS-  
COCK, JJ., concur.

Judgment affirmed.

(193 N. Y. 218.)

### HENRY v. HERRINGTON

(Court of Appeals of New York. Oct. 23, 1908.)

#### 1. ELECTION OF REMEDIES (§ 14\*)—DEFENSE—NECESSITY OF PLEA.

Election of remedies, to be available as a defense, must be pleaded.

[Ed. Note.—For other cases, see Election of Remedies, Dec. Dig. § 14.\*]

#### 2. ELECTION OF REMEDIES (§ 14\*)—INCONSISTENT REMEDIES.

Where a person having two inconsistent remedies elects one, he cannot, if defeated, resort to the other.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. §§ 16, 17; Dec. Dig. § 14.\*]

#### 3. ELECTION OF REMEDIES (§ 10\*)—DISMISSAL OF FORMER SUIT.

Where plaintiff, after having sold certain personal property for which the buyer refused to pay, sued the buyer and others for conspiracy to defraud her of the property, which action was dismissed because, when brought, she had no interest in the property, such action was never available to plaintiff, and therefore its institution was not an election of remedies, depriving her of the right thereafter to sue the buyer for the balance of the price.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 14; Dec. Dig. § 10.\*]

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Anna Henry against Hammond Herrington. Judgment for plaintiff, affirmed by the Appellate Division (120 App. Div. 902, 105 N. Y. Supp. 1120), and defendant appeals. Affirmed.

John T. Norton, for appellant. John B. Holmes, for respondent.

GRAY, J. This action was brought to recover the balance of the purchase money due to the plaintiff from the defendant upon a sale of personal property. The fact of the sale was put in issue by the answer; but the plaintiff recovered a verdict for the amount

claimed by her, and the judgment upon the verdict has been unanimously affirmed by the Appellate Division. This is sufficient to dispose of the controverted facts of the case; but the appellant insists that a serious question of law survives the disposition made below, which has been erroneously determined. That was whether a previous action, brought by the plaintiff against this defendant and other persons, did not bar her from maintaining the present action, upon the ground that there had been an election by her between inconsistent remedies for obtaining relief, to which she must be held. The answer does not plead this defense, as it should have done to make it available (*Roberge v. Winne*, 144 N. Y. 709, 89 N. E. 631); but it may be that, by the course taken by the parties upon the trial, that objection was waived. I think that it was, and, so assuming, it is quite clear that the plaintiff had not been precluded from maintaining this action upon the ground stated. The facts are established for us by the verdict and judgment below, and they show that the property sold by the plaintiff consisted of certain furniture, fixtures, etc., contained in a hotel, which she and her husband were conducting. He was the lessee of the hotel, and had transferred to her the personal property mentioned, in payment of an indebtedness, and, also, subject to a chattel mortgage given by him to the defendant to secure a loan of \$500. Some time thereafter she made a sale of these chattels to the defendant for the sum of \$1,700, and executed a bill of sale thereof. One hundred dollars of the price were paid down. The balance, less the amount due upon the chattel mortgage, was to be paid some two weeks later, and the property sold was, by the direction of the defendant, to be left in the hotel. An explanation of the transaction is furnished in the evidence that the defendant expected to sell the property to Dennin, the lessor of the hotel, or to Ormsby, whom Dennin intended to secure as a tenant. Subsequently the plaintiff and her husband were dispossessed, and Ormsby went into possession of the hotel and its contents, having purchased the latter from the defendant. The defendant failed to pay his indebtedness to the plaintiff upon the bill of sale at the time when it matured, and he refused to admit any liability, referring her to Dennin and Ormsby. Believing, or acting upon the advice, that there had been a plan or conspiracy between Dennin, Ormsby, and the defendant to cause her husband to be dispossessed of the hotel, and herself to be cheated out of the property sold to the defendant, and after making futile efforts to get it back, she commenced an action against the three, and demanded damages against them, upon allegations that they had agreed together and had conspired to defraud her of the possession and ownership of her property. Her com-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaint, however, set forth the sale to this defendant by the bill of sale, his failure to pay, and that she had "never yet received either the property, \* \* \* or any money, or a return of the bill of sale." When the action came on for trial, it was dismissed upon the pleadings. Thereafter she brought the present action.

If the plaintiff had two remedies open to her adoption in order to right herself, which were not consistent with each other, and she made an election of one in bringing her former action, she must be held to it, and will be deemed to have been concluded thereby from prosecuting the other remedy. This doctrine of the election of inconsistent remedies consists in holding a party, where there is, by law or by contract, a choice between two remedies, which proceed upon opposite and irreconcilable claims of right, to the one taken. *Morris v. Rexford*, 18 N. Y. 552; *Mills v. Parkhurst*, 126 N. Y. 89, 26 N. E. 1041, 13 L. R. A. 472. If it appeared that the plaintiff had a right, either to disaffirm the sale of the chattels, or to treat the sale as absolute and to sue for their price, then, undoubtedly, by commencing an action upon the former theory, she would have concluded herself from ever proceeding upon the other theory. But, as the facts are established, she had no such choice, with respect to the transaction of sale, and that was manifest in her complaint in the former action. Her pleading showed that the title to the property had been transferred to this defendant under a bill of sale, and the action was properly dismissed and refused trial; for there could have been no conspiracy between the parties defendant to deprive the plaintiff of property, which she expressly alleged had been legally transferred by her to another. The proof is that the transaction of sale was complete by the execution of the bill of sale and the part payment of the price, and that the delivery of the subject of the sale was made in accordance with the direction of the vendee. The plaintiff had but the one course open to adoption against the defendant, and that was to compel him to pay what he still owed her. It is not the mere fact of having previously brought some action against a defendant to obtain relief upon such a transaction which would determine the application of the doctrine of election. It would be the fact that a plaintiff, with two courses open to him, had, by his previous action, declared his election or decision to affirm or to disaffirm the transaction, as the case might be. The right to make an election must actually exist; and, if it shall appear that it did not, then it is quite immaterial, in its bearing upon a subsequent action, that some previous action, looking to a remedy for the plaintiff's loss, had been brought. *Morris v. Rexford*, supra; *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272, 8 L. R. A. 216, 18 Am. St. Rep. 803. The

plaintiff's previous action was fruitless, because she had no right to maintain it, upon her own showing; but that did not preclude her from subsequently bringing an action in which she asserted a right which she possessed. *Kinney v. Kiernan*, 49 N. Y. 164, 169. She had made no election; for there was no choice of remedies against the defendant, and in suing him with others, as for a conspiracy, she mistook or misconceived her remedy, and was dismissed; but she did not forfeit her legal right to bring this action to recover from the defendant what he owed her. Any step or action taken by her, which was fruitless, because proceeding upon a misconception of the rights which the law gave her, left her unaffected as to any legal remedy which she did possess.

No other question requires consideration, and I advise the affirmance of the judgment.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

Judgment affirmed.

(193 N. Y. 262)

HOLLAND v. GROTE et al.

(Court of Appeals of New York. Oct. 23, 1908.)

1. JUDGMENT (§ 793\*)—LIEN—PROPERTY AFFECTED—FRAUDULENT CONVEYANCE.

A judgment, having been recovered and properly docketed before the execution by the judgment debtor of an alleged fraudulent conveyance of land owned by him, became and for 10 years continued a lien thereon, enforceable by execution, despite any number of transfers, under Code Civ. Proc. § 1251, providing that a judgment so docketed is a lien on real property and chattels real which the debtor has at the time of docketing the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1383; Dec. Dig. § 793.\*]

2. FRAUDULENT CONVEYANCES (§ 11\*)—REMEDIES OF CREDITORS—PLEADING—COMPLAINT—ALLEGATIONS OF FRAUD.

In an action to subject the proceeds of land, alleged to have been fraudulently conveyed by a judgment debtor, to the payment of the judgment, after it had ceased to be a lien on the land, a mere allegation of the debtor's fraudulent intent in making the conveyance is not sufficient to sustain the complaint, if it otherwise appears that such intent had not been consummated by acts, which, as a matter of fact, hindered and delayed the creditor in the enforcement of his ordinary remedies.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 15; Dec. Dig. § 11.\*]

3. FRAUDULENT CONVEYANCES (§ 239\*)—REMEDIES OF CREDITORS—EQUITABLE RELIEF—JUDGMENT LIEN—EXPIRATION.

That a creditor failed to collect his judgment by execution during the period limited therefor does not prevent him from thereafter seeking relief in equity to subject the proceeds of a sale of land, fraudulently conveyed by the debtor after judgment, to the payment thereof.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 683; Dec. Dig. § 239.\*]

**1. FRAUDULENT CONVEYANCES (§ 239\*)—ACTION TO VACATE—ELEMENTS.**

The general question presented by a judgment creditor's suit is whether, at the time of its commencement, a fraudulent transfer of the debtor prevents collection of a valid unpaid judgment, and, if this is so, equity will not refuse relief because the creditor has not been swift enough with other proceedings to prevent a fraudulent intent to withdraw property from being consummated.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 681-683; Dec. Dig. § 239.\*]

**5. JUDGMENT (§ 876\*)—EXPIRATION OF LIEN—EFFECT.**

Though the lien of a judgment has expired, the judgment still presumptively constitutes a valid claim against the debtor until the expiration of 20 years from its rendition, since it is not until then conclusively presumed to be paid, as expressly provided by Code Civ. Proc. § 376.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1648; Dec. Dig. § 876.\*]

**6. JUDGMENT (§ 802\*)—EXPIRATION OF LIEN—ENFORCEMENT.**

Land of a judgment debtor to which he has retained title may be levied on and sold under the judgment, after the expiration of the judgment lien, as authorized by Code Civ. Proc. § 1252.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1426; Dec. Dig. § 802.\*]

**7. FRAUDULENT CONVEYANCES (§ 266\*)—REMEDIES OF CREDITORS—PLEADING—ANSWER—ADEQUATE REMEDY AT LAW.**

Where a judgment creditor sued to subject the proceeds of certain land conveyed by the debtor in fraud of the creditor's rights to the payment of the judgment, and the complaint on its face showed that he had no adequate remedy at law, a defense alleging no additional facts, but charging that plaintiff had an adequate and complete remedy at law, was demurrable.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 266.\*]

**8. FRAUDULENT CONVEYANCES (§ 266\*)—REMEDIES OF CREDITORS—PLEADING—DEFENSES—LIMITATIONS.**

Complainant, a judgment creditor, after the expiration of 10 years from the date of his judgment, and after the lien had expired, sued to subject the proceeds of certain land, alleged to have been fraudulently conveyed by the debtor, to the payment of the judgment, the complaint alleging that on a certain date, shortly before the commencement of the suit, execution was duly issued on the judgment and returned unsatisfied. *Held* that, while the issuance and return of such execution was necessary to complainant's right of action, the time and place thereof were not parts of the cause of action, and, defendant not being bound by the allegation as to the date the execution was issued and returned, a defense alleging that the cause of action "alleged in the complaint" did not accrue within 10 years before the commencement of the action was not demurrable.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 266.\*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by James M. Holland against Ida F. Grote, impleaded with Augustus H. Grote. From an order and judgment of the Appellate Division (125 App. Div. 413, 109 N. Y. Supp. 787) affirming an interlocutory judg-

ment sustaining plaintiff's demurrer to defendant's separate defenses (56 Misc. Rep. 370, 107 N. Y. Supp. 687), defendant Ida F. Grote appeals by permission on certified questions. Reversed in part, and affirmed in part.

The questions certified are whether the defenses alleged, respectively, are sufficient in law on the face thereof. While the questions so certified do not expressly include, they are assumed to involve and present, a preliminary question whether the complaint states a cause of action.

William C. Rosenberg, for appellant. Otto B. Schmidt, for respondent.

**HISCOCK, J.** This action is one in equity brought by a judgment creditor after execution returned unsatisfied to reach the proceeds of certain real estate alleged to have been transferred without consideration and with fraudulent intent by the defendant, Augustus H. Grote, to the appellant, Ida F. Grote, and afterwards transferred by the latter to a purchaser for value. Amongst other defenses the appellant affirmatively and separately alleged in effect, first, that the complaint did not state facts sufficient to constitute a cause of action; second, that the plaintiff had an adequate and complete remedy at law; and, third, that the cause of action alleged in the complaint did not accrue within the period prescribed by the statute of limitations. The respondent demurred to each of these defenses as insufficient in law upon the face thereof, thus raising the questions presented upon this appeal, and which resolve themselves into the one whether the complaint states a good cause of action on the principle, somewhat informally expressed, that a bad answer is sufficient for a bad complaint, and if this question be answered in the affirmative, then into the ones relating directly to the sufficiency of the answers.

The determination of the first question requires a summary of the material allegations of the complaint. These are to the effect that one Stein, respondent's assignor, September 27, 1888, duly recovered a judgment against the defendant Augustus H. Grote, which on that day was duly docketed in the office of the clerk of the county of New York; that on or about February 13, 1893, said Grote, without any consideration and with intent to hinder, delay, cheat, and defraud his creditors, and especially said Stein, purported to convey to the appellant, Ida F. Grote, real estate of considerable value situate in the city of New York, by a deed which was recorded February 3, 1895; that thereafter and on or about May 8, 1899, said grantee sold and conveyed said premises to a third party for a valuable consideration, and ever since then has had and still has in her possession the proceeds of said sale,

amounting to upwards of \$20,000; that on or about June 7, 1907, an execution was duly issued on said judgment to the sheriff of the proper county and returned unsatisfied; that said deed was fraudulent, and was kept from record with the intent and for the purpose of misleading and defrauding the judgment creditors of the grantor, and that plaintiff's assignor had no knowledge thereof, "and that knowledge thereof and of the facts as hereinbefore stated has only come to this plaintiff recently, and that said judgment creditors, particularly the said Conrad Stein, were wholly ignorant of the said transfer and conveyance and of the facts hereinbefore set forth until recently"; that before the commencement of this action the judgment above mentioned was transferred to the plaintiff. And upon these allegations it is prayed that the transfer to the appellant be adjudged fraudulent and void, and that the proceeds realized by her on the sale of the real estate fraudulently transferred to her be applied to the payment and satisfaction of the plaintiff's judgment, with a receiver and injunction if necessary.

If appellant's contention that the complaint does not state facts sufficient to constitute a cause of action were directed against the facts as they existed for 10 years after respondent's judgment was recovered, I should appreciate its force. The judgment, having been recovered and properly docketed before the execution of the alleged fraudulent conveyance, became and for 10 years continued a lien on the premises covered by the latter, and could be enforced and collected by execution despite any number of transfers. Code Civ. Proc. § 1251.

No matter how fraudulent the intent of the grantor may have been in making a conveyance of his real estate during the period prescribed by the statute, such conveyance was utterly ineffectual to prevent the judgment creditor by ordinary legal processes from collecting his debt, and there was no occasion whatever for application to a court of equity for aid. Even if it should be assumed that under such circumstances there might have been in good faith that issue and failure to collect in whole or part an execution which is one of the requisites of a judgment creditor's action, there still would have been lacking that other essential element of such an action—a barrier fraudulently erected by the debtor between his property and his creditor's judgment whose removal required the assistance of a court of equity. It does not seem to me that the mere allegation of a fraudulent intent on the part of a judgment debtor in making a conveyance is sufficient to sustain a complaint in such an action as this, if it appears from the other allegations of the complaint that such intent has not been consummated by acts which, as a matter of fact, do in the slightest degree hinder and delay the creditor in the

enforcement of his ordinary remedies. *Skinner v. Stuart*, 39 Barb. 206.

The case of *Kain v. Larkin*, 141 N. Y. 144, 36 N. E. 9, which is cited as authority for the proposition that this would be sufficient, does not seem to sustain the proposition, for in that case it appeared that the fraudulent grantor not only intended to hinder and delay his creditors, but that he actually did so by executing his conveyance before recovery of judgment instead of after its recovery as in the present case.

I am not, however, able to agree with the argument that because the respondent's judgment was superior to the alleged fraudulent conveyance for 10 years the latter did not, when this action was commenced, operate as a hindrance and a fraud, and that the creditor, having failed to enforce his judgment when he might have done so by ordinary process, will not be allowed to appeal to equity now that his lien has expired. I am not aware of any principle or authority which prevents a creditor having a valid judgment from asking a court of equity to remove a fraudulent conveyance of his debtor which stands as a barrier to the present enforcement of his claim, simply because through ignorance, as is alleged in the present complaint, or for other sufficient reasons, he has failed to collect the same by execution proceedings during the limited period allowed for that process.

The general question presented by a judgment creditor's suit is whether at the time of its commencement a fraudulent transfer of the debtor prevents collection of a valid unpaid judgment, and if this is so equity will not refuse relief because the creditor has not been swift enough with other proceedings to prevent the fraudulent intent to withdraw property from becoming consummated.

In my opinion, the allegations of the complaint now before us show sufficient cause for equitable relief. While the lien of the judgment on real estate has expired, the judgment still presumptively constitutes a good and valid claim against the grantor. Code Civ. Proc. § 376. If the judgment debtor still retained the title to his real estate, the judgment might still be enforced and collected therefrom under the provisions of section 1252 of the Code. *Evans v. Hill*, 18 Hun, 464; *Garczynski v. Russell*, 75 Hun, 497, 27 N. Y. Supp. 465. If he had parted with his real estate and retained the proceeds thereof, there is no question but that collection of the judgment might be enforced by legal methods open to the creditor. Code Civ. Proc. §§ 1377, 1378, 2432, etc. But instead of following either one of these courses, the debtor has with fraudulent intent divested himself of this property and passed it and its proceeds over to a fraudulent transferee by a conveyance which now prevents the creditor from collecting his debt in the ordinary legal methods, and thus the convey-

ance, executed with fraudulent intent, at the time of the commencement of the action operated as an actual and practical barrier and fraud. Under these circumstances it is quite clear that the respondent had a right to appeal to a court of equity, as he has done, to compel the fraudulent grantee to account for the proceeds of the property which she wrongfully helped to withdraw from the creditors who were entitled to it. *Burtus v. Tisdale*, 4 Barb. 571; *Lawrence v. Bank of Republic*, 31 How. Prac. 502, 505; *Murtha v. Curley*, 90 N. Y. 372.

Although not cited, and, therefore, apparently not relied on, the case of *Faneuil Hall National Bank v. Bussing*, 147 N. Y. 665, 42 N. E. 345, has not been overlooked, in which some things are said which might be regarded as opposed to the views which have been herein expressed. In that case judgment was recovered and docketed, and a receiver in supplementary proceedings appointed in New York county, and the order appointing the receiver was filed and recorded in Westchester county, where the judgment debtor owned some real estate. This real estate was subsequently sold to a third party, who remained in possession for 10 years, when, about 18 years having elapsed since the entry of the judgment, an order was made requiring the receiver in supplementary proceedings to sell the right, title, and interest of the judgment debtor.

It was held that the docket of the judgment and the supplementary proceedings instituted in New York county, and the filing of the order appointing the receiver in Westchester county, where the judgment had not been docketed, were ineffectual to vest in the receiver any interest whatever in the Westchester real estate. It also appeared, as already stated, that the period for the operation of the lien of a judgment had long since expired, and these considerations fully disposed of all the questions before the court. This being so, the court in addition did say: "The judgment creditors had, for ten years from the filing of the judgment rolls, an ample remedy at law against this property which they failed to invoke, and, if they were damaged by the conveyance of the executrix of the judgment debtor to Valentine during that period, it was due to their failure to at once docket the judgments in Westchester county and proceed to sale thereunder. Having suffered their remedy at law to lapse, all equitable remedies are also cut off. *Borst v. Corey*, 15 N. Y. 505."

The case of *Borst v. Corey*, thus cited, simply held that where the statute of limitations barred an action at law to recover a balance of indebtedness due on the purchase price of land, a creditor would not be permitted to avoid the statute by seeking relief in the form of an equitable action to enforce a lien for the indebtedness.

I do not think that these cases, when in-

terpreted in the light of the questions presented to the court, are authorities against the right of the respondent to maintain this action on the facts which are alleged.

It is suggested as a minor question that the allegation of the mere transfer to respondent of the judgment recovered by his assignor is not sufficient, and that there should have been broader allegations of a transfer of the general cause of action claimed to be set forth in the complaint. This contention does not seem to be well founded. *Strange v. Longley*, 3 Barb. Ch. 650; *Gleason v. Gage*, 7 Paige, 121.

The conclusion that the complaint sufficiently sets forth a cause of action brings us directly to a consideration of the sufficiency of the various defenses which have been subjected to demurrer.

No argument seems necessary to show that the first of these, "that the complaint does not state facts sufficient to constitute a cause of action," is not a good or sufficient answer.

The second defense, "that the plaintiff has an adequate and complete remedy at law," likewise is insufficient. In the absence of other allegations, this answer must be construed and interpreted by reference to the material allegations of the complaint as they stand. It does not allege any additional facts showing that an adequate remedy at law does exist, but simply asserts that on the complaint as framed such remedy does exist. An inspection of the complaint shows that on the material and substantial facts as there alleged the plaintiff must necessarily resort to equity and cannot secure sufficient relief elsewhere; unless he completely changes his cause of action, he must seek equitable relief.

The third defense presents a closer question than the others, but in my opinion it is sufficient on its face. It alleges that the cause of action "alleged in the complaint" did not accrue within 10 years before the commencement of the action. Under ordinary circumstances, and except for one reason next to be mentioned, it is conceded, or at least perfectly clear, that this form of answer would be sufficient. *Code Civ. Proc.* § 413; *Bell v. Yates*, 33 Barb. 627; *Sands v. St. John*, 36 Barb. 628; *Budd v. Walker*, 29 Hun, 344.

It is urged as a special reason for holding the answer insufficient in this case that it alleges that the particular cause of action "alleged in the complaint" is barred, and that inasmuch as it was necessary for the plaintiff to allege that an execution had been issued and returned, until which time the cause of action did not accrue, and inasmuch as it is specifically alleged that this act did not take place until a short time before the action was commenced, the complaint shows on its face that the cause of action therein alleged had not become barred, and therefore the defense is insufficient.

It seems to me that this argument is not

well founded. It is true that the plaintiff was compelled to allege an issue of execution and failure to collect in whole or part, and that his cause of action did not accrue until that took place. It was not, however, necessary to a sufficient statement of his cause of action that he should allege the specific date on which this occurred. While good pleading might dictate a statement of the time, it is settled that time and place are not parts of the cause of action, and that for a failure to state them the pleading would not be subject to demurrer, but only to a motion to make more definite and certain. On the trial the defendant would be at liberty to show that the date stated in the complaint was not the one on which the execution was issued and returned. This being so, the defendant is not bound by his plea of the statute of limitations as to an admission that the execution was issued, and that plaintiff's cause of action indisputably accrued on the date which was unnecessarily pleaded, but he may show as a matter of fact that an execution was issued, and that plaintiff's cause of action did accrue at some other date and that it is barred by the statute.

These conclusions lead to answering the first two questions certified to us in the negative, and the last one in the affirmative, and lead to a modification of the order of the Appellate Division so as to affirm the interlocutory judgment in sustaining plaintiff's demurrers to the first two defenses, and to reverse said judgment in so far as it sustains plaintiff's demurrer to the third defense set up in said answer, with leave to plaintiff to withdraw demurrer to third defense within 20 days, without costs to either party in any court.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, and CHASE, JJ., concur.

Ordered accordingly.

(193 N. Y. 306)

GRANT et al. v. COBRE GRANDE COPPER CO. et al.

(Court of Appeals of New York. Nov. 10, 1908.)

1. APPEAL AND ERROR (§ 1089\*)—REVIEW—DECISION OF INTERMEDIATE COURT.

While the Court of Appeals, on reviewing a motion to set aside an order of service of summons by publication, will not usually search the complaint with the care it will on a demurrer, yet, where the Appellate Division sets aside the order on the ground that the complaint fails to state a cause of action, the Court of Appeals must finally determine that question as to the point on which the Appellate Division based its decision.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1089.\*]

2. PROCESS (§ 92\*)—SERVICE—PUBLICATION—SUFFICIENCY OF COMPLAINT.

An individual executed deeds in escrow, conveying mining property to a foreign cor-

poration for delivery to the corporation on specified payments being made as set forth in a contract. Before the first payment fell due, the individual ousted the officers of the foreign corporation, procured his own election as president, and appointed his clerk secretary and treasurer, and assumed the performance of the duties of such officers, and the management of the corporation, including the payment of its obligations to himself and the preservation of the contract right of the corporation. He transferred the properties to a new foreign corporation for its stock, which he appropriated to himself, and put it beyond the power of the original corporation to further perform its contract with him. Held that, as the individual must be deemed to have undertaken to look to the new corporation for the discharge of the obligations of the original corporation, a complaint in an action by stockholders of the original corporation against the new corporation for an accounting, etc., alleging the facts, sufficiently stated a cause of action, within Code Civ. Proc. § 439, providing that an order for the service of summons by publication must be founded on a complaint showing a cause of action, though it failed to allege that the original corporation had performed the contract.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 92.\*]

3. PROCESS (§ 92\*)—SERVICE—PUBLICATION—SUFFICIENCY OF COMPLAINT.

It further appeared that the operation of the mining properties by the new corporation was profitable, and the individual had been able to reimburse himself many times for the amount that was owing to him by the original corporation at the time the properties were transferred to the new corporation. Held that a complaint in an action by stockholders of the original corporation alleging the facts and praying for an accounting against the new corporation, etc., stated a cause of action justifying an order of service of summons by publication, under Code Civ. Proc. § 439, though it did not allege performance of the contract by the original corporation.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 92.\*]

4. PROCESS (§ 92\*)—SERVICE—PUBLICATION—SUFFICIENCY OF COMPLAINT.

An individual conveyed absolutely a mine to a foreign corporation, and accepted in payment thereof notes of the corporation. Subsequently, the individual assumed the management of the foreign corporation and conveyed the mine to a new foreign corporation, receiving therefor its stock, which he appropriated to his own use. The new corporation operated the mine. Held, that a complaint in an action by stockholders of the original corporation stating the facts and praying that the new foreign corporation account for the profits, etc., stated a cause of action justifying an order of service of summons by publication, under Code Civ. Proc. § 439.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 92.\*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by James A. Grant and another against the Cobre Grande Copper Company and others to have a trust declared in certain property, and for an accounting. From an order of the Appellate Division (126 App. Div. 750, 111 N. Y. Supp. 386) reversing an order refusing to vacate an order for service of summons by publication, plaintiffs appeal by permission, and the Appellate Division

certifies question. Questions answered, and the order of the Appellate Division reversed.

Samuel S. Watson, for appellants. F. W. M. Cutcheon, for respondents.

**HAIGHT, J.** This action was brought by the plaintiffs, as stockholders of the defendant the Cobre Grande Copper Company, an Arizona corporation, in behalf of themselves and all other stockholders of the corporation similarly situated to have the defendant the Cananea Consolidated Copper Company, a Mexican corporation, of which William C. Greene is the president, adjudged to be the holder in trust for the benefit of the Cobre Grande Copper Company of certain mines and mining properties situated in the republic of Mexico, and to compel such corporation and William C. Greene, its president, together with the Greene Consolidated Copper Company, a West Virginia corporation organized as a holding company, of which Greene is also president, to account to the Cobre Grande Copper Company and to the plaintiffs for income and proceeds arising from the work, use, and occupation of such mines and mining properties.

The plaintiffs, upon affidavits showing facts in compliance with the provisions of sections 438 and 439 of the Code of Civil Procedure, procured an order directing the service of the summons upon the defendant Cobre Grande Copper Company by publication. A motion was made at the Special Term to set aside the order. The motion was denied, but upon appeal the Appellate Division reversed the order and granted the motion. It then allowed an appeal to this court, certifying the following questions for our determination:

"(1) Had the court jurisdiction upon the papers presented to grant an order directing the service of the summons in this action upon the defendant the Cobre Grande Copper Company by publication?

"(2) Was the court justified in vacating an order duly granted directing the service of a summons by publication upon the papers presented?"

Section 1780 of the Code of Civil Procedure provides that "an action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action." Section 438, so far as now material, provides: "An order directing the service of a summons upon a defendant, without the state, or by publication, may be made in either of the following cases: (1) Where the defendant to be served is a foreign corporation." Section 439 provides that "the order must be founded upon a verified complaint, showing a sufficient cause of action against the defendant to be served, and proof by affidavit of the additional facts required by the last section." The reversal of the Appellate Division appears to have been based upon the latter provision of the Code, and

upon the ground that the complaint filed in this action does not state a sufficient cause of action against the Cobre Grande Copper Company. It is not our practice upon motions of this character to search the complaint with the care we would upon a demurrer; but inasmuch as the Appellate Division has held that the complaint fails to state a cause of action, it becomes our duty to now finally determine that question as to the point upon which that court based its decision.

The complaint, in substance, alleges that on or about the 26th day of November, 1898, the defendant William C. Greene contracted to convey to one George Mitchell certain mines and mining properties located in the Cananea Mountains, in the republic of Mexico, in consideration of the sum of \$12,500 in cash, and the further sums of \$37,500 to be paid on the 26th day of November, 1899, \$100,000 to be paid the 26th day of November, 1900, and \$100,000 to be paid the 26th day of November, 1901. Greene at the time of the execution of this agreement executed deeds conveying such mining properties to Mitchell, and delivered the same in escrow to the Phoenix National Bank of Phoenix, Ariz., for delivery to Mitchell upon his complying with the terms of the agreement. Immediately upon the execution of the agreement Mitchell paid to Greene the sum of \$12,500 in cash, as provided by the contract, and thereupon entered into possession of the mines and mining properties, and worked and operated them in accordance with the terms of the agreement, and in conjunction with the defendant Greene, who had a license from the government of Mexico to operate mines in the "Zona Libre" or "neutral zone" of the republic of Mexico in which said mines were located, and began to work and develop the same and to erect machinery and other appliances for their proper operation. Thereupon Greene and Mitchell entered into a contract of co-partnership, under the name of Mitchell, Greene & Co., for the development, improvement, and working of the mines so conveyed by Greene to Mitchell, and they continued to work and develop the mines under the license to the defendant Greene until about the 25th day of April, 1899, at which time the defendant Cobre Grande Copper Company was incorporated, and thereupon Mitchell, in consideration of the transfer to him of 199,995 shares of the capital stock of the company, transferred to that corporation all his property, right, title, and interest in said mines and mining properties held by him individually or in trust, acquired from Greene under the contract of November 26, 1898. On the 22d day of July, 1899, the defendant Greene executed and delivered to the defendant Cobre Grande Company an agreement ratifying and confirming the agreement of November 26, 1898, and consented to the transfer by Mitchell of all said properties to the Cobre Grande Copper Company, and in addition thereto the defendant Greene also

transferred to the Cobre Grande Copper Company other mines, mining claims, and mining properties contiguous and adjoining the mines and mining properties conveyed to it by Mitchell, specifically describing them by name. But the defendant Greene continued to hold the titles to the said mines and mining properties in trust for and on account of the defendant Cobre Grande Copper Company, which being an Arizona corporation, and not having a license from the republic of Mexico, could not operate such mines. It also appears that on the 24th day of July, 1899, the defendant Greene conveyed to the defendant Cobre Grande Copper Company the Elisa mine, so called, located in the republic of Mexico and adjacent to the properties already conveyed, and accepted from the Cobre Grande Copper Company in full payment therefor four promissory notes of \$25,000 each, aggregating the sum of \$100,000, one payable July 24, 1901, one on July 24, 1902, one on July 24, 1903, and the last on July 24, 1904.

It further appears from the allegations of the complaint that one John H. Costello had become the president of the Cobre Grande Copper Company, J. Henry Wood, the secretary and treasurer, and Cornelius O'Keefe, its manager at the works and mines in Mexico; that Greene, Mitchell, and one Treadwell, who were also directors in the corporation, had become dissatisfied with the management of the other officers, and that thereupon they had a conference with one J. Edward Addicks, of Delaware, and one Thomas W. Lawson, of Boston, for the purpose of securing the necessary funds to pay the debts and protect and preserve the properties of the Cobre Grande Copper Company, and that at such conference it was arranged to oust Costello, the president, Wood, the secretary and treasurer, and O'Keefe, the manager, and to organize a Mexican corporation to take over the titles to the mining properties and to operate the mines, and to organize a holding company to take over the stock of the other companies, and that the necessary funds to carry out this arrangement should be advanced by Addicks and Lawson. Thereupon Greene, Mitchell, and Treadwell proceeded to Arizona, and on the 28d day of September, 1899, they as directors of the company held a meeting at the office of the company and declared the election of Costello and Wood null and void, on the ground that proper notice of the meeting at which they were elected had not been given. They then proceeded to fill the vacancies so created by the election of William C. Greene as president, White, an employé of his, as secretary and treasurer, and one Norton Chase, an attorney in the employ of Walter S. Logan, who was the attorney for the defendant Greene, as a director, and then voted to dispense with the services of O'Keefe as manager. The defendant Greene, assuming to act as president of the Cobre Grande Copper

Company, and Treadwell, acting as its vice-president, proceeded to Mexico and took possession, in the interest of the Cobre Grande Copper Company, of all the mines and mining properties of the company, with all the appurtenances, appliances, and supplies, together with the products that had been mined and the returns from the various smelters to which the products had been shipped, which supplies and products amounted to many thousands of dollars in value. Thereupon, pursuant to the arrangement with Lawson and Addicks, the defendant Greene, with Norton Chase, his attorney, proceeded to organize the defendant, the Cananea Consolidated Copper Company, Sociedad Anonima, under the laws of the republic of Mexico, to hold the titles to said mines and mining properties, and on or about the 11th day of October, 1899, pursuant to such agreement with Lawson and Addicks, the defendant Greene executed an agreement in writing in the Spanish language whereby he undertook to transfer and convey to the Cananea Consolidated Copper Company all the mines and mining properties of the Cobre Grande Copper Company, including the Elisa mine and all the mines and mining properties which had been transferred and conveyed to the Cobre Grande Copper Company; that the Cananea Copper Company accepted said mining property with full knowledge of and subject to all the rights, interest, and claims of the defendant Cobre Grande Copper Company and its stockholders; that all the shares of the capital stock of the Cananea Company were issued and delivered to the defendant Greene except seven shares held by persons to qualify them as directors, and immediately thereupon the Cananea Consolidated Copper Company entered into possession of all the mining properties of the Cobre Grande Copper Company, and proceeded to work and operate the same, and ever since has continued to do so until the present time.

It is also alleged that, pursuant to the agreement with Lawson and Addicks, Greene, Mitchell, Treadwell, Barnes, and Walter S. Logan, Greene's attorney, organized the Greene Consolidated Copper Company of West Virginia as a holding company, with Greene, Mitchell, Treadwell, and Logan as its directors and officers; that the main purpose and object of its organization was to take over and hold a majority in interest of the capital stock of the defendant Cobre Grande Copper Company and all the capital stock of the defendant Cananea Consolidated Copper Company, except such shares as were necessary to be held by individuals to qualify them to act as directors. The capital stock of the Greene Consolidated Company was fixed at \$5,000,000, and divided into 500,000 shares of the par value of \$10 each. Upon the organization of the Greene Consolidated Company all the stock of the Cananea Company, except seven shares which were necessary to qualify directors, was turned

over by Greene to the treasury of the Greene Consolidated Company, which enabled the Greene Company to exercise control and dominion over the Cananea Company and over all its assets, properties, income, profits, and advantages arising from the operation of its mines, and from which it has been enabled to distribute upwards of \$4,000,000 in dividends.

It is also alleged, in substance, that, upon the organization of the Greene Consolidated Copper Company, Greene on behalf of the company offered and agreed that all stockholders of the Cobre Grande Copper Company should have the right to exchange their stock in that company for the stock in the Greene Consolidated Company, share for share; that the purpose of making such offer for the exchange of stock was to obtain a majority of the shares of the capital stock of the Cobre Grande Copper Company, and thereby obtain control and dominion over its affairs and its property, and as soon as the defendant Greene and the Greene Consolidated Company had obtained a majority of the shares of the capital stock of the Cobre Grande Copper Company all offers to exchange stock of the Greene Consolidated Company for that of the Cobre Grande Copper Company were withdrawn, and all of the rights of the plaintiffs, and other minority stockholders of the Cobre Grande Copper Company similarly situated, to participate in the earnings, profits, and benefits accruing or arising from the mines and properties of the Cobre Grande Copper Company were denied by the defendants Greene and the Greene Consolidated Company and the Cananea Company.

It is further alleged that the \$37,500 payable on November 26, 1899, as part of the purchase price of the mines and mining properties conveyed by the defendant Greene to the defendant Cobre Grande Copper Company by the agreement on July 22, 1899, and all other payments therein specified and provided to be made and paid, and all agreements and covenants to be carried out and performed by the defendant Cobre Grande Copper Company under that agreement, including the payment of the notes given as the purchase price of the Elisa mine, "were paid, made, done and performed at the time and in the manner provided in said agreement and by or for the account of the defendant Cobre Grande Copper Company, or the payments and conditions thereof were waived, or settled in time and in manner agreed upon and accepted by all parties in interest, and the funds to make said payments and to carry out, do, and perform the agreements, covenants and things to be carried out, done, and performed by or on account of the defendant Cobre Grande Copper Company, as aforesaid, were raised and provided and obtained and secured upon the faith, credit, and pledge of the said mines and mining properties of the defendant Cobre Grande Copper Company

and from the income and profits of the said mines and mining property of the defendant Cobre Grande Copper Company."

We have already stated the relief sought to be obtained by the plaintiffs. The complaint contains many other allegations in much detail, to some of which we shall hereafter have occasion to refer. We have only given a brief summary of the allegations which we deem necessary to properly understand the questions presented for our determination. The determination of the Appellate Division that the complaint failed to state a cause of action was based upon the allegations of the complaint, to which we last referred. The prevailing opinion says with reference thereto that, "If the cause of action is one to establish a trust of real estate and incidentally to obtain an accounting with reference to the income, or as an action for an accounting as to the income of an alleged trust and incidentally for a declaration of trusts, the alleged rights of the Cobre Grande Copper Company, which the plaintiffs are attempting to assert, depend upon the continued existence of the option right to purchase the properties in question and the right to hold possession thereto under the agreements collateral to the option. As the escrow agreements were mere option contracts entitling the Cobre Grande Copper Company, upon making certain payments, to receive conveyances of the property, it is necessary that the complaint should show either that the payments required to be made in order to entitle the Cobre Grande Company to a delivery of the deeds were made, or that facts should be alleged showing a modification or waiver of these conditions so that it may appear that such rights have actually accrued to the Cobre Grande Company. Since it appears that all the contract rights of the Cobre Grande Copper Company, independently of the escrow agreements, were to cease at Greene's election upon its failure to perform any of the covenants contained in the license agreement of November 26, 1898, as modified by the agreement of July 22, 1899, and as it expressly appears that Greene claimed default had occurred and attempted to exercise his election to terminate the rights of the Cobre Grande Copper Company, it was necessary, in order to make out a cause of action, that the pleader should allege that the Cobre Grande Copper Company had duly performed all the covenants and conditions of the license agreement with Greene of July 22, 1899, or should set up the facts establishing a waiver thereof." The opinion then proceeds to quote the allegation to which we have referred, and then says with reference thereto that it is the only allegation of the complaint concerning the performance by the Cobre Grande Copper Company of the contracts, and that it is not an allegation that the covenants or conditions of any of the agreements were performed or that they were waived; that an allegation of perform-

ance made in the alternative is not a sufficient allegation either of performance or of waiver.

It must be conceded that the allegations of performance, on the part of the Cobre Grande Copper Company, of the requirements of the optional contracts, so called, as above quoted, are in the alternative, and that the effect is to allege payment or waiver or settlement. But passing the question as to whether the complaint would be demurrable for this reason, under our modern practice, or whether the parties should move to make the complaint more definite and certain, we shall proceed to the consideration of another phase of the question. It must be borne in mind that this is an equitable action brought to compel an accounting; that it is not an action at law in which allegations of payment, of waiver, and of settlement are treated as separate and distinct matters of performance or defense. The allegations of the complaint under review are general in form, and are in effect a summary of the conclusion reached from the allegations of fact preceding those under review. The Appellate Division, we think, erred in its statement that the allegations referred to were the only allegations of the complaint concerning performance. Under the modified contract of July 22, 1899, the terms of payment provided for under the contract of November 26, 1898, were to be made in installments, \$37,500 November 26, 1899, \$50,000 November 26, 1900, \$50,000 November 26, 1901, \$50,000 November 26, 1902, and the remaining \$50,000 November 26, 1903. It will therefore be observed that the first payment falling due was November 26, 1899. Prior to this time Greene, Mitchell, and Treadwell had entered into their agreement with Addicks and Lawson for the ousting of the president, secretary, and treasurer, of the Cobre Grande Copper Company and the organization of two new corporations, which they carried into effect on the 23d day of September, 1899, by which Greene and his associates became the officers of the Cobre Grande Copper Company, its president and directors, and then on the 11th day of October, 1899, organized the new Cananea Company under the laws of Mexico and transferred the properties belonging to the Cobre Grande Copper Company to it, Greene taking all of the stock except seven shares, which were reserved to qualify directors in that corporation. All this took place before any payment, as we have seen, became due to him from the Cobre Grande Copper Company. Greene, by ousting these officers and taking the presidency of the Cobre Grande Copper Company and appointing as secretary and treasurer his clerk, assumed the per-

formance of all the duties of such officers in the management of the corporation, including the payment of the obligations of the company to himself and the preservation of the contract right of the corporation; and when he transferred and conveyed all of the property and interest of the company to the newly organized Cananea Company for the stock of that company, which he appropriated to himself, he put it beyond the power of the Cobre Grande Copper Company to further perform its contracts with him, and thereupon he must be deemed to have undertaken to look to the Cananea Company for the discharge of the obligations of the Cobre Grande Copper Company.

It further appears from the allegations of the complaint, as we have seen, that the operation of these mines by the Cananea Company has been extremely profitable, and at least \$4,000,000 has been divided among the stockholders of the Greene Consolidated Company, which was organized as the holding company. It is therefore apparent that the Cananea Company, of which Greene was the president, has been able to reimburse him many times over for the amount that was owing to him by the Cobre Grande Copper Company at the time its properties were transferred to the Cananea Company.

Again, as we have seen from the allegations of the complaint, the conveyance of the Elisa mine, so called, to the Cobre Grande Copper Company, was absolute and not conditional. Greene accepted in payment therefor four promissory notes of \$25,000 each. It was therefore a completed transaction, and no option remained to be exercised, or act to be performed, as a condition for the passing of the title. This mine was also transferred to the Cananea Company, and that company has had the benefit of the proceeds therefrom. We consequently conclude that the complaint states a good cause of action, at least in so far as the questions discussed are concerned.

Our attention has been called to other questions pertaining to jurisdiction, etc., some of which were considered when this case was here before. 189 N. Y. 241-252, 82 N. E. 191. Further discussion at this time is not deemed necessary.

The order of the Appellate Division should be reversed and that of the Special Term affirmed, with costs in all courts, and the questions certified answered, the first in the affirmative and the second in the negative.

CULLEN, C. J., and EDWARD T. BARTLETT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur.

Order reversed, etc.

(193 N. Y. 22.)

## PEOPLE v. CAHILL.

(Court of Appeals of New York. Oct. 23, 1908.)

## 1. ELECTIONS (§ 95\*)—REGISTRATION LAWS—CONSTITUTIONALITY.

Laws 1905, p. 1846, c. 689, authorizing, among other things, the state superintendent of elections to subpoena and examine persons regarding suspected cases of illegal registration, is constitutional.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 95.\*]

## 2. WITNESSES (§ 304\*)—PRIVILEGE OF WITNESS—IMMUNITY STATUTES—PERJURY.

Under Pen. Code, § 41q, providing that one offending against any section of this title (which relates to illegal registration) shall be a competent witness against another person so offending, and may be compelled to testify on any trial in the same manner as any other person, but that the testimony shall not be used in any prosecution against the witness, and no such witness shall be liable to prosecution for the offense regarding which his testimony was given, etc., one whose examination was legal is not immune from punishment for falsely testifying before the superintendent of elections.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1051; Dec. Dig. § 304.\*]

## 3. WITNESSES (§ 304\*) — PRIVILEGE OF WITNESSES—CONSTITUTIONAL PROVISIONS.

Where defendant testified before the superintendent of elections regarding the suspected illegal registration of certain persons, he could not, in a trial for perjury in having testified falsely before the superintendent, claim that, by being compelled to testify, the constitutional provisions that no person shall be compelled in any criminal case to be a witness against himself was violated, since his statements related to independent offenses committed by others.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1051, 1052; Dec. Dig. § 304.\*]

## 4. WITNESSES (§ 304\*) — PRIVILEGE OF WITNESSES—CONSTITUTIONAL PROVISIONS—IMMUNITY STATUTE.

Pen. Code § 41q, provides that one offending against any section of this title (which relates to illegal registration) is a competent witness against another person so offending, and may be compelled to testify on any trial the same as any other person, but that the testimony shall not be used in any prosecution against the witness, and no such witness shall be prosecuted for the offense regarding which his testimony was given, etc. *Held*, that though, on a trial for perjury in testifying falsely before the superintendent of elections as to the alleged illegal registration of certain persons, it appeared that defendant was himself implicated in such illegal registration, it could not be claimed that, by being compelled to testify before the superintendent, the constitutional provision that no person shall be compelled in any criminal case to testify against himself was violated, the statute protecting defendant from harm from such testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1051; Dec. Dig. § 304.\*]

## 5. WITNESSES (§ 305\*)—PRIVILEGE OF WITNESS—CONSTITUTIONAL PROVISIONS—WAIVER.

Where defendant without objection testified before the superintendent of elections as to the suspected illegal registration of certain persons, and, in a trial for perjury for having testified falsely, it appeared that he was implicated in the illegal registration, he could not claim that the constitutional provision that no person shall be compelled in any criminal case to be a witness against himself was violated, since, if he

felt that his testimony might disclose criminal conduct on his own part, he should have declined to answer the questions.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1053; Dec. Dig. § 305.\*]

## 6. CRIMINAL LAW (§ 406\*)—EVIDENCE—ADMISSIONS.

Defendant was charged with perjury in having falsely sworn, in an examination before the superintendent of elections as to the alleged illegal registration of defendant and M. and W., that all three had slept in a certain building during a given time. M. was permitted to testify that on defendant's telling him to register he stated that he was not of age, whereupon defendant said that he himself voted when he was 16, and told witness to go ahead and register and he would see that no harm came to him. W. testified that defendant told him to register, and that if any harm came to him he would see that he got out. *Held*, that the evidence was competent as tending to show an admission on defendant's part that the witness had not stayed at the building long enough to entitle him to register.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 406.\*]

## 7. PERJURY (§ 32\*)—EVIDENCE.

The evidence was also competent as establishing a motive for defendant's testimony before the superintendent that each man was qualified by residence to register.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 109; Dec. Dig. § 32.\*]

## 8. CRIMINAL LAW (§ 406\*)—EVIDENCE—OTHER CRIMES.

In a trial for perjury in having falsely sworn before the superintendent of elections that one M. had slept in a certain numbered building long enough to entitle him to register, M. testified that defendant asked him to register from the building, and, on being told that M. was under age, stated that he (defendant) had himself voted while a minor, and that he would see that no harm came to witness. *Held*, that while the evidence of defendant's admission that he had committed another crime by voting before he came of age would by itself have been inadmissible, yet the conversation detailed by the witness being an entire and connected one, it was admissible as an entirety.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 917; Dec. Dig. § 406.\*]

Oullen, C. J., and Willard Bartlett and Chase, JJ., dissenting in part.

Appeal from Supreme Court, Appellate Division, Second Department.

Joseph J. Cahill was convicted of perjury, and from an order and judgment (126 App. Div. 391, 110 N. Y. Supp. 728) affirming, by a divided court, the conviction, he appeals. *Affirmed*.

Martin W. Littleton, for appellant. Wm. S. Jackson, Atty. Gen. (James A. Donnelly, of counsel), for the People.

HISCOCK, J. Chapter 689, p. 1846, of the Laws of 1905, entitled "An act to amend chapter six hundred and seventy-six of the laws of eighteen hundred and ninety-eight, entitled 'An act to create a metropolitan elections district; provide for the appointment of a state superintendent therein, and to prescribe his powers and duties,' generally," amongst other things authorizes the state su-

perintendent or his deputy to subpoena persons and examine them with reference to cases of suspected illegal registration. Said official having reason to suspect that the appellant and two other persons, named respectively McKenna and White, had illegally registered from a certain building in the borough of Brooklyn, caused the appellant to be subpoenaed for the purpose of giving information in regard to said cases. He appeared and, without any objection, made an affidavit dated November 2, 1905, tending to show that he and each of said other individuals was entitled to register as he had. He has been convicted of perjury on the ground that the statements made with reference to the other individuals were false.

We regard as too clear to require discussion the propositions questioned by counsel for the appellant that said chapter 689, p. 1846 of the Laws of 1905 is constitutional; that there was evidence permitting the jury to find as it did that the statements made by appellant in respect to McKenna and White were material and false, and that the appellant is not immune from punishment for giving such false testimony under the immunity statute hereafter to be referred to, or for any other reason, if his examination was legal.

Contenting ourselves with thus merely stating our conclusions upon these points, we pass to a consideration of the other questions which have been argued.

Appellant contends that the proceeding before the superintendent of elections in which he made his affidavit was a "criminal case" against him, and that, having been subpoenaed and examined under the compulsion of the statute, he has been compelled to become a witness against himself in violation of the provisions of the Constitution both of the United States (Const. U. S. Amend. 5) and of the state (Const. N. Y. art. 1, § 6) which provide that "no person shall be compelled in any criminal case to be a witness against himself," and that, therefore, the whole proceeding, including his affidavit containing the alleged false statements, is absolutely null and void, and furnishes no basis for a charge of perjury.

It is answered with considerable force that the proceedings before the superintendent in which appellant was examined were not of such a character as to constitute a "case" and come within the purview of the constitutional provision just quoted. An inspection of the statute creating and prescribing the duties of the office of superintendent of elections does give much weight to the argument that it creates a purely administrative official who is empowered in various ways, including an examination of witnesses, to investigate, amongst other things, the subject of registration of voters, to the end that illegal registration may be discovered and voting thereon prevented. Such official by the provisions of the statute has no power to

punish or entertain proceedings for the punishment of a person guilty of illegal registration. In this respect he differs from a grand jury investigating and having the power to take action looking to the punishment of alleged crimes, and proceedings before which body have been held to come within the contemplation of the constitutional provision quoted. *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110; *People ex rel. Lewisohn v. O'Brien*, 176 N. Y. 253, 68 N. E. 353.

But if we assume that an investigation by such official was a case or proceeding contemplated by the Constitution, we do not think that appellant's constitutional rights were violated in obtaining from him the testimony on account of which he has been convicted.

If the proceeding was more than a mere general investigation, then there were three separate cases or proceedings, and the alleged false testimony for which conviction has been had is to be regarded as given in cases against McKenna and White, rather than in any case against himself, and it was not harmful to him.

It appears without contradiction that at the time when appellant appeared and made his affidavit there was pending in the office of the superintendent an investigation of the registration of all three men, and subpoenas had been issued in the investigation of White and McKenna. The deputy superintendent testified as follows: "Mr. Cahill came in and was referred to me, and I told him we had received some information to the effect that there were three men registered from 413 Henry street who did not reside there, of whom he was one. \* \* \* I asked him would he relate the facts with reference to these three cases, and give me the names of the other two registered persons besides himself, and he said that he would. We had first a general conversation. I asked him if he lived at that place himself, and he stated that he did. \* \* \* I then asked him with reference to McKenna and White. \* \* \* I then asked him if he would swear that that was true, and he said he would."

The information including the alleged false statements with respect to the residence of McKenna and White, for which alone the appellant has been convicted, was then incorporated in the affidavit which has been made the basis of this prosecution, and the witness was sworn for the first time when he verified it.

While the deputy superintendent testifies that the affidavit was entitled "*People v. Joseph J. Cahill*," the affidavit itself shows that it was simply entitled "Case No. 354." We do not, however, regard the mere title of the affidavit as very material. As a matter of fact, the superintendent was endeavoring to secure information in regard to three cases, and the witness was brought in and in rather an informal manner interrogated

in regard to each, and then his statements as to all were embodied in one affidavit, and verified as they chanced to be applicable to one or the other. So far as the practical result was concerned, it was not different than it would have been had the witness verified separately the statements pertinent to each case.

Naturally, illegal registration is an individual crime. The illegal registration of the three men could not well constitute a joint offense, and there was nothing on the face of the proceedings then pending to indicate that Cahill was implicated in the illegal registration of White and McKenna, and that, therefore, he was constitutionally relieved from giving information in respect to them, or that such information in any way incriminated him. Apparently it was perfectly proper and legal to subpoena and examine him in respect to the others, and no one could say that in so doing he was being called on to give testimony against himself.

The real and precise question, therefore, seems to be whether the validity of his oath to statements relating to White and McKenna, which he could be compelled to make, is destroyed because at the same time he was compelled to verify other statements relating to himself, and which it will be assumed he could not have been compelled to make.

We think that it was not, and that to hold otherwise under the circumstances of this case would be going beyond that which has been held in any of the cases called to our attention.

In *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851, the defendant had been examined before a legislative committee about certain acts of alleged bribery, and subsequently the attempt was made to use the evidence so given by him for the purpose of proving his complicity in the crime, and what was said with reference to compelling a person to be a witness against himself in a criminal case must be read in the light of those fundamental facts.

*People ex rel. Lewisohn v. General Sessions*, 96 App. Div. 201, 89 N. Y. Supp. 364, involved contempt proceedings against the relator because of his refusal to answer certain questions before a grand jury on the ground that such answer would tend to incriminate him, and what was said upon the subject of the right of a person not to be a witness against himself was said in the discussion of that general question.

The case of *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, also involved a discussion of questions arising in connection with the refusal of a witness to answer questions on the ground that they would tend to incriminate him.

In *U. S. v. Edgerton* (D. C.) 80 Fed. 374, it appeared that the defendant was required to appear before a grand jury without knowing that his own conduct was under investigation, and was called on to give evidence

material to a charge for which he was subsequently indicted, and it was held that this was improper.

In *People v. Singer*, 18 Abb. N. C. 96, the defendant was indicted for murder, and it appeared that she had been brought before the grand jury and interrogated with reference to the charge against herself for which she was subsequently indicted, and this was held to be improper.

*Boone v. People of the State of Illinois*, 148 Ill. 440, 36 N. E. 99, presented substantially the same facts.

Thus it appears in each one of the cases that the question involved was as to compelling a person to give evidence in regard to an offense alleged to have been committed by the witness. Here, as already sufficiently appears, the statements related to apparently independent offenses committed by other people.

If in the light of what was subsequently testified to on the trial, it should be contended that appellant was in fact implicated in the illegal registration of White and McKenna, and that, therefore, he should not have been compelled to give evidence in their cases, two answers may be made:

In the first place, we have no doubt that he secured immunity against any harm from such testimony, which was as broad as the protection afforded by the constitutional provisions to which we have referred. Section 41q of the Penal Code, which is here applicable, provides as follows: "A person offending against any section of this title (which title relates amongst other things to illegal registration) is a competent witness against another person so offending and may be compelled to attend and testify on any trial, hearing or proceeding or investigation in the same manner as any other person. The testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person testifying. Any such person testifying shall not thereafter be liable to indictment, prosecution or punishment for the offense with reference to which his testimony was given, and may plead or prove the giving of testimony accordingly, in bar of such an indictment or prosecution."

Secondly, if appellant felt that his testimony in regard to White and McKenna might disclose criminal conduct on his own part from which he was not otherwise protected, it was his right and duty to decline to answer the questions, which he did not do. *People v. Priori*, 164 N. Y. 459, 58 N. E. 668; *People ex rel. Lewisohn v. General Sessions*, 96 App. Div. 201, 89 N. Y. Supp. 364.

Certain objections and exceptions to the admission of evidence are urged upon our consideration.

Both McKenna and White were sworn as witnesses for the prosecution to alleged statements by the appellant. Over objections and exceptions the former testified as follows:

"Mr. Cahill told me to register. \* \* \*

"Q. What did he say to you about registering, and what did you say to him about registering first? (Objections.)

"Mr. Jones: Answer this last question as to who spoke first. A. Mr. Cahill asked me did I register, and I said no, I wasn't of age; he said 'How many months do you lack of twenty-one?' I said, 'Six or seven.' He said, 'Go on and register anyway; I voted when I was sixteen years of age.'

"Mr. Littleton: I object and move to strike out the answer on the ground that it is utterly and entirely without any issue in this case or to any conception of the indictment in this case.

"The Court: Standing by itself it may be, but he can have all the conversation as bearing on the defendant's knowledge when he swore the man slept there, if he knew he did not. \* \* \*

"Mr. Littleton: I object to it on the ground that the sole issue to be submitted to this jury is whether this man swore falsely, when he swore this man slept there always, and that is no part of this issue, but does tend to prove another charge and another crime against this defendant.

"The Court: I think it is pertinent and I will allow it. (Defendant excepted.)

"Mr. Jones: Go on and tell what was said by you. A. Mr. Cahill told me to go ahead and register, and I said I wasn't of age, and he said, 'You go up; I will see no harm comes to you'; and I said, 'I am kind of afraid,' and he said, 'Go on up, anyway'; and I came back. He told me 'where to register from—413 Henry street. I didn't say anything about registering from 413 Henry Street.'"

The witness White testified, over objection and exception:

"Go on and tell the court and jury what the defendant said. How did you come to register from 413 Henry street, if you didn't sleep there? A. I stood on the opposite corner, and Mr. Cahill came out with a cigar in his mouth, \* \* \* and he said: 'Mr. White, go up and register, and if any harm comes to you I will see that you get out.'"

It may be conceded at once that this evidence was material and calculated to prejudice the appellant's case, and if error was committed in its reception he ought to have relief. The question is whether it tended, directly or indirectly, in any degree, great or small, legitimately to establish that the appellant was guilty of the crime of perjury which he was charged with having committed when he testified before the superintendent of elections in the following November: "I formerly resided at Henry street, \* \* \* and took up my residence at 413 Henry street two or three months ago, \* \* \* and both John White and Bernard McKenna have slept there almost every night during that time."

In determining this question it is well to

bear in mind the circumstances under which the appellant is charged with having committed perjury in making the statement which he did. The subject under investigation was the right of those two men to register from 413 Henry street, and the record makes it quite apparent that on the hearing before the superintendent of elections the questions whether they were entitled to register and whether they had slept at 413 Henry street as testified to by appellant were regarded as identical. If they had so slept at the place in question as testified by appellant, it indicated that they were entitled to register, and, conversely, if they were not entitled to register, it would indicate that they had not been living at Henry street as appellant testified.

If the appellant at the time they registered did or said anything which indicated appreciation of danger in their so doing, we think it was some evidence of an admission on his part that they had not been staying at Henry street for a sufficient length of time to permit their registry, and, therefore, that he was swearing falsely when he testified to facts establishing their right to register. This was certainly true in the case of White, whose only known lack of qualifications was lack of residence. We think it was also true in the case of McKenna. For while he gives nonage as an excuse for not registering, there is also evidence to show that he was not qualified by residence, and, therefore, anything in the way of an admission by appellant that he was not qualified to register might be considered by a jury as relating to either disqualification.

It remains, then, but to add in this connection that in our opinion appellant's direction to McKenna and White to register from Henry street, followed in each case by a promise to protect the man from harm if he did so, was susceptible of the construction by the jury that he knew that each man was liable to get into trouble if he registered, and that this trouble would arise from lack of that very residence in the district which appellant subsequently attempted to establish by false testimony.

But, further than this, evidence of these conversations showing his direction to each man to register and his promise to protect him from harm if he did so, both by reason of the express promise and by reason of his having become connected with the registry as he did, established a direct motive for his testimony before the superintendent that each man was qualified by staying at 413 Henry street to make the registry which was then being investigated, and was competent for that purpose. *Commonwealth v. Hudson*, 97 Mass. 535; *Pierson v. People*, 79 N. Y. 424, 435, 35 Am. Rep. 524.

Much stress is laid on the fact that the evidence of McKenna tells of an admission by the appellant that he had voted before he was entitled to, and, therefore, had com-

mitted another crime than that for which he was being tried. Undoubtedly evidence of such admission by itself would have been entirely incompetent, and the court so indicated at the time of its reception. But the conversation detailed by each witness was an entire and connected one relating to a single subject, and even if that question was raised, as it probably was not, neither authority nor good practice required counsel by leading questions to draw from the witness what he deemed a material sentence scattered here and there through the conversation. Under the circumstances he was entitled to ask for the conversation as an entirety. The court plainly laid down the rule that the object of the conversation was not to show the commission of some other crime by the appellant, but that it simply bore on his knowledge when he swore to the facts already detailed.

The judgment should be affirmed.

**WILLARD BARTLETT, J.** (dissenting). Under the act creating the metropolitan elections district, consisting of the counties of New York, Kings, Queens, Richmond, and Westchester, and providing for the appointment of a state superintendent therein, and prescribing his powers and duties, the deputy superintendents of elections are authorized, among other things, to investigate all questions relating to the registration of voters, and for that purpose they are empowered to visit and inspect any house, dwelling, building, inn, lodging house, or hotel within the metropolitan district and to interrogate any inmate, house dweller, keeper, caretaker, owner, proprietor, or landlord thereof or therein as to any person or persons residing or claiming to reside therein or thereat. *Laws 1898, p. 1612, c. 676, as amended by Laws 1905, p. 1846 c. 689.* See section 6, subd. 1, *Laws 1905, p. 1849, c. 689.* The superintendent, his chief deputy and not more than ten deputies, duly designated by the superintendent for that purpose, are authorized to administer oaths and affirmations to any person in any matter or proceeding authorized as aforesaid, and in all matters pertaining or relating to the elective franchise. Section 7. In November, 1905, a deputy thus designated, named Jesse Fuller, Jr., administered an oath in Kings county to the defendant, and took his examination under oath with regard to the residence of John White and Bernard McKenna, two men who had registered in the sixth election district of the third assembly district in Kings county for the purpose of voting at the ensuing election. The defendant made affidavit before Deputy Superintendent Fuller on the 2d day of November, 1905, as follows: "I reside at number 413 Henry street, Brooklyn; I formerly resided at the corner of Henry and Baltic streets, but took up my residence at 413 Henry street two or three months ago,

and slept there on the second floor, the one just above the saloon, almost every night since, and both John White and Bernard McKenna have slept there also almost every night during that time." The indictment charged the defendant in the first count with the crime of feloniously making a false statement under oath before a deputy state superintendent of elections, and in the second count with the crime of perjury, and alleged that the sworn statement above quoted was false, and was known to be so by the defendant at the time when he made it.

Upon the trial there was no attempt to prove that the statement was false so far as it related to the residence of defendant himself. The learned trial judge instructed the jury that it was not claimed that the affidavit was false entirely, but that the people contended "that when Joseph J. Cahill swore that both John White and Bernard McKenna had slept there at 413 Henry street also almost every night during the past two or three months before the 2d day of November, 1905, he swore willfully to that which he knew to be false, and that McKenna and White had not so slept there." It is apparent, therefore, that the verdict of guilty must have been based solely upon a finding by the jury that the defendant had knowingly sworn falsely in regard to the residence of these two men. Both McKenna and White testified as witnesses for the prosecution upon the trial. After McKenna had stated that he registered as living at No. 413 Henry street at the instance of the defendant, his examination proceeded as follows:

"Q. What did he say to you about registering, and what did you say to him about registering first?

"Mr. Littleton: I object to the evidence upon the ground that the sole issue charged against this defendant is he made a false statement, not as to this man's age or qualifications nor as to his residence, but that he made a false statement in that he said this man had slept almost always in 413 Henry street, and that is the sole issue of this affidavit.

"The Court: Bearing on whether or not he did, he has the right to ask this question.

"(Objection overruled and defendant excepted.)

"Mr. Jones: Answer this last question as to who spoke first. A. Mr. Cahill asked me did I register, and I said no, I wasn't of age; he said, 'How many months do you lack of twenty-one?' I said, 'Six or seven.' He said, 'Go on and register anyway; I voted when I was sixteen years of age.'

"Mr. Littleton: I object, and move to strike out the answer on the ground that it is utterly and entirely without any issue in this case or to any conception of the indictment in this case.

"The Court: Standing by itself it may be, but he can have all the conversation as bear-

ing on the defendant's knowledge when he swore the man slept there, if he knew he did not.

"Mr. Littleton: Your honor doesn't seem to want to hear my objection.

"The Court: State your objection and don't think I do not, but I think it is perfectly competent.

"Mr. Littleton: I object to it on the ground that the sole issue to be submitted to this jury is whether this man swore falsely when he swore this man slept there always, and that is no part of this issue, but does tend to prove another charge and another crime against this defendant.

"The Court: I think it is pertinent, and I will allow it.

"(Defendant excepted.)"

White also testified under appropriate objection and exception in answer to the question how he came to register from 413 Henry street if he did not sleep there: "I stood on the opposite corner, and Mr. Cahill came out with a cigar in his mouth— no, he did not have a cigar; he had his hands in his pockets. He came out and he said, 'Mr. White, go up and register, and if any harm comes to you I will see that you get out.'"

I think that the admission of this evidence was clearly erroneous that it must have been exceedingly prejudicial to the defendant, and that the error in receiving it and in refusing to strike it out demands a reversal of this judgment, unless we are prepared to ignore, and, indeed, virtually repeal, the general rule of evidence in criminal cases which prohibits proof on the part of the prosecution of the commission of crimes other than that alleged in the indictment.

A conspicuous instance of the recent enforcement of this rule by this court is furnished by the case of *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, in which its character and scope were fully discussed in the opinion of Werner, J., who reviewed the numerous authorities by which it is supported in this and other states, and clearly classified the exceptions to it which have been recognized in the development of criminal procedure here and in other jurisdictions where the common law prevails. It is to be observed the defendant was indicted for false swearing and perjury; not for false registration or inducing others to commit that crime, and not for voting illegally. Yet the sole tendency of the testimony of McKenna and White, which has been quoted, was to establish the defendant's guilt of these other and different offenses. Upon no theory of the doctrine of relevancy does it seem to me that the fact that the defendant had voted when he was only 18 years of age can be deemed relevant to any of the issues which were litigated under the indictment and plea in this case. The defendant's declaration to that effect, assuming that he

made it, merely tended to show that years ago he had committed another crime. To hold that evidence of this sort was not harmful to a man upon trial for a crime relating to the elective franchise would be, in my judgment, to ignore those influences which common experience shows to be powerfully operative upon the human mind. The only question which the jury were called upon to determine upon the trial was whether the defendant had sworn falsely in stating under oath that these men slept for two or three months at 413 Henry street, in the borough of Brooklyn, and the fact, assuming it to be such, that he had once voted illegally had no conceivable bearing on that question, nor was the evidence properly receivable under any of the exceptions to the general rule recognized and so well stated in the *Molineux* Case. It did not tend either to establish motive, intent, the absence of mistake or accident, a common scheme or plan embracing the commission of two or more related crimes, or the identity of the defendant. It had no relation to the crime charged, and its sole effect must have been to make the jury think that the defendant was a bad man whose antecedents indicated a willingness to commit any offense against the election laws.

The objectionable character of the testimony of these two witnesses to the effect that the defendant urged them to register and said he would take care of them if they did so is almost equally manifest. As has been pointed out, he was not on trial for the crime of false registration or inducing others falsely to register, and this evidence had no relevancy to the charge that he knowingly stated an untruth when he testified before the deputy superintendent of elections in reference to the sleeping place of these witnesses. I recognize to the fullest extent the wisdom of the statutory rule which prevails in this state that upon an appeal in criminal cases the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the party. Code Cr. Proc. § 542. It seems clear to my mind, however, that the errors which I have discussed cannot justly be deemed technical, and that they must have operated to the detriment of the defendant to such an extent as to deprive him of the fair trial to which he is entitled by law. Entertaining this view, I deem it my duty to vote for a reversal of the judgment. Upon the other question in the case I concur in the conclusions reached by Judge HISCOCK.

HAIGHT, VANN, and WERNER, JJ., concur with HISCOCK, J. CULLEN, C. J., and CHASE, J., concur with WILLARD BARTLETT, J.

Judgment of conviction affirmed.

(171 Ind. 579)

CITY OF TERRE HAUTE et al. v. SACHS  
et al. (No. 21,154.)<sup>a</sup>

(Supreme Court of Indiana. Nov. 24, 1908.)

**1. EMINENT DOMAIN (§ 167\*)—STATUTES—RETRACTIVE OPERATIONS—REPEALING ACTS—PENDING PROCEEDINGS.**

Act March 6, 1905 (Acts 1905, p. 219, c. 129), known as the "Cities and Towns Act," which repealed Acts 1899, p. 270, c. 152, providing for proceedings by cities to condemn property for public use, expressly excepts proceedings pending when the act went into effect, and such cases are to be determined as if the latter statute had not been enacted.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 167.\*]

**2. EMINENT DOMAIN (§ 246\*)—DISCONTINUANCE OF PROCEEDINGS—TIME.**

Acts 1899, p. 312, c. 152, § 83 (Burns' Ann. St. 1901, § 4190e3), relating to condemnation proceedings by cities, and providing that, if on appeal to the circuit court the report of the board of public works as to benefits or damages is greatly diminished or increased, the city may discontinue such proceedings, recognizes the right to discontinue before or when the cause is disposed of in the circuit court by some final order or judgment therein; but a city may not discontinue where judgment against the city for damages was made on March 16th, and a motion for new trial, after remaining in court until October 17th, was denied, after which the city gave notice of appeal to the Supreme Court.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 648, 649; Dec. Dig. § 246.\*]

Appeal from Circuit Court, Vigo County; James E. Piety, Judge.

Condemnation proceedings by the City of Terre Haute and others against Jacob Sachs and others. From the findings of the board of public works defendants appealed to the circuit court, where a judgment for damages was awarded. Plaintiffs subsequently moved unsuccessfully for a new trial, and plaintiffs excepted and prayed an appeal to the Supreme Court. Several months later plaintiffs applied for a reinstatement of the proceedings on the docket of the circuit court, for the purpose of discontinuing and dismissing the proceedings. From a judgment sustaining a demurrer, to this application, plaintiffs appeal. Affirmed.

Frank S. Rawley, for appellants. Davis & Davis, for appellees.

JORDAN, J. The record in this appeal discloses the following facts: On February 5, 1904, the board of public works of the city of Terre Haute, by resolution, instituted condemnation proceedings in respect to Thirteenth street of said city. These proceedings were based upon and in pursuance of sections 78 to 89, inclusive, of the governing statute of that city approved March 3, 1899. See Acts 1899, pp. 310-313, c. 152; Burns' Ann. St. 1901, §§ 4190e2-4190e3 inc. Appellees, property owners whose lands would be affected by the change to be made in the street, were made adverse parties to the proceedings. They appeared and remonstrated

against the narrowing or change in said street, for the reason that their property, situated along the line thereof, would be greatly damaged by the change. Upon a hearing, the board of works found against appellees as to damages and ordered the proposed change to be made. On May 31, 1904, within the time fixed by law, appellees, under the provisions of the statute, duly appealed from the order of the board of public works to the Vigo circuit court, and the cause was docketed as an action pending therein. On December 12, 1905, it came on for trial before the court, without the intervention of a jury, and the trial thereof was continued from day to day until completed. On March 19, 1906, the court made its finding, and, among other things, assessed or awarded damages to appellees in various sums. Appellee Jacob Sachs was given \$5,000, and the others were awarded smaller amounts. Thereupon the court rendered judgment upon its finding, adjudging and decreeing that appellees herein recover of the city of Terre Haute the respective sums found in their favor as damages, together with the costs laid out and expended. To this judgment and decree the court added the following: "It is further ordered and adjudged that the defendant city be restrained from aligning and narrowing Thirteenth street between Wabash avenue and the Vandalia railroad from 65 to 60 feet, until it shall have first paid or tendered payment of the sums hereinbefore adjudged as occasioned by such change." On April 20, 1906, the city of Terre Haute filed its motion for a new trial. On October 17th of the latter year this motion was overruled, to which the city excepted and prayed an appeal to the Supreme Court, etc. On the 18th day of May, 1907, appellant city filed its petition or application for the reinstatement of the proceedings on the docket of the Vigo circuit court for the purpose of having the court enter an order discontinuing and dismissing said proceedings. The court, as it appears, "being fully advised," ordered that the cause be redocketed, and thereupon appellees appeared by counsel and demurred to said petition or application, for the reason that the petition did not state grounds and facts sufficient to constitute a right of action. This demurrer was sustained by the court, and the appellant city of Terre Haute refused to further plead, and thereupon the court rendered judgment against it upon demurrer. From this judgment this appeal is prosecuted.

The only error assigned is that the court erred in sustaining appellees' demurrer to the petition to redocket the cause and to vacate the judgment. The insistence of counsel for appellant city of Terre Haute is that the lower court should, upon the petition of the city, have vacated the judgment in the original proceedings and permitted

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>a</sup> Rehearing denied.

the city as a matter of right to discontinue or dismiss said proceedings. Therefore it is argued that the court erred in sustaining appellees' demurrer to the petition. On the other hand, counsel for appellees contend that, if appellant city desired to discontinue or abandon its condemnation proceedings, it should have done so without delay; that it cannot be permitted to wait for some seven months after the rendition of the final judgment, adjudging damages in favor of appellees, and then avail itself of the right which it claims to have the judgment set aside and the cause dismissed or discontinued. It is further claimed by appellees that the act of 1899, under which the proceedings were instituted, was repealed by an "act concerning municipal corporations," known as the "Cities and Towns Act," approved March 6, 1905 (Acts 1905, p. 219, c. 129), and in force and effect on April 15th of that year, and therefore the cause, after the taking effect of this latter act, was controlled thereby. But, as shown, the original proceedings were pending in the lower court at the time of the taking effect of the act of 1905 and were excepted from the repealing clause of the latter act and were to be heard and determined in like manner as if such act had not been enacted.

While it may be said that there is some confusion and conflict among the cases, still the general rule which appears to be established by the great weight of authorities is that a municipal corporation, in a proceeding which it has instituted to condemn property for public use, upon an appeal to a court as in this cause, may discontinue, as a matter of right, its proceedings before or at the time the cause is disposed of in the trial court by some final order or judgment therein. *Sowers v. Cincinnati, etc., R. Co.*, 162 Ind. 676, 71 N. E. 134; 2 *Dillon's Municipal Corporations* (4th Ed.) § 608; *Mills on Eminent Domain* (2d Ed.) § 514; *Smith's Modern Law on Municipal Corporations*, § 716; *North Missouri R. Co. v. Lackland*, 25 Mo. 515; *City of St. Joseph v. Hamilton*, 43 Mo. 282, 288; *Simpson v. Kansas City*, 111 Mo. 237, 20 S. W. 38. This right to discontinue the condemnation proceedings in question, on an appeal to the circuit or superior court, is expressly recognized by section 83 of the act of 1899 (section 4190e3, *Burns' Ann. St.* 1901), which provides: "Such appeal may be taken by filing an original complaint in such court against such city within the time named, setting forth the action of the said board of public works in respect to such assessment, and stating the facts relied upon as showing as error on the part of such board. Such court shall rehear the matter of such assessment *de novo*, and confirm, lower or increase the same as may seem just. In case such court shall reduce the amount of benefits assessed against the land of such property holder, or increase the amount of damages awarded in his favor

to the extent of ten (10) per centum of such benefits or damages, the plaintiff in such suit shall recover costs, otherwise not. The judgment of such court shall be final, and no appeal shall lie therefrom: *Provided*, if upon such appeal the report of the board of public works as to benefits or damages be greatly diminished or increased, *the city may, upon the payment of costs, discontinue such proceedings.*" (Our italics.) *Wagner, J.*, speaking for the court, in the city of St. *Joseph v. Hamilton*, supra, said: "I have no doubt that the city may dismiss its proceedings at any time before final judgment in the circuit court, and then the only liability that would be incurred would be the expenses."

Judge Dillon, in his work on *Municipal Corporations*, in the section above cited, says: "Under the language by which the power to open streets and to take private property for that purpose is usually conferred upon municipal corporations, they may at any time before taking possession of the property under completed proceedings, or before the final confirmation, recede from or discontinue the proceedings they have instituted. This may be done, unless it is otherwise provided by legislative enactment, at any time before vested rights in others have attached. Until the assessments of damages have been made, the amount cannot be known; and on the whole it is reasonable that after having ascertained the expense of the project, the corporation should have a discretion to go on with or not, as it sees fit." This statement of the law by Judge Dillon is cited with approval in *Sowers v. Cincinnati, etc., R. Co.*, supra. In this latter case we said: "As against the owner of the lands sought to be appropriated for a street, the general rule is that there is a right to discontinue as long as the amount of the compensation remains undetermined. The provision granting the express right to discontinue, after a trial has resulted in a finding or verdict materially changing the assessment of benefits or damages, was evidently incorporated in the statute to avoid the possible holding by the courts that the cause could not then be discontinued—a holding that would be quite reasonable in view of the provisions of our civil code regarding dismissals of action." As asserted by Judge Dillon and other authorities, the reason for the rule which allows the condemning corporation to discontinue or dismiss its proceedings, after the damages in favor of the landowners have been assessed and ascertained, is that, until the amount of money to be paid by such corporation as damages for the appropriation of property has been ascertained or determined, it is not in a position to exercise its discretion as to whether it will pay the award and proceed with the public improvement, or discontinue the proceedings and abandon the making of the improvement. Appellant, in sup-

port of its contention, refers to *Brokaw v. City of Terre Haute*, 97 Ind. 451. That case is clearly distinguishable from the one now before us and lends no support to appellant's contention. That was a proceeding by appellee in that appeal, under the governing statute of 1881, to open and widen a public street in the city. Damages appear to have been assessed by the city commissioners and reported to the common council. Upon the order of the council, approving and confirming the report of said commissioners, *Brokaw* appealed to the *Vigo* superior court, in which the case was tried by a jury, which awarded him by its verdict \$1,500. After the return of the verdict but before any judgment had been rendered thereon, the city paid all the costs and moved the court to be permitted to discontinue the proceedings. This motion was resisted by the property owner on the ground that the city had already opened the street. The motion, nevertheless, was sustained by the court, and the proceedings were dismissed. On appeal from this judgment to this court the ruling of the lower court was sustained and judgment affirmed. The court, in that case, said: "The sole question presented for our consideration is: Was the appellee precluded from discontinuing the proceedings by its act of opening the street in controversy before the final determination of the appeal? The statute, which authorized the appeal, provides, 'but such appeals shall not prevent such city from proceeding with the proposed appropriation, nor from making the proposed change or improvement.' Rev. St. 1881, § 3180. It, also, further provides: 'If upon appeal, the report of the commissioners as to the benefits or damages be greatly diminished or increased, the city may, upon payment of all costs, discontinue such proceedings.' Although the appellee, in the exercise of the power granted to it by the first provision of the statute above cited, widened and opened the street during the pendency of the appeal, it was not, in our opinion, precluded thereby from subsequently abandoning the same, and discontinuing the proceedings which were still pending, upon ascertaining that the amount of the damages awarded to the appellant, on his appeal, greatly exceeded the sum that was assessed in his favor by the city commissioners." While the court held that the city, by opening the street during the pendency of the appeal, was not precluded from subsequently abandoning the improvement and discontinuing the proceedings which were still pending, upon ascertaining the amount of the damages awarded, still it would be liable for the payment of any damages which the property owner might sustain which were the direct and proximate result of the proceedings and the acts of the city thereunder. As shown, no final judgment had been rendered, and the cause was still pending in

the superior court upon the verdict of the jury when the city exercised its right to discontinue and dismiss the proceedings.

In the case now before us the facts are quite different. They disclose that, upon appeal of the original proceedings to the circuit court, the latter court, upon the trial, assessed and fixed by its finding the amount of damages which the city was to pay to the several property owners. This finding of the court was, as heretofore shown, made on March 19, 1906. On April 20th of the latter year the city moved for a new trial. The cause remained pending in the court upon this motion until October 17, 1906, when it was denied. The judgment of the court overruling the motion for a new trial was the final disposition of the proceedings in the circuit court. Appellant city, at least at the time its motion for a new trial was overruled, should have then elected to exercise its discretion either to discontinue the proceedings and abandon the improvement or pay the damages awarded and proceed with the improvement in question. It certainly had ample time between the assessment and determination of damages by the court upon its finding, and the date at which its motion for a new trial was overruled, to decide what steps it would take.

Upon no view of the case can the right, as claimed by appellant city, under the facts, be sustained.

There is no error, and the judgment is affirmed.

(171 Ind. 280)

**JORDAN v. CITY OF LOGANSFORT et al.**  
(No. 21,108.)

(Supreme Court of Indiana. Nov. 24, 1908.)

**1. MUNICIPAL CORPORATIONS (§ 994\*) — INDEBTEDNESS—WHEN CREATED.**

An indebtedness for the construction by a city of a sewer comes into existence on the completion of the work according to the contract and its acceptance by the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2162; Dec. Dig. § 994.\*]

**2. MUNICIPAL CORPORATIONS (§ 513\*) — ASSESSMENTS—INJUNCTION.**

The rule that a taxpayer cannot enjoin a municipal assessment until a cloud on his title is about to be wrongfully created applies to cases involving the legality of a specific assessment against complainant's property.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1197; Dec. Dig. § 513.\*]

**3. MUNICIPAL CORPORATIONS (§ 513\*) — ASSESSMENTS—INJUNCTION.**

A taxpayer of a city may, as such, enjoin a threatened assessment against the city for the construction of a sewer, on the ground that the assessment is for a debt in excess of the constitutional limitation, without showing any special interest or damage.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1196; Dec. Dig. § 513.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. MUNICIPAL CORPORATIONS (§ 995\*) — ASSESSMENTS—INJUNCTION.

Municipal authorities may be enjoined from exceeding their powers and doing threatened acts which will result in a misappropriation of public funds, and entail on taxpayers the expense of litigating with persons holding invalid claims against the municipality.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2163; Dec. Dig. § 995.\*]

5. MUNICIPAL CORPORATIONS (§ 513\*) — ASSESSMENTS—INJUNCTION.

A suit by a taxpayer of a city, as such taxpayer, to enjoin a threatened assessment against the city for a debt in excess of the constitutional limitation, is not premature.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1202; Dec. Dig. § 513.\*]

Appeal from Circuit Court, Cass County; J. P. Wason, Special Judge.

Action by Michael A. Jordan against the City of Logansport and others. From a judgment for defendants on sustaining a demurrer to the complaint, plaintiff appeals. Reversed, with directions.

Walters & Long and Miller, Shirley & Miller, for appellant. Quincy A. Myers, for appellees.

MONTGOMERY, J. Appellant brought this suit against the city of Logansport, the members of its board of works, and Dennis Uhl, the contractor, for an injunction against the making of a threatened assessment against said city on account of the construction of a certain sewer system. A temporary restraining order was issued upon the verified complaint, and subsequently upon a hearing dissolved. Appellees' demurrers to the amended complaint were sustained, and, appellant declining to plead further, final judgment was rendered against him for costs.

The controlling questions are presented by the assignments that the court erred in sustaining the demurrers of appellees to the amended complaint. The facts alleged in the complaint in this case are substantially the same as in the case of *City of Logansport et al. v. Jordan* (No. 21,022, at last term) 85 N. E. 959, and the decision in that case settles the principal questions involved in this. It was expressly held in that case that an indebtedness for the construction of a sewer came into existence upon the completion of the work in accordance with the contract, and its acceptance by the municipal authorities.

Appellees' counsel justify the decision of the court below in holding the complaint insufficient, upon the ground that this action was prematurely brought and not maintainable by appellant, since it is not shown that the making of the threatened assessment will create a lien or charge against his property or a cloud upon his title. It is contended that a taxpayer has no cause of action, in cases like this, until a lien or apparent lien

and cloud upon his title is about to be wrongfully created, citing *McConnell v. Hampton*, 164 Ind. 547, 73 N. E. 1092; *Landes v. Walls*, 160 Ind. 216, 66 N. E. 679; *Smith v. Smith*, 159 Ind. 391, 65 N. E. 183; *Cason v. City of Lebanon*, 153 Ind. 567, 55 N. E. 768; *City of Richmond v. Davis*, 103 Ind. 449, 3 N. E. 130. The principle stated is applicable to cases involving the legality of a specific assessment against the property of the complainant, but in this case the suit is brought by appellant as a taxpayer, or representative of a class of citizens, to restrain the commission of an ultra vires act by the municipality which would have a tendency to increase the burden of taxation. Appellant in this case need not show any special interest or damage, but is entitled to maintain the suit in his capacity as a taxpayer. The case belongs to that class in which it is held that municipal authorities may be enjoined from going beyond their powers and doing threatened acts, which, if carried into effect, would either result in a misappropriation of public funds, or entail upon taxpayers the expense of litigating with persons holding invalid claims against the city. The threatened making of an assessment on account of a debt in excess of the constitutional limitation, and therefore void, justified appellant as a taxpayer in resorting to a court of equity for relief, and, the facts being admitted, there is no merit in the claim that the suit was prematurely brought. *Sackett v. City of New Albany*, 88 Ind. 473, 45 Am. Rep. 467; *City of Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Middleton v. Greeson, Tr.*, 106 Ind. 18, 5 N. E. 755; *Alexander v. Johnson*, 144 Ind. 82, 41 N. E. 811; *City of Laporte v. Gamewell*, 146 Ind. 466, 45 N. E. 588, 35 L. R. A. 686, 58 Am. St. Rep. 359; *Scott v. City of Laporte*, 162 Ind. 34, 68 N. E. 278, 69 N. E. 675; *Voss v. Waterloo Water Co.*, 163 Ind. 69, 71 N. E. 208, 66 L. R. A. 95, 106 Am. St. Rep. 201; *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070; *Davenport v. Buffington*, 97 Fed. 234, 38 C. C. A. 453, 46 L. R. A. 377; *Inge v. Board of Pub. Works*, 135 Ala. 187, 33 South. 678, 93 Am. St. Rep. 20; *Bradford v. San Francisco Co.*, 112 Cal. 537, 44 Pac. 912; *Peck v. Spencer*, 26 Fla. 23, 7 South. 642; *Americus v. Perry*, 114 Ga. 871, 40 S. E. 1004, 57 L. R. A. 230; *Chicago v. Nichols*, 177 Ill. 97, 52 N. E. 359; *Cascaden v. Waterloo*, 106 Iowa, 673, 77 N. W. 333; *Blood v. Beal*, 100 Me. 30, 60 Atl. 427; *Baltimore v. Gill*, 31 Md. 375; *Alpena v. Alpena Cir. Judge*, 97 Mich. 550, 56 N. W. 941; *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249; *Mauldin v. Greenville*, 83 S. C. 1, 11 S. E. 434, 8 L. R. A. 291; *Austin v. McCall*, 95 Tex. 565, 68 S. W. 791.

The judgment is reversed, with directions to overrule the several demurrers of appellees to the amended complaint, and for further proceedings.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(171 Ind. 268)

**TEEPLE v. STATE ex rel. BOWER et al.**  
(No. 21,285.)

(Supreme Court of Indiana. Nov. 24, 1908.)

**1. APPEAL AND ERROR (§ 766\*)—RECORD—BRIEF—CURING ERROR.**

Where appellees copied in their brief the order book entry overruling appellant's demurrer to a paragraph of the application for a writ of mandamus and the alternative writ, they thereby cured appellant's failure to set out in his brief the part of the record showing the ruling of the court on the demurrer, and appellant's exception thereto, as required by Sup. Ct. Rule 22 (55 N. E. v).

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 766.\*]

**2. APPEAL AND ERROR (§ 634\*)—PREPARATION OF RECORD—COURT RULES—COMPLIANCE.**

Where a bona fide effort is made by appellant to comply with the court rules governing the preparation of appeal records, and the rules have been substantially complied with, defects will be disregarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2775; Dec. Dig. § 634.\*]

**3. MANDAMUS (§ 154\*)—APPLICATION—ALTERNATIVE WRIT—SUFFICIENCY—MAINTENANCE OF SCHOOL.**

Where a paragraph of an application for mandamus to compel the maintenance of a school in a district, and the alternative writ issued thereon, did not show that the school in that district had not been abandoned by being consolidated with another school or schools in other school districts in the township, as authorized by Burns' Ann. St. 1908, § 6420, the petition and alternative writ were demurrable.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 286-303; Dec. Dig. § 154.\*]

**4. MANDAMUS (§ 154\*)—ALTERNATIVE WRIT—APPLICATION—SUFFICIENCY—OFFICIAL ACTS.**

It being presumed that an officer has performed all his official duties, an alternative writ of mandamus to compel him to act is not sufficient, unless the facts alleged therein, and in the application therefor, show that it is the duty of the officer to perform the act to be compelled, and that he has power to perform it.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 303; Dec. Dig. § 154.\*]

**5. SCHOOLS AND SCHOOL DISTRICTS (§ 118\*)—ACTIONS—PARTIES.**

Where an action is brought against the "trustee of the township," it is conclusively presumed that it is against the trustee of the civil township, and not of the school township.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 275; Dec. Dig. § 118.\*]

**6. SCHOOLS AND SCHOOL DISTRICTS (§ 21\*)—"SCHOOL TOWNSHIP."**

Under the express provisions of Burns' Ann. St. 1908, §§ 6404, 6405, a "school township" is a corporation, and has control of the schools, schoolhouses, and school funds. It is a distinct legal entity from that of the civil township.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 39, 40; Dec. Dig. § 21.\*]

**7. APPEAL AND ERROR (§ 750\*)—NEW TRIAL—DENIAL—ASSIGNMENT OF ERROR.**

Where the overruling of a motion for a new trial has been assigned as error, it is sufficient to present for review on appeal all the

grounds properly assigned for a new trial, since rulings which form the grounds for new trial cannot be independently assigned as error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3081; Dec. Dig. § 750.\*]

**8. MANDAMUS (§ 180\*)—PEREMPTORY WRIT—ISSUANCE.**

The issuance of a peremptory writ of mandamus is a matter of judicial discretion, to be exercised on equitable principles, and is governed by fixed rules.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 401-405; Dec. Dig. § 180.\*]

**9. MANDAMUS (§ 143\*)—ISSUANCE—LACHES.**

An application for mandamus must be made within a reasonable time after the alleged default or neglect of duty, and will not be granted when it will work injustice, or introduce confusion and disorder, or operate harshly, nor where relator has instigated, authorized, or approved the acts complained of.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 285; Dec. Dig. § 143.\*]

**10. MANDAMUS (§ 143\*)—LACHES.**

In determining what will constitute such laches as will defeat the right to mandamus, regard should be had to the circumstances, if any, justifying the delay, to the nature of the case, the relief demanded, and whether the rights of the defendant, other persons, or the public as public corporations, have been prejudiced by the delay.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 285; Dec. Dig. § 143.\*]

**11. MANDAMUS (§ 143\*)—ABANDONMENT OF SCHOOL DISTRICT—LACHES.**

Where a school district had been abandoned and consolidated with other districts for more than two years, during which time public money had been expended in erecting a new schoolhouse for the new district, and school had been taught therein, and public interests and convenience had become involved, relator was barred by laches, in the absence of any excuse for the delay, in applying for mandamus to compel the opening of school in the abandoned district.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 285; Dec. Dig. § 143.\*]

**12. SCHOOLS AND SCHOOL DISTRICTS (§ 154\*)—TRANSFER OF CHILDREN.**

Under Burns' Ann. St. 1908, §§ 6449-6453, providing for the transfer of children from one school corporation to another, a child of school age, and not the parent, guardian, or custodian of such child, is transferred for educational purposes.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 154.\*]

**13. SCHOOLS AND SCHOOL DISTRICTS (§ 50\*)—TRANSFER OF CHILDREN—SCHOOL ELECTIONS—RIGHT TO VOTE.**

Under Burns' Ann. St. 1908, §§ 6449-6453, providing for the transfer of children from one school corporation to another, the parent, guardian, or custodian of a transferred child is not a legal voter of the district to which the pupil is transferred.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 50.\*]

**14. INFANTS (§ 77\*)—TRANSFERRED PUPIL—RIGHTS—ENFORCEMENT—GUARDIAN OR NEXT FRIEND.**

When a child of school age is transferred from one school corporation to another, as authorized by Burns' Ann. St. 1908, §§ 6449-6453, an action to enforce any right it may have to attend the school to which the transfer has been

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

made may be properly brought, on the relation of such child, by its next friend.

[Ed. Note.—For other cases, see *Infants*, Dec. Dig. § 77.\*]

**15. MANDAMUS (§ 154\*)—APPLICATION—FORM.**

Burns' Ann. St. 1908, § 1226, provides that mandamus shall be issued on affidavit and motion, and shall be attested and sealed and made returnable as the court shall direct, etc. Section 1228 declares that whenever a return shall be made to any writ, issues of law and fact may be joined, and like proceedings had and judgment rendered as in civil actions, and section 1230 provides that the court shall have the same power to enlarge the time of making a return and pleading to such writ and for filing subsequent pleadings and to continue the cause as in civil actions. *Held* that, while the return to a writ of mandamus may be in separate paragraphs, and may be met by a demurrer or reply, the affidavit or verified application or petition for the writ should not be in paragraphs.

[Ed. Note.—For other cases, see *Mandamus*, Dec. Dig. § 154.\*]

**16. MANDAMUS (§ 154\*) — APPLICATION — AMENDMENT.**

Where additional matter is desired to be presented in support of an application for mandamus, it should be presented by an amended application, filed by leave of court, and not by filing an additional application for an alternative writ as an additional paragraph of the application, and obtaining a second alternative writ thereon.

[Ed. Note.—For other cases, see *Mandamus*, Dec. Dig. § 154.\*]

Appeal from Circuit Court, Clark County; H. C. Montgomery, Judge.

Mandamus by the State, on the relation of John W. Bower and others, against James N. Teeple, trustee, etc. From an order directing the issuance of a peremptory writ, respondent appeals. Reversed, with instructions.

G. H. D. Gibson and E. C. Hughes, for appellant. James W. Fortune, for appellees.

**MONKS, J.** This proceeding was brought by the relators in September, 1907, to compel appellant by writ of mandate to perform certain alleged official duties. The verified application for the writ was in two paragraphs, upon which an alternative writ was issued. To this alternative writ appellant filed a return, which was held sufficient on demurrer. Afterwards relators filed another verified application for an alternative writ denominated "paragraph 3." An alternative writ was issued on said paragraph. Appellant's demurrer "for want of facts" to this alternative writ, and the application therefor, was overruled. Appellant filed a return to the second alternative writ. A trial of said cause by the court resulted in a finding, and, over appellant's motion for a new trial, a judgment in favor of the relators, and an order for a peremptory writ of mandate commanding appellant "to forthwith employ a teacher to teach the Otisco school in district No. 11, in said township for the school year of 1907 and 1908 and not to abandon the

same." The errors assigned call in question the action of the court in overruling appellant's demurrer "for want of facts" to the application for an alternative writ, designated "paragraph 3," and the alternative writ issued thereon, and appellant's motion for a new trial.

The relators contend that appellant is not "entitled to have said alleged error of overruling his demurrer to said paragraph and alternative writ considered, on account of his failure to set out in his brief that part of the record showing the ruling of the court thereon, and appellant's exception thereto, as required by rule 22 of this court (55 N. E. v)." It is not necessary to determine whether or not such ruling and exception thereto are sufficiently set forth in appellant's brief, because the relators have cured the defect, if any, in appellant's brief by copying the order book entry of said ruling, and appellant's exception thereto, in their brief, thus accomplishing the purpose of the rule. *Chicago, etc., R. Company v. Wysor Land Company*, 163 Ind. 288, 289, 69 N. E. 546; *Tipton Light, etc., Company v. Dean*, 164 Ind. 533, 534, 535, 73 N. E. 1082. The relators complain of the failure of appellant to comply with said rule in other respects, but as appellant has made a good-faith effort to comply, and has substantially complied therewith, said defects will be disregarded. *Stamets v. Mitchenor*, 165 Ind. 672, 675, 75 N. E. 579; *Howard v. Adkins*, 167 Ind. 184, 186, 78 N. E. 665, and cases cited. Said third paragraph, and the alternative writ issued thereon, allege facts showing "that appellant, nor any of his predecessors in office, had ever obtained an order from the county superintendent of said county authorizing him to change the site and location of the school building in said school district No. 11, located at the town of Otisco, to some other site in said school district," under the provisions of sections 6417-6419, Burns' Ann. St. 1908, sections 5920c-5920e, Burns' Ann. St. 1901 (Acts 1903, p. 17, c. 6), and that the attendance at said school has been such that appellant had no power or authority to "discontinue and abandon said school under section 6422, Burns' Ann. St. 1908 (Acts 1907, p. 444, c. 233)." And that appellant had not abandoned said school district on "the written consent therefor, signed by a majority of those legal voters who are entitled to vote for township trustee in such district," as provided in section 6420, Burns' Ann. St. 1908, section 5920, Burns' Ann. St. 1901 (Acts 1901, p. 159, c. 97), which took effect March 7, 1901. Section 6421, Burns' Ann. St. 1908 (Acts 1901, p. 437, c. 200), which took effect March 11, 1901, four days after section 6420 (5920g), supra, took effect, provided: "That whenever a majority of the legal voters of any school district or corporation shall petition the trustee

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tee or trustees of such school district or corporation for the abandonment of their school and the consolidation of their schools with the schools of some other district or corporation in the same township, it shall be the duty of the trustee or trustees of such school district or corporation to comply with such petition, and to provide for the education of the children of such abandoned district or corporation in other schools as asked for in such petition." For aught that appears in the third paragraph, and in the alternative writ issued thereon, appellant may have abandoned the school at Otisco in said district No. 11 by consolidating said school with the school or schools in other school districts in said township, on the petition of the class of legal voters mentioned in said section 6420 (5920g); the said class of voters being a different class from that mentioned in section 6420 (5920g), supra. *Ireland v. State*, 165 Ind. 377, 380, 75 N. E. 872. Said third paragraph, and the alternative writ issued thereon, not showing that the school at Otisco in said school district No. 11, was not abandoned by being consolidated with other school or schools in other school districts in the said township, under said section 6420 (5920g), supra, it was insufficient, and the court erred in overruling the demurrer thereto. *Ireland v. State*, supra. This is true because the presumption is that appellant, as trustee of said township, has performed all of his official duties, and therefore the alternative writ is not sufficient, unless the facts alleged therein, and in the application therefor, show that it is the duty of the officer to perform the act sought to be compelled, and that he has the power to perform the same. *State v. Johns* (Ind.) 84 N. E. 1, 2, and cases cited; *State*, etc., v. *Anderson*, 170 Ind. 540, 85 N. E. 17. It is evident that it was not the duty of appellant to employ a teacher to teach the school at Otisco in said district No. 11 if the same had been abandoned by consolidation under section 6420 (5920g), supra. Besides, it will be observed that the proceeding was brought against appellant, "trustee of Charlestown township." It has been held that, when the action is brought against the "trustee of the township," as in this case, it is conclusively presumed that the action is against the trustee of the civil township, and not the school township. *Jarvis v. Robertson, Trustee*, 126 Ind. 281, 26 N. E. 182, and cases cited. The school township is a corporation, and has control of the schools, schoolhouses, and school funds, and is a distinct legal entity from that of the civil township. Sections 6404, 6405, *Burns' Ann. St.* 1908; Sections 5913, 5914, *Burns' Ann. St.* 1901; *State v. Ogan*, 159 Ind. 119, 63 N. E. 227. It was therefore held by this court, in *Hornby, Trustee, v. State*, 39 Ind. 102, that a suit to compel a trustee to build a schoolhouse must be against him as "trustee of the school township," and not as "trustee of the township."

If brought against him as "trustee of the township," as in this case, the alternative writ is bad on demurrer for want of facts. It follows from what we have said and the authorities cited that the court erred in overruling the demurrer to the "third paragraph" of the application and the alternative writ issued thereon.

The causes assigned for a new trial present the question of the sufficiency of the evidence to sustain the finding of the court, and that said finding is contrary to law. The relators insist that no question is presented as to the sufficiency of the evidence and whether the finding of the court is contrary to law because the same have not been assigned as errors in this court. The overruling of said motion for a new trial has been assigned as error in this court, and this is all that is required to present all the causes, properly assigned for a new trial, for the determination of this court. "It has been held in many cases that the ruling which forms the basis, grounds, or cause for a new trial cannot be independently assigned as error in this court." *Elliott, App. Proc.* §§ 347, 349, 350; *Ewbanks, Man.* § 844, p. 65; section 134, p. 202; *Cheek v. State* (this term, No. 21,245) 85 N. E. 779; *Raper v. American, etc., Co.*, 156 Ind. 323, 324, 59 N. E. 937, and cases cited; *Bane v. Keefer*, 152 Ind. 544, 547, 548, 53 N. E. 834; *Cline v. Lindsey*, 110 Ind. 837, 843, 11 N. E. 441, and cases cited.

It appears from the evidence that in May, 1905, school districts 8, 11, and 12 in Charlestown township were adjacent to each other, and that the schoolhouse in said district No. 8 had been destroyed by fire. The schoolhouse in said district No. 11 was in the town of Otisco. In May or June of said year 1905, appellant, the members of the advisory board of said township, and the county superintendent, went to the said town of Otisco to consult with the patrons of said school in regard to consolidating said three districts and erecting a new school building therefor. After consulting the patrons of said school at Otisco and said other districts, it was decided to build a schoolhouse sufficiently large to accommodate the children of school age in said three districts. Appellant thereby decided to consolidate said three districts. During the summer of 1905, appellant caused to be erected, in said new district No. 8, at the expense of said township, a large and commodious school building sufficient to accommodate all the children of school age in said new district composed of the old districts mentioned, and also for a high school. Teachers were employed by appellant for said new schoolhouse, and the children of school age in said new district attended said school during the school years of 1905 and 1906, and 1906 and 1907; except, as a matter of convenience, four grades for small children were taught during said two years at the schoolhouse in the said town of Otis-

co. Appellant decided not to employ a teacher to teach said four grades for small children in said schoolhouse in Otisco for the school year of 1907 and 1908, but said pupils were required to attend school at said new schoolhouse in said new district No. 8. In April, 1906, and in April, 1907, appellant enumerated all the unmarried persons of school age in said new district No. 8 composed of said three old districts, 8, 11, and 12, and attached them, for school purposes to said new school district 8. Appellant, over the objection of the relators, testified that a majority of the legal voters of said old districts 8, 11, and 12 presented to him a petition, asking that he consolidate said districts, and that he consolidated the same. The relators objected to this evidence, "for the reason that appellant, as township trustee, had no power, upon the petition of the majority of the legal voters of said old districts Nos. 8 and 12, to consolidate said three districts, and for the further reason that any action that might be taken by any other district would not justify said appellant in abolishing or consolidating said old district 11 with any other school district in said township." The court overruled the objection. It is not necessary to determine as to the correctness of the objection made to the admission of said evidence, or the ruling of the court in admitting the same, nor what effect, if any, said evidence should have, for the reason that under the facts above set forth the relators were not entitled to an order or judgment for a peremptory writ of mandate.

The issuing of a writ of mandate is considered discretionary. The discretion is a judicial discretion, to be exercised on equitable principles, and is governed by fixed rules. It will not be granted when it will work injustice, or introduce confusion and disorder, or operate harshly, nor where the relator has instigated, authorized, or approved the acts complained of. Application therefor must be made within a reasonable time after the alleged default or neglect of duty. Laches or delay in making application for the writ, unless satisfactorily explained, may afford sufficient cause for its denial. In determining what will constitute such unreasonable delay or laches as will defeat the right to mandamus, regard should be had to the circumstances, if any, justifying the delay, to the nature of the case, the relief demanded, and the question whether the rights of the defendant, other persons, or the public as public corporations, have been prejudiced by the delay. Tapping on Mandamus, pp. 290-292; Merrill on Mandamus, § 87. High on Ex. Legal Rem. (3d Ed.) § 30b; 19 Am. & Eng. Ency. of Law (2d Ed.) 753-756; 13 Eng. Pldg. & Prac. 498, 499; 26 Cyc. 143-150; 2 Spelling on Inj. & Ex. Rem. § 1382; State v. Board, etc., 162 Ind. 590, 603, 68 N. E. 295, 70 N. E. 373, 984, and authorities cited; Shafer v. Constans, etc., 3 Mont. 369; State v. District Court, 29 Mont. 265, 270, 74 Pac.

496, and authorities cited; Chinn v. Trustees, etc., 32 Ohio St. 236; Taylor v. City of Bayne, 57 N. J. Law, 376, 30 Atl. 431; People ex rel. v. Common Council, 78 N. Y. 56-63; People ex rel., etc., v. Chapin, 104 N. Y. 96, 10 N. E. 141; Matter of Murphy v. Keller, 61 App. Div. 145, 70 N. Y. Supp. 405; People v. Keating, 49 App. Div. 123, 63 N. Y. Supp. 71; People v. Greene, 87 App. Div. 346, 84 N. Y. Supp. 565; People v. Maxwell, 87 App. Div. 391, 84 N. Y. Supp. 947; People v. Board of Health, 56 Misc. Rep. 26, 106 N. Y. Supp. 923, and cases cited; People v. Sturgis, 82 App. Div. 580, 81 N. Y. Supp. 816; People v. Board, etc., 114 App. Div. 1, 99 N. Y. Supp. 737; Id., 187 N. Y. 535, 80 N. E. 1116, and cases cited; State v. Gibson, 187 Mo. 536, 554-559, 86 S. W. 177; People v. City of Chicago, 127 Ill. App. 118; Manchester v. Furnold, 71 N. H. 153, 159, 51 Atl. 657; True v. Melvin, 43 N. H. 503; Cahill v. Superior Court, 145 Cal. 42, 46, 47, 78 Pac. 467, and authorities cited; Simpson v. City of Kansas City, 52 Kan. 88, 34 Pac. 406; State v. Police Board, 107 La. 162, 165-169, 31 South. 662.

In this case as above shown, and as argued by the counsel for the relators, the school in the town of Otisco, in said old district No. 11, was abandoned in May or June, 1905, by the act of the appellant in consolidating, or attempting to consolidate, said district with old districts 8 and 12. If the action of appellant was without authority and void as claimed by the relators, they had a remedy by injunction to prevent the consolidation of said three old districts and the expenditure of the funds of said township in the erection of said new school building in the new school district No. 8. But they waited until after appellant had expended the funds of said township in the erection of a large and commodious schoolhouse for said new district No. 8, of which said old district No. 11 formed a part, and until after the school had been taught therein for two years (the school year of 1905 and 1906, and the school year of 1906 and 1907), and until September 21, 1907, a period of more than two years, when this proceeding was brought. During all this time, appellant and the public have treated said three old districts as consolidated, and thereby the schools in each as abandoned, enumerating the pupils of school age in the said three old districts as being in new district No. 8, and attaching them thereto for school purposes in April of each of the years 1906 and 1907. During this delay public money has been expended in erecting said schoolhouse for said new school district No. 8, and school has been taught therein, and public rights and interests and convenience have become involved. It is evident that the rights of the public and of said township have been prejudiced by said delay. The relators should have acted promptly, before public money had been expended, and before public rights, interests, and conven-

ence or the rights of third parties had become involved. No excuse is shown for this delay.

It appears from the evidence that a number of the relators were not, at the time this action was commenced, and never had been, residents of said old school district No. 11, nor were they residents of said Charlestown township. They lived in Oregon and Monroe townships, but near the town of Otisco, in which the schoolhouse for the old district No. 11 was located. As no enumeration was made in the years 1906 and 1907 of the children of school age in said old district No. 11, no such children or their parents, guardians, or persons having charge of such children were listed and attached to said old district in either of said years. Under sections 6449-6453, Burns' Ann. St. 1908, and sections 5959a-5959e, Burns' Ann. St. 1901 (Acts 1901, p. 448, c. 204), in regard to transfer from one school corporation to another, the child of school age, and not the parent, guardian, or person in custody of such child is transferred for educational purposes. The parent, guardian, or custodian of such transferred pupil is not a legal voter of the district to which said pupil is transferred. *Ireland v. State*, 165 Ind. 377, 75 N. E. 872; *Weir v. State*, 161 Ind. 435, 439, 68 N. E. 1023. It is held in the case last cited that when a person of school age is transferred, under the act of 1901 (sections 6449-6453 [5959a-5959e] *supra*), that an action is properly brought, on the relation of such child, by its next friend, to enforce any right it may have to attend the school to which such transfer was made. There were no transfers to the old district No. 11 of children of school age from the school corporation of Monroe township or Oregon township in the years 1906 and 1907. As neither of the relators who resided in Monroe township or Oregon township when this action was commenced was the parent, guardian, or person having control of any child or children transferred in 1907 to said old district No. 11 in Charlestown township, such relators were not entitled to maintain an action to compel appellant to hire a teacher for the school in said old district No. 11, nor to have any relief in relation to said school or the abandonment thereof.

It will be observed that the relators filed a verified application in two paragraphs for an alternative writ of mandate, that said writ was issued, and return made thereto by appellant, that afterwards another application for an alternative writ, designated as "paragraph 3," was filed, and that another alternative writ was issued thereon and a

return was made thereto by appellant. The issues made by these two writs, the returns thereto, and the replies to said returns were tried by the court. This manner of procedure is not authorized by our statute. Section 1226, Burns' Ann. St. 1908 (section 1183, Burns' Ann. St. 1901), provides that: "The writ shall be issued upon affidavit and motion, and shall be attested and sealed, and made returnable as the court shall direct; and the person, body, or tribunal to whom the same shall be directed and delivered, shall make return and for any neglect to do so shall be proceeded against as for contempt." Section 1228, Burns' Ann. St. 1908 (section 1185 Burns' Ann. St. 1901), provides that: "Whenever a return shall be made to any writ, issue of law and fact may be joined; and like proceedings shall be had for the trial of issues and rendering judgment as in civil actions." Section 1230, Burns' Ann. St. 1908 (section 1187, Burns' Ann. St. 1901), provides that: "The court shall have the same power to enlarge the time of making a return and pleading to such writ, and for filing any subsequent pleadings, and to continue such cause, as in civil actions." While the return under said sections may be in separate paragraphs like an answer, and may be met by a demurrer or reply (*Potts v. State*, 75 Ind. 336, 339-341, and cases cited), the affidavit, or as is usually called, the verified application or petition for the writ, should not be in paragraphs (8 Works, Prac. & Pleading [4th Ed.] pp. 223-226; *Merrill on Mandamus*, §§ 316, 317, 318, 322). See, also, 11 Ency. of Forms of Pldg. & Prac. pp. 775-894. The alternative writ stands as the complaint, and the facts stated therein, aided if necessary by the facts alleged in the application therefor, must show that it was the duty of the defendant, and that he had the power to perform the act sought to be compelled by said writ. *State v. Johns* (Ind.) 84 N. E. 1, 2, and cases cited; *State, etc., v. Anderson*, 170 Ind. 540, 85 N. E. 17; *Welch v. State*, 164 Ind. 104, 106, 72 N. E. 1043, and cases cited; *Gill v. State*, 72 Ind. 266. Instead of filing the application designated "paragraph 3," and obtaining a writ thereon, the application on file should have been amended by leave of court, and the alternative writ already issued amended to conform to the amended application.

The judgment is reversed, with instructions to sustain appellant's motion for a new trial and his demurrer to the "third paragraph" of the application, and the alternative writ issued thereon, and for further proceedings not inconsistent with this opinion.

(171 Ind. 213)

**TOLEDO & I. TRACTION CO. et al. v.  
INDIANA & C. INTERURBAN  
RY. CO. (No. 21,046.)**

(Supreme Court of Indiana. Nov. 24, 1908.)

**1. EMINENT DOMAIN (§ 255\*)—PROCEEDINGS—PLEADING—OBJECTIONS—PRACTICE — STATUTORY PROVISIONS.**

Under Eminent Domain Act, § 5 (Laws 1905, p. 61, c. 48; Burns' Ann. St. 1908, § 980), relating to objections in condemnation proceedings, the objections are intended to serve the purpose of a demurrer in so far as they are directed to the face of the complaint, in which case they raise an issue of law, and a plea or answer when they set up facts sufficient to defeat plaintiff's right to condemn; and, if an objection addressed to the face of the complaint is sustained, plaintiff must except to preserve the question for review, and, if objections presenting issues of fact are overruled, the defendant must except to preserve the question.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 255.\*]

**2. EMINENT DOMAIN (§ 166\*) — NATURE OF PROCEEDINGS.**

Eminent domain proceedings are not in a strict sense ordinary civil actions, but are actions of a special character based wholly on statute; nevertheless, in respect to the practice therein, the provisions of the Civil Code, so far as applicable and consistent, may be invoked.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 448; Dec. Dig. § 166.\*]

**3. PLEADING (§ 352\*)—MOTION TO STRIKE—NATURE.**

Under the Civil Code a motion to strike out a pleading is not designed to perform the office of a demurrer, and the sufficiency of the pleading in regard to the facts alleged cannot properly be challenged in whole or in part by such a motion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1078; Dec. Dig. § 352.\*]

**4. EMINENT DOMAIN (§ 193\*)—PROCEEDINGS—PLEADING.**

In eminent domain proceedings, if plaintiff desired to test the sufficiency of defendants' objection in respect to the facts therein alleged, it should have demurred as provided by the Code, to an answer in a civil action; a motion to strike not being the proper practice.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 522; Dec. Dig. § 193.\*]

**5. EMINENT DOMAIN (§ 47\*)—LAND SUBJECT TO CONDEMNATION FOR RAILROAD RIGHT OF WAY—LAND PURCHASED BY INDIVIDUALS FOR A RAILROAD TO BE INCORPORATED.**

Where individuals not invested by statute with any right to condemn land for a railroad right of way, purchased land for the right of way of an unorganized railroad which they were promoting and intended to incorporate in the future, and caused the right of way to be surveyed and staked off, their contracts with the landowners were their individual contracts, not the contracts of the proposed railroad, and did not withdraw the land from the power of the state to appropriate it for a public use, and hence another duly organized railroad could condemn the land under the eminent domain act for a right of way.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 118; Dec. Dig. § 47.\*]

**6. EMINENT DOMAIN (§ 47\*)—LAND SUBJECT TO CONDEMNATION—RAILROAD RIGHT OF WAY.**

The conveyances of the land by the individuals to the contemplated railroad upon its in-

corporation subsequent to the appropriation of the land by condemnation proceedings of the other railroad, and consequently with a servitude fastened thereon, did not confer on the company any better right to the land than the individuals had at the time of conveyance.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 118; Dec. Dig. § 47.\*]

**7. EMINENT DOMAIN (§ 47\*)—LAND SUBJECT TO CONDEMNATION—RAILROAD RIGHT OF WAY.**

The adoption by the promoted railroad company of the promoters' acts in locating and purchasing the right of way, upon their conveyance of the land to it after the other railroad had appropriated the land by eminent domain proceedings, could not relate back to the preliminary location and purchase by the promoters and become effective as of that date, so as to divest the servitude placed thereon by the eminent domain proceedings, but was of no more legal effect than would have been a new contract of the same date.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 47.\*]

Appeal from Circuit Court, De Kalb County; Emmett A. Bratton, Judge.

Condemnation proceedings to secure a right of way by the Indiana & Chicago Interurban Railway Company against the Toledo & Indiana Traction Company and others. There was an interlocutory order adjudging plaintiff entitled to condemn the land, and appointing appraisers to assess the damages, and defendants appeal. Affirmed.

King & Tracy, D. M. Link, and Olds & Niezer, for appellants. Zollars & Zollars, F. L. Weishelmer, and J. E. & J. H. Rose, for appellee.

**JORDAN, J.** Appellant the Toledo & Indiana Traction Company, and appellee the Toledo & Chicago Interurban Railway Company, are corporations organized under the laws of the state of Indiana pertaining to the incorporation of street railway companies. Appellant company was organized January 21, 1907. On January 1, 1907, appellee instituted this proceeding in the De Kalb circuit court against certain landowners by filing a complaint in the office of the clerk of said court and taking the steps required under sections 1 and 2 of an act entitled "an act concerning proceedings in the exercise of eminent domain" (Acts 1905, p. 59, c. 48; sections 929, 930, Burns' Ann. St. 1908). The action was commenced to condemn and appropriate for the right of way of appellee's railroad certain lands situated in De Kalb county, Ind. These lands were described and set forth in the complaint. On January 25, 1907, Schuyler C. Schenck and Jacob M. Longnecker, together with the Toledo & Indiana Traction Company, made application to the court to be made parties defendant in said proceedings, claiming to have and hold an interest or title in and to each of said several tracts and parcels of real estate sought to be condemned by these proceedings. This application the court sustain-

ed, and said parties were made defendants. On the 13th day of April, 1907, all the parties to the action appeared before the court, and appellee, upon leave, filed an amended complaint, naming therein as defendants, along with others, said Schuyler C. Schenck, Jacob M. Longnecker, and the Toledo & Indiana Traction Company, the appellants in this appeal. This amended complaint, among other things, alleged that Schenck and Longnecker, at the time of the commencement of the action and for a long time prior thereto, were, and ever since said time continuously have been, nonresidents of the state of Indiana; "that whatever interests in or title to any real estate claimed or owned by appellant the Toledo & Indiana Traction Company had been acquired by it by conveyance from said Schenck and Longnecker since the commencement of this action; that the Toledo & Indiana Traction Company has not now, and never has had, any officer or agent within the state of Indiana; that said company was not incorporated nor in existence at the time of the commencement of this action, nor was it incorporated until January 21, 1907; that immediately upon its incorporation, and when accepting said conveyance from Schenck and Longnecker, it had knowledge that the plaintiff was seeking and intending in this action to appropriate and condemn for its right of way each of the tracts of land now claimed by said Toledo & Indiana Traction Company."

To the amended complaint appellants filed 10 separate objections against the right of appellee to condemn a part of the lands described in the complaint in which said appellants claimed an interest. Upon the motion of appellee the court struck out all of the objections except the 4th, 5th, 7th, 8th, and 9th, and thereupon the case was submitted to the court upon the complaint and the remaining objections. The principal reasons upon which appellee based its motion to strike out the tenth paragraph of appellants' objections were, first, that the facts therein stated were not sufficient to constitute a good defense; second, that the facts stated in said objections were not sufficient to constitute a good objection to plaintiff's complaint.

On hearing, the court entered an interlocutory order, whereby it decided that appellee was entitled to have the lands claimed to be owned by appellants condemned for a right of way, upon the payment of damages, and appointed appraisers to assess the damages. From this interlocutory order appellants prosecute this appeal, and assign as errors that the De Kalb circuit court erred in sustaining appellee's motion to strike out appellants' objection No. 10; that the court erred in finding for the plaintiff and entering an interlocutory order appointing appraisers. Appellants found their argument in this appeal upon the alleged error of the court in striking out paragraph No. 10 of appellants'

objections. The material facts therein alleged are in substance as follows:

"Prior to the month of October, 1906, defendants Schenck and Longnecker were, and ever since have been, the principal and controlling stockholders owning and controlling a majority of the stock of the Toledo & Indiana Railway Company (an Ohio corporation), which owned and operated an electric interurban railway between Toledo and Bryan, in the state of Ohio; and being so interested in, owning, and operating said interurban line, Schenck and Longnecker, about the 1st of October, 1906, acting for themselves and associates and stockholders of the Toledo & Indiana Railway Company, decided and determined to extend the line of that company from Bryan, in the state of Ohio, along and adjacent to the Lake Shore & Michigan Southern Railway Company's right of way, to the town of Waterloo, De Kalb county, Ind., a distance of 26 miles, the Toledo & Indiana Railway Company to build, construct, and extend its line of railway from the village of Bryan, Ohio, to the Indiana state line, to the town of Waterloo, Ind., said line to be selected, surveyed, purchased, and acquired by said Schenck and Longnecker; that, in pursuance of such decision and arrangement, said Schenck and Longnecker proceeded to have surveyed and staked out said proposed line from Bryan to Waterloo, adjacent to the right of way of the Lake Shore & Michigan Southern Railway Company, causing the same to be surveyed and staked out along said line from Bryan to Waterloo, in the doing of which they expended \$2,500; that, in furtherance of their decision, Schenck and Longnecker proceeded to purchase land along the designated route, to the width of 66 feet in most instances, but varying in width at some points on account of conditions existing; 'that the title to all said right of way was conveyed to said Schenck and Longnecker, as trustees, no beneficiaries being named, they being named in the deed as S. C. Schenck and J. M. Longnecker; that, for a valuable consideration to be paid by them, they purchased and received conveyances from the following named codefendants herein:' [Here the names of the persons from whom the land was alleged to have been purchased are given, together with the description of the lands so purchased.] 'All of said real estate being conveyed to Schenck and Longnecker as trustees, their successors, heirs and assigns, together with the privileges and appurtenances to the same belonging, to be used only for railroad purposes, and the same was conveyed upon the conditions that the grantees, their successors or assigns, should, within a period of eighteen months from the date of the respective deeds, commence the construction of a railroad from Bryan, Ohio, to Waterloo, Indiana; to complete the same within three (3) years from said date, otherwise said conveyances should become null

and void and of no effect, and the property granted and conveyed by said deeds to revert to the original grantors; all of said conveyances were made and executed at various dates prior to the commencement of proceedings by the plaintiff in this behalf, and prior to plaintiff having surveyed and determined upon the route designated in the amended petition in this behalf, and subsequent to October 1, 1906. Said Schenck and Longnecker and associates, in good faith accepted the conveyances of real estate for railroad purposes, with the intention and determination of building and constructing the line of railway from the village of Bryan, in the state of Ohio, to the town of Waterloo, in the state of Indiana, along and upon said route, and were able to build and construct said railway along said line between the village of Bryan, Ohio, and the town of Waterloo, Indiana. Said Schenck and Longnecker and their associates proceeded with diligence to purchase and acquire title to all of the right of way along the designated line and to acquire the real estate hereinbefore described, the same being more than eighty per cent. of the mileage of the proposed railway between the towns of Butler and Waterloo, prior to the commencement of these proceedings. They, in furtherance of their decision and determination, and without any delay whatever, duly and legally organized, under the laws of the state of Indiana, authorizing the incorporation of street railways in said state, a corporation for the purpose of building, constructing, and operating a street railway from said state line to and through the city of Butler, and to and through the town of Waterloo, Indiana, which corporation was duly incorporated on the 21st day of January, 1907, with an authorized capital stock of \$100,000, which corporation is denominated the Toledo and Indiana Traction Company, the defendant herein."

"That the plaintiff is seeking to condemn the real estate so owned by Schenck and Longnecker as trustees, prior to the commencement of these proceedings, and which was purchased and conveyed to them for the sole purpose, on behalf of the grantors and grantees, of dedicating the same to public use for the building and construction of a street and interurban railroad thereon, prior to the commencement of these proceedings, and prior to plaintiff's having surveyed and designated or determined on the route over which they seek to condemn the real estate in this cause, for the construction of a street railway."

"That thereafter, in furtherance of said decision and determination, and after the incorporation of the Toledo & Indiana Traction Company, defendants, Schenck and Longnecker, as trustees aforesaid, for a valuable consideration, conveyed all of the real estate hereinbefore described to their co-defendant, the Toledo & Indiana Traction Company aforesaid, which is now the own-

er of the real estate so sought to be condemned in this cause; which corporation was organized for the express purpose of carrying out the objects and purposes of Schenck and Longnecker and their associates as aforesaid, and building and constructing said electric railway over and along the line so selected and designated by them, and over and along the real estate hereinbefore described; that immediately upon receiving the conveyance of said real estate from Schenck and Longnecker as trustees, the Toledo & Indiana Traction Company adopted the right of way so staked out and determined upon by Schenck and Longnecker, who had promoted and organized the corporation and taken the real estate in their own names and trust, to be transferred and conveyed to the corporation when organized; and accepted all the benefits and all the liabilities under and by virtue of said deeds, and fully ratified and confirmed the acts of Schenck and Longnecker in the laying out and purchasing the right of way as aforesaid, and resolved and determined to build and construct and operate a railroad from the state line between the states of Ohio and Indiana, along the line hereinbefore described to the town of Waterloo; and further authorized the president of the Toledo & Indiana Traction Company to proceed with the acquiring of the right of way along the line between said points which had not theretofore been acquired, and to acquire said right of way by purchase, condemnation proceedings, or otherwise as in his judgment he might deem best, and at such price and upon such terms as he might approve, and authorized him to employ counsel to institute and prosecute all necessary and proper proceedings in court for such purpose, and expressly authorized him to defend the proceedings in this cause for the condemnation of the real estate."

"And they further aver that the plaintiff, and its officers and agents, have full knowledge and notice of the actions as aforesaid of Schenck and Longnecker, and that they were promoting, in the interest of themselves and others, their railroad corporation, for the purpose of building and constructing an electric railway along and upon said right of way; and that they had expended large sums of money in the surveying and staking out of the right of way aforesaid, and in procuring title to the real estate hereinbefore described, and had full knowledge and notice of the rights and title of said defendants, and the purposes and intentions of those defendants in the procuring of the right of way and the construction of the street and interurban railway along the right of way aforesaid; and that, prior to and during the time that these defendants were so procuring the title to said real estate for the right of way, the plaintiff had procured and was procuring, and intending to construct, a railway along and upon a

different route, connecting the town of Waterloo and the city of Butler, and still have control of this right of way, and, as these defendants charge, intend to construct their railway upon the same; and that these proceedings are instituted not in good faith intending to use the right of way designated in the petition in this cause, but to obstruct and prevent these defendants from carrying out their object in constructing their street railway from the village of Bryan, Ohio, to the town of Waterloo, Ind., as aforesaid; and plaintiff is not in good faith condemning and appropriating the lands for the public uses alleged in its amended petition, with the good faith and intention of constructing an electric railway thereon."

"It is further alleged that the defendants have the right, by virtue of the Ohio corporation, to extend the line in that state to the Indiana state line, and that the defendants in good faith intended to build, construct, and operate a line of electric street railway from the state line, connecting with the Ohio Interurban line, and extending to the town of Waterloo, over the lands so purchased by Schenck and Longnecker. That 'they in good faith promoted the building, construction and operation, and the incorporation of this defendant, for the purpose of building said line of railway as aforesaid from the state line between the states of Ohio and Indiana along the line aforesaid to the town of Waterloo; that in furtherance of their object and purpose they in good faith took the title to the real estate as aforesaid, as promoters, in trust to be conveyed to the Toledo & Indiana Company (appellant herein), when organized; and in good faith and with diligence pursued the promotion and building of said line of railway, in laying out, acquiring title thereto, and incorporating the defendant, the Toledo & Indiana Traction Company, under the laws of the state of Indiana, and expended large sums of money in the doing thereof; of all of which the plaintiff, the Toledo & Chicago Interurban Railway Company, and its officers and agents, had knowledge; that by reason of the facts aforesaid the defendants, before and at the time of the commencement of these proceedings, held, and now hold, the title to the real estate aforesaid as a right of way for street railway purposes, with good faith and intention to build and construct a line of electric street railway thereon; and they are able and willing and intend to carry out such purposes and object.' That, by reason of the facts aforesaid, the real estate hereinbefore described had been and was, at and before the commencement of these proceedings, dedicated to the public use for a right of way for an electric street railway, and is so held by the defendants for that purpose at that time, and ever since has been so held.' There is the further averment that the real estate is necessary to appellants' road."

It is further charged that "by reason of the facts aforesaid the real estate hereinbefore described is not; and was not, at the time of the commencement of these proceedings, subject to condemnation and appropriation by the plaintiff, the Toledo & Chicago Interurban Railway Company, for the purposes and objects set forth in their amended petition, the instrument of appropriation in this cause."

Counsel for appellees contend, as a threshold proposition, that, because appellant reserved no exception to the interlocutory order of the court appointing appraisers and made no motion to modify that judgment, there is no question before this court for decision. In answer to this contention it may be said that section 5 of the eminent domain act of 1905 provides: "If any such objections shall be sustained, the plaintiff may amend his complaint or may appeal to the Supreme or Appellate Court from such decision. \* \* \* But if such objections are overruled, the court, or judge, shall appoint appraisers, as provided for in this act, and from such interlocutory order overruling such objections and appointing appraisers, such defendants, or any of them, may appeal to the Supreme or Appellate Court." etc.

In the appeal of *Morrison v. Indianapolis, etc.*, R. Co., 166 Ind. 511, 76 N. E. 981, we had occasion to construe or interpret these provisions of section 5; and in so doing in that case we said: "The written objections as prescribed are of a dual character, and are intended to serve the purpose of a demurrer and also a plea or answer. It is evident that, so far as they are directed or addressed to the face of the complaint, they perform the office of a demurrer, and thereby raise an issue of law from the facts alleged or disclosed upon the face of the complaint." In considering the provision, "or for any other reason \* \* \* set up in such objections," we also affirmed that it was thereby intended that the written objection should perform the office of a plea or answer to the complaint by alleging or setting up facts sufficient, which, if established or proven at the preliminary hearing, would operate to abate the action, or break down or defeat the plaintiff's right to condemn or appropriate the property involved. Of course, in a case in which the objection is addressed to the face of the complaint, as a demurrer is sustained, the plaintiff then, in that case, must reserve an exception to the ruling of the court if he desires to present any question upon such ruling in case he appeals to the Supreme Court. If at the preliminary hearing any or all of the objections tendering an issue of fact are, upon the evidence given at such hearing, overruled by the court in its interlocutory order, the objecting defendant must also except to such decision of the court in case he desires to appeal from such order and present any question upon the overruling of such objection or objec-

tions. In this case, however, the court, and also the respective parties, apparently under a mistaken view in regard to the procedure, appear to have treated and considered the motion of appellee to strike out certain paragraphs of the written objection as taking the place of a demurrer for want of facts. It is certainly manifest that had the plaintiff successfully demurred to paragraph No. 10 of the objections, and had the defendants excepted to such ruling on the demurrer, they could have appealed from the adverse interlocutory order and secured a decision of the Supreme Court in the appeal from the ruling of the lower court sustaining the demurrer to the tenth paragraph of their objections, without in any manner excepting to the interlocutory order of the trial court. Proceedings to condemn or appropriate property in the exercise of the right of eminent domain are not in a strict sense ordinary civil actions, but are statutory actions of a special character, based wholly upon the statute by which they are authorized; but nevertheless, in respect to matters of practice therein, the provisions of the Civil Code, so far as applicable and consistent, may be invoked in such action. *Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co.* 118 Ind. 578, 19 N. E. 440; *Great Western, etc., R. Co. v. Hawkins*, 80 Ind. App. 557, 66 N. E. 765.

Under our Civil Code it has been firmly settled by the decisions of this court that a motion to strike out a pleading is not as a general rule designed to perform the office of a demurrer. The sufficiency of the pleading in regard to the facts therein alleged cannot be properly challenged in whole or in part by such a motion. *Guthrie v. Howland*, 164 Ind. 214, 73 N. E. 259, and authorities there cited; *Hart v. Scott*, 168 Ind. 530, 81 N. E. 481.

The trial court, in sustaining the motion of appellee to strike out the tenth paragraph of appellants' written objections upon the reasons stated in the motion, appears to have predicated its ruling on the ground that the facts therein alleged did not constitute a cause of defense to appellee's complaint. If appellee desired to test the sufficiency of this pleading in respect to the facts therein alleged, it should have demurred, as provided by the Code, to an answer of a defendant in a civil action. But as the motion below to strike out was treated in the lower court as performing the office of a demurrer, we, for the purpose of this appeal only and not as establishing a precedent, will so treat and consider it in determining the questions raised by the parties.

The claim or argument advanced by counsel for appellants is that the facts set up in paragraph 10 of the written objections show or establish that under the law applicable thereto appellee has no right to condemn or appropriate the lands in controversy for its right of way, for the reason that at and

prior to the commencement of this proceeding these lands already had been dedicated or devoted to a public use. On the other hand, counsel for appellee combat this proposition and argue that the facts set up in said paragraph do not show that these lands had been devoted to a public use. They insist that the purchase of lands, as is shown in this case, with a purpose or object at some time in the future to construct a railroad thereover, does not impress them with a public use so as to prevent their condemnation for the right of way of another railroad prior to the building on such lands by said purchasers of a proposed railroad. Or, in other words, counsel for appellee state their proposition as follows: "Can individual promoters from Ohio, or any other state, come into Indiana, and by buying lands with the intention of, at some future time, building a railroad across them, or with the intention of, at some time in the future, promoting a corporation and having it build a railroad across them, withdraw those lands from the power of the state of Indiana to take them for a public use, by the exercise of its power of eminent domain, and that, as against a proceeding by the state, commenced before the corporation of the promoters, is brought into being?"

Counsel assert that the above question is fully answered in the negative by the decisions of this court. Possibly the tenth paragraph of the written objections may be open to the criticism that it intermingles together facts and conclusions. The principal facts therein averred disclose that appellants Schenck and Longnecker were and are residents of the state of Ohio. They appear to be stockholders of and connected with an interurban railroad company operating a line of railway from the city of Toledo, Ohio, to the town of Bryan, in the latter state. In October, 1906, these parties, with the purpose in view of extending the line of their railway from the town of Bryan to the Indiana state line and from thence to Waterloo, in De Kalb county, Ind., procured deeds from various landowners of strips of land on the south side of the Lake Shore & Michigan Southern Railway from the Ohio and Indiana state line through the town of Butler to Waterloo, Ind. The amount of land purchased by them was about 80 per cent. of what would be required for a right of way of a railroad. Schenck and Longnecker had the land thus procured by them surveyed and staked out, and took deeds of conveyance therefor in their own individual names "as trustees," no cestui que trust being mentioned therein, the conveyances being made to them as "trustees, their successors, heirs and assigns," it being provided in the deeds that the land was to be used only for railroad purposes, and the conveyances were upon the condition that these grantees, "their heirs and assigns," should, within 18 months from the date of said deeds, commence the

construction of an interurban railroad from Bryan to Waterloo and complete the same within three years from said date; otherwise the lands were to revert to the grantors. Schenck and Longnecker accepted the conveyances of the land for railroad purposes, with the intention and determination of building and constructing a railroad upon or over the land. These deeds were executed during the months of October, November, and December, 1906. As previously shown, on the 1st day of January, 1907, appellee, which was then, and for some years prior thereto had been, a street and interurban railroad corporation, duly organized and incorporated under the laws of the state of Indiana, filed its complaint in the De Kalb circuit court to condemn or appropriate the land for a right of way of its railway from Waterloo to Butler, and notice was given to the owners of the lands described in the complaint. These descriptions included lands now claimed by appellants. On the 21st day of January, 1907, after the commencement of this action, appellants Schenck and Longnecker procured the incorporation of appellant, the Toledo & Indiana Traction Company, and on the 25th day of that month this newly incorporated company, together with Schenck and Longnecker, appeared in the lower court and upon application were made defendants to the action, and thereupon, under their objections filed, claimed that they were the owners of a part of the lands described in the complaint, and that they held such lands for railroad purposes; and therefore the appellee could not condemn them for the purpose of a right of way because they were already devoted to a public use. Counsel for appellee, in support of their insistence that the lands claimed to have been owned by Schenck and Longnecker at the time of the commencement of this proceeding—January 1, 1907—were subject to be appropriated by appellee railroad for its right of way, cite the following authorities: *Indiana Power Co. v. St. Joseph, etc., Power Co.*, 159 Ind. 42, 63 N. E. 304, 64 N. E. 468; *Southern Indiana Ry. Co. v. Indianapolis, etc., Co.*, 168 Ind. 363, 81 N. E. 65, 13 L. R. A. (N. S.) 197; *Williamsport, etc., R. Co. v. Philadelphia, etc., R. Co.*, 141 Pa. 407, 21 Atl. 645, 12 L. R. A. 220; *New Brighton, etc., R. Co. v. Pittsburgh, etc., R. Co.*, 105 Pa. 13; *Washington, etc., R. Co. v. Cœur D'Alene R., etc., Co.*, 160 U. S. 77, 16 Sup. Ct. 231, 40 L. Ed. 355; *Lake Merced Water Co. v. Cowles*, 31 Cal. 215; *Morris, etc., R. Co. v. Blair*, 9 N. J. Eq. 635; *Utah, etc., R. Co. v. Utah, etc., Ry. Co. (O. C.)* 110 Fed. 879; *Rochester, etc., R. Co. v. New York, etc., R. Co.*, 110 N. Y. 128, 17 N. E. 680.

In the case of *Indiana Power Co. v. St. Joseph, etc., Power Co.*, 159 Ind. 42, 63 N. E. 304, 64 N. E. 468, the facts, briefly stated, are as follows: Both of the parties in that case were hydraulic companies, incorporated under the same statute, and the object of

each company as expressed in its articles of association was the same. It appears that the Indiana Power Company was incorporated on the 14th of December, 1899, and it at once accepted and adopted the preliminary survey and plans made prior to its organization by its civil engineer; it also employed an engineer to make further surveys, plans, and maps of the proposed site for its dam and all other works in connection therewith. In December, 1899, this company contracted for land on which it expected or contemplated to build the south end of its dam and canal. On March 2, 1900, it marked off the land on both sides of the river according to the plans for the construction of its dam and as contemplated, by setting out stakes corresponding with the civil engineer's surveying plans and maps. On the 5th and 10th of March, 1900, it purchased these lands for the sum of \$500, and expended in the survey, plans, and specifications \$2,323. The condemnation or appropriation of the lands sought by the St. Joseph Power Company would destroy the value of the lands purchased by the Indiana Power Company as a site for the location and construction of its plant. The St. Joseph & Elkhart Power Company was not incorporated, it appears, until February 27, 1900, and on March 16th, of the latter year, after the Indiana Power Company had acquired the lands in controversy by purchase, the St. Joseph Power Company filed in the office of the clerk of the St. Joseph circuit court its complaint and instrument of appropriation for the purpose of condemning or appropriating the portion of the lands which the Indiana Power Company had so purchased. At the same time the St. Joseph Company filed its petition to appraise the damages which the Indiana Power Company would sustain by such appropriation. It was held by this court in that case that appellant, the Indiana Power Company, held the lands in question as a private individual, and, being so held, they were subject to the right of eminent domain, and could be appropriated by the state for the public use expressed in the instrument of appropriation filed by appellee. In considering the questions therein involved, the court, in the course of its opinion, said: "Where such instrument of appropriation is filed, and lands are acquired by virtue of such proceeding, it is said, by many of the courts, that the corporation takes such lands by grant from the state, and that by reason of the taking in this manner they are impressed with a public use. \* \* \* It is true that the same section expressly authorizes the purchase in fee simple of lands by the corporation for the purposes of its organization, but it will be observed that the lands which may be so acquired are those which are described in the instrument of appropriation. In nearly all the cases where the courts have been called upon to decide the question of priority in right between conflicting claims

to lands to be used for corporate purposes, they have held that the company by which the location is first made has the superior right. The difficulty arises in determining what acts constitute such location. It is said in *Mills' Eminent Domain* (2d Ed.) § 47, that: "It does not signify that the articles of incorporation of one are prior in date to those of the other, or that one has made preliminary surveys over a particular route, or has made purchases of individuals along that route. Until the survey is made and filed, the company would hold the land purchased as any other individual landowner, and such land could be condemned by the rival company upon compensation. The priority of construction gives no rights where another company has perfected its location first."

The court further said: "Where the conflict is between parties seeking to condemn, that one shall prevail who first makes a location in accordance with the statute. \* \* \* The right to the use of the right of way is a public, not a private, right. It is, in fact, a grant from the state, and, although the payment of damages to the owner is a necessary prerequisite, the state may define who shall have the prior right to pay the damages to the owner, and thereby acquire a perfected title to the easement. The owner cannot, by conveying the right of way to A., thereby prevent the state from granting the right to B. \* \* \* The state has the control over the right of way, and can, by statute, prescribe when, and by what acts, the right thereto shall vest, and also what shall constitute an abandonment of such rights. The organization of appellant (*Indiana Power Company*) as a corporation, under the act for the incorporation of hydraulic companies, the recording of the articles of association, the selection of the site of the dam, the acquisition of the premises intended for the dam by deeds from the owners, did not, in our opinion, operate as a grant to those lands, or of any interest in them by the state to the corporation, nor impress upon them any public use. \* \* \* The appellee (*St. Joseph Company*) proceeded strictly according to the terms of the statute. The appellant held certain lands, but, as stated in the authorities, it held them as a private individual might."

In that case, upon a petition for a rehearing, the court further said: "It is equally evident that, under the statute authorizing the organization of companies for hydraulic purposes, the only public and unequivocal act by which such companies are empowered to indicate their intention to devote lands to a corporate and public use is by filing their instrument of appropriation in the office of the clerk of the county where the lands are situated. In the case before us, while the appellant was a hydraulic company, and had purchased lands in the vicinity of the St. Joseph river, it had built no dam, nor had it

begun the construction of such a work, further than to cause surveys to be made, plans to be prepared, and stakes to be set out for the guidance of its workmen."

In harmony with the decision in the *Indiana Power Co. v. St. Joseph, etc., Power Co.*, supra, is the later holding in the *Southern Indiana Ry. Co. v. Indianapolis, etc., Ry. Co.*, supra. In the latter case, the appellee, on the 14th day of March, 1906, filed its complaint in accordance with the act of 1905, supra, to condemn for a railroad right of way a strip of land about nine miles in length which belonged to the appellant, the *Southern Indiana, etc., Railroad Company*, which company was made a defendant in the condemnation proceedings. The *Southern Railway Company* was a railroad corporation, and had undertaken the building of a branch line of railroad from a point in Vigo county, Ind., to Indianapolis, and for that purpose had purchased tracts of land in Owen county, which included the strip of land which the *Indianapolis, etc., Railroad Company* was seeking to condemn. The *Southern Company* had performed some work in the way of constructing a track on the lands in controversy in Owen county. This consisted of concrete work at the Eel river crossing, and in making a preliminary survey, grubbing, and distributing a small amount of drainage pipe. The money laid out and expended by said railroad company on this account in Owen county was \$1,500, \$500 of which had been expended upon the strip of land which the *Indianapolis Railroad Company* was seeking to appropriate. Prior to the filing of the complaint to condemn by the latter company, the *Southern Company* had filed a map and profile of its land in Owen county, but it contained nothing from which the right of way could be determined. This court, in considering the priority question as therein involved, said: "The law under which each of the railroad corporations in question was incorporated only required that the articles of incorporation should designate the termini of the road, and the counties through or into which it would pass. There was, therefore, no grant to either of them of a specific right of way, and any conflict arising between them in respect thereto must be solved by priority of location. This can be accomplished not by ordinary acts in pais, but by some public act, which can be said, in a way at least, to commit the company, as between it and the state, to a definite location. \* \* \* As the law stands in this state, we think there can be no question, in the absence of an actual occupancy for railroad purposes, or of steps taken under the statute which amount to a location of the right of way, that lands purchased by a railroad company on which to build its road are open to a location by means of a condemnation proceeding instituted by another company." Citing *Indiana Power Co. v. St. Joseph, etc., Power Co.*, 159

Ind. 42, 68 N. E. 304, 64 N. E. 468, and Lewis' Eminent Domain (2d Ed.) § 306.

The court cited with approval the case of Williamsport, etc., R. Co. v. Philadelphia, etc., Ry. Co., supra, and said: "It was held that, in the absence of a legal location on the part of the plaintiff railroad, it had no standing to enjoin the defendant railroad from proceeding regularly to appropriate a certain lot, for which the plaintiff had contracted, and which it intended to use as a terminal for its railroad, which was then in course of construction." The Southern Railroad Company, in the above case, held the lands in controversy under unconditional deeds, but it appeared that it held them with the intention of devoting them to use as a right of way. But it was not occupying the lands, and had not taken the steps under the statute which amounted to a location of the right of way. This court, in that case, held that the lands in question were liable to condemnation by the appellee company.

In the case of the New Brighton, etc., R. Co. v. Pittsburgh, etc., R. Co., 105 Pa. 13, heretofore cited, 13 private parties, contemplating promoting a railroad company and securing its incorporation, caused a preliminary survey to be made over a route for the projected railroad. Subsequently they secured a charter and incorporated the proposed railroad. The latter, after its incorporation, adopted the line of the preliminary survey as the location of its road. In the meantime, however, another railroad company had made a preliminary survey over the same ground and made a final location of its road. It was held in that case that the latter company had the better title, and that the adoption by the former company, after its incorporation, of the line run before it was incorporated, could not operate to extend its title back to the date of the preliminary survey. The rule declared and enforced by the court in this latter case is quite applicable to and influential, under the facts in the case at bar.

To recapitulate, Schenck and Longnecker were mere private individuals, and in contemplation of promoting and incorporating a traction railroad company, which was to construct its railroad over the land herein involved from the Indiana state line to Waterloo, caused the route or right of way to be surveyed and staked off, and acquired title thereto by conveyance from the owners of the land. About two months after acquiring title to the land, they appear to have promoted appellant the Toledo & Indiana Traction Company, which was incorporated on January 21, 1907. After the incorporation of this company, Schenck and Longnecker conveyed the land to it. Some 20 days before appellant company was incorporated, or came into existence, appellant company, having the right to exercise the power of eminent domain, instituted this action under and in pursuance of the eminent domain

statute of 1905, and took the steps required by law to locate its right of way over the lands in dispute and to appropriate them to its use as and for a right of way, subject, however, to the payment of such damages as might be legally assessed. Section 1 of that statute provides that: "Any person, corporation or other body, having the right to exercise the power of eminent domain for any public use under any statute existing, or hereafter passed, and desiring to exercise such power, shall do so only in the manner provided in this act, except as otherwise provided herein." Schenck and Longnecker, as individuals, were not invested by any statute of this state with the right of eminent domain in respect to condemning or appropriating lands for the right of way of any railroad, consequently the steps taken by them in respect to the survey and staking off of the lands and obtaining conveyances therefor prior to the commencement of this action were not in pursuance of any statute. It will be noted that under the conveyances to them they were, within 18 months from the date of the deeds, to commence the construction of a railroad from Bryan, Ohio, to Waterloo, Ind. Certainly, under the circumstances, it would not be tenable to argue that they, as the promoters of a railroad to be organized or brought into existence at some time in the future, by making, as they did, a survey and location of a route or line for the building of a railroad by a proposed but unorganized railroad company, which might never be organized or incorporated, could thereby withdraw the lands in question for a period of 18 months, or for any other period of time, from the power of the state to condemn or appropriate them for a public use.

The conveyances of the land which Schenck and Longnecker secured from its owners placed them in the position of the owners of real estate, and under the circumstances certainly no good or sufficient reason can be assigned to show that such real estate, on January 1, 1907, while under their ownership, was not liable to condemnation by the state for a public use as a right of way of appellee's railroad. The conveyances of Schenck and Longnecker to appellant company, after the land was appropriated by appellee company and a servitude fastened thereon, could not operate to confer upon that company any better title or right to the land than that which had been acquired and was held by its said grantors at the time of the conveyance. The contracts entered into by and between the landowners and Schenck and Longnecker at the time the latter obtained the deeds of conveyance cannot in any sense be said to have been the contracts of appellant company, for it at that time was unincorporated and had no existence. It was in no manner liable thereon or bound thereby. 2 Cook on Corporations (5th Ed.) § 707, and authorities there cited. These were

merely the personal contracts of Schenck and Longnecker, and not those of the railroad company which they intended thereafter to form and incorporate. *Carmody v. Powers*, 60 Mich. 28, 28 N. W. 801.

But it is alleged in the tenth paragraph of the objections and claimed by appellants' counsel that, at the time Schenck and Longnecker conveyed the land to appellant company, the latter adopted the right of way which had been surveyed and staked off by its said grantors, and fully ratified and confirmed their acts in the locating and purchasing of such right of way. It must be remembered that, at the time of the conveyance of the land to appellant, the state, through appellee company, had already fastened a servitude thereon. The adoption, however, by appellant company, as alleged and claimed, would not relate back to the time when the preliminary survey, location, and purchase of the right of way were made by its grantors and thereby become effective as of that date. In no sense, certainly, could such adoption relate back so as to interfere with, break down, or divest the servitude upon the land which appellee company had acquired under the steps and proceedings which it had taken in pursuance of the statute.

In *New Brighton, etc., R. Co. v. Pittsburgh, etc., R. Co.*, supra, the court held that a railroad company, after its incorporation, could not adopt a preliminary survey and location made prior to its incorporation by parties who had no authority under the law to make such preliminary survey and location. It was affirmed that the adoption by the railroad company in question of the preliminary line run before its incorporation would not carry its title or right back to the date of such preliminary survey. The court in the course of its opinion in that case, said: "Doubtless a preliminary survey, made at the instance of persons contemplating the procurement of a charter, greatly facilitates the work of the corporation, afterwards created, in making its location, and designating the same by marks on the ground; and there can be no impropriety in the corporation resolving to adopt such preliminary survey, but that alone, without more, will not secure to it the right of location as against another company that goes upon the ground, surveys, marks, and actually appropriates the proposed location."

In *Washington, etc., R. Co. v. Cœur D'Alene R., etc., Co.*, supra, it was contended that the appellant company in that appeal had the right, after it became duly incorporated, to adopt as its right of way the preliminary line run by a surveyor, claiming to be acting for the company, before it had been fully incorporated, and that when such line or right of way so surveyed was adopted by the company it would relate back to the date when such survey was made. The court, in that appeal, however, said: "We are un-

able to accept such a view of the law. \* \* \* Until the power to build the road upon the surveyed line was in a proper manner assumed by or conferred upon the plaintiff company, its acts of making surveys were of no avail, and that, so far as the conflicting rights of the parties to this controversy are concerned, the status of the plaintiff is the same as if the survey of October 28, 1886, had not been made."

In *McArthur v. Times Printing Company*, 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653, the court, in considering the question of the adoption of contracts by a corporation, made by its promoters before its organization, said: "What is called 'adoption' in such cases is, in legal effect, the making of a contract at the date of adoption, and not as of some former date." We are not impressed with and cannot concur in the contention that appellant company, after it was incorporated and came into existence, upon receiving the conveyance of the lands from Schenck and Longnecker, thereby ratified and confirmed the prior acts and contracts of said grantors relative to the right of way in controversy. It is unreasonable to assert that the company could ratify, in the legal or proper sense of that term, the acts performed by Schenck and Longnecker and the contracts made by them before the company had been brought into being or had a legal existence. The rule upon this proposition appears to be properly stated in 23 Am. & Eng. Ency. of Law (2d Ed.) p. 889. We quote from the text, which is well supported by the authorities: "A ratification, properly so called, implies an existing person, on whose behalf the contract might have been made at the time. There cannot, in law, be a ratification of a contract which could not have been made binding on the ratifier at the time when it was made, because the ratifier was not then in existence."

In *McArthur v. Times Printing Co.*, supra, the court, in dealing with a similar question on ratification, said: "Although the acts of a corporation with reference to the contracts made by the promoters in its behalf, before its organization, are frequently loosely termed 'ratification,' yet a 'ratification,' properly so called, implies an existing person on whose behalf the contract might have been made at the time. There cannot, in law, be a ratification of a contract which could not have been made binding on the ratifier at the time it was made because the ratifier was not then in existence."

Whatever appellant company, after its organization, may have been done by the way of adoption or ratification of the acts and contracts of Schenck and Longnecker, was of no more legal effect or import than would have been a new contract or a new deal on its part of the same date, which was at least 20 days after appellee company had appropriated the land to a public use.

Although we have not set out and referred

to in detail all of the minor points and questions argued by counsel for appellant, we have, however, in general, considered all of them, but discover no error in the ruling of the trial court. Consequently the interlocutory order should be, and is hereby in all things affirmed.

MONTGOMERY, J., concurs in the result.

MONTGOMERY, J. (concurring). I concur in the disposition made of the principal question in this case and in the final result reached, but disagree with so much of the opinion as sanctions the practice of demurring to an objection to a complaint in condemnation proceedings. No causes or grounds of demurrer to an objection are prescribed, and, in my opinion, no such demurrer should be entertained. The statute expressly declares that no pleadings other than the complaint, objections thereto, and answer authorized by section 8 of the act shall be allowed. This is a special proceeding, and this preliminary hearing is not governed by the Civil Code, but may be had before the judge in vacation as well as in open court, and was intended to be of an expeditious and summary character. The objections authorized must, from the nature of the case, in most instances serve the purpose of demurrers and challenge the jurisdiction of the court or the right of the plaintiff, upon the face of the complaint, to exercise the power of eminent domain for the use sought. Facts may be set up affirmatively, by way of objection, which if true would abate or defeat the plaintiff's right to exercise the power of eminent domain generally, or for the use sought, or with respect to the particular property involved.

The filing and submission of objections invokes the judgment of the court upon the sufficiency of the complaint and such objections without other request, motion, or demurrer. If the court is without jurisdiction, or the complaint is manifestly insufficient, the objections should be sustained. If the court has full jurisdiction, and the complaint upon its face is sufficient to authorize the condemnation sought, such objections as perform the office of a demurrer, and such affirmative objections as, conceding their truth, would not abate or defeat the proceeding, should be overruled; and such objections as allege facts sufficient to abate or defeat the asserted right should be sustained.

When an objection has been sustained to the complaint, the plaintiff may amend, or, electing to stand upon the pleading, may suffer judgment to go in favor of the defendant, or, in case the objection be affirmative, call for proofs. When an objection is overruled, the defendant, with leave of court, may amend, or, electing to stand upon such objection, may suffer judgment to go in favor of the plaintiff. Appraisers will not be ap-

pointed until the court or judge in vacation is satisfied as to the regularity of the proceedings and the right of the plaintiff to exercise the power of eminent domain for the use sought. After the hearing upon the complaint, and affirmative objections if any remain, appraisers should be appointed or refused in accordance with the law and facts established, and from this order either party, having saved proper exceptions, may appeal. *Westport Stone Co. v. Thomas*, 170 Ind. —, 83 N. E. 617.

This practice in my opinion conforms to the positive directions of the statute, fully secures the rights of the parties, and simplifies and facilitates the object sought to be attained by the proceeding.

(171 Ind. 283)

#### HEWITT v. STATE. (No. 21,238.)

(Supreme Court of Indiana. Nov. 24, 1908.)

##### 1. CONSTITUTIONAL LAW (§ 46\*)—STATUTES—VALIDITY—NECESSITY OF DETERMINATION.

Courts will not pass on constitutional questions unless it is necessary to do so in disposing of the particular case.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 43; Dec. Dig. § 46.\*]

##### 2. MASTER AND SERVANT (§ 18\*)—REGULATION OF EMPLOYMENT—STATUTES—CONSTRUCTION.

Acts 1907, p. 193, c. 121, requiring the owner, operator, lessee, superintendent, or other person in charge of a coal mine to provide a washroom for the employes, is directed against the person in charge of the coal mine, whatever may be the title of his office or relation to or interest in the business; and, to charge one designated as "superintendent" of a mine with violating the act, it is necessary to show that he was in charge of the mine.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 16; Dec. Dig. § 18.\*]

##### 3. INDICTMENT AND INFORMATION (§ 55\*)—AVERMENTS—INFERENCES.

No material averment in a criminal pleading can be supplied by inference or intendment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 174; Dec. Dig. § 55.\*]

##### 4. INDICTMENT AND INFORMATION (§ 70\*)—AVERMENTS—INFERENCES.

In indictments and informations every fact essential to constitute the crime must be alleged directly and positively, and no material matter should be introduced by way of argument, conclusion, or recital.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 192; Dec. Dig. § 70.\*]

##### 5. INDICTMENT AND INFORMATION (§ 75\*)—AVERMENTS—INFERENCES.

Allegations in an indictment or information by the use of the participle "being," instead of the affirmative form of the verb, are allowable in setting out matter of inducement in charging the offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 202; Dec. Dig. § 75.\*]

##### 6. MASTER AND SERVANT (§ 18\*)—RELATIONS—STATUTES—VIOLATION.

An affidavit charging a violation of Acts 1907, p. 193, c. 121, requiring the owner, operator, or other person in charge of a mine, on

the request of a certain number of employes, to furnish a washroom, should in direct terms allege that accused at a time and place named was in charge of a coal mine, that a specified number of employes requested him to provide a washroom for the employes, and that he neglected so to do, and failed to provide any washroom for the employes.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 18.\*]

Appeal from Circuit Court, Vigo County; John E. Piety, Judge.

John Hewitt was convicted of violating the act regulating coal mines, and he appeals. Reversed, with directions.

McNutt, McNutt & Wallace and Barrett & Barrett, for appellant. James Bingham, Atty. Gen. (Oscar E. Bland, Henry W. Moore, Alexander G. Cavins, Edward M. White, and William H. Thompson, of counsel), for the State.

MONTGOMERY, J. Appellant was convicted of violating section 1 of the act of 1907 in relation to employes in coal mines (Acts 1907, p. 193, c. 121). Section 1 of said act reads as follows:

“Coal Mining—Wash Houses for Laborers.

“Section 1. Be it enacted by the General Assembly of the state of Indiana, that for the protection of the health of the employes hereinafter mentioned it shall be the duty of the owner, operator, lessee, superintendent of, or other person in charge of every coal mine or colliery, or other place where laborers employed are surrounded by or affected by similar conditions as employes in coal mines, at the request in writing of twenty (20) or more employes of such mines or place, or in event there are less than twenty (20) men then employed then upon the written request of one-third ( $\frac{1}{3}$ ) of the number of employes employed, to provide a suitable wash room or wash house for the use of persons employed so that they may change their clothing before beginning work, and wash themselves, and change their clothing after working. That said building or room shall be a separate building or room from the engine or boiler room, and shall be maintained in good order, be properly lighted and heated, and be supplied with clean and warm water, and shall be provided with all necessary facilities for persons to wash, and also provided with suitable lockers for the safe keeping of clothing: Provided, however, that the owner, operator, lessee, superintendent of or other person in charge of such mine or place aforesaid shall not be required to furnish soap or towels.”

Section 2 prescribed penalties for neglect or failure to comply with the provisions of the act, and for other offenses.

The body of the affidavit upon which appellant was tried and convicted reads as follows: “Harry Moore swears that John He-

witt, late of said county, on or about the 7th day of May, A. D. 1907, at said county and state aforesaid, he, the said John Hewitt, being then and there and from said day continuously up to the time of filing this affidavit, and being now superintendent of Lost Creek mine, a coal mine where persons were then and there, and have been continuously since said date, and are now, employed, situate in said county and state aforesaid, and he, the said John Hewitt, as said superintendent being then and there requested in writing by more than twenty of the employes of said Lost Creek coal mine to provide suitable washroom or washhouse for the use of persons there employed at said Lost Creek mine, in compliance with the laws of the state of Indiana, did then and there and has ever since, and does now unlawfully, neglect, fail and refuse to provide such suitable washroom or washhouse for the use of persons there employed at said Lost Creek coal mine, and did then and there and has ever since and does now unlawfully neglect, fail and refuse to provide such suitable washroom or washhouse. Contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Indiana. Harry Moore.”

The sufficiency of this affidavit was challenged by motions to quash and in arrest of judgment in the trial court, and the overruling of these motions has been assigned as error upon appeal.

The decision of the learned trial judge appears to have been based upon the validity of the act, rather than the form and substance of the charge. Counsel have ably discussed the constitutional question involved, but it is a familiar principle that courts will not pass upon constitutional questions unless necessarily required to do so in disposing of the particular case.

This affidavit, in our opinion, is so defective upon its face as to necessitate a reversal of the cause, without a consideration of the validity of the statute upon which it is based. The statute imposes the duty of providing a washroom or washhouse for employes, upon the owner, operator, lessee, superintendent, or other person in charge of any mine or colliery, upon request of a certain number of employes. It is clear that this act is directed against the person in charge of any mine, whatever may be the title of his office or other relation to or interest in the business. Appellant is in no manner alleged to have been in charge of the coal mine in question at the time request was made for washroom accommodations, except as that fact may be implied from the title of his office. The title of an officer or employe will not ordinarily determine with accuracy his powers and duties, and it may frequently happen that the owner or lessee of property is out of possession. In our view

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of this statute it is material to show that the accused was in charge of the mine at the time of committing the alleged offense, and no material averment in criminal pleading can be supplied by inference or intendment. Having elected to designate appellant's title, the allegation should have been that appellant was then and there the superintendent and in charge of Lost Creek mine, etc. The absence of a proper averment showing appellant's charge of the mine is fatal to the sufficiency of the affidavit. Gillett's Crim. Law, § 719. It is a familiar principle of pleading that in indictments and informations every fact necessary to constitute the crime charged must be directly and positively alleged, and no material matter should be introduced wholly by way of argument, conclusion, or recital. 22 Cyc., and cases cited; *Terre Haute, etc., Co. v. State*, 169 Ind. 242, 82 N. E. 81; *State v. Metsker*, 169 Ind. 555, 83 N. E. 241.

The affidavit in this case must be quashed upon the ground above stated, but we deem it proper to express our disapproval in other respects. It will be noted that the greater portion of the allegations of the affidavit are made by the use of the participle "being," instead of using the affirmative and declarative form of the verb. This form of expression is allowable in setting out matter of inducement in charging a criminal offense, but when used in alleging issuable facts, if tolerated at all, has been invariably criticized and disapproved. *State v. Trueblood*, 25 Ind. App. 437, 57 N. E. 975; *People v. Piggett*, 128 Cal. 509, 59 Pac. 31; *Shanks v. State*, 51 Miss. 464. See, also, *State v. Dunning*, 83 Me. 178, 22 Atl. 109; *State v. Manley*, 107 Mo. 364, 17 S. W. 800; *State v. Bloor*, 20 Mont. 574, 52 Pac. 611.

If we concede that it was proper to charge in the affidavit, as was done, that appellant "being" then and there superintendent, etc., as in the nature of inducement to bring him within the class upon whom the prescribed duty was imposed, yet we think the expression "being requested," etc., was a mere recital and not sufficient. The fact should have been directly and affirmatively charged that 20 of such employes in writing requested appellant to provide a washroom for the use of persons employed in said mine. Good pleading would require the allegations of the affidavit to be in direct terms, and the charge to be, in substance, that, at the time and place named, Lost Creek mine was a coal mine then and there situate, in which persons were then, and continuously since have been and now are, employed, and that appellant Hewitt was then and there superintendent and in charge of said mine, and that 20 of the employes of said mine then and there in writing requested said Hewitt, while superintendent and in charge of said mine, to provide a washroom or washhouse

for the use of persons employed in said mine, and that said Hewitt, being superintendent and in charge of said mine as aforesaid, and having been requested as aforesaid, did then and there unlawfully neglect, fail, and refuse to provide a suitable washroom or washhouse, or any washroom or washhouse whatever, for the use of persons employed in said mine, and ever since said date to the present has unlawfully refused, neglected, and wholly failed to provide any washroom or washhouse for the use of persons employed in said mine, contrary to the form of the statute, etc.

For the reasons indicated, the affidavit should have been quashed.

The judgment is reversed, with directions to sustain appellant's motion to quash the affidavit.

(71 Ind. 710)

STERLING v. FRICK et al.<sup>1</sup> (No. 21,168.)  
(Supreme Court of Indiana. Nov. 24, 1906.)

1. HIGHWAYS (§ 42\*)—PROCEEDINGS TO ESTABLISH—PUBLIC UTILITY—EVIDENCE—MATERIALITY.

On an issue as to the public utility of a proposed highway, it was proper to exclude a question as to how much it would cost to "make a good road through the timber," since it called for an indefinite answer, and since witness had testified to the cost of putting the road in such passable condition as would be required of the road district, which was as far as the inquiry was material.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 133; Dec. Dig. § 42.\*]

2. HIGHWAYS (§ 42\*)—PROCEEDINGS TO ESTABLISH—PUBLIC UTILITY—EVIDENCE—MATERIALITY.

On an issue as to the public utility of a proposed highway, it is proper to consider the location of established ways, their proximity to the proposed road and their accessibility, but not the number of miles of highway in the township, the amount of taxable property, the rate of road taxation, the amount of the road fund, nor the number of road hands in the district.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 132-136; Dec. Dig. § 42.\*]

3. WITNESSES (§ 248\*)—EXAMINATION—ANSWERS—RESPONSIVENESS.

On an issue as to the public utility of a proposed highway, a witness was asked: "The other conditions surrounding this, going to show whether this road is of public utility, you don't know, do you, these other conditions, except as along the line of the road you don't know anything about?" Held, that the answer, "It looked like the road would be of public utility," could not be excluded as not responsive.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 861-863; Dec. Dig. § 248.\*]

4. TRIAL (§ 295\*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

Instructions must be considered together, and, if as a whole they correctly state the law, that one or more considered apart appear inadequate will not be deemed reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 703; Dec. Dig. § 295.\*]

<sup>1</sup>For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
86 N.E.—5

<sup>1</sup> Rehearing denied, 87 N. E. 237.

**5. HIGHWAYS (§ 42\*)—PROCEEDINGS TO ESTABLISH—INSTRUCTIONS—PUBLIC UTILITY.**

An instruction in a proceeding to establish a highway that, in deciding the question of public utility, the jury should determine whether the road would be a "useful" road, and that if its usefulness would exceed its cost the jury should find for the petitioners, was not error as tending to lead the jury to believe that, if the road would be useful to one citizen or to a small number, the finding should be for the existence of public utility regardless of public interest, in view of other instructions that mere private convenience or private utility falls short of public utility, and that in determining the question the jury should consider whether the public was already supplied with sufficient highways in the neighborhood leading to towns, and whether the proposed road would be convenient to a few persons only, etc.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 132-136; Dec. Dig. § 42.\*]

**6. HIGHWAYS (§ 42\*)—PROCEEDINGS TO ESTABLISH—INSTRUCTIONS.**

An instruction, in a proceeding to establish a highway, that if the benefits to land were equal to or greater than the damages by the construction the jury should find against remonstrant on the question of damage, was not error as precluding consideration of the cost of removing and rebuilding fences, where the jury were directed to determine the amount of remonstrant's damages through the facts alleged in his remonstrance, one item of remonstrance being that it would be necessary to build and maintain a specified amount of fence.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 132-136; Dec. Dig. § 42.\*]

Appeal from Circuit Court, Carroll County; James P. Watson, Judge.

Wesley A. Frick and others, county commissioners, having established a highway, James P. Sterling, a remonstrator, appealed to the circuit court, whence he appeals from a judgment for the commissioners. Affirmed.

John H. Gould and Edward E. Pruitt, for appellant. Boyd & Julien, for appellees.

**HADLEY, J.** In a proceeding to establish a new highway in Carroll county, viewers reported that the proposed road would be of public utility, whereupon appellant and others filed a remonstrance against the public utility. Reviewers were appointed, and, they having reported adversely to the remonstrators, the board of commissioners entered an order establishing the highway as prayed. Appellant, alone, appealed to the circuit court. In the latter court, the jury returned a verdict for appellees, and, appellant's motion for a new trial having been overruled, he appeals.

During the progress of the trial, appellant, in the direct examination of his witness, Sterling, inquired "how much would it cost to put the proposed highway simply through the woods, in a passable condition?" The witness answered that it would cost not less than \$200 to put it through the woods; that is, to do such work on it as the road district would do, not counting a removal of the timber that the landowners would be

expected to do. He, also, in answer to the question, "What would be necessary, to make it a good passable road through the timber?" stated that it would require a removal of all the timber, drainage, and a grade that would take the water off the roadway. Appellant then propounded to the witness the following question: "How much would it cost to make a good road through the timber?" The ruling of the court, in excluding the answer to this question, presents the first question we are called upon to decide.

The cost of a good road would depend on the kind of a good road that was meant, whether only a well-cleared road, or simply well-graded, or graded and graveled, as are the roads with which the proposed highway connects at both ends. The question called for an indefinite answer that would have been of no assistance to the jury. Besides, the witness had previously testified as to the cost necessary to put the road in such passable condition as would be required of the road district. That was as far as the inquiry was material. If the public later on shall want a better road than the law requires the road district to furnish, resort may be had to special proceedings. The answer was properly excluded.

Answers were excluded to the following questions propounded by appellant to his witness: "How many miles of public highway are there, at this time, in Jackson township?" "What is the amount of taxable property in Jackson township subject to road taxes?" "What is the rate of taxation for road purposes in Jackson township?" "What is the amount of the road fund for Jackson township for the year 1907?" "How many male persons are there in road district No. 3, of Jackson township, liable to work on the public highways?" No matter what the answer might have been to any or all the foregoing interrogatories, no light would have been thrown upon the question of public utility of the proposed highway. There may be ever so many miles of highway in a township, yet if not distributed in such a way as to furnish the public a reasonable route of travel to the county seat, to the markets, to church, and such other places as citizens usually need and desire to frequently visit, additional highways may be established. Because some parts of the township may have more roads than they need, is no reason why another part should have less than it needs. In determining the question of public utility (among a number of other facts), it is proper enough to consider the location of established ways—their proximity to the proposed new one, and their accessibility to the inhabitants; but the number of miles in the township, the taxable property, the rate of taxation, the amount of the road fund, and number of road hands in the district, do not in any way affect the question

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of utility to a community not reasonably provided. The exclusion of answers to the above questions was not error. *Opp v. Timmons*, 149 Ind. 236, 48 N. E. 1028; *Speck v. Kenoyer*, 164 Ind. 431, 73 N. E. 896.

One of the controlling inquiries in such cases is, do the people need the road? and is the need sufficiently urgent to justify the cost? In the cross-examination, a witness had testified that he had viewed the proposed way from one end to the other, and had spoken concerning the physical condition of the route; whereupon, appellant's attorneys propounded the following interrogatory: "The other conditions surrounding this, going to show whether this road is of public utility, you don't know, do you, these other conditions, except as along the line of the road you don't know anything about?" To this question, the witness answered, "It looked like the road would be of public utility." The court overruled appellant's motion to strike out the answer as not responsive. Just what answer counsel expected, or that should be regarded as responsive to the question as put, is not clear, and we are unwilling to disturb the judgment of the court, whose opportunity for arriving at a correct understanding of the question was better than ours.

Appellant assails the fourth instruction given to the jury on the court's own motion. It was to the effect that, in deciding the question of public utility, the jury should determine, from the evidence given relative to that issue, whether the proposed road, if established, would, or would not, be a useful road, and if the finding should be that the road would be useful, and that such usefulness shall be to a greater degree than the cost of the road, then the finding on the question of public utility should be for the petitioners. But on the other hand, if the finding should be that the cost of the road would be as great, or greater, than the value of the benefits derived from the established road, then the finding should be for the remonstrator. Appellant argues that the term "useful," as used in the instruction, is, properly, as applicable to the private citizen as to the public, and that the vice of the instruction lies in its natural tendency to lead the jury to believe that if they found that the proposed road would be useful to a citizen, or to a very small number of citizens, and that the usefulness to them, as individuals, would exceed the cost of the road, the finding should be for the existence of public utility, without reference to its effect upon public interests. Standing alone, the instruction would be too narrow and indefinite in this respect; but it is a familiar rule that instructions must be considered with reference to each other, and as a body, and if, as a whole, they correctly state the law, it will not be deemed reversible error if one or more, considered apart and of themselves,

appear inadequate. *Eacock v. State*, 169 Ind. 488, 502, 82 N. E. 1039; *Rains v. State*, 152 Ind. 69, 72, 52 N. E. 450.

As touching the same point, the court in other instructions, notably in No. 7, given upon the request of appellant, directed the jury "that, as contradistinguished from public utility, mere private convenience or private utility alone falls short of what the law recognizes as of public utility. And, in the solution of the question here as to the alleged public utility of the proposed highway, it will be proper for you to consider the following questions: Would the proposed road lead to any market place, town, post office, church, or school? Would the cost of building and keeping in repair a bridge and culverts on the road, if necessary to the road, and the cost of putting the road in a passable condition, exceed any benefits the road might be to the public? Is the public now supplied with sufficient other public highways in the neighborhood, leading to towns, market places, post offices, schools, and churches? Would the proposed road only be a convenience to a very few persons who already have a private way or ways to public highways or roads? If, upon a careful consideration of these questions, you are not convinced by a fair preponderance of the evidence that the proposed road would be of public utility, then it will be your duty to find and return a verdict for the remonstrator." At least two other instructions, in like vein and effect, were given, and we do not see how the jury could have been misled by the instructions, as a whole, into believing that it was proper to ground public utility upon private benefits.

Further complaint is made of the following language used by the court in the sixth instruction given: "And if you find from the evidence upon this subject that the benefits to said land are equal to, or are greater than, the damages to said land by the construction of said road, then you should find against the remonstrant on the question of damages." "It shuts the door," appellant avers, "to any consideration whatever of the cost of removing and rebuilding fences." There is no force in this complaint when the body of the instructions is considered.

In his eighth instruction, the court directed the jury that they must determine, from a consideration of all the evidence, the amount of appellant's damages "by reason of the facts alleged in his remonstrance," and one item of the remonstrance is "that it will be necessary to build and maintain three hundred and sixty rods of fence where there is now no necessity for any." There are many other exceptions reserved relating to the instruction and the introduction of the evidence, but no other is urged, and we have been unable, upon examination, to find in them any prejudicial error.

Judgment affirmed.

(171 Ind. 296)

**STATE v. WILLETT.** (No. 21,247.)  
(Supreme Court of Indiana. Nov. 24, 1908.)

**1. INSURANCE (§ 32\*)—INSURANCE COMPANIES —“STOCK INSURANCE COMPANY.”**

A “stock insurance company” is one wherein the stockholders contribute all the capital, pay the losses, and take the profits.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 32.\*]

**2. INSURANCE (§ 52\*)—INSURANCE COMPANIES —“MUTUAL INSURANCE COMPANY.”**

A “mutual insurance company” is one wherein the members constitute both the insurers and the insured, where the members all contribute by assessments to the creation of a fund from which all losses and liabilities are paid, and wherein the profits are divided among themselves in proportion to their interests.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 64; Dec. Dig. § 52.\*]

For other definitions, see Words and Phrases, vol. 5, p. 4650.]

**3. INSURANCE (§ 32\*)—INSURANCE COMPANIES —“MIXED INSURANCE COMPANIES.”**

“Mixed insurance companies” are those which embody the characteristics of both stock and mutual companies.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 32.\*]

**4. INSURANCE (§ 124\*)—NATURE OF CONTRACT —INDEMNITY—“INSURANCE CONTRACT.”**

Contracts of insurance companies with those insured are plain indemnity contracts, by which one party agrees for a stipulated sum to assume some risk borne by the other party, and, if the apprehended loss occurs, to fully reimburse the loser, or to the extent agreed upon in the contract (citing Words and Phrases, vol. 4, pp. 3674-3677).

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 172-178; Dec. Dig. § 124.\*]

**5. INSURANCE (§ 124\*)—CONTRACT TO FURNISH BURIAL.**

A contract founded upon a legal consideration, whereby the obligor agrees to furnish the obligee or one of the obligee's near relatives with a burial reasonably worth a fixed sum, is a valid indemnity contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 172-178; Dec. Dig. § 124.\*]

**6. INSURANCE (§ 124\*) — “INSURANCE CONTRACT”—NATURE.**

An “insurance contract” is one whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject, by specific perils.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 172-178; Dec. Dig. § 124.\*]

**7. INSURANCE (§ 124\*)—“LIFE AND ACCIDENT INSURANCE.”**

“Life and accident insurance” is a contract whereby one, for a stipulated consideration, agrees to indemnify another against injuries by accident or death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 172-178; Dec. Dig. § 124.\*]

**8. INSURANCE (§ 124\*)—“LIFE INSURANCE”—CONTRACT TO FURNISH BURIAL—STATUTORY PROVISIONS.**

The object of an association was to furnish each of its members at death a specific sum for application to his funeral expenses, by a system of mutual contribution; the members at the death of any member paying death assessments. It employed agents to solicit business from the general public and was not founded on principles of philanthropy. *Held*, that its

contracts with its members constituted “life insurance.” within Burns' Ann. St. 1908, § 4713, forbidding the taking of an application for insurance upon the life of any person in the state in favor of a person not having a bona fide insurable interest in the life of insured, or who is not related to him within a certain degree.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 172-178; Dec. Dig. § 124.\*]

For other definitions, see Words and Phrases, vol. 5, p. 4154-4156; vol. 8, p. 7707.]

**9. WORDS AND PHRASES—“BENEFICIARY.”**

A “beneficiary” is defined as one who receives a benefit or advantage; a person to whom a policy of insurance effected is payable (citing Words and Phrases, vol. 1, p. 750).

**10. INSURANCE (§ 156\*)—CONTRACT—CONSTRUCTION—BENEFICIARY.**

The contracts of insurance, whereby an association agreed to furnish funds for the burial of its members, provided that a member should pay a sum upon every death in the membership occurring before his own, and in consideration thereof, upon his death, the association would pay a specified firm of undertakers a sum for burial goods and service for his funeral. The association's by-laws provided that the firm of undertakers, their heirs and assigns, should furnish all burial supplies and services, and that the association should pay them the full amount of the benefits accruing under the contracts, and no part to the members' surviving relatives and friends as death benefits. *Held*, that the firm of undertakers was sole beneficiary under the contract.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 156.\*]

**11. INSURANCE (§ 116\*) — LIFE INSURANCE — “INSURABLE INTEREST.”**

A person has an insurable interest in the life of another, where there is a reasonable probability that he will gain by the latter's remaining alive or lose by his death (quoting Words and Phrases, vol. 4, p. 3672).

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 158-162; Dec. Dig. § 116.\*]

**12. INSURANCE (§ 116\*)—LIFE INSURANCE—INSURABLE INTEREST.**

The official undertakers of an association, whose business was to insure to each of its members a sum to defray his funeral expenses, and who through the profits they received from the sale of supplies were the sole beneficiaries under the contracts between the association and its members, had no insurable interest in the members' lives.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 158-162; Dec. Dig. § 116.\*]

**13. INSURANCE (§ 127\*)—LIFE INSURANCE — MEDICAL EXAMINATION OF APPLICANT — STATUTORY PROVISIONS.**

The contract between the association and a member being life insurance, the issuance thereof without the member having satisfactorily passed a medical examination by an authorized physician would violate the express provisions of Burns' Ann. St. 1908, § 4713.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 127.\*]

Appeal from Circuit Court, Hancock County; R. L. Mason, Judge.

Matt Willett was charged with writing a policy of insurance in violation of Burns' Ann. St. 1908, § 4713. A motion to quash the indictment was sustained, and the State appeals. Reversed and remanded, with instructions to overrule the motion.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Chas. L. Tindall, James Bingham, E. M. White, H. M. Dowling, and A. G. Cavins, for the State. Felt & Buiford, for appellee.

**HADLEY, J.** The prosecuting attorney filed an affidavit charging appellee with writing a policy of insurance in violation of section 4713, Burns' Ann. St. 1908 (section 4894u1, Burns' Ann. St. 1901). Appellee's motion to quash the affidavit was sustained, and the state appeals.

The first count of the affidavit stated, in substance, that the appellee, on the 10th day of December, 1907, knowingly and unlawfully wrote a policy of insurance upon the life of one Davis, who was then and there an individual in the state of Indiana; the policy reading as follows: "No. 8539. Greenfield, Ind., Dec. 10, 1907. This is to certify that Charles C. Davis, who was born on the 1st day of July, 1867, is entitled to membership in the Greenfield Mutual Burial Association, and entitled to all the benefits as a member of said association, in accordance with the by-laws thereof. M. T. Smith, President. Attest: Oak S. Morrison, Secretary." The affidavit then sets out the by-laws of the Greenfield Mutual Burial Association, which state that the object of the association is to provide a plan for the payment of funeral expenses for the members thereof, which plan consists of the payment, by assessment, of funeral expenses to the amount of \$75 for each member 10 years of age or over, and \$37.50 for each member under 10 years of age. Any person in good health, between the ages of 1 year and 70 years, may become members by paying an initiation fee of 10 cents if over 10 years of age, and 5 cents if under 10 years of age. The officers shall consist of president, vice president, secretary, and treasurer, the duties of the last two to be performed by the same person, and these three shall constitute a "board of control" and have full power to direct the affairs of the association. These officers are to be elected annually, if necessary, and the various adult members are each given one vote. When a member dies, if over 10 years of age, every member over 10 years old shall be assessed and pay 11 cents; 10 cents of this being used as "funeral expenses," and 1 cent being used for "paying for collections." All members under 10 years old and over 5 years old must pay 5 cents, all of which is to go for "funeral expenses." If a member under 10 years of age dies, each member over 10 years of age shall pay 6 cents, 5 cents of which to go to pay "funeral expenses," and 1 cent "for collections," and members under 10 years shall pay 3 cents each, all of which is to be used for "funeral expenses." Failure to pay any such assessment for 30 days forfeited the membership and all previous payments. In case the membership becomes so reduced that the benefits promised in the by-laws cannot be paid, only such benefits are to be furnished as the above assessments

would "justify." If there should be an excess of revenue from the assessments, such excess shall be paid into the treasury, to be applied on future benefits as the necessity therefor may arise. A member removing to such a distance as to render the services of the "association's undertaker" impracticable must notify the "association's undertaker" of such removal, and give the name of an undertaker preferred at the new place of residence. Failure to do so forfeited all rights in the association. No salary shall be paid to any officer. The initiation fees shall be paid into an "expense fund," for the "expenses of organizing the association—and such subsequent expenses as may be legitimately incurred." The president can call meetings of the association at his pleasure, and must do so upon written request of 10 members. Each member shall receive a certificate as follows: "No. ———. Greenfield, Ind., ——— 190—. This is to certify that ———, who was born on the ——— day of ———, ———, is entitled to membership in the Greenfield Mutual Burial Association and entitled to all the benefits as a member of said association in accordance with the by-laws thereof. ———, President. ———, Secretary." Applicants for membership are required to be in good health. Articles 14 and 15 are in these words: "The benefits herein provided are for the purpose of furnishing respectable funeral and burial services for deceased members, and the benefits provided are to be paid to the undertaker furnishing such services, and not to surviving relatives and friends as death benefits. It is agreed that the goods for said funerals shall be furnished and services rendered by C. W. Morrison & Son, their heirs and assigns, and they are hereby designated the official undertakers of this association. Board of Control: Marshall T. Smith, President, Joel B. Pusey, Vice President, Oak S. Morrison, Sec'y and Treas." The affidavit further charged that neither the beneficiary named in said policy of insurance, nor any member of the firm of C. W. Morrison & Son, had any bona fide insurable interest, in whole or in part, in the life of said Charles C. Davis, at the time said policy was issued, nor at said time was the beneficiary of such policy, nor was any member of the firm of C. W. Morrison & Son, related to said Charles C. Davis in any degree of kinship whatever.

The statute referred to at the head of this opinion forbids the taking, or the receiving, of any application for any insurance upon the life of any person in the state of Indiana, in favor of any person who has not a bona fide insurable interest in the life of the insured, or who is not related to him within a degree not further removed than first cousins. It also forbids the issuance of a policy of insurance where the insured has not been subjected to, and satisfactorily passed, a medical examination by a duly authorized physician. The offenses created by

this statute relate to the character of the interest, or relationship, of beneficiaries in contracts of insurance, and the state of the health of the insured. The first question therefore to be determined is whether the Greenfield Mutual Burial Association, as shown by its by-laws and certificates of membership, is engaged in doing a life insurance business; or, in other words, whether their "certificates," such as was issued in this case, are, in legal contemplation, insurance contracts upon the life of persons named.

There are three kinds of insurance companies—stock, mutual, and mixed. A "stock company" is one where the stockholders contribute all the capital, pay all the losses, and take all the profits. A "mutual company" is one wherein the members constitute both the insurers and the insured, where the members all contribute, by a system of assessments, to the creation of a fund from which all losses and liabilities are paid, and wherein the profits are divided among themselves in proportion to their interests. "Mixed companies" are such as the term implies. They embody the characteristics of both the others. The subjects of insurance are numberless. The various systems, with their ramifications, offer indemnity for almost every conceivable loss, or injury, that may be sustained, and which depends upon future possibility, or uncertainty, in point of time. It embraces the hazards of navigation, losses by fire, lightning, tornadoes, accidents of almost every character, insolvency of debtors, dishonesty and negligence of employes, failure of title to real estate, death of animals and of human beings. In life insurance, the event insured against is sure to happen, and at some time the indemnity promised the beneficiary is sure to demand the full amount stipulated in the contract. But the contracts made by all kinds of insurance companies are plain indemnity contracts; contracts by which one party agrees, for a stipulated sum, to assume some risk borne by the other party, and, if the apprehended loss occurs, to make the loser whole by reimbursing him fully, or to the extent agreed upon in the contract. There is no doubt but a contract founded upon a legal consideration, whereby the obligor undertakes to furnish the obligee, or to one of the latter's near relatives, as the case may be, at death, a burial reasonably worth a fixed sum, would be a valid contract. If the citizen of small means, or for any other reason, desires to make a definite arrangement for the expenses of his funeral, and thus make certain of a sufficient amount to secure a respectable burial, the law will sustain him, if he will keep his contract within certain well-defined limitations demanded by both the statute and public policy. Such a contract, however phrased, would be an indemnity contract.

Bouvier defines an "insurance contract" to

be one "whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject, by specific perils." Bouvier's L. Dic., p. 1008, "Insurance." In *State v. Railroad Co.*, 68 Ohio St. 9, 67 N. E. 93, 64 L. R. A. 405, 96 Am. St. Rep. 635, life and accident insurance is defined to be "a contract whereby one party, for a stipulated consideration, agrees to indemnify another against injuries by accident or death." In *Commonwealth v. Beneficial Ass'n*, 137 Pa. 412, 18 Atl. 1112, it is said: "A contract of insurance is purely a business adventure, not founded on any philanthropy or charitable privilege; and the design and purpose of an insurance company and the dominant and characteristic feature of its contract is the granting of an indemnity, or security against loss, for a stipulated consideration. The same subject is stated in Cooley's *Briefs on L. of Ins.* vol. 1, p. 5, thus: "Perhaps a better definition is that a contract of insurance is an agreement by which one party for a consideration promises to pay money, or its equivalent, or do some act of value to the assured, upon the destruction or injury of something, in which the other party has an interest." "To render a contract one of life insurance the payments must be contingent upon the duration of human life." 25 Cyc. p. 697. See, also, *May on Insurance*, § 112; *Standard Dict. "Insurance"*; *People v. Rose*, 174 Ill. 810, 51 N. E. 246, 44 L. R. A. 124; *Words & Phrases*, "Insurance"; 15 Am. & Eng. Ency. p. 878.

In the light of the foregoing definitions, we again inquire: Was the contract solicited and taken of Charles C. Davis, by appellee, any kind of life insurance, within the meaning of the statute? The contract was issued by an association whose declared object is to secure, or make certain, by a system of mutual contribution, to each member of the association, at death, the specific benefit of \$75 for application to his burial service. This was indemnity, or security, that at the cessation of the life of the member a certain sum of money should be payable by the association for his burial, whether the deceased had paid one assessment or a thousand. The controlling elements of the contract, as interpreted by the by-laws, are in all material respects similar to those of an ordinary mutual life insurance company. The members of the association are both the indemnitors and the indemnitees. It pays its losses from a mutually contributed fund, and divides its profits among the members. Death assessments must be paid by the contract holder during the life of the insured, and the promised indemnity is payable in a lump sum, and in a definite amount. The association needs and employs agents to represent it. It solicits from the general public. It is founded on no principle of philanthropy, benevolence, or charity. It is not a benefit and protective society, designed to furnish relief to its sick and disabled mem-

bers out of funds mutually contributed for that purpose. It is simply a business enterprise in which the contract holder is promised a definite thing, in consideration of his performance of a definite undertaking on his part. The contract is determinable by the cessation of a human life, and belongs to that extended class of agreements dependent upon such contingency, and commonly known as "life insurance." It is therefore life insurance within the meaning of section 4713, *supra*, and subject to the wholesome provisions of our insurance laws. *State v. Wichita Mutual Burial Association*, 73 Kan. 179, 84 Pac. 757; *Fikes v. State*, 87 Miss. 251, 39 South. 783; *State v. Beardsley*, 88 Minn. 20, 92 N. W. 472; *In re Solebury Mutual Protective Society*, 4 Com. Pl. R. (Pa.) 11. The Kansas case, *supra*, involved an association that had by-laws, and issued certificates of membership substantially identical with those under consideration; and, concerning the purposes of the association, that court said: "The business designed to be transacted under the plan of the Wichita Mutual Burial Association is plain ordinary insurance." In the case before us, some of the details of the plan, as outlined by the by-laws, are veiled, and give evidence of an effort to avoid the classification just made. Some of the provisions are unreasonable, some unguarded, and others indefinite, and tend to expose the concern to the suspicion that the whole system is, in real design, but the scheme of an undertaker to promote his private business, largely at the expense of persons of small means. A wise public policy demands that the laws be liberally construed to circumvent any attempt, by such bodies, to evade the reasonable and beneficent restraints of the statute.

This leads us to the important inquiry: Does it appear that the beneficiary of the contract has an insurable interest in the life of the insured, Charles C. Davis? First, who is the beneficiary of the insurance contract? It is contended by the Attorney General that it is C. W. Morrison & Son, the official undertakers, and by the appellee that it is Davis' estate and next of kin, who, but for the insurance, would be called upon to furnish the burial. "Beneficiary" is defined in Webster's Int. Dict. as "one who receives a benefit or advantage." "The 'beneficiary' is the person to whom a policy of insurance effected is payable." Words and Phrases, vol. 1, p. 750. There is no beneficiary named in the certificate of membership issued to Davis, and nothing of the contract is mentioned beyond the statement that Davis is a member "and entitled to all the benefits of a member of the association in accordance with the by-laws thereof." So we must go to the "by-laws" for an exposition of the contract. From these by-laws, we learn the terms of the contract to be that Davis, as a member, had undertaken to pay to the association 11 cents on every death in the

membership that should occur before his own, and in consideration of which, upon his death, the association was to pay to C. W. Morrison & Son \$75 for burial goods and service. It is expressly agreed, as shown by articles 14 and 15, above set out, that C. W. Morrison & Son, their heirs and assigns, as undertakers, shall furnish the supplies and services for the burial, and the association shall pay to them the full amount of the benefits accruing under the policy contract, for such services, and no part thereof "to the surviving relatives and friends as death benefits." It is plain that the contracting parties intended to make Morrison & Son the sole beneficiary. Under the by-laws, the insured is not entitled to withdraw profits, or to receive dividends, or sick or other benefits. He is not even entitled to revoke the appointment of his undertaker, and commit that duty to his relatives and friends. The \$75 benefit must be paid to Morrison & Son, their heirs and assigns, and to no one else. Neither the administrator, nor the heirs of the insured, could maintain an action against the association for a default in payment. The right to bury the insured is a contract right of Morrison & Son, deemed so absolute and personal and beneficial as to be descendable and assignable. If it should turn out that the insured, at the end of life, has neither estate nor next of kin, would that contingency make Morrison & Son any more beneficiaries than they otherwise are? It is argued that the undertakers will take no benefit; that they will return the money's worth to the deceased. In answer, it may be said that they may at least take the contractor's profit, which, under the by-laws, is left to their unbridled greed. We conclude that if the estate, or next of kin, can, under the terms of the contract, be considered, in any just sense, beneficiaries, it must be ascribed to a secondary degree, and we hold that Morrison & Son, as the official undertakers of said association, are the primary and intended beneficiary.

The question then arises: Have Morrison & Son a bona fide insurable interest, in whole or in part, in the life of the insured? It is said in Words and Phrases, vol. 4, p. 3673: "The tendency of the American decisions is to hold that, wherever there is any well-founded expectation of, or claim to, any advantage to be derived from the continuance of a life, there is an insurable interest in the life" —citing Bliss, Life Ins. §§ 21-31; May, Ins. 102-111. By the same volume, a clear and succinct definition, in these words, "a person has an insurable interest in the life of another, where there is a reasonable probability that he will gain by the latter's remaining alive, or lose by his death," is credited to 3 Kent, Com. (14th Ed.) 566, note. It is charged in the affidavit that neither the firm, nor any member of the firm, of Morrison & Son, had any bona fide insurable interest in the life of Charles C. Davis at the time said policy

was issued; nor was the firm, nor any member thereof, at the time, related to said Davis in any degree of kinship whatever. There is nothing in the case, as against these direct averments, from which we can infer either an insurable interest or kinship.

The second count alleged substantially the same facts as did the first, and set out a copy of the by-laws, and then charged that, at the time said policy was written and issued, said Charles C. Davis, the person whose life was thereby insured and to whom the policy was issued, had not first passed a satisfactory medical examination by a physician duly authorized to practice medicine in the state of Indiana. This count also stated a sufficient charge under said section.

The judgment is reversed, and the cause remanded, with instructions to overrule the motion to quash the affidavit.

(171 Ind. 294)

### BLACK v. STATE. (No. 21,242.)

(Supreme Court of Indiana. Nov. 24, 1908.)

#### 1. APPEAL AND ERROR (§ 613\*)—BILL OF EXCEPTIONS.

The bill of exceptions is not before the court on appeal, where the evidence has been brought into the record by appending what purports to be the original bill of exceptions to the transcript, following the clerk's general certificate, and by adding to the bill a special certificate of the clerk, under seal, that defendant had filed in the clerk's office on a certain day "the above and foregoing original longhand manuscript of the evidence," taken and certified by the official reporter.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 613.\*]

#### 2. APPEAL AND ERROR (§ 613\*)—BILL OF EXCEPTIONS—AUTHENTICATION—SUFFICIENCY.

A special certificate of the clerk of court certifying to the original longhand manuscript of the evidence is insufficient to authenticate the bill of exceptions, since it is the bill, and not the original longhand manuscript, which must be looked to to determine what the evidence was.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2705; Dec. Dig. § 613.\*]

Appeal from Circuit Court, Jay County; J. F. La Follette, Judge.

George Black was convicted of exhibiting a gaming device for gain, and appeals. Affirmed.

Geo. T. Whitaker and S. A. D. Whipple, for appellant. James Bingham, E. M. White, H. M. Dowling, and A. G. Cavins, for the State.

GILLETT, C. J. Prosecution for exhibiting a gaming device for gain. The questions raised depend for their proper determination upon the evidence, since no other questions are made, except such as pertain thereto, under the portion of appellant's brief devoted to points and authorities. The method by which it has been sought to bring the evidence into the record, so far as certificates

by the clerk are concerned, has been by appending what purports to be the original bill of exceptions to the transcript, following the clerk's general certificate, and by adding to said bill a special certificate by the clerk, under the seal of the court, to the effect that the defendant in the cause had filed in the clerk's office on a certain day "the above and foregoing original longhand manuscript of the evidence," taken and certified by the official reporter. It is clear upon this state of the record that the bill of exceptions is not before us. *De Hart v. Board*, 143 Ind. 363, 41 N. E. 825; *Johnson v. Johnson*, 156 Ind. 592, 60 N. E. 451; *Butt v. Lake Shore*, etc., R. Co., 159 Ind. 490, 65 N. E. 529; *Bingle v. State*, 161 Ind. 369, 68 N. E. 645; *Huber Manufacturing Co. v. Busey*, 18 Ind. App. 410, 43 N. E. 967.

Relative to the clerk's second certificate, if we were to attach force to it, it is insufficient, since it fails to authenticate said bill. It is the bill of exceptions, and not the original longhand manuscript of the evidence, which the clerk is authorized to certify to. We look to the original bill to determine what the evidence was, for, when the bill is before us, it is the act of the judge which gives authenticity to the contents of the bill. *Adams v. State*, 156 Ind. 596, 59 N. E. 24; *Henderson v. McAllister*, 141 Ind. 436, 46 N. E. 1071; *Pennsylvania Co. v. Brush*, 130 Ind. 347, 28 N. E. 615.

As the record fails sufficiently to present any question for our decision, it follows that the judgment must be affirmed.

It is so ordered.

(171 Ind. 736)

### BLACK v. STATE. (No. 21,243.)

(Supreme Court of Indiana. Nov. 24, 1908.)

Appeal from Circuit Court, Jay County; J. F. La Follette, Judge.

George Black was convicted of exhibiting a gaming device for gain, and appeals. Affirmed.

Geo. T. Whitaker and S. A. D. Whipple, for appellant. James Bingham, E. M. White, H. M. Dowling, and A. G. Cavins, for the State.

GILLETT, C. J. The record in this case is in the same condition as in *Black v. State* (No. 21,242, at this term) 86 N. E. 72, and on the authority of that case the judgment herein is affirmed.

(171 Ind. 736)

### BLACK v. STATE. (No. 21,244.)

(Supreme Court of Indiana. Nov. 24, 1908.)

Appeal from Circuit Court, Jay County; J. F. La Follette, Judge.

George Black was convicted of exhibiting a gaming device for gain, and appeals. Affirmed.

Geo. T. Whitaker and S. A. D. Whipple, for appellant. James Bingham, E. M. White, H. M. Dowling, and A. G. Cavins, for the State.

GILLETT, C. J. The record in this case is in the same condition as in *Black v. State* (No.

21,242, at this term) 86 N. E. 72, and on authority of that case the judgment herein is affirmed.

(171 Ind. 725)

**STATE v. ROMAINE** (No. 21,197.)

(Supreme Court of Indiana. Nov. 24, 1908.)

Appeal from Circuit Court, Orange County; Thomas B. Buskirk, Judge.

Harry Romaine having been discharged on a charge of unlawfully visiting a gambling house, the state appeals. Reversed, with instructions.

James Bingham, Geo. W. McMahan, El. M. White, H. M. Dowling, and A. G. Cavina, for the State.

**JORDAN, J.** Appellee, in this case, is charged upon affidavit with having unlawfully visited a gambling house in Orange county, Ind., in violation of section 470 of the Public Offense Statute of 1905 (Laws 1905, p. 693, c. 169; section 2371, Burns' Ann. St. 1908). Upon his motion the affidavit was quashed and judgment rendered discharging him without day. The state appeals and assigns that the court erred in sustaining the motion to quash the affidavit.

The charging part of the affidavit in this case is identical with the one involved in *State v. Bridgewater* (No. 21,189, decided at last term) 85 N. E. 715. The same questions in regard to its sufficiency are presented and urged by counsel as were in the latter appeal. Upon the authority of the decision in that case, the affidavit herein in controversy must be held sufficient.

The judgment below is reversed, with instructions to the lower court to overrule the motion to quash.

(172 Ind. 370)

**LEIMGRUBER v. LEIMGRUBER.**<sup>1</sup>  
(No. 21,180.)

(Supreme Court of Indiana. Nov. 24, 1908.)

**1. EXECUTORS AND ADMINISTRATORS (§ 227\*)—PRESENTATION OF CLAIMS—STATEMENT.**

Under Burns' Ann. St. 1901, § 2405, and Burns' Ann. St. 1908, § 2828, relating to claims against decedents' estates, and providing that the claimant shall file a succinct and definite statement thereof, in the clerk's office, a formal complaint is not necessary, and a statement is sufficient which shows that the claim is within the statute of limitations, and exhibits the net amount of the sums claimed, and alleges that the same are unpaid.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 811; Dec. Dig. § 227.\*]

**2. APPEAL AND ERROR (§ 960\*)—REVIEW—DISCRETION OF TRIAL JUDGE.**

A motion to make a claim against a decedent's estate more specific is largely within the discretion of the trial judgment, and, for his ruling to be reversible error, it is necessary to show injury from the denial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 8832; Dec. Dig. § 960.\*]

**3. HUSBAND AND WIFE (§ 39\*)—MUTUAL TRANSACTIONS.**

A married woman may deal with her husband as with a stranger, but the husband, on account of his presumed superior, dominant influence to bind his wife, must clearly establish the contract and show that it is fair to her.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 220; Dec. Dig. § 39.\*]

**4. APPEAL AND ERROR (§ 1011\*)—REVIEW—FINDINGS OF COURT—CONFLICTING EVIDENCE.**

The findings of a trial court on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 8963; Dec. Dig. § 1011.\*]

**5. EXECUTORS AND ADMINISTRATORS (§ 252\*)—CLAIMS AGAINST ESTATE—DEPOSITS IN BANK—OWNERSHIP—EVIDENCE.**

On a claim by a husband against the estate of his deceased wife for moneys deposited in a bank in her name designated as "Special" and "Agent," and also for money paid on building and loan stock, evidence held sufficient to show claimant's ownership of such funds.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 903; Dec. Dig. § 252.\*]

**6. EVIDENCE (§ 271\*)—ADMISSIBILITY—SELF-SERVING DECLARATIONS.**

On a claim by a husband against the estate of his deceased wife for money deposited in bank in her name, as "Agent," testimony of a witness for the estate as to what deceased said about the money was properly excluded when the question called for a purely self-serving statement.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1094; Dec. Dig. § 271.\*]

**7. WITNESSES (§ 267\*)—CROSS-EXAMINATION—REPETITION OF TESTIMONY.**

It is within the discretion of the trial court to refuse to permit cross-examination calling for a repetition of testimony given on direct examination.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 923; Dec. Dig. § 267.\*]

**8. TRIAL (§ 363\*)—VENIRE DE NOVO—GROUNDS.**

A motion for a venire de novo does not apply to special verdicts or to special findings unless such verdict or finding is so uncertain, ambiguous, or otherwise defective that no judgment can be rendered thereon.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 869; Dec. Dig. § 363.\*]

Appeal from Circuit Court, Decatur County; Marshall Hacker, Judge.

Action by William F. Leimgruber against William F. Leimgruber as administrator of Mary M. Leimgruber, deceased. From a judgment for claimant, the estate appeals. Affirmed.

Wickens & Osborn, for appellant. Bennett & Davidson, for appellee.

**HADLEY, J.** William F. Leimgruber, being the administrator of his wife's estate (Mary M., deceased), filed a personal claim against his decedent's estate for money had and received for the benefit of the claimant for more than \$12,000. Deeming the claim of sufficient importance, the court appointed Wickens & Osborn, reputable attorneys of the bar, to defend on behalf of the estate. There was no special answer. The cause was submitted to the court for trial, and upon request he returned a special finding of facts and his conclusions of law thereon. The finding was in favor of the claimant for \$8,771.27. A motion for a new trial was denied the estate, and it appeals.

The first question we are called upon to

<sup>1</sup>For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>2</sup>Rehearing denied, 85 N. E. 592.

decide is the correctness of the court's action in overruling appellant's motion to make the claim more specific. The complaint was in a single paragraph, and in these words:

"To money had and received by decedent for the use and benefit of the claimant, William Leimgruber, from June, 1898, to April, 1906, and which is due and unpaid.. \$ 7,445 64

"For money paid by the claimant, William Leimgruber, for the use and benefit of the decedent, and at her request to Mary J. Hart, and Jessie Woodfill, upon the following dates and for the following amounts, to wit:

Oct. 25, 1898.....	\$395 50
do .....	400 00
Nov. 22, 1899.....	367 50
do .....	400 00
Dec. 6, 1900.....	291 00
do .....	509 00
Dec. 23, 1901.....	280 48
do .....	489 54
Jan. 5, 1903.....	231 00
do .....	469 00
Jan. 5, 1904.....	202 94
do .....	597 06
Jan. 5, 1905.....	167 16
do .....	685 09
	\$ 5,465 16

\$12,910 80

"That in June, 1898, claimant, William Leimgruber, husband of the decedent, engaged in the saloon business in the city of Greensburg, Decatur county, Ind., and was engaged in said business in said city continuously until April —, 1906, the date of decedent's death. That, while so engaged in said business, claimant and said decedent agreed that the money derived from said business should be deposited in the name of decedent in the Citizens' National Bank of Greensburg, Ind., and the Workingmen's Building & Loan Association of Greensburg, Ind., the title to said money so to be deposited to be and remain in claimant and be the property of claimant. That in pursuance to said agreement there was placed in said Building & Loan Association the sum of \$——, which, together with accrued dividends thereon, is now \$1,662.80; and in pursuance to said agreement there was deposited in the name of decedent in the said Citizens' National Bank the money derived from said saloon business, and the property of claimant, many thousand of dollars. That from said moneys so deposited there was drawn out by claimant for the conduct of said business and other expenses of claimant, a large sum to wit, \$——, and there was drawn out from said money so deposited the sum of to wit, \$5,465.16, which sum was paid at the request of the decedent, and for her use and benefit, to Mary J. Hart and Jessie Woodfill, and the further sum of \$650, which was paid to Ann Murray for the use and benefit of decedent and at her request, leaving as a balance on April —, 1906, in said Citizens' National Bank, of said money so deposited as aforesaid and the property of claimant, the sum of \$5,132.84, and leaving in said building and loan association, with accrued dividends, the sum of \$1,662.80. That

by reason of the foregoing facts there is now due and owing this claimant from said decedent the sum of \$12,910.80, which sum is unpaid."

The claim was duly verified.

The motion to make more specific requested the court to require the claimant to show, when the decedent and claimant made the agreement, that the money derived from the saloon business, as alleged, should be deposited in the Citizens' National Bank, and in the Workingmen's Building & Loan Association, in her name, and be the property of the claimant; and that he show therein the particular sums, and the times when said moneys were deposited in the said bank and loan association, as the property of the claimant, under said agreement; and that claimant show the amount drawn out of the funds deposited in conducting the saloon business.

It is not necessary, under section 2828, Burns' Ann. St. 1908, and section 2465, Burns' Ann. St. 1901, in presenting a claim against a decedent's estate, to present a formal complaint, but it will be deemed sufficient if there is filed such a "succinct and definite statement" of the facts as will exhibit a prima facie claim. *Stanley's Estate v. Pence*, 160 Ind. 636, 641, 66 N. E. 51, 67 N. E. 441; *Miller v. Eldridge*, 126 Ind. 461, 27 N. E. 132; *Stricker v. Barnes*, 122 Ind. 348, 23 N. E. 263. We see no reason why the pleading is not good on demurrer, as presenting a legal demand against the estate. It will be observed that the averments appearing in the latter portion of the pleading are wholly in explanation of the two foregoing items. The pleading shows that the date of the agreement was within the statute of limitation; it exhibits the net amount of the sums received by the decedent under said agreement, and that the same were unpaid. This states a prima facie claim under the above authorities.

The overruling of the motion to make the claim more specific was so largely a matter of discretion with the trial judge that to constitute it reversible error, on appeal, it is necessary for the mover to show that he was in some way injured by the denial. *Insurance Co. v. Rowe*, 117 Ind. 202, 20 N. E. 122; *Railroad Co. v. Miller*, 36 Ind. App. 26, 72 N. E. 827, 73 N. E. 1001.

In the *Rowe* Case, the court said, by Mitchell, J.: "While the granting or refusing of such motions is not a matter wholly within the discretion of the nisi prius courts, it is nevertheless so far discretionary that a reversal would not follow, except in a case where it appeared that the rights of the complaining party may have suffered." As the claim stood the same evidence was admissible as would have been if the motion had been granted and enforced, and it is not suggested how the estate would have been better advised of what it had to meet. There was no reversible error in overruling the motion.

The special finding discloses that the appellant, William Leimgruber, was married to his wife, Mary M., in November, 1897. At the time of the marriage, Mary was the owner of real estate of the value of \$11,000, upon which there was a mortgage, in favor of Mary Hart and Jessie Woodfill, for \$5,650. Mary M. died on April 26, 1906, the owner of real estate of the value of \$11,650, which was incumbered by mortgage for \$2,148, the wife's real estate being her only source of income while the wife of claimant, except \$301 inherited from deceased relatives. The claimant, from June, 1898, until after the death of his wife, April 26, 1906, was engaged in the retail saloon and lunch business in Greensburg, under a license issued in his name. At the beginning of his business in June, 1898, the claimant opened an account with the Citizens' National Bank, in his own name, and continued the same in his own name until July 23, 1901, when his said account, being overdrawn for \$2.50, was settled and closed, and no other account in the name of the claimant was thereafter opened or kept in that or any other bank in Greensburg in the name of the claimant during the lifetime of his wife, Mary. During the time claimant maintained his said account with the Citizens' National Bank, from June 14, 1898, to July 23, 1901, he deposited therein all receipts from his saloon business, amounting to \$18,291. After July 23, 1901, the claimant deposited in said bank the proceeds of said saloon and lunch business, in the name of "Mary M. Leimgruber, Special," and from July 9, 1901, to April 23, 1907, the day before his wife's death, there was deposited to said account of "Mary M. Leimgruber, Special," from the moneys received from said saloon and lunch business, all of which money belonged to the claimant, the sum of \$22,667; that during the same period all bills pertaining to said business and the family expenses of claimant were paid by claimant drawing his checks on said "special" account, and at the time of his wife's death there was a balance remaining of said account of \$266.45. The claimant deposited the money, derived from the saloon and lunch business, in the name of "Mary M. Leimgruber, Special," for the purpose of making it appear that he had no money in bank, in the event that he should be prosecuted and convicted of a violation of the liquor laws; and the claimant did not make a gift of said money to his wife, and it was not his intention to give her any money that he had, or should acquire, from the saloon business. Beginning October, 1898, and continuing until April 24, 1906, there was a further account kept at said bank, in the name of "Mary M. Leimgruber, Individual," and up to the time of Mary M.'s death there was deposited to this account \$8,036, and from which account all payments on the Hart and Woodfill mortgage, noted in the claim, were made, amounting to the sum of \$5,465.15.

On July 8, 1901, the decedent drew her check against the account of "Mary M. Leimgruber, Special," for \$273.77, and with it opened a further account in said bank, in the name of "Mary M. Leimgruber, Agent," and continued to make additional deposits thereto from time to time, paid therefrom a personal debt to Ann Murray of \$650, and at the time of her death had a balance to her credit of \$4,157.82, all of which deposits were made with the claimant's money, and without his knowledge and consent. In 1900, the claimant subscribed for 10 shares of stock in a local building and loan association, in the name of his wife, paid all fees and all dues from his own money, retained absolute possession of the passbook, and which stock, at the death of his wife, had a cash book value, from weekly dues and dividends, of \$1,697.60. The building and loan stock, and the balance appearing in each of the three bank accounts at her death, were invoiced and appropriated as assets of the decedent's estate.

On the foregoing facts, the court stated conclusions of law to the effect that the claimant was entitled to recover from his wife's estate the balance existing in the accounts designated as "Mary M. Leimgruber, Agent," at the time of her death, and \$650 shown to have been paid out of the "Agent" account on the personal debt of the decedent, and the cash value of the building and loan stock, amounting in all to \$6,771.27.

As constituting the basis for the conclusions of law that the balances in the "Special" and "Agent" accounts were the property of the claimant, it is directly found that the money paid into the "Special" account proceeded from the saloon and lunch business of the claimant, and was to be kept in the bank in the name of "Mary M. Leimgruber, Special," under an agreement of the two that it should be so kept and remain the property of the husband. It was treated by both in accordance with such an agreement; by the husband, who listed the saloon property for taxation in his own name, the entire period, except for one year, and by checking on the account to meet his family expenses, as well as to keep the saloon going; in short, by the exercise of absolute control and dominion over it. The wife, on the other hand, except for the single instance when she started her "Agent" account, treated the "Special" account with utter indifference. She made no checks upon it, no deposits to it, and at the same time maintained in the bank her own undisputed account, designated as "Mary M. Leimgruber, Individual." The designation of this latter account was, in substance, an acknowledgment on her part that the other two then running in her name, in the same bank, namely, the "Special" and "Agent" were not her deposits. It was a notice by her that the two latter were to be distinguished from her individual account. The one marked "Agent" was a positive declaration that the deposit was not hers, but be-

longed to a principal. The agreement, the court finds to have been entered into, and the books of the bank make it clear that the balance found at the decedent's death, in each the "Special" and "Agent" accounts, belonged to the claimant. The \$650 paid on her personal debt, in the purchase of real estate in her own name, was clearly shown to have been paid from the "Agent" account, which, as we have seen, was created and maintained with the claimant's money, and without his knowledge and consent. With respect to the building and loan stock, the finding is, in effect, that the claimant subscribed for himself, in the name of his wife, and paid for and maintained it, without the knowledge of his wife. Under the finding, there was no delivery, and no gift of the stock to the wife.

Under our statutes, a married woman has the power to contract as feme sole, except she is forbidden to convey or incumber her real estate, or enter into a contract as surety for another. Section 7855, Burns' Ann. St. 1908. She may carry on business on her own separate account, and in relation to her personal estate may make any contract she chooses. Section 7853, Burns' Ann. St. 1908. On her part, a married woman may deal with her husband as with a stranger, but the husband, on account of his presumed superior, dominant influence to bind his wife, must clearly establish the contract, and show that it is fair to her and free from over-reaching. *Harrell v. Harrell*, 117 Ind. 94, 19 N. E. 621; *Arnold v. Engleman*, 103 Ind. 512, 8 N. E. 238; *Wilson v. Wilson*, 113 Ind. 415, 15 N. E. 518; *Gosnell v. Jones*, 152 Ind. 638, 53 N. E. 381. There is nothing in the findings to indicate unfairness to the wife, or that any advantage was taken of her. At the time of the marriage she was the owner of an estate, consisting of real property in Greensburg, of the value of \$11,000. During her coverture of eight years, she kept her property in repair, increased her holdings by an additional purchase to the value of \$11,650, paid a personal mortgage indebtedness of \$5,465.15, and at the time of her death had a balance to her credit in bank of \$708.57.

Appellant makes complaint that the special finding of facts, as a whole, and certain specific facts set forth, were not sustained by sufficient evidence, and are contrary to law. Concerning the items particularly complained of, and also the findings as a whole, the evidence was conflicting, and the trial court, having had the witnesses before it, and a superior opportunity to judge of their credibility, reached conclusions that all the findings of fact were sufficiently proven, and,

under the circumstances, it is not within our province to overthrow them.

The claimant had offered evidence in support of the issue that the decedent had created and maintained at the bank the "Agent" account, with his money and without his knowledge and consent, and during the examination of one of the defendant's witnesses she was asked the following question: "What did your mother say about the money in the 'Agent' book, as to where it came from?" Upon the defendant's objection, the court held the question improper, and appellant insists that the ruling was error. We think not. It was the party's own witness. The question was addressed to no particular time, or place, or act, and, being in the absence of the claimant, called for a purely self-serving statement.

George Bruce, secretary of the Workingmen's Building & Loan Association, a witness for the claimant, in testifying concerning the claimant's subscription to the stock of said association, and the issuance to him, by the witness, of the building and loan passbook, was permitted by the court to state the conversation, or state what was said by the parties at the time, as a part of the transaction. Whereupon, on cross-examination, appellant's counsel asked the witness the following question relating to said conversation: "I will ask you if the conversation you have just recited was a part of the transaction in the issuing of that book." It will be observed that the question propounded did not relate to any particular statement, or part, of the conversation, but was, in effect, whether the conversation, as a whole, and the issuance of the passbook, were parts of the same transaction. The witness had just answered that they were, and we think it was a matter of discretion with the court to require, or refuse, a repetition of the answer; furthermore, we do not see how appellant was injured by the exclusion of the answer.

Appellant's motion for a venire de novo because the special finding of the court is so uncertain, indefinite, and ambiguous that no judgment can be entered thereon, was overruled. Other reasons assigned were causes for a new trial, but not for a venire de novo. The latter motion does not apply to special verdicts, or to special findings, unless the special verdict, or special finding, is so uncertain, ambiguous, or otherwise defective that no judgment at all can be rendered upon it. *Maxwell v. Wright*, 160 Ind. 515, 517, 67 N. E. 267. We have found that this is not such a case.

We find no error. Judgment affirmed

(4 Ind. App. 408)

**OVERMEYER et al. v. BOARD OF COM'RS OF CASS COUNTY.** (No. 3,243.)<sup>1</sup>

(Appellate Court of Indiana, Division No. 1. Nov. 24, 1908.)

**1. HIGHWAYS (§ 118\*)—IMPROVEMENTS—EXPENSES—COUNSEL FEES—AUTHORITY TO EMPLOY COUNSEL.**

A petitioner for a highway improvement, under Acts 1905, p. 521, c. 167, relating to highways, has no authority to employ an attorney to give advice to the board of commissioners, after the matter has been presented to it, and charge the expenses to the construction fund.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 355; Dec. Dig. § 118.\*]

**2. HIGHWAYS (§ 118\*)—IMPROVEMENTS—"ALL EXPENSES INCURRED."**

The words "all expenses incurred," in Acts 1905, p. 557, c. 167, § 75, authorizing the board of commissioners to issue bonds for the construction of a highway improvement to an amount not exceeding the contract price, and "all expenses incurred" and damages allowed prior to the letting of the contract mean the expenses incurred in the performance of the work required by the act; and, though a petition must be filed to obtain an improvement, a petitioner employing an attorney to draw the petition cannot charge his fees to the construction fund.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 354, 355; Dec. Dig. § 118.\*]

**3. HIGHWAYS (§ 118\*)—IMPROVEMENTS.**

One seeking to recover a claim against a public fund must show a statute authorizing the recovery.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 118.\*]

Appeal from Circuit Court, Cass County; John S. Lalry, Judge.

Action by Frank P. Overmeyer and others against the Board of Commissioners of Cass County. From a judgment for defendant on sustaining a demurrer to the claim, plaintiffs appeal. Affirmed.

Robert C. Hillis and George A. Gamble, for appellants. John M. Ashby and Myers & Yarlott, for appellee.

**HADLEY, J.** This was an action by appellant against appellee to recover the sum of \$175 to pay attorneys, employed by him and others to prosecute a petition before the board of commissioners for the improvement of a public highway in Jackson township, under Acts Gen. Assem. 1905. The complaint, which was first filed as a claim before said board of commissioners, avers in substance that appellant, together with others, petitioned appellee for the improvement of a public highway in Jackson township, under Acts Gen. Assem. 1905; that said petition was granted, and such proceedings had under the law as were necessary for the construction of said improvements, which were ordered made and contracted for. It is then averred that to secure such improvements it was necessary for said appellant and other petitioners to have the services of an attorney for the purpose of preparing and filing

said petition, and the preparation of all the notices, records, entries, orders, etc., so that all of said steps would be taken according to law, and that they employed two attorneys for that purpose, who accepted the employment and performed the services, a bill of particulars of said services being filed as an exhibit and made a part of said claim. It is averred that cost of said services is reasonable, and that appellant ought to be allowed said sum, for himself and all the other petitioners, with which to pay said attorneys for said services, and the same be charged as a part of the estimated cost of the construction of said improvements, as one of the items of expense incurred prior to the letting of the contract for the improvement of said highway, as aforesaid. Prayer that said appellant and the other petitioners be allowed the sum of \$175, to be used in paying the attorneys for said services, as aforesaid. This claim was disallowed by the board, and appeal from such disallowance was taken to the Cass circuit court, and in said court appellee demurred to said claim, which demurrer was sustained. Appellant refused to plead further, and judgment was rendered in favor of appellee.

The question presented in this appeal is upon the ruling of the court in sustaining a demurrer to the claim. By the bill of particulars filed with the complaint it appears that all the services rendered for which compensation is claimed, except the preparation of the petition and presentation of the same to the board, were in the nature of legal supervision of the various steps imposed on the board by the law under which the petition was filed. It certainly requires no argument to sustain the position that the Legislature never contemplated that a petitioner for a highway improvement might employ an attorney to supervise the action of the board of commissioners in the construction of the improvement, and bind the fund to pay such attorney for such services. After the petition was filed the petitioner had no further legal concern with the matter. Everything to be done thereafter was to be done by the board of commissioners, and it alone was responsible for its being done legally and in due form. If it needed legal advice, it was its duty to secure it; but it would be strange indeed if this board which has the whole responsibility for its proceedings, could be compelled to receive and follow the advice of an attorney employed by the petitioners. Whether the board could employ counsel and charge the expense thereof to the construction fund is a question not here presented, and upon which we express no opinion. Certain it is that the petition or petitioners are not authorized to furnish the legal advisers to the board of commissioners, after the matter has been presented to it, and charge the expense

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup> Rehearing denied. Transfer denied.

thereof to the construction fund; but it is contended that the petitioners were compelled to employ a lawyer to prepare and present the petition. The provision of the statute, under which appellant seeks to recover, is as follows: "For the purpose of raising money to pay for construction, the board of commissioners shall issue the bonds of the county not to exceed in amount the contract price and all expenses incurred and damages allowed prior to the letting of the contract." Acts 1905, p. 557, c. 167, § 75; Burns' Ann. St. 1908, § 7725. To say that this provision is entitled to the broad general meaning sought to be given it by appellant would be a very dangerous construction. It would, in fact, be saying that any person who was interested in the road might authorize himself, or some other person, to perform some service looking to the establishment of the improvement, and present and recover a claim therefor. If appellant was authorized to employ an attorney to prepare the petition, he was just as well authorized to hire some one to circulate the petition, and, if he might employ some one to circulate the petition, it would be only a step further for us to say that he would be authorized to employ helpers to perfect an organization to carry the election; and it might be truthfully said that each of said employments was necessary in order to establish the improvement, while fundamentally it might be true that such improvement itself was not a necessity, though highly desirable. "All expenses incurred," as used in this statute, should be held to mean the expenses incurred in the performance of the work specifically required to be done by the provisions of said act. To hold otherwise would open up an unlimited field of employment. But there is no provision in the statute for the employment of an attorney to prepare the petition. In fact there is no provision requiring any one to file a petition. A petition must be filed to obtain the improvement, it is true, but the improvement is not required, and may not be necessary. The filing of the petition, therefore, was a voluntary act on the part of the petitioners. Whether they drew and presented the petition themselves, or employed an attorney to do it for them, was a matter of no particular importance to the other citizens of the taxing districts or the county. In this, as in the case of almost every public improvement, the burdens of the initiative are upon the progressive public-spirited citizens. The complaint does not show the necessity for the employment of an attorney to prepare and present the petition. While it is averred that such a necessity existed, this is merely a conclusion. No facts are stated upon which it is based. It does not appear that no one but a lawyer could have drawn and presented the petition. The law clearly specifies what the petition shall contain, and

we have no doubt that there are many men outside of the legal profession who could draw such a petition that would be in all respects in conformity to the act, and no formal presentation to the board of commissioners is required.

It is a well-established rule that, where one seeks to recover a claim against a public fund, he must show a statute authorizing such recovery. *Kersey v. Turner*, 99 Ind. 237; *Board, etc., v. Cole*, 2 Ind. App. 475, 476, 28 N. E. 772; *Board, etc., v. Fullen*, 118 Ind. 158, 20 N. E. 771. No such statute is pointed out. The demurrer was properly sustained.

Judgment affirmed.

(44 Ind. App. 480)

LOUISVILLE & S. I. TRACTION CO. v.

WORRELL (No. 6,465.)<sup>1</sup>

(Appellate Court of Indiana, Division No. 2  
Nov. 19, 1908.)

1. APPEAL AND ERROR (§ 289\*)—PRESENTATION AND RESERVATION OF GROUNDS—MOTION FOR NEW TRIAL—RULING ON EVIDENCE—MOTION TO SUPPRESS DEPOSITION.

The ruling, on a motion to suppress a deposition, whether made before or during the trial, to be reviewable must be given as a cause for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1692; Dec. Dig. § 289.\*]

2. TRIAL (§ 359\*)—GENERAL VERDICT—SPECIAL INTERROGATORIES—MOTION FOR JUDGMENT ON SPECIAL INTERROGATORIES.

Only the pleadings, the general verdict, and the answers to special interrogatories can be considered in determining the force of special interrogatories, on a motion for judgment on the interrogatories notwithstanding the general verdict.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 359.\*]

3. TRIAL (§ 353\*)—ANSWERS TO SPECIAL INTERROGATORIES—INCONSISTENCIES—EFFECT.

Answers to interrogatories which are in conflict or are inconsistent with each other or are uncertain in their meaning will not control the general verdict; and hence, where, in an action for injuries to a street car passenger, the complaint charged negligence in the care and operation of the controllers, whereby fire was produced, which alarmed plaintiff and caused her to jump from the car while in motion, answers to interrogatories that the burning of the controllers was the result of some unforeseen cause, that there was no inherent defect in the controllers, that controllers on street cars do not burn out when in good order, and that the car was not inspected the night before the accident, being merely inconsistent with each other, and not necessarily with a general verdict for plaintiff, will not override such general verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 356; Dec. Dig. § 353.\*]

4. TRIAL (§ 295\*)—CONSTRUCTION OF CHARGE AS A WHOLE—REVIEW.

In passing on the question whether an instruction, in an action for injuries to a street car passenger, was erroneous for failing to charge on contributory negligence, it was proper to consider other instructions in reference to her negligence, and which covered the law on the subject.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

<sup>1</sup> Rehearing denied. Transfer denied.

**5. CARRIERS (§ 348\*)—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.**

In an action for injuries to a street car passenger, who jumped from a moving car because alarmed on account of the explosion of the controllers, instructions that the existence of fire in the vestibules of the car did not authorize plaintiff, assured that there was no danger, to heedlessly jump from the car while in motion; that if plaintiff by her rashness contributed to the accident, the verdict should be for defendant; that sometimes an injury to a passenger might as well happen through his own negligence as that of the carrier, and an injury under such circumstances raised no presumption of negligence, etc.—were favorable to defendant on the issue of contributory negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1403-1407; Dec. Dig. § 348.\*]

**6. CARRIERS (§ 338\*)—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE.**

Where there was evidence that a passenger, moved by the impulse of fear caused by the explosion of the controllers, carefully stepped off the car and was thrown to the ground and injured, the jury properly found that the passenger, in attempting to get away from the danger, was not negligent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1352; Dec. Dig. § 338.\*]

**7. TRIAL (§ 194\*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.**

An instruction, in an action for injuries to a passenger alighting from a street car to escape from danger, caused by the explosion of the controllers, that expert testimony had been introduced to show the effect of certain causes, "but the court warns the jury that such testimony does not establish the fact that the wires and fuse were defective as alleged in the complaint," is properly refused; it being for the jury to determine what any particular testimony did or did not establish.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 439-446; Dec. Dig. § 194.\*]

**8. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

In an action for injuries to a passenger who jumped from a car to avoid danger from the explosion of the controllers, the error, if any, in permitting an expert to testify as to other explosions on electric cars within his experience, and by what they were caused, was harmless to defendant; the evidence being pertinent only to the question of defendant's negligence, which was presumed under the doctrine of *res ipsa loquitur*.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

**9. CARRIERS (§ 316\*)—INJURIES TO PASSENGERS—NEGLIGENCE—PRESUMPTIONS.**

Where a passenger is injured without his fault through a defect in the appliance of the car on which he is riding, which is under the management of the carrier, the presumption of negligence arises against the carrier, and remains until overthrown by other facts.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1283; Dec. Dig. § 316.\*]

**10. CARRIERS (§ 316\*)—PASSENGERS—INJURIES—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.**

The burden of proving that a passenger, injured by jumping from a street car to avoid a threatened danger occasioned by the explosion of the controllers, was negligent, is on defendant.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1283-1294; Dec. Dig. § 316.\*]

**11. CARRIERS (§ 338\*)—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE.**

A passenger, whether on a steam railroad, a street railroad, or an interurban railroad, leaving her seat to escape an apparent danger occasioned by the explosion of the controllers, is not negligent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1352; Dec. Dig. § 338.\*]

**12. CARRIERS (§ 305\*)—INJURIES TO PASSENGERS—PROXIMATE CAUSE.**

Where, on the explosion of the controllers of a car, a passenger left her seat and stepped off the car, in motion, and was injured, the proximate cause of the injury was not the act of her leaving her seat, but the explosion of the controllers.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 305.\*]

**13. NEGLIGENCE (§ 119\*)—ALLEGATIONS OF NEGLIGENCE—PROOF.**

Where various acts of negligence are independently pleaded, it is only necessary to prove such facts averred as amount to a cause of action.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. § 119.\*]

**14. NEGLIGENCE (§ 119\*)—ALLEGATIONS OF NEGLIGENCE—PROOF.**

A plaintiff suing for personal injuries is not deprived of his right to rely on the doctrine of *res ipsa loquitur* by reason of having averred a particular act of negligence complained of, where such act is the one which legal inference tends to establish.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. § 119.\*]

**15. CARRIERS (§ 316\*)—INJURIES TO PASSENGERS—NEGLIGENCE—RES IPSA LOQUITUR.**

Where, in an action for injuries to a street car passenger, the complaint charges negligence in the care and operation of the controllers, whereby fire was produced, alarming plaintiff and causing her to jump from the car while in motion, the acts of negligence are such as legal inference tends to establish, and plaintiff is not deprived of her right to rely on the doctrine of *res ipsa loquitur*.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 316.\*]

**16. NEGLIGENCE (§ 121\*)—RES IPSA LOQUITUR—PROOF OF CAUSE OF ACCIDENT.**

An unsuccessful attempt to prove by direct evidence the precise cause of an accident does not estop the injured person from relying on the presumption applicable to it.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 121.\*]

Appeal from Circuit Court, Harrison County; Christopher W. Cook, Judge.

Action by Clara A. Worrell against the Louisville & Southern Indiana Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Rowland Evans, Charles D. Kelso, and William Ridley, for appellant. Geo. H. Hester, for appellee.

COMSTOCK, J. In the Harrison circuit court appellee sought to recover damages for personal injuries, alleged to have been sustained through the negligence of the appellant, its agents and servants, while she was a passenger upon one of its cars. The com-

plaint was filed in the Clark circuit court, and after successive changes of venue was tried in the court from which this appeal is taken, resulting in a verdict and judgment in favor of appellee for \$2,000.

With the general verdict the jury returned answers to interrogatories. The issues were formed by amended first and second paragraphs of complaint, separate demurrers thereto, and appellant's answer in general denial. In the reply brief it is conceded that each paragraph of the complaint states a cause of action. Appellant offered no evidence. The following is a brief outline of the facts alleged and supported by the evidence: Appellant operates an electric street railway system in the city of Jeffersonville, Ind. One of its lines extends eastwardly on Chestnut street from Spring street, upon which, at the time of the accident in question, it regularly operated electric cars, for the transportation of passengers, as a common carrier. The cars belonged to appellant, and were solely under its care, control, inspection, and management. It likewise furnished the electric motive power by which the cars were propelled. On the night of January 31, 1904, between 8 and 9 o'clock p. m., appellee, for the purpose of being transported to her home on Chestnut street, took passage on one of appellant's cars, and paid the customary fare therefor. It was a small-sized electric car, equipped with vestibule in front and rear, with a trolley pole operating on an overhead wire, with controllers, brakes, and in all respects similar in appearance and in construction to such electric cars as are universally in use on the streets of towns and cities. There was nothing about the appearance of the car to indicate to appellee that it was not in safe condition, or that there was any danger from any of its defective parts of an explosion or its taking fire. The night was dark and cloudy. After the car had run several blocks the controller on the front platform, where the motorman was standing, suddenly took fire and began burning while the car was still running. This burning produced flames of fire, vivid flashes of electricity, and a dense smoke that completely filled the car. It appeared to the passengers, as several of them testified, that the motorman had completely lost control of the car, and that it could not be stopped. There was an instant panic among them. Five women on the car, fearing for their lives, jumped from their seats, and started for the rear door for the purpose of getting off. Appellee was seated nearest to the door. She reached the platform while the car was still burning, and, believing that it could not be stopped and was in danger of burning, and that she was liable to be injured or killed if she remained thereon, she stepped off, as the car was moving about five miles an hour, as carefully as was possible under the circumstances, and was thereby thrown to the ground, by reason of which she sustained a

broken arm, permanently disabling her from earning a livelihood.

For reversal appellant relies upon the action of the court in overruling, respectively, its motion for judgment, on the answers to interrogatories returned by the jury, notwithstanding the general verdict, for a new trial, and to suppress the deposition of Davis L. Field. The ruling last named is made only an independent assignment of error. No question is presented thereby for the reason that it should be given as a cause for a new trial. And this is true whether the ruling is made before or during the progress of the trial. *Burnett v. Miles*, 148 Ind. 230, 46 N. E. 464; *Hatton v. Jones*, 78 Ind. 466; *Patterson v. Lord*, 47 Ind. 208; *Porter Huron Co. v. Smith*, 21 Ind. App. 234, 52 N. E. 106; *Capital Nat'l Bank v. Wilkerson*, 36 Ind. App. 551, 555, 76 N. E. 258; *Daunhauer v. Hilton*, 82 Ind. 531; *Jeffersonville, etc., R. Co. v. Riley*, 39 Ind. 568; *Mercer v. Patterson*, 41 Ind. 440; *Ferguson v. State ex rel.*, 90 Ind. 43; *Eubank's Manual*, § 132.

In arguing that the court erred in overruling appellant's motion for judgment on the answers to interrogatories appellant relies upon the answer to 63 and the absence of an answer to 64. No. 63 reads: "Was the burning out of the controllers the result of some unforeseen and unaccountable cause? Ans. Yes." No. 64 reads: "If you answer 63 in the negative, then please state in detail the cause of the burning out of the controllers." No answer. Counsel for appellant refer to the rule that only the pleadings, the general verdict, and the answers to special interrogatories can be considered in determining the force of such special interrogatories on the motion in question. Attention is called to the fact that each paragraph of the complaint charges negligence in the care or in the operation of the controllers, whereby sparks and flames of fire and flashes of electricity were produced which alarmed plaintiff and caused her to jump from the car while in motion, resulting in her injury. It is insisted that, as the burning out of the controllers was thus shown to have been the result of some unforeseen and unaccountable cause, appellant was not guilty of negligence in failing to foresee and guard against an unforeseen and unaccountable cause. Interrogatory No. 44 reads: "Was there an inherent defect in the controller, the cause of which neither science, mechanical nor electrical research has been able to discover, avoid, or remedy? Ans. No." Interrogatory No. 76 reads: "Were there many unknown causes that would burn out a controller? Ans. No." The last and the preceding interrogatories are inconsistent with the answers to the sixty-third. Interrogatory No. 33 reads: "Do controllers upon street cars burn out, although in apparent good order, and although daily inspected and found in good condition? Ans. No." In other interrogatories it was found that the car was not in-

spected the night before the accident, and that the defendant's cars were not inspected daily on and before the day of the accident. These answers are contradictory to No. 68, and make it manifest that the jury did not intend to find that the cause of the accident was not established, nor that the accident was occasioned by "unaccountable cause." Where answers to interrogatories conflict, or are inconsistent with each other, or are uncertain in their meaning, they will not control the general verdict. They cancel or neutralize each other, and do not overthrow the general verdict. *Wabash R. Co. v. Biddle*, 27 Ind. App. 161, 59 N. E. 284, 60 N. E. 12; *Cleveland, etc., R. Co. v. Wuest*, 41 Ind. App. 210, 83 N. E. 621. It has been held in numerous cases that the special findings of fact do not override the general verdict, unless there is a conflict between the two that cannot be reconciled by any evidence legitimately admissible under the issues. *Rhodius v. Johnson*, 24 Ind. App. 401, 56 N. E. 942; *Flickner v. Lambert*, 36 Ind. App. 524, 74 N. E. 263; *Cleveland, etc., R. Co. v. Wuest*, 41 Ind. App. 210, 83 N. E. 621.

We do not find in the record before us the conflict necessary to overthrow the general verdict.

Instruction No. 2, given to the jury at the request of appellee, is objected to because it fails to charge that, if from the evidence appellee was guilty of negligence contributing to her injury, she could not recover. The instruction correctly states the law, although it does not state all the law. In passing upon the question it is proper to consider other instructions given in reference to appellee's negligence, and which covered the law upon that subject. Instruction No. 2, given at request of defendant, stated that, if while plaintiff was riding, as alleged in her complaint, both or either of the controllers on the ends or end of the car burned out, and thereby flames of fire and smoke came forth into the vestibules of the car, but that such flames of fire were confined to the vestibules of said car, and after the appearance of said flames plaintiff was assured that there was no danger or cause for alarm, such circumstances did not authorize the plaintiff to rashly and heedlessly jump from the car while it was running at a rate of speed which made it dangerous to jump, and if the plaintiff did so jump, after such warning, then the verdict should be for the defendant. In other instructions given, the jury were told that they must be satisfied by the preponderance of evidence that the defendant placed the plaintiff in peril by the burning out of the controllers, or either of them, if they did so burn out, before they could find for the plaintiff; that if they find from the evidence that the plaintiff by her rashness or heedlessness or carelessness contributed to the accident, the verdict should be for the defendant; that if the plaintiff injured herself by jumping from the moving

car as the result of a rash apprehension of danger which did not exist, the verdict should be for defendant; that if the plaintiff without just cause jumped from the car at a time when it was going at a speed at which it was dangerous to go, the verdict should be for the defendant; that they should consider the conduct of any or all passengers on the car, and might consider the fact, if found to be a fact, that none of the other passengers jumped from the car, as to whether the plaintiff had just cause to jump from the car. Instruction No. 12 reads: "It sometimes happens that, from the very nature of an accident, it is disclosed that an injury to a passenger might as well have happened through his own negligence as that of the common carrier, and the injury under such circumstances raises no presumption that the carrier was negligent; and, if you are satisfied from the evidence that the plaintiff needlessly and rashly contributed to her own injury, then your verdict should be for the defendant." The instructions, taken together upon this question, were favorable to appellant.

There is evidence to show that, moved by the impulse of fear, caused by the flames of fire, vivid flashes of electricity, and smoke that filled the car, appellee carefully stepped off the car, and was thrown to the ground and received the injuries described. The jury have correctly found that plaintiff's attempting to get away from danger was not negligence. Serious consequences may reasonably have resulted from conditions as they appeared to appellee, and she was not negligent in attempting to escape therefrom. *Cincinnati, etc., R. R. Co. v. Acrea*, 41 Ind. App. —, 82 N. E. 1009; *Penn. R. Co. v. McCaffrey*, 139 Ind. 430, 33 N. E. 67, 29 L. R. A. 104; *Clark v. Penn. R. Co.*, 132 Ind. 199, 31 N. E. 808, 17 L. R. A. 811; 1 *Thomp. Neg.* § 196; 3 *Thomp. Neg.* § 2927.

Objection was made, and exception taken, to the refusal of court to give instruction No. 33, tendered by appellant, which reads as follows: "Expert testimony has been introduced in this cause for the purpose of showing the effect of certain causes, but the court now warns you that such testimony alone does not establish the fact that the wires, electrical apparatus, and fuse were either defective, uncovered, or uninsulated, as alleged in the plaintiff's complaint." This instruction was correctly refused, for the reason, if no other, that it was for the jury to determine what any particular testimony did or did not establish.

It is insisted that the court erred in permitting Wilfred Gross, an expert witness, to testify as to other explosions on electric cars within his experience, and by what they were caused. Conceding for the sake of argument, and for the purposes of this case only, that such ruling was erroneous, yet it was harmless. The evidence was pertinent only to the question of appellant's negligence.

Where a passenger is injured without his fault, through a defect in the appliance of the car in which he is riding, and which is under the management and control of the carrier, the presumption of negligence arises against the carrier, and remains until overthrown by other facts. *Cleveland, etc., Ry. Co. v. Hadley*, 40 Ind. App. 731, 82 N. E. 1025, and cases cited; *Knoefel v. Atkins*, 40 Ind. App. 428, 81 N. E. 600, 603; *Pittsburgh, etc., R. Co. v. Higgs*, 165 Ind. 694, 707, 708, 76 N. E. 299, 4 L. R. A. (N. S.) 1081; *Indianapolis, etc., Co. v. Schmidt*, 163 Ind. 360, 368, 369, 71 N. E. 201; *Cleveland, etc., R. Co. v. Newell*, 104 Ind. 274, 3 N. E. 836, 54 Am. Rep. 312, and cases cited; *Terre Haute, etc., R. Co. v. Sheeks*, 155 Ind. 74, 94-96, 56 N. E. 434, and cases cited; *Louisville, etc., Ry. Co. v. Miller*, 141 Ind. 533, 551, 552, 37 N. E. 343, and cases cited; *Kentucky, etc., Bridge Co. v. Quinkert*, 2 Ind. App. 244, 252, 28 N. E. 338; *Louisville, etc., R. Co. v. Faylor*, 126 Ind. 126, 25 N. E. 869; *Louisville, etc., R. Co. v. Hendricks*, 128 Ind. 463, 464, 28 N. E. 58. The burden of showing appellee guilty of contributory negligence was upon appellant. Appellee denied that she was warned not to leave the car. She alighted carefully. The accident was due to some defect in the appliance of the car, or condition of such appliance, which was peculiarly within the knowledge and control of the defendant. The verdict is a finding against appellant upon all the issues. The appellee was not guilty of contributory negligence unless it was that she left her seat to escape apparent danger. This conduct on her part, by many decisions, is held not to have been negligence. *Cincinnati, etc., R. Co. v. Acrea*, 41 Ind. App. —, 82 N. E. 1009; *Firebaugh v. Seattle Electric Co.*, 40 Wash. 658, 82 Pac. 995, 2 L. R. A. (N. S.) 836, 111 Am. St. Rep. 990; *Poulson v. Nassau Electric Co.*, 18 App. Div. 221, 45 N. Y. Supp. 941; *Buckbee v. Third Ave. R. Co.*, 64 App. Div. 360, 72 N. Y. Supp. 217; *Brod v. St. Louis Transit Co.*, 115 Mo. App. 202, 91 S. W. 993; *Chicago, etc., Traction Co. v. Newmiller*, 215 Ill. 383, 74 N. E. 410, 4 St. Ry. Rep. 165, and cases cited in note. The above ruling applies alike to steam railroads and street and interurban railways. *Bosqui v. Sutro R. Co.*, 131 Cal. 390, 63 Pac. 682; *Paynter v. Bridgeton Trac. Co.*, 67 N. J. Law, 619, 52 Atl. 367, and cases cited; *Brod v. St. Louis Transit Co.*, 115 Mo. App. 202, 91 S. W. 993. If a common carrier is liable, as has been held in numerous cases, for injury to a passenger while remaining passive, such carrier is equally liable to the passenger injured in an attempt to escape a reasonably apprehended danger. From the failure of the appellant to offer evidence to explain the explosion the

jury had the right to put a construction upon such failure of the defendant, and draw the inference of negligence. *Indianapolis, etc., Ry. Co. v. Darnell*, 32 Ind. App. 694, 695, 68 N. E. 609.

Under the evidence and the law we are of the opinion that the maxim "*res ipsa loquitur*" applies. It has been held to have applied in numerous cases in which the facts were analogous to the case at bar. *German v. Brooklyn Heights Co.*, supra; *Buckbee v. Third Ave. R. Co.*, supra; *D'Arcy v. Westchester, etc., Ry. Co.*, 82 App. Div. 263, 81 N. Y. Supp. 952; *Poulson v. Nassau, etc., R. Co.*, supra; *Lynch v. Metropolitan St. Ry. Co.* (Sup.) 90 N. Y. Supp. 378; *Firebaugh v. Seattle Electric Co.*, supra; *Chicago, etc., Trac. Co. v. Newmiller*, supra. The responsible cause of appellee's injury was the proximate cause. It was not the act of leaving her seat to escape from the car, but the explosion that was the direct cause. Appellant insists that there is an absolute failure of proof that the machinery, wires, or appliances of the car were in any way defective, or that the car was negligently operated, that the appellee, having alleged specific acts of negligence, cannot rely upon a presumption, that the burden was on appellee to prove one of the specific acts of negligence charged, and that the doctrine of *res ipsa loquitur* does not apply. Where various acts of negligence are independently pleaded, it is only necessary to prove such facts averred as amount to a cause of action. *New York, etc., R. Co. v. Flynn* (Ind. App.) 51 N. E. 741; *New York, etc., R. Co. v. Callahan*, 40 Ind. App. 223, 81 N. E. 670, 671; *Indianapolis, etc., R. Co. v. Shifer*, 35 Ind. App. 700, 702, 74 N. E. 19; *Terre Haute, etc., R. Co. v. McCorkle*, 140 Ind. 613, 40 N. E. 62; *Standard Oil Co. v. Bowker*, 141 Ind. 12, 16, 40 N. E. 128; *Penn. R. Co. v. Witte*, 15 Ind. App. 583, 43 N. E. 319, 44 N. E. 377. As to the right of appellee to rely upon the rule referred to, *Thompson* in his work on Negligence says: "The plaintiff in an action for personal injuries is not deprived of his right to rely upon the doctrine of *res ipsa loquitur* by reason of having averred the particular act of negligence complained of, where such act is the one which legal inference tends to establish." 6 *Thomp. Neg.* § 7643. In the case at bar the particular acts of negligence charged are such as its legal inference tends to establish. An unsuccessful attempt to prove by direct evidence the precise cause of an accident does not estop the injured party from relying upon the presumption applicable to it. *Cassady v. Old Colony, etc., Ry. Co.*, 184 Mass. 156, 68 N. E. 10, 63 L. R. A. 285.

Judgment affirmed.

(43 Ind. A. 265)

**COLUMBUS ST. RY. & LIGHT CO. v. CITY OF COLUMBUS.** (No. 6,568.)<sup>1</sup>

(Appellate Court of Indiana, Division No. 2. Nov. 24, 1908.)

**1. STREET RAILROADS (§ 24\*)—ORDINANCES—NATURE—ACCEPTANCE.**

A city ordinance accepted by a street railroad for whose benefit it was made becomes a contract between the city and the railroad.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 24.\*]

**2. STREET RAILROADS (§ 37\*)—ORDINANCE—REPAIR OF STREET.**

If a street railway ordinance merely requires those operating the railway to keep the street between and near its tracks in repair, they are not required to pave.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 103, 105; Dec. Dig. § 37.\*]

**3. STREET RAILROADS (§ 28\*)—CHARTER FROM CITY—CONSTRUCTION.**

A city ordinance empowering the construction and operation of a street railway in the city streets is to be strictly construed against the railway company, and, if there are doubtful provisions therein, they are to be taken in favor of the city.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 40; Dec. Dig. § 28.\*]

**4. STREET RAILROADS (§ 37\*)—CHARTER FROM CITY—CONSTRUCTION.**

Under an ordinance granting the right to construct and operate a street railway, which provided that the portion of the street between and adjacent to the tracks should be kept in as good repair, considering the nature of the use, as other parts of the street are kept by the city, those operating the railway must pave that portion when it becomes necessary to keep it in as good condition as the rest of the street is kept by the city.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 103, 105; Dec. Dig. § 37.\*]

Appeal from Circuit Court, Bartholomew County; Marshall Hacker, Judge.

Action by the city of Columbus against the Columbus Street Railway & Light Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Hord & Cox, for appellant. C. B. Cooper and C. S. Baker, for appellee.

**ROBY, J.** The question for decision is whether appellee city can recover from appellant the expense incurred by it in paving a part of Washington street between Third and Eleventh streets in the city of Columbus. Its right to do so is grounded upon an ordinance duly enacted by it, accepted by the person for whose benefit it was made, and assigned by him to appellant, who assumed all duty and obligation imposed by said ordinance, which is in terms as follows:

**"Street Railway Ordinance.**

"Section 1. Be it ordained by the mayor and common council of the city of Columbus, in the county of Bartholomew and state of Indiana, that John S. Crump, his successors and assigns, are hereby empowered and duly authorized to locate, construct, maintain and

operate upon, over, along and across Washington street, Eleventh street, Thirteenth street, Fourteenth street, Mechanic street, Pearl street, Sycamore street, Sixteenth street, Chestnut street, and Third street and across each and all streets and alleys intersecting and crossing the first above named ten streets in said city and further extensions after the completion thereof, a street railroad, or railroads, single or double track, with necessary turnouts and turntables and with cars to be drawn or propelled by horse, mule, electric, cable or other motive power as at present used or employed by street railroads. Said road shall be constructed and equipped in a substantial manner with first class material and operated daily on schedule time, and the fare for each passage within the corporate limits of said city shall not exceed five cents.

"Sec. 2. That the said John S. Crump, his successors and assigns, shall construct and maintain said railroad or railroads, switches, sidings, turnouts and turntables upon, over, along and across said streets named in section 1 of this ordinance as not to unnecessarily interfere with the free use thereof, and that the portion between the tracks and on the outside thereof to the limit of two feet shall be kept in as good repair and condition, considering the nature of the use as other parts of said streets are kept by said city.

"Sec. 3. That this ordinance shall be in full force and shall take effect from and after its passage, provided always, that if said road is not completed within one hundred and twenty days from the taking effect of this ordinance, then this ordinance shall be void and of no effect.

"Ordnained by the common council of the city of Columbus, Indiana, this 29th day of May, 1890.

W. W. Stader, Mayor.

"Daniel Crow, Clerk."

The right to so recover depends upon the meaning of the latter part of section 2, which reads as follows: "and that portion between the tracks and on the outside thereof to the limit of two feet shall be kept in as good repair and condition, considering the nature of the use as other parts of said streets are kept by said city." When the ordinance was enacted Washington street was graded and graveled. Subsequent to the assignment to appellant it was paved between Third and Eleventh streets. Appellant refused to pave any part of the same or to pay therefor, but notified appellee that it would not do so.

If the contract—the ordinance becoming a contract upon its acceptance—merely stipulates for the repair of the street, as counsel for appellant assume in argument, then the obligation to pave was not created, and the city cannot recover. *Western Paving & Supply Co. v. Citizens' St. Ry. Co.*, 128 Ind. 525,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup> Rehearing denied.

533, 26 N. E. 188, 28 N. E. 88, 10 L. R. A. 770, 25 Am. St. Rep. 462; State ex rel. Corrigan v. St. Ry. Co., 85 Mo. 263, 55 Am. Rep. 361; Hurley v. Inhabitants of Trenton, 66 N. J. Law, 538, 49 Atl. 518; In re Repairing Fulton Street, 29 How. Prac. (N. Y.) 429; City of Williamsport v. Williamsport Pass. R. Co., 203 Pa. 1, 52 Atl. 51.

The agreement is not only to keep that portion of the street designated in good repair, but also to keep it in as good condition as other parts of the street are kept by the city. The phrase "good repair" does not necessarily mean good condition. A dirt road might be in good repair and yet be in poor condition to bear the increased traffic of a modern city. The presumption is that the word "condition" meant something, and it must be regarded. The purpose for which streets are established and improved is well known, and the parties must be considered as contracting in view of such purpose. The part of the street described in the contract might be in good repair as a graveled street and yet come very far from being in as good condition as the rest of the street is kept by the city. It must be also remembered "that such charter is to be strictly construed against the railway company, and that it has no doubtful rights under the charter, for where there are doubts they are construed against the grantee and in favor of the city." Western Paving & Supply Co. v. Citizens' St. Ry. Co., supra, at page 530 of 128 Ind., page 190 of 26 N. E. (10 L. R. A. 770, 25 Am. St. Rep. 462). The contract, therefore, required that the space designated be paved by the railway company when it was necessary to do so in order to keep the same in as good condition as the rest of the street is kept by the city. State ex rel. v. Jacksonville St. Ry. Co., 29 Fla. 590, 10 South. 590; Mayor, etc., v. Harlem Bridge M. & F. Ry. Co., 186 N. Y. 304, 78 N. E. 1072.

When it is determined that a paved street may be in better condition for travel than an unpaved one, further discussion is foreclosed by the agreement which the parties have themselves made and the averments contained in the complaint. Having refused to comply with its contract engagement, the appellant became liable to appellee for damages so caused, and its demurrers were correctly overruled.

Judgment affirmed.

(42 Ind. A. 548)

**JOHNSON COUNTY SAVINGS BANK v. KRAMER.** (No. 6,246.)

(Appellate Court of Indiana, Division No. 1. Nov. 24, 1903.)

**1. APPEAL AND ERROR (§ 725\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.**

An assignment that "the court erred in overruling the demurrer to the second and third paragraphs of the" answer is sufficient to re-

view a ruling overruling generally the demurrer, which was directed to the paragraphs severally, though to uphold the assignment both paragraphs must be found insufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3004; Dec. Dig. § 725.\*]

**2. BILLS AND NOTES (§ 13\*)—NATURE OF INSTRUMENT—DRAFT OR NOTE.**

An instrument, dated in Iowa, directing defendant to pay a specified sum one year after date to be charged to the drawer's account, and accepted by defendant in Indiana, is a foreign bill of exchange and not a note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 28; Dec. Dig. § 13.\*]

**3. BILLS AND NOTES (§ 97\*)—DRAFTS—ACCEPTANCE—LAW GOVERNING.**

An acceptance of a foreign draft in Indiana is governed by the laws of that state.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 106; Dec. Dig. § 67.\*]

**4. BILLS AND NOTES (§ 97\*)—ACTION ON DRAFT—DEFENSES—WANT OF CONSIDERATION.**

In a suit on a draft brought by an indorsee against the acceptor, it is no defense that the drawer misrepresented the value of the goods in part payment of which the draft was drawn, and refused to take them back; that the acceptor had paid more than they were worth; and that the drawer broke its agreement that it would buy back the goods remaining on hand if the retail sales did not equal the purchase price within a specified time, to his damage in a sum exceeding the amount of the draft; the indorsee not being connected with or affected by such matters.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1374½; Dec. Dig. § 97.\*]

Appeal from Superior Court, La Porte County; Harry B. Tuthill, Judge.

Action by the Johnson County Savings Bank against Leonard G. Kramer. From a judgment for defendant, plaintiff appeals. Reversed, with instructions.

M. R. Sutherland and R. N. Smith, for appellant. J. F. Gallaher, for appellee.

MYERS, J. Appellant brought this action against appellee, alleging in substance that a partnership composed of Milbert F. Price and Lewis E. Lyon, doing business at Iowa City, Iowa, under the firm name of the Puritan Manufacturing Company, on April 15, 1904, at its place of business in said Iowa City drew in due course its draft or bill of exchange, sued on in this action, upon the appellee, as well as three other drafts or bills of exchange, each for \$95, due in three, six, and nine months after date, and forwarded them to the appellee for his acceptance in writing; that the appellee received said drafts or bills of exchange and accepted them in writing by signing his name on the face of each, "L. G. Kramer," and delivered them at said Iowa City to said Puritan Manufacturing Company, which in due course, May 21, 1904, in good faith and for a valuable consideration to it paid by the appellant, indorsed and delivered said drafts or bills of exchange to the appellant, "who is now and has been the owner of the draft

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

or bill of exchange sued upon in this action ever since the time of said indorsement." A copy of said draft or bill of exchange, and the acceptance of the appellee written upon the face thereof, and the indorsement of the Puritan Manufacturing Company to the appellant on the back thereof, were exhibited with the complaint as follows:

"Puritan Mfg. Company. No. ———.

"Iowa City, Ia., April 15th, 1904.

"Twelve months after date pay to Puritan Mfg. Company, or order, Ninety-five Dollars, \$95.00. Value received and charge to account of  
Puritan Mfg. Company,

"Per M.

"To L. G. Kramer, Michigan City, Ind."

"Customer's acceptance: Accepted, L. G. Kramer (Customer's Signature)."

"Pay Johnson Co. Savings Bank, Iowa City, Iowa. Puritan Mfg. Co."

"Pay any Bank or Banker or order,

"Johnson County Savings Bank,

"Iowa City, Iowa.

"William A. Fry, Cashier."

The complaint further showed that when the draft or bill of exchange here in question became due and payable it was presented to the appellee for payment through the first National Bank of Michigan City, Ind., and payment was refused by the appellee. The complaint sets forth certain alleged statutes of Iowa, and contains averments concerning the same; that the instrument sued upon is long past due and wholly unpaid. The appellee answered in three paragraphs, a general denial, and two affirmative paragraphs. A demurrer to the second and third paragraphs of answer was overruled. This demurrer, in so far as it is material, was as follows: "Now comes the plaintiff in the above-entitled cause and demurs, separately and severally, to the second and third paragraphs of defendant's answer, on the following grounds, first, that neither of said paragraphs states facts sufficient," etc. The order book entry showing the court's action and the appellant's exception is as follows: "Which demurrer is by the court overruled, to which ruling of the court said plaintiff by counsel excepts." It is assigned here that "the court erred in overruling the demurrer to the second and third paragraphs of the defendant's answer to the amended complaint." It is contended that no question is presented by this assignment.

The demurrer is addressed to the paragraphs of answer separately and severally. The record shows that the court overruled the demurrer without referring to the separate paragraphs, and that the exception of the appellant to this action of the court was likewise general. The assignment of error is not addressed to the action of the court with reference to the paragraphs separately, but is addressed generally to the overruling of the demurrer.

Certain cases cited by the appellee have been overruled, and it is said that such a general exception to such a general ruling upon a demurrer addressed to the paragraphs of a pleading separately is a sufficient exception as to such ruling upon each of the paragraphs separately considered. *Whitesell v. Strickler*, 167 Ind. 602, 78 N. E. 845, 119 Am. St. Rep. 524; *City of Decatur v. McKean*, 167 Ind. 249, 78 N. E. 982; *Bessler v. Laughlin*, 168 Ind. 38, 79 N. E. 1033; *Bedford Quarries Co. v. Bough*, 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (N. S.) 418. While the ruling upon the several paragraphs might have been assigned separately in this court, yet under the recognized practice the assignment made in this case is allowable, though it will be necessary for the upholding of that assignment to determine that both paragraphs embraced in the demurrer were insufficient. *Black v. Thompson*, 136 Ind. 611, 36 N. E. 643; *Moore v. Morris*, 142 Ind. 354, 41 N. E. 796; *Ketcham v. Barbour*, 102 Ind. 576, 26 N. E. 127; *Saunders v. Montgomery*, 143 Ind. 185, 41 N. E. 453.

In the second paragraph of answer it was alleged in substance that the draft sued on was accepted by the appellee at Michigan City, Ind.; that it was drawn for the payment of certain goods sold by the Puritan Manufacturing Company to appellee under a written contract exhibited with the answer; that certain representations were made as to said goods; that appellee purchased the same upon such representations; that they were not as represented; that if said goods had been as represented they would have been of the value of \$380; that they were not worth more than \$200; that appellee had paid said manufacturing company for said goods \$270; that as soon as he learned of the valueless character of the goods he notified said company that he would return the same to it, which return was refused and forbidden by said company; that he has at all times been ready and willing to deliver said goods to said company, etc.; that the draft sued on by the assignee of that company was for the amount claimed to be due from appellee for said goods over and above the \$270 already paid.

In substance, the third paragraph of answer showed that the draft in suit was drawn against appellee by the Puritan Manufacturing Company and accepted at Michigan City, Ind., and assigned to the appellant; that it represented a partial payment for goods purchased by appellee from that company under the written contract exhibited; that the amount to be paid for the goods was \$380, and that the company at the time of the sale of the goods represented them to be merchantable, and as an inducement to the appellee to purchase them guaranteed that, if the retail sales of said goods in the appellee's store did not equal the purchase price of \$380 by the expiration of 12½ months from the date of the invoice, said company would

buy back for cash at the original invoice price all of said jewelry then remaining in appellee's hands. It is averred that said sales in 12½ months did not equal \$380; that appellee performed all of his part of said contract; that said company failed and refused to comply with said contract on its part, and refused to buy back the goods as it had agreed to do, whereby appellee was damaged in the sum of \$350; that said goods remaining in his hands at the invoice price amounted to \$353, which appellee had at all times been willing to deliver to said company upon the payment to him of the invoice price, etc., and demanding that his damages, \$350, be set off against appellant's claim.

The writing in suit is to be regarded not as a promissory note, but as a foreign bill of exchange. Appellee's contract of acceptance of the bill was made in this state, and is governed by the laws of this state. *Burnhels v. Field*, 17 Ind. 609; *Payne v. Albany*, etc., Bank, 3 Ind. App. 214, 28 N. E. 432; *Nicely v. Commercial Bank*, 15 Ind. App. 503, 509, 44 N. E. 572, 57 Am. St. Rep. 245; *Daniel*, Neg. Inst. §§ 7, 27, 867.

In *Spurgin v. McPheeters*, 42 Ind. 527, it was held that, in a suit by the payee against the acceptor of a bill of exchange, the latter could not avail himself of a want of failure of consideration as between him and the drawer (a third person), or of a set-off in favor of such defendant against such drawer.

In *Hinkley v. Fourth National Bank*, 77 Ind. 475, it was held that the element of fraud being absent, in an action by an indorsee of a bill of exchange against the acceptor, the acceptor cannot defend by merely showing that he received no consideration, but the acceptor must also show that there was no consideration between the indorsee who sues and his indorser. See, also, *Harger v. Worrall*, 69 N. Y. 370, 25 Am. Rep. 206; *Galvin v. Meridian National Bank*, 129 Ind. 439, 28 N. E. 847; *Heuertematte v. Morris*, 101 N. Y. 71, 4 N. E. 1, 54 Am. Rep. 657; *Hoffman v. Bank of Milwaukee*, 12 Wall. 181, 20 L. Ed. 386.

In *First National Bank v. Ruhl*, 122 Ind. 279, 23 N. E. 766, which was an action upon commercial paper by a holder through indorsement, it was held that an answer pleading want of consideration was bad because it did not show that the plaintiff was not a purchaser for value and in good faith.

Whatever might be said of answers setting up the matters stated in the second and third paragraphs, if the action was one brought by the payee and drawer of the bill against the acceptor, they cannot be said to have presented any defense to the action against the acceptor brought by the indorsee, nor in any manner connected with or affected by such matters.

Judgment reversed, with instructions to sustain appellant's demurrer to the second and third paragraphs of answer.

(44 Ind. App. 100)

# INDIANA NATURAL GAS & OIL CO. v. WILHELM. (No. 6,217.)<sup>1</sup>

(Appellate Court of Indiana, Division No. 1. Nov. 24, 1908.)

## 1. PLEADING (§ 11\*)—ALLEGATIONS—ULTIMATE FACTS.

It is sufficient if a complaint alleges the ultimate facts to be proved.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 31; Dec. Dig. § 11.\*]

## 2. PLEADING (§ 8\*)—ALLEGATIONS—FACTS OR CONCLUSIONS.

In an action for rentals under a gas lease providing that, if gas were found in sufficient quantities to market and to be piped to such market, plaintiff's compensation should be a certain sum per well, allegations in the complaint that gas was found in sufficient quantities to be marketed and to be piped to market, and that there were good markets within 10 miles, and others further away, where the gas could have been delivered and sold at a profit to defendant, set out facts which, if proved, with the other material averments of the complaint, would entitle plaintiff to recover, and hence were not averments of mere opinions.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.\*]

## 3. PLEADING (§ 11\*)—MATTERS OF EVIDENCE.

In an action to recover rentals under a gas lease, where it was alleged that gas was found in sufficient quantities to be marketed and to be piped to a market, and that there were good markets for the gas within 10 miles, and at other places further away, to which the gas could be delivered and sold at a profit to defendant, the amount of gas produced in any well, cost of production, and cost of transportation to market were evidentiary facts to be proved in support of the ultimate facts alleged, and need not be pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 31; Dec. Dig. § 11.\*]

## 4. MINES AND MINERALS (§ 79\*)—GAS LEASES—ACTIONS—INSTRUCTIONS.

In an action for rentals under a gas lease providing that, if gas were found in sufficient quantities to market and to be piped to market, plaintiff should receive a certain sum per well, a charge that under the lease gas is found in sufficient quantities to market and to be piped to market, whenever gas is found or exists in any wells drilled on the premises in such quantities that, taking into consideration the opportunity to sell it and the cost and expense attendant thereon, it could have been reasonably sold at a profit to the lessee, was not objectionable as leaving out of consideration the rental required to be paid if the gas were marketed.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 79.\*]

## 5. MINES AND MINERALS (§ 79\*)—GAS LEASES—RIGHT TO RENTAL—COMPUTATION OF COST OF MARKETING GAS.

In an action for rentals under a gas lease giving the lessor a certain sum per well if gas were produced in sufficient quantities to make it marketable, where the wells were already producing oil in marketable quantities, the original cost of drilling the wells was not to be considered in determining whether the gas produced could be profitably marketed, but the only expense chargeable to the gas would be that of operating and marketing it, including the rental therefor.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 79.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.  
<sup>1</sup> Rehearing denied.

**6. TRIAL (§ 295\*)—INSTRUCTIONS—CONSTRUCTION OF CHARGE AS A WHOLE.**

On appeal the instructions will be considered as a whole, and if, when taken together, the law is correctly stated, the case will not be reversed, though some one charge do not state all the law applicable to the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-718; Dec. Dig. § 295.\*]

**7. APPEAL AND ERROR (§ 1001\*)—REVIEW—WEIGHT OF EVIDENCE.**

A judgment will not be disturbed on appeal upon the weight of evidence, where there is evidence to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

Appeal from Circuit Court, Grant County; H. J. Paulus, Judge.

Action by Jane Wilhelm against the Indiana Natural Gas & Oil Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. A. Johnson and Blackledge, Shirley & Wolf, for appellant. Joseph L. Custer, A. L. Cline, and G. A. Deniter, for appellee.

WATSON, C. J. This was an action by appellee to recover rentals for gas under the terms of a lease between the parties hereto, for a period of six months for one of the wells, and for a period of one year for each of the remaining four wells. The lease provided: "That said parties of the second part (appellant), in consideration of said grant and demise, agree to give to party of the first part (appellee) the full equal one-eighth of all the petroleum oil obtained or produced on the premises herein leased and to deliver the same in tanks or pipe lines to the credit of the party of the first part. It is further agreed that, if gas is found in sufficient quantities to market the same and to be piped away from the premises to such market, the consideration in full to party of the first part shall be two hundred dollars per annum for each and every gas well drilled on the above-described land." Issues were joined, and trial had before a jury, which returned a verdict for appellee, with damages in the sum of \$825, and judgment was rendered on the verdict.

Appellant assigns as errors: (1) The amended complaint does not state facts sufficient to constitute a cause of action; (2) the court erred in overruling appellant's demurrer to the amended complaint; (3) the court erred in overruling appellant's motion for a new trial. The complaint alleged the drilling of each well, and that "gas was found in sufficient quantities during the year thereafter following to be marketed and in sufficient quantities to be piped away from the premises to a market for such gas, that during all such time there were good markets for such gas at Upland, Matthews, Gas City, and Hartford City, and at other places, all within 10 miles of said well, and at other

places further away, to which said gas could have been then delivered, used, and sold at a profit to the defendant. \* \* \*". These allegations, it is urged by appellant, are not statements of fact, but mere opinions.

It is a familiar and well-settled rule that alleging the ultimate facts to be proved will be sufficient. *Guenther v. Fohey*, 26 Ind. App. 93, 59 N. E. 182; *Penn. Co. v. Zwick*, 1 Ind. App. 280, 27 N. E. 508. The allegations objected to clearly set out a state of facts which, if proved, along with the other material averments of the complaint, would entitle appellee to recover. Consequently they cannot be said to be averments of mere opinions. There is also the objection that the complaint does not aver the amount of gas produced in any well, the cost of production, or the cost of transportation to market. Such objection cannot avail appellant, for the reason that each of the facts thus set out is evidentiary in character, and must necessarily appear in the proof of the ultimate facts alleged in the complaint.

The reason assigned for new trial is that the sixth instruction given by the court leaves out of consideration the original cost of the wells, and also the rental required to be paid each year. The instruction objected to is as follows: "Under the terms of the contract in suit, gas is found 'in sufficient quantities to market the same and to be piped away from the premises to such market' whenever gas is found or exists in any wells drilled on the premises in such quantities that, taking into consideration the opportunity to sell the same, the cost and expense attendant thereon, and in connection with the operation of such well for oil, if you find the same to have been so operated, the gas in such well could or might have been reasonably sold at a profit to the lessee." It will be observed that in this instruction the court specifically told the jury that they were to consider the opportunity to sell the gas, with the cost and expense attendant thereon. The court in giving such instruction must clearly have had in mind the amount of rental to be paid in case gas was marketed, for appellant would become obligated for such sum upon the production of a marketable quantity. It is reasonable to suppose, also, that such meaning of the court was conveyed to the minds of the jury, and that they so understood it.

In the fourth instruction, the jury was told that, in order to recover, appellee must by her evidence affirmatively answer the question: "Did said wells, or either of them, produce gas in sufficient quantities to enable the defendant (appellant) to pipe the same away to market therefor, and realize therefrom and thereon a fair, reasonable, and just profit, everything considered?" It is undisputed that the wells in question were being pumped for and were producing oil during the period

for which this rental price was claimed. The same wells were also producing gas at the same time. This fact alone distinguishes the case at bar from the case of *Manhattan Oil Co. v. Carrell*, 164 Ind. 523, 73 N. E. 1084, relied upon by appellant. In that case the court held that the cost of drilling new wells should be considered in determining whether oil was found in paying quantities as agreed in a lease calling for more wells to be drilled in the event that oil was found in paying quantities. In this case there is no question that the wells were producing oil in paying quantities. It is not to be presumed that the oil was being pumped and put on the market at a loss to the producer. Consequently, the question here involved is as to the disposal of an additional product of a well that was already producing oil sufficient to market; such product being the gas which accumulated therein and flowed therefrom. Since such product is entirely independent of and separate from the oil produced, the profit arising from the sale of gas thus found would be over and above the profits arising from the oil. Consequently, the only expense chargeable to the gas alone would be that of operating and marketing the gas, including, of course, the agreed rental therefor. This court, on appeal, will consider the instructions as a whole, and if, when taken together, the law is correctly stated, although some one instruction may not fully state all the law applicable to the cause, the case will not be reversed because of such insufficient instruction. *Cleveland, etc., R. Co. v. Penketh*, 27 Ind. App. 210, 60 N. E. 1095; *Indiana Gas Co. v. Anthony*, 26 Ind. App. 307, 58 N. E. 868; *Gemmill v. Brown*, 25 Ind. App. 6, 56 N. E. 691; *Maxon v. Clark*, 24 Ind. App. 620, 57 N. E. 260; *Musser v. State*, 157 Ind. 423, 61 N. E. 1; *Morgan v. Hoadley*, 156 Ind. 320, 59 N. E. 935; *Bowman v. Bowman*, 153 Ind. 498, 55 N. E. 422; *Hamilton v. Love*, 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 71 Am. St. Rep. 384. The jury was told that appellee must show that appellant could have realized a "fair, reasonable, and just profit, everything considered," and, further, that gas would be found "in sufficient quantities to market the same, and to be piped away from the premises to such market," when found in such quantities that, considering the opportunity to sell, with the attendant cost and expense, in connection with the operation of the well for oil, it could have been reasonably sold at a profit. Thus it was made clear that in determining what would be a reasonable, fair, and just profit, the jury were to consider the cost of marketing the gas, which would necessarily include the rental price, since that obligation would arise upon the production of a marketable quantity of gas, and the expenses in connection with operating for oil.

The evidence pertaining to the amount of

gas produced was very contradictory. Under the well-settled rule that courts on appeal will not disturb a judgment upon the weight of evidence where there was evidence to support the verdict (*Cleveland, etc., R. Co. v. Kepler*, 31 Ind. App. 1, 66 N. E. 1030; *Gleason v. McGinnis*, 30 Ind. App. 4, 65 N. E. 191; *Heintz v. Mueller*, 27 Ind. App. 42, 59 N. E. 414; *Sharp v. State*, 161 Ind. 288, 68 N. E. 283; *Williams v. Chapman*, 160 Ind. 130, 66 N. E. 460; *Smith v. Barber*, 153 Ind. 322, 58 N. E. 1014), we cannot say, as a matter of law, that the verdict in this case was erroneous, for there was evidence to support it.

There was no reversible error on the part of the trial court brought to our attention in this appeal.

The cause is therefore affirmed.

(236 Ill. 502)

#### OLSON v. KELLY COAL CO.

(Supreme Court of Illinois. Oct. 26, 1908. Rehearing Denied Dec. 3, 1908.)

#### 1. APPEAL AND ERROR (§ 1062\*)—REVERSIBLE ERROR—REFUSAL TO WITHDRAW COUNTS OF DECLARATION.

Where, in an action for injuries to a mine employé, there was evidence to support the count based on the violation of Mines and Mining Act (Hurd's Rev. St. 1905, c. 93) § 18, providing that no one shall be allowed to enter a mine to work therein, except under the direction of the mine manager, until all conditions shall have been made safe, and tending to support the common-law counts, the refusal to withdraw the common-law counts from the jury was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4212; Dec. Dig. § 1062.\*]

#### 2. MASTER AND SERVANT (§ 125\*)—MINES—OBLIGATION OF OPERATOR.

Mines and Mining Act (Hurd's Rev. St. 1905, c. 93) § 18, providing that no one shall be allowed to enter a mine to work therein, except under the direction of the mine manager, until all conditions shall have been made safe, and providing for a mine examiner, etc., contemplates that the mineowner shall keep his mine in a safe condition to protect the men, but it is not contemplated that he shall be relieved of liability for an injury to the miners because he has not received notice of such dangerous conditions by report of his mine examiner or manager, as actual notice to the mine examiner or manager of a dangerous condition of the mine is notice to the owner.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 251; Dec. Dig. § 125.\*]

#### 3. MASTER AND SERVANT (§ 125\*)—EMPLOYÉES IN MINES—OBLIGATION OF OPERATOR.

Where, in an action for injuries to a mule driver in a mine, the evidence showed that the mine manager had been in the mine on the night before the injury, and had seen the dangerous condition of the entry where the driver was injured, and permitted the driver without being under his direction as mine manager to go into the mine to work, and that, while the driver was passing through the entry, he was injured, a recovery for a violation of Mines and Mining Act (Hurd's Rev. St. 1905, c. 93) § 18, providing that no one shall be allowed to enter a mine to work therein, except under the direction of the mine

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

manager, until all conditions shall have been made safe, was authorized.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 251; Dec. Dig. § 125.\*]

**4. MASTER AND SERVANT (§ 118\*)—EMPLOYÉS IN MINES—INJURIES—NEGLIGENCE.**

Where a mine manager permitted an employé to enter the mine and work therein otherwise than under his direction and without removing a dangerous condition, his conduct constituted on the part of the mineowner a conscious violation of Mines and Mining Act (Hurd's Rev. St. 1905, c. 98) § 18, providing that no one shall be allowed to enter a mine to work therein, except under the direction of the mine manager, until all conditions shall have been made safe.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 118.\*]

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, Vermillion County; E. R. E. Kimbrough, Judge.

Action by Olaf Olson against the Kelly Coal Company. From a judgment of the Appellate Court affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

This was an action on the case commenced in the circuit court of Vermillion county by the appellee against the appellant to recover damages for a personal injury sustained by the appellee while engaged in the mine of the appellant as a mule driver. The case was tried upon a declaration containing three counts. The first count was based upon an alleged violation of section 18 of the mines and mining act (Hurd's Rev. St. 1905, c. 98), which provides that no one shall be allowed to enter a mine to work therein, except under the direction of the mine manager, until all conditions shall have been made safe; and the second and third counts were based upon a breach of the common-law duty which appellant owed to appellee to furnish him a safe mule and a reasonably safe place in which to work. The general issue was filed, and a trial resulted in a verdict and judgment in favor of the appellee for the sum of \$3,000, which has been affirmed by the Appellate Court for the Third District, and a further appeal has been prosecuted to this court.

The evidence tended to show that appellee was employed in appellant's mine as a mule driver; that in the discharge of his duty he drove a mule hitched to loaded cars, which ran on a track provided for that purpose in the mine; that the entry where the accident occurred was about 8 feet wide; that one rail of the track was located within from 6 to 12 inches of the wall of the rib side; that there had accumulated upon the gob side, near the rail, a large amount of débris, which was from 18 inches to 3 feet high; that the appellee was riding upon the front of the car; that the car caught upon said débris, which caused the mule to give a sharp pull to release the car; that at that point the car was going downgrade, and, when the car

was released, it ran against the mule, and the appellee, being unable to escape on the gob side, was crowded off the car upon the rib side, and was caught between the car and the wall; that the mine examiner was in said entry on the night before the appellee was injured, and had notice of the condition of the débris on the gob side of the entry and its proximity to the track, and this appellant permitted appellee, without being under the direction of its mine manager, to enter the mine to work on the next morning without having the débris in the entry near the track over which he was hauling cars removed.

Buckingham & Troup, for appellant. W. T. Gunn and S. M. Clark, for appellee.

HAND, J. (after stating the facts as above). The appellant contends that the court erred in declining, upon its motion, to withdraw the common-law counts of the declaration from the jury, on the ground that there was no evidence which would support a recovery thereon. We do not think the court committed a reversible error in overruling said motion, as there was evidence tending to support the other count of the declaration, and it clearly appears from the record that there was evidence tending to support the common-law counts in the declaration, and it is settled in this state that one good count in a declaration which is supported by the evidence will sustain a verdict and judgment, although other counts in the declaration may not be supported by the evidence. Consolidated Coal Co. v. Schelber, 167 Ill. 539, 47 N. E. 1052; Illinois Central Railroad Co. v. Weiland, 179 Ill. 609, 54 N. E. 300; Swift & Co. v. Rutkowski, 182 Ill. 18, 54 N. E. 1038; Eldorado Coal & Coke Co. v. Swan, 227 Ill. 586, 81 N. E. 691.

It is also contended that the court erred in overruling appellant's motion for a directed verdict, as it is said that the evidence does not show a willful violation of the provisions of section 18 of the mines and mining act (Hurd's Rev. St. 1905, c. 98), the position of appellant being that the only evidence of a willful violation of said section 18 contemplated by the statute is the report of the mine examiner; in other words, that the suit being based upon a violation of section 18 of the mines and mining act, actual notice of the dangerous condition in the mine to its mine examiner was not sufficient notice of such condition to appellant to make it liable under that section of the statute for an injury resulting from such dangerous condition. We do not agree with this contention. The statute clearly contemplates that the mineowner shall keep his mine in a safe condition to protect the men employed by him therein from injury, and to this end it is provided that a mine examiner and a mine manager shall be employed, and that the mine shall

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

be examined and reports of its condition as disclosed by such examination made, and that a willful failure to make such examination or report, which results in injury to men working in the mine, shall make the mineowner liable for such injury. It is not, however, contemplated by the statute that the mineowner shall be relieved of liability for an injury resulting to men working in his mine in consequence of a dangerous condition in the mine of which he has actual notice by reason of the fact that he has not received notice of such condition through the channel of the report of his mine examiner. A mine examiner is a vice principal of the mineowner (*Davis v. Illinois Collieries Co.*, 232 Ill. 284, 83 N. E. 836), and actual notice to the mine examiner or the mine manager of a dangerous condition in the mine is notice to the mineowner of such condition. In this case the evidence tends to show that the mine examiner of appellant was in the mine the night before the appellee was injured and saw the condition of the débris upon the gob side of the entry at the point where appellee was injured; that, regardless of his knowledge of such condition, the appellant permitted the appellee, without being under the direction as mine manager, to go into the mine on the following morning to work without removing said débris, the result of which was that while the appellee was passing through the entry in which such dangerous condition existed, with his car, he was injured.

The evidence was conflicting as to the condition of the débris upon the gob side of the entry, where the accident occurred. The evidence of the appellee tended to show it was piled near the track to a height of from 18 inches to 3 feet, which made it very dangerous to persons similarly situated to appellee at the time he was injured; while the evidence of the appellant tended to show the entry at the point of the injury was in a safe condition. The question of the condition of the entry at the point where the accident occurred was one of fact to be determined by the jury, and not by the mine examiner. The mine examiner had no power to adjudicate the question of the safety of the entry at that point (*Davis v. Illinois Collieries Co.*, supra), and, if the appellant permitted the appellee to enter the mine to work therein otherwise than under his direction as mine manager, knowing of said dangerous condition, before said dangerous condition had been made safe, such conduct on his part constituted upon the part of the appellant a conscious violation of section 18 of the mines and mining act, and rendered the appellant liable to the appellee for a willful violation of said act. *Odin Coal Co. v. Denman*, 185 Ill. 413, 57 N. E. 192, 78 Am. St. Rep. 45; *Marquette Coal Co. v. Dielle*, 208 Ill. 116, 70 N. E. 17; *Kellyville Coal*

*Co. v. Strine*, 217 Ill. 516, 75 N. E. 375; *Hennietta Coal Co. v. Martin*, 221 Ill. 460, 77 N. E. 902; *Eldorado Coal Co. v. Swan*, supra.

Finding no reversible error in this record, the judgment of the Appellate Court must be affirmed.

Judgment affirmed.

(236 Ill. 437)

#### KNOX v. AMERICAN ROLLING MILL.

(Supreme Court of Illinois. Oct. 26, 1908. Rehearing Denied Dec. 3, 1908.)

#### 1. APPEAL AND ERROR (§ 1094\*)—REVIEW—SUFFICIENCY OF EVIDENCE—DUTY OF SUPREME COURT.

Where there is evidence fairly tending to support a verdict for plaintiff, in a personal injury action involving the issues of assumed risk and contributory negligence, which has been approved by the trial court and the Appellate Court, the Supreme Court will not inquire into those questions, except to find whether the law was properly applied on the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322, 4324; Dec. Dig. § 1094.\*]

#### 2. MASTER AND SERVANT (§ 203\*)—INJURY TO SERVANT—ACTIONS—NATURE OF ISSUES—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

While the issues of contributory negligence and assumption of risk may both arise under the facts of a case, they are distinct issues; since, while one suing for a personal injury must show the exercise of ordinary care, if he had assumed the risk of injury because of his employment, he cannot recover, though without negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 203.\*]

#### 3. MASTER AND SERVANT (§ 219\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—OBVIOUS DEFECTS—NOTICE TO SERVANT.

If defects in the working place or the machinery with which a servant is required to work are open and obvious, he will ordinarily be charged with knowledge thereof, and it may be inferred from his familiarity with the place or machinery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.\*]

#### 4. MASTER AND SERVANT (§ 217\*)—INJURIES TO SERVANT—ASSUMPTION OF OBVIOUS HAZARDS—CONTINUANCE IN EMPLOYMENT.

A servant assumes all hazards which are obvious and apparent, and which are known to him, though the conditions were caused by the master's negligence, if he continues in the employment without the master's promise to remedy the defects.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 533; Dec. Dig. § 217.\*]

#### 5. MASTER AND SERVANT (§ 295\*)—INJURIES TO SERVANT—TRIAL—INSTRUCTIONS—IGNORING ISSUES.

Where the declaration in an injury case negated plaintiff's assumption of risk, even if that question was in issue, a charge that recovery could be had only if defendant was negligent as charged in the declaration was not erroneous because omitting to refer to the question of assumed risk.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 295.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**6. MASTER AND SERVANT (§ 296\*)—INJURIES TO SERVANT—TRIAL—INSTRUCTIONS.**

In an action by a servant for injuries, charges, fixing the time when the servant should be exercising reasonable care for his safety as "at the time of the injury," were not objectionable as not covering all the time of the transaction leading up to the injury, where they sufficiently informed the jury that the time of the entire transaction was meant.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 296.\*]

**7. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—TRIAL—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.**

Whether a servant, injured by falling through an opening in a plank floor in a dark engine room, was negligent in attempting to pass through the room without a torch held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.\*]

**8. DAMAGES (§ 173\*)—PERSONAL INJURIES—ACTIONS—EVIDENCE.**

In fixing damages for personal injuries, on the question of the comparative earning capacity of plaintiff at the time of and after his injury, all evidence tending to show his ordinary pursuits, and the extent to which his injury prevented him from following them, is competent; and hence evidence that the former occupation of a servant, injured while employed as a night foreman of a steel company, was that of a puddler, and of the wages generally paid for such employment, and that he was able to work at his former occupation, and could obtain employment therein at the time of his injury, though he had not worked as a puddler for two years, was admissible.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 490; Dec. Dig. § 173.\*]

**9. MASTER AND SERVANT (§ 150\*)—INJURIES TO SERVANT—SAFE PLACE TO WORK—WARNING OF INCREASED DANGERS.**

Where a servant was customarily absent during a certain part of each week, and part of the planking over a pit in a room where he was required to go was removed during his absence, it was the master's duty to warn him of the increased hazard thus created, and the servant might assume that the duty would be observed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 306; Dec. Dig. § 150.\*]

Appeal from Branch Appellate Court, First District, on Appeal from Circuit Court, Cook County; A. H. Frost, Judge.

Action by Cyrus Knox against the American Rolling Mill. From a judgment of the Branch Appellate Court for the First District (140 Ill. App. 359), affirming a judgment for plaintiff, after appeal. Affirmed.

This is an action brought by appellee, against appellant, in the circuit court of Cook county, for personal injuries sustained by him July 28, 1902, by falling into a pit at appellant's mill, in Muskegon, Mich. The jury returned a verdict in favor of appellee for \$2,700, upon which judgment was entered. The Appellate Court, on appeal, affirmed the judgment of the lower court, and the case was thereupon brought to this court for review. Appellee was night foreman for the appellant company, and had been holding that position for something over six

weeks. Appellant's plant consisted of a muck mill, an open hearth steel plant, two finishing mills, and a gas house, all under one roof. The plant ran day and night. All but the steel plant, however, shut down over Saturday night and Sunday. Appellee usually went to work at 6 o'clock on week day nights, and at any time between 8 and 10 o'clock on Sunday nights. The furnace and engine room appear to have been separated by a wall about 8 feet high, both being in the central part of the building. The floor of the engine room was lower than that of the furnace room, with two or three steps between. In the former room was a long pit, in which ran a large fly wheel and a large pulley wheel, connected by a belt. The axles of both these wheels stood a little above the floor, the distance between the rims being about 20 feet. The pit between these two wheels was usually covered with planks, 20 or more in number, to enable persons to walk across. These planks were loose, and were never taken up, except for the purpose of doing repairing about the wheels, which could only be done when the engine was not running. Appellee left the plant each week between 6 and 7 o'clock Saturday morning, and did not return until Sunday night, and had no knowledge of what was going on in the plant in these intervals unless he was notified. Three of the planks across this pit were removed, according to the testimony of appellee, some time after he left on the Saturday morning immediately preceding the accident, and before the Sunday night when the accident occurred. The testimony of appellant tends to show that the planks were removed two or "about three days" before the time of the accident. The opening left by taking up these planks was about 3 feet wide by four feet long. They appear to have been taken up for the purpose of doing some babbitting work about the shafts of the wheels. This work had to be done in the daytime. On the Sunday night in question appellee went to work about 7 o'clock. That night he had several men cleaning up the mill, preparatory to starting up Monday morning. They were at this work until about midnight, and then went to lunch. Appellee had instructed them that after lunch they should couple up the nine-inch mill. While they were eating, he sat down by the furnace for a time, and after the men had eaten their lunch, the appellee started through the engine room to go to the nine-inch mill, where the men were at work. He walked down the steps into the engine room, to pass in a northwesterly direction across the pit on the planks, and stepped into the open space left by the removal of the three planks, falling into the pit. His left arm was drawn from the socket at the shoulder, and the muscles and tendons loosened from the back, some of them

being broken. The evidence shows, without contradiction, that for over two years he was unable to dress himself, and that at the time of the trial, five years after the accident, there was no motion of his arm in any direction when it was lifted above his shoulder, that there was atrophy of the arm and shoulder muscles, and that the injury was permanent. The evidence also tends to show that the place where the accident occurred was in a semidark condition, there being some light from the furnace room, and light from a torch 20 or 25 feet away and from another torch a little nearer.

F. J. Canty, J. C. M. Clow, and E. E. Gray (H. E. Long, of counsel), for appellant. Darrow, Masters & Wilson, for appellee.

CARTER, J. (after stating the facts as above). At the close of plaintiff's testimony, and also when all the evidence had been introduced, appellant offered an instruction asking to have a verdict directed for defendant. These instructions were refused, and exceptions duly taken. It is insisted that there was no evidence in the record justifying the verdict; that appellee not only assumed the risk of the accident, but was guilty of contributory negligence. As there is evidence in the record fairly tending to support the verdict of the jury, which has been approved by the trial court and the judgment of the Appellate Court, we cannot inquire into those questions, except in so far as to find whether the law was properly applied on the trial.

Counsel for the appellant have not in their argument clearly distinguished between contributory negligence and assumption of risk. These subjects are different and distinct in law, although they may both arise under the facts of a particular case. *Chicago & Eastern Illinois Railroad Co. v. Heerey*, 203 Ill. 492, 68 N. E. 74. In that case we said (page 502 of 203 Ill., page 77 of 68 N. E.): "Every person suing for a personal injury must show that he was in the exercise of ordinary care and caution for his own safety, so that the question of contributory negligence may be involved in every case; but an employé may have assumed a risk by virtue of his employment, or by continuing in such employment with knowledge of the defect and danger, and if he is injured thereby, although in the exercise of the highest degree of care and caution and without any negligence, yet he cannot recover." The evidence is uncontradicted that during the time of appellee's employment by appellant the pit in question had always been covered with planks up to within a day or two of the accident; that the employés were accustomed to go back and forth across these planks in passing through the mill, though there was another way that could be taken if desired; that when the pit was so covered there was no danger in crossing. The appellee swore positively that the planks had nev-

er been taken up before while he was at work for appellant, and that he had no knowledge or notice of their being taken up at this time, before he fell into the pit. There is no evidence tending to show, in the slightest manner, that he had notice of the planks being up before the time of the accident. If the defects are open and obvious, that fact is generally sufficient to charge an employé with knowledge, and knowledge may also be inferred from his familiarity with the working place or machinery with which he is required to work. 3 *Elliott on Railroads* (2d Ed.) § 1312. An employé assumes all the hazards which are obvious and apparent, and which are known to him, although such conditions were produced by the master's negligence, if he continues in such employment without the master's promise to remedy such defects (*Kath v. East St. Louis Railway Co.*, 232 Ill. 126, 83 N. E. 533; *Elgin, Joliet & Eastern Railway Co. v. Myers*, 226 Ill. 358, 80 N. E. 897); but, as there is no evidence in the record tending to show that appellee had knowledge or means of knowing of this defect, there is no basis in the evidence for the contention that he acquiesced in the defective condition caused by the removal of these planks, and assumed the risk (*Davis Coal Co. v. Pollard*, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319), or that he continued in the service of appellant, without objection, after he had knowledge.

The question of assumed risk not being in the case, there is no ground for appellant's contention that the giving of appellee's first instruction was reversible error, in that it omitted to refer in any way to this question. The objection to the above instruction, and also to instruction 4, given for appellee, that they fixed the time when he should be using and exercising reasonable care for his own safety as "at the time of the injury," and therefore did not cover all the time of the transaction leading up to the injury, is without force. We do not think the jury would have any difficulty, under any of these instructions, in understanding the time meant. What was said by this court in *Peterson v. Chicago Traction Co.*, 231 Ill. 324, 83 N. E. 159, with reference to an instruction which was, if anything, more open to this objection than the one here in question disposes of appellant's contention on this point.

It is further insisted that the appellee cannot recover because he was guilty of contributory negligence in not taking a torch before attempting to pass through the engine room. If the planks had not been removed from across the pit, it certainly could not be contended that appellee would have been injured. It is true that some of the witnesses say the workmen used torches about their work, but appellee testifies that during all the time he acted as foreman there he never took a torch in going about the building. Whether or not he was guilty of contributory negligence under these circumstances was a

question for the jury. All the evidence that was offered by either party on this question was submitted to the jury under proper instructions; and, as there was evidence tending to support appellee's contention, the judgment of the Appellate Court approving that of the circuit court and the finding of the jury is binding on us.

Appellant makes the further contention that the court erred in permitting appellee to be examined as to his former occupation as a puddler, and the wages that were generally paid for such employment. The proper inquiry in matters of this kind is the comparative capacity of the plaintiff to earn money at the time of and after the injury. *Chicago & Joliet Electric Railway Co. v. Spence*, 213 Ill. 220, 72 N. E. 706, 104 Am. St. Rep. 213. All evidence tending to show the character of plaintiff's ordinary pursuits, and the extent to which the injury has or will prevent him from following such pursuits, is admissible. 4 *Sutherland on Damages* (3d Ed.) § 1248; *Graham v. Mattoon City Railway Co.*, 234 Ill. 483, 84 N. E. 1070. Appellee, at the time he testified, in 1907, was 53 years old. The accident occurred 5 years before. The evidence shows that at the time of the accident he was in good physical condition, and able to work at his former occupation of puddler. He, however, testified that he had not worked at puddling for two years, but that at the time of the accident "the job was still open for me to go back to." He further testified that his arm was in such condition that it would be impossible for him, at the time he testified, to perform the work of a puddler. The wages that he received as puddler were more than he was receiving as night foreman at the time he was injured, and more than he was receiving at the time he testified. The facts in this case plainly distinguish it from *Chicago & Joliet Electric Railway Co. v. Spence*, supra, and other cases relied on by appellant on this point. The evidence offered was proper to be considered, together with all the other evidence as to plaintiff's earning capacity, in fixing the amount of damages. *West Chicago Street Railroad Co. v. Dougherty*, 209 Ill. 241, 70 N. E. 536. Furthermore this testimony only related to the amount of damages, and had no bearing on the question whether the defendant was liable as charged in the declaration.

It is the duty of the master to use reasonable care to furnish a reasonably safe and proper place for the servant to work. *Illinois Steel Co. v. Ziemkowski*, 220 Ill. 324, 77 N. E. 190, 4 L. R. A. (N. S.) 1161; *Donk Bros. Coal Co. v. Thil*, 228 Ill. 233, 81 N. E. 857. Appellee's duties required him to go to all parts of the building in question. The planks were removed in the absence of appellee. He had a right to assume that he would be informed by his master of any unusual dangers or increased hazards that had

been created at the plant during his absence. It was the duty of appellant, in the exercise of ordinary care, to warn him of any changes which would increase the danger of his employment, so that he might guard against the new hazard. There is no evidence in the record that tends to show that any such warning was given. The evidence tends to uphold the verdict of the jury. *Iroquois Furnace Co. v. McCrea*, 191 Ill. 340, 61 N. E. 79; *Deering v. Barzak*, 227 Ill. 71, 81 N. E. 1.

We find no reversible error in the record. The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

(236 Ill. 333)

# J. BURTON CO. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 26, 1908. Rehearing Denied Dec. 8, 1908.)

## 1. MUNICIPAL CORPORATIONS (§ 680\*) — STREETS—ALLEYS—SPACE UNDER SIDEWALKS — USE — ORDINANCES — CONSTRUCTION — "ROADWAY."

An ordinance was entitled "An ordinance concerning the use of streets and alleys and the space under sidewalks by private persons." Section 1 prohibited such use without a permit, to be issued only as therein provided, and not transferable without the written consent of the commissioner of public works. Section 2 declared that no permit should be issued for the use of any space under the surface of "the roadway of any street or other public ground." *Held*, that since the word "roadway" as used in such provision was not the space between two curbs, sidewalks, or parkways, but was properly defined as the portion of the street used for horses and vehicles, which may be coextensive with the limits of the street, the prohibition in section 2 applied to alleys, so that the commissioner of public works could not issue a permit for the use of space underneath the roadway of a public alley.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 680.\*]

For other definitions, see *Words and Phrases*, vol. 7, p. 6257.]

## 2. EVIDENCE (§ 10\*)—JUDICIAL NOTICE.

Courts will not take judicial notice that alleys are not provided with sidewalks, or that any particular alley has none.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 10.\*]

## 3. MUNICIPAL CORPORATIONS (§ 661\*)—STREETS —ALLEYS—JURISDICTION OF CITY.

The jurisdiction of a city over public streets and alleys is identical, there being no legal distinction between them.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 661.\*]

## 4. MUNICIPAL CORPORATIONS (§ 661\*)—"STREETS AND ALLEYS."

The words "streets and alleys" are constantly used in collocation and in legislation, there being no difference between them, except an indefinite difference in width.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 661.\*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 841-843; vol. 7, pp. 6684-6691; vol. 8, pp. 7573, 7805.]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

### 5. STATUTES (§ 218\*)—ORDINANCES—ADMINISTRATIVE CONSTRUCTION.

The rule that contemporaneous, long, uniform, and practical construction of a statute or ordinance by administrative officers will be followed by the court is only applied where such construction is shown and the case is doubtful.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 294; Dec. Dig. § 218.\*]

### 6. MUNICIPAL CORPORATIONS (§ 111\*)—ORDINANCES—UNIFORMITY.

Chicago Municipal Ordinance, Feb. 5, 1908, regulating the use of space under the streets or public grounds in the city, and prohibiting permits for the use of any such space under the roadway of any street or public ground, was not objectionable for nonuniformity, since it operates alike on all persons similarly situated, except in cases of contract rights acquired prior to its adoption.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 111.\*]

### 7. MUNICIPAL CORPORATIONS (§ 689\*)—STREETS—USE OF UNDERLYING SPACE—PERMIT—ESTOPPEL.

Where a city commissioner of public works granted plaintiff a permit to use the space under a public alley in violation of an ordinance, and accepted plaintiff's bond and compensation therefor, the city was not thereby estopped to deny the validity of the permit, though cancellation thereof would subject plaintiff to great expense and would require change of his plans for a projected building.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1478; Dec. Dig. § 689.\*]

### 8. MUNICIPAL CORPORATIONS (§ 219\*)—AUTHORITY OF AGENT—ACTS IN EXCESS OF AUTHORITY.

The agent of a municipal corporation cannot bind the corporation in its private corporate capacity beyond the authority conferred on him.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 581; Dec. Dig. § 219.\*]

Appeal from Appellate Court, First District, on Error to Circuit Court, Cook County; Thomas G. Windes, Judge.

Suit by the J. Burton Company against the city of Chicago. A decree for complainant was affirmed by the Appellate Court (140 Ill. App. 344), and defendant appeals. Reversed and remanded, with directions.

Edward J. Brundage, Corp. Counsel, Edwin H. Cassels, William D. Barge, and Emil C. Welten, for appellant. Fred A. Bangs, for appellee.

DUNN, J. Appellee, the J. Burton Company, filed its bill in the circuit court of Cook county against the city of Chicago and three individuals, to enjoin them from interfering with the work of excavating for and building a vault under an alley in the city of Chicago. The bill alleged that the complainant was the owner of certain real estate, in the rear of which was a public alley, over which the city had jurisdiction and control; that on February 5, 1908, the city council passed an ordinance the first two sections of which are as follows:

"Section 1. No person shall use any space

underneath the surface of any street or other public ground in this city, or construct or maintain any structure thereunder, without first obtaining a permit so to do from the commissioner of public works of the city. No such permit shall be issued except as hereinafter provided, and no such permit shall be transferred or assigned, nor shall any right or privilege thereunder be transferred or assigned without the written consent of the commissioner of public works.

"Sec. 2. Application for such permits shall be in writing, stating specifically the space desired, its length, breadth and depth, the use intended to be made thereof and the structure to be built therein. No permit shall be issued hereunder for the use of any space under the surface of the roadway of any street or other public ground."

Section 3 provides that "every applicant for such permit shall file with his application his bond \* \* \* for the maintenance of the street, alley or other public way, or the sidewalk over such space, as the case may be, in such condition that said street, alley or public way, or the sidewalk, shall at all times, after such structure is completed or such space is covered, be safe for public use." Section 4 provides that "the person, firm or corporation making, using or maintaining any structure or using space underneath the surface of any street, alley, public way or public ground, shall render to the city, as the annual compensation for such use," a sum to be determined according to a rule stated. Section 6 provides that "if any person now using any space underneath any street, public alley, sidewalk or public way shall fail to take out a permit for such use, as herein provided, within ninety days after this ordinance is in effect, then the commissioner of public works shall proceed to remove every such structure and close the space therein." Section 11 provides that "nothing in this ordinance contained shall be held or construed to apply to any person now using any such space underneath the surface of any street or other public ground according to the terms of any ordinance heretofore passed which requires the payment of compensation for such use if such person is making such payments nor so long as such payments are made according to the terms of such ordinances. \* \* \* Nothing in this ordinance contained shall preclude the city from revoking any permit issued hereunder when the space described in such permit is needed for public use."

It was further alleged that on April 12, 1906, the commissioner of public works issued a permit to complainant to excavate for, construct, and maintain, a vault 16 feet in width underneath the surface of the alley, in accordance with plans prepared for said work and approved by the commissioner, and that the complainant paid to the city

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the sum of \$5 as compensation from May 1, 1906, to November 1, 1906, as provided by the permit, and filed a bond in compliance with the terms of the ordinance. The bill then alleged that upon the opposite side of the alley, and abutting thereon, was property owned by Kupka, Bocek, and Peklo, who were made parties defendant; that the complainant had, in process of construction, a building upon its property, and had commenced to excavate, and that these opposite owners had complained about the excavation, and had requested a certain alderman to see that the city should stop the excavation and prevent the use of the vault; that they were endeavoring to secure the co-operation of the city, and had threatened by force to prevent the complainant from doing the work and using the space under the alley, and unless they were prevented from so doing, they would stop the work of excavation; that since the granting of the permit the complainant had caused plans to be prepared for the construction of the building and of the vault, and had erected a boiler house in such a position that if it was unable to use the vault, it would be obliged to make changes and alterations in the building at an expense of \$2,500. It was then further alleged, upon information and belief, that the owners of the real estate on the opposite side of the alley had endeavored to intimidate the workmen employed on the excavation, had threatened them with violence and bodily injury, and that the city, in consequence of their activity, had threatened to stop the work, and had taken some steps toward that end. The prayer of the bill was for an injunction restraining the defendants from in any way interfering with or preventing, either by threats or actions, the excavation of the alley, the construction of the vault, or the use and occupation of the space under the alley, and restraining the city from revoking the contract. The complainant dismissed the bill as to the individual defendants. A demurrer interposed by the city of Chicago was overruled, and, the city electing to stand by its demurrer, a decree was entered in accordance with the prayer of the bill. From a judgment of the Appellate Court affirming this decree, an appeal is now prosecuted to this court.

It is claimed by the appellant that section 2 of the ordinance set out in the bill prohibits the issuing of a permit for a vault under the roadway of an alley, while the appellee insists that the prohibition of that section has no application to alleys. Reading sections 1 and 2 together, there would seem to be little occasion for construction. The words are to be given their usual and popular meaning, and the same words occurring in different parts of the ordinance are to be given the same meaning, unless the context requires different meanings. The two sections read together declare that no person shall use any space underneath the sur-

face of any street or other public ground, without first obtaining a permit so to do, and that no permit shall be issued for the use of space under the surface or roadway of any such street or other public ground. It is apparent that the object of the ordinance was to prevent the use of the space under sidewalks by adjoining owners, without compensation to, or regulation by, the city, and to provide for its lawful use, under proper regulations, under the control and direction of the city authorities, and upon payment of compensation provided for and regulated by law. The title of the ordinance is "An ordinance concerning the use of streets and alleys and the space under sidewalks by private persons." It manifestly was not contemplated that a permit should be given, under any circumstances, for the private use of space under any roadway. That was not the subject-matter of the ordinance. It is not to be imagined that the words "any street or other public ground," occurring in the first sentence of the ordinance, prohibiting the use of the space under "any street or other public ground" without a permit, were understood to have any different meaning from the same words used in the same connection to prohibit the issue of any such permit to use the space under any roadway. If the prohibition in section 2 constitutes a proviso or exception to section 1, it is hardly to be supposed that the words of the proviso or exception were intended to have a different meaning from the same words in the enacting clause, the operation of which words in the enacting clause was to be qualified or restrained by those of the proviso or exception. If the words "any street or other public ground" were sufficient in the enacting clause to include alleys, they must be sufficient in the proviso to except them.

Counsel for appellee assume that the word "roadway" means a portion of a street between two curbs, two sidewalks, and, in some instances, two parkways, and that this court will take judicial notice that in the city of Chicago the alleys have no sidewalks. Each of these assumptions is wholly unwarranted. The roadway of a street is the portion used for horses and vehicles, and may be coextensive with the street. Alleys usually have no sidewalks, but we do not take notice that all alleys have, or any particular alley has none. The power and jurisdiction of the city over the public alleys of the city are identical with its power and jurisdiction over the streets of the city. In this state there is no distinction in law between a public street and a public alley. The only popular distinction between them is the difference in width, and that distinction is as indefinite as the difference between a narrow-tired wheel and a broad-tired wheel. There is no certain width on one side of which a public highway is a street, while on the other side it is an alley. Nor can it be said that a public way having a sidewalk on one

or both sides is a street, while another public highway, identical in every other respect, but without a sidewalk, is an alley. The words "streets and alleys" are constantly used in collocation, and in the legislation of the state are nearly always met with together. The method of establishment and vacation, the character of the title acquired, and the trust upon which it is held, the kind of use, the manner of improvement, the jurisdiction and power of the municipality, as well as its liabilities, are identical in the case of streets and of alleys. The establishment of sidewalks is under the control of the municipality, and it may establish sidewalks on either or both sides of a narrow street or omit them altogether from a wide one, but the highway is not thereby changed from alley to street, or vice versa. It is insisted that, to give effect to the words in sections 3, 4 and 6 in regard to the space under any street, alley, public way, sidewalk, or public ground, it is necessary to hold that the exception to section 2 does not include the space under an alley. To reach this conclusion counsel ask us to hold that the meaning of the word "street" in the exception is restricted, by the use of the word "roadway," to a street having not only a roadway, but other surface, and that thereby the words "or other public ground" are restricted to other public ground having roadway and other surface. Then we are asked to hold, as a matter of law, that an alley has only a roadway, and no other surface, and therefore is not included in the exception. There is no allegation in the bill that there are no alleys having sidewalks in the city of Chicago, and we do not know that such is the fact.

The rule that contemporaneous, long, uniform, and practical construction by administrative officers of a statute will be followed by the court in doubtful cases has no application here, because no such construction is shown, and it is not a doubtful case.

The objection that the ordinance is void because it operates partially is not valid, because it does operate alike upon all persons similarly situated, except in cases of contract rights acquired prior to its adoption.

It is claimed that the appellant, having, through the commissioner of public works, granted the permit and accepted the bond and compensation from appellee, is estopped to deny the validity of the permit. It is conceded that the city had the authority to grant a permit to make the excavation and construct the vault in question, but the commissioner of public works had no such authority. On the contrary, the ordinance prohibited his doing so. The appellee, in applying for the permit, must be held to have known the commissioner had no power to grant it. The permit itself purports to be issued in pursuance of the ordinances of the city, and the bond given by the appellee is conditional for keeping the sidewalk in repair, and for a compliance with the ordi-

nances of the city regulating the use of space underneath sidewalks. The agent of a municipal corporation can no more bind the corporation in its private corporate capacity beyond the authority conferred upon him than an agent of an individual can bind his principal beyond his authority. The mere issue of the permit gave no right to appellee, because the commissioner of public works was without authority to issue it.

It is earnestly contended that the case of *Gregsten v. City of Chicago*, 145 Ill. 451, 84 N. E. 423, 36 Am. St. Rep. 496, is decisive in favor of the validity of the permit in this case, and of the right of appellee to construct and maintain the vault. It is not, however, in point here. In that case the ordinance authorized the issuance of a permit, and the only objection to its regularity was that it was not shown that the bond required of the applicant had been approved by the city council. It was shown that *Gregsten* had excavated and constructed the vault at great expense, occupied it for 20 years, in accordance with the permit, with his boilers and apparatus used in connection with his adjoining building, and had during all that time, at his own expense, maintained and kept the alley in repair—all with the full knowledge of the city authorities. It was held that, from its long acquiescence in the use of the alley in accordance with the permit, the approval of the bond by the city council would be presumed. It was then held that the permit and bond constituted a contract not revocable by the city at its pleasure. In that case a contract was entered into by officers properly authorized to make it, and it was held binding on the city. In this case the officer was expressly prohibited from issuing the permit. Nothing tending to establish an estoppel is shown. The ordinance was passed February 5, 1906, the permit was issued April 12th and the bill was filed October 8d.

It is alleged that the appellee has begun the excavation of the alley, has had plans prepared looking to the construction of its building and the occupation of the space under the alley in connection therewith, and has let its contracts for construction, and ordered building material, in contemplation of using the space under the alley, and that it will be put to great expense if it cannot use such space and is obliged to change its plans. This action of appellee was, however, taken on its own responsibility, relying upon an invalid permit issued at its own instance, without any authority, and was not induced by any action of the city or any of its officers, or even, so far as appears, with their knowledge.

The bill does not show that the complainant is entitled to the relief prayed for, and the demurrer to it should have been sustained.

The judgment of the Appellate Court and the decree of the circuit court are reversed,

and the cause remanded to the circuit court, with directions to sustain the demurrer to the bill.

Reversed and remanded, with directions.

(236 Ill. 329)

### MAHAN et al. v. SCHROEDER.

(Supreme Court of Illinois. Oct. 26, 1908. Petition for Rehearing Stricken Dec. 4, 1908.)

#### 1. TRUSTS (§ 41\*)—EVIDENCE—BENEFICIAL OWNERSHIP—PRESUMPTIONS.

Notes and a mortgage having been in decedent's husband's possession at her death, properly indorsed and assigned to him by her, it will be presumed that he owned the beneficial interest, as well as the legal estate.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 60; Dec. Dig. § 41.\*]

#### 2. TRUSTS (§ 42\*)—EVIDENCE—ADMISSIBILITY.

On a bill to establish an express trust in notes and a mortgage, assigned by decedent to her husband, in favor of her legatees, an instrument subsequently executed by decedent, being a request to her husband to deliver the notes and mortgage placed in his charge to decedent's executor, so that her will might be carried out, was inadmissible against her husband's estate, unless he knew of the execution of the instrument before her death; and statements made by her in his absence, and not part of the transaction by which she made the assignment, were also inadmissible.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 61; Dec. Dig. § 42.\*]

#### 3. TRUSTS (§ 44\*)—EXPRESS TRUSTS—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show an express trust, in favor of decedent's legatees, in notes, etc., assigned to her husband.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 66-68; Dec. Dig. § 44.\*]

#### 4. HUSBAND AND WIFE (§ 49½\*)—FIDUCIARY RELATIONS—QUESTION OF FACT.

One is not dominant over his wife, as a matter of law, so as to create a presumption that her gift to him results from undue influence; the question of his dominance being one of fact.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 259; Dec. Dig. § 49½.\*]

#### 5. HUSBAND AND WIFE (§ 49½\*)—TRANSFER OF PROPERTY—UNDUE INFLUENCE—EVIDENCE—WEIGHT.

Evidence held to show that one did not exercise fraud or undue influence over his wife to procure an assignment to him of notes and a mortgage.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 260; Dec. Dig. § 49½.\*]

#### 6. EVIDENCE (§ 213\*)—ADMISSIONS—COMPROMISE OF CLAIM.

That, on being sued by his wife's personal representative for the value of notes assigned to him by her, decedent compromised an importuning daughter's claim is not available, on a subsequent bill to establish a trust in favor of the wife's legatees, as an admission that he did not own the notes absolutely.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 745; Dec. Dig. § 213.\*]

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, McLean County; Colostin D. Myers, Judge.

Bill by Walter Mahan and others against

Franklin Schroeder, executor. From a judgment of the Appellate Court for the Third District, affirming a decree dismissing the bill, plaintiffs appeal. Affirmed.

On April 3, 1906, Walter Mahan, George Mahan, and Fred Mahan, by James Mahan, their next friend, and Edwin Abbott, Herman Mahan, and James Mahan, grandchildren of and legatees under the will of Maria Schroeder, deceased, appellants, filed their bill in the circuit court of McLean county against Franklin Schroeder, as executor of the will of Herman Schroeder, deceased, appellee, to establish and enforce a trust with reference to a certain note and mortgage for the principal sum of \$11,000, and the coupon notes accompanying the principal note, for an accounting with reference thereto, and for the appointment of a trustee to receive and administer the property according to the terms of a trust declared in the will of said Maria Schroeder, who was the wife of said Herman Schroeder, and who predeceased him. The bill, as amended, alleges, among other things, that appellants are the children of America, daughter of Herman and Maria Schroeder, and that Walter Mahan, George Mahan, and Fred Mahan are minors; that their mother, who was several times married, and is now America Hoffman, has an interest in the subject-matter of the suit adverse to the interests of her said children; that Maria Schroeder departed this life on November 27, 1901, leaving a last will and testament, in and by which she bequeathed her property to the children of the said America Hoffman, subject to certain provisions made therein for their mother during her lifetime; that the said will was duly admitted to probate in the county court of McLean county on August 27, 1904, and upon the refusal of the executor named therein to qualify, Homer W. Hall was appointed administrator with the will annexed, and thereafter, on November 1, 1905, the said administrator, having reported that he was unable to find any assets of said estate, was discharged by order of the court; that America Hoffman is still living, and that complainants are her only surviving children; that on March 7, 1901, the date of the execution of said will, Maria Schroeder owned and was possessed of one note for the sum of \$11,000, due February 28, 1911, with 10 coupon interest notes for \$577.50 each, and \$1,000 in cash in the First National Bank of Bloomington, being the proceeds of the sale of a farm to Claus Struve, and also owned and was possessed of a 10-acre tract of land known as "Villa Maria," located in the eastern suburbs of the city of Bloomington, and certain other property not necessary to mention here; that at the time of the execution of said will Maria Schroeder was 74 years of age, and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

thereafter became, and was and continued to be, sick, weak, and feeble of mind and body, and that, from time to time during said sickness, the said America Hoffman, who was a spendthrift, procured her mother to sign blank checks against the said bank account, and deliver them to the said America Hoffman, who filled out and cashed such checks until the said \$1,000 deposited in said bank was all withdrawn; that said Maria Schroeder, upon learning that said bank account was exhausted, on or about June 6, 1901, negotiated a loan from said bank to defray the expenses of her sickness, and took the note above mentioned, with the interest coupons thereto attached, and deposited it with said bank as collateral security for said loan; that thereafter, while the said Maria Schroeder was in a sick and feeble condition, confined to her bed, and greatly worried and troubled over the loss of her bank account and the manner in which it had been withdrawn, her husband, the said Herman Schroeder, a strong-minded, severe man, of whom she stood in great fear, fraudulently contriving to gain possession of said note and coupons and deprive complainants of the benefit thereof, took advantage of the weak and enfeebled condition of his wife, and by threatening, cajoling, and representing to her that, unless said note and coupons were placed in his custody, the said America Hoffman would obtain possession of and squander them, so played upon the fears and weakness of his said wife as to induce her to consent to intrust him with the custody and control of said note and coupons; that in accordance with said arrangement the said Maria Schroeder executed and published her said certain writing, stating that said note and coupons were placed in the hands of her husband only as custodian or trustee, and directing that at her death he turn over said note and coupons to her executor or trustee, to be disposed of in accordance with the terms of her will; that Maria Schroeder then and there gave to her said husband a check for the balance of \$279.59 remaining to her credit in said bank, and executed and delivered to him an assignment of said mortgage securing said note and coupons; that said Herman Schroeder thereupon cashed the said check, and paid to the said bank the note for \$300 made by his wife, and received and retained possession of said note and coupons which had been deposited with said bank as collateral; that the said Herman Schroeder paid no consideration for said note and coupons, and that Maria Schroeder was led to believe that the sole object of said transaction was to place said note and coupons beyond the reach of America Hoffman during the lifetime of said Maria, and at her death to be turned over to her executor or trustee, and disposed of in accordance with the terms of her will; that upon the death of said Maria Schroeder the

said husband retained possession of said note and coupons, claiming to be the owner thereof by virtue of said transaction, and refused, and whose executor still does refuse, to account for and turn over said note and coupons, or either of them, to the administrator of the estate of Maria Schroeder for the use and benefit of said estate. The answer of the defendant denies the material allegations of the bill, and avers that the said Maria Schroeder sold, assigned, and delivered the said note and coupons to the said Herman Schroeder as his own property, without any trust or condition whatever. A replication was filed, and on April 27, 1906, the cause was referred to a master, to take proofs and report the same to the court, together with his findings and conclusions thereon. On March 28, 1907, the master filed his report, finding the facts to be substantially as set out in the bill, and that complainants were entitled to the relief prayed therein. Objections to the master's report were overruled, and ordered to stand as exceptions, and on May 29, 1907, the court entered a decree overruling the report, sustaining the exceptions thereto, and dismissing the bill for want of equity. From that decree complainants prayed an appeal to the Appellate Court for the Third District, where the decree of the circuit court was affirmed, and to review the judgment of that court a further appeal is prosecuted by them to this court.

Herman Schroeder (who was known as Dr. Schroeder) and Maria Schroeder were natives of Germany. About the year 1852, after their marriage, they emigrated to this country and settled in Bloomington, where they resided so long as they lived, Mrs. Schroeder's death occurring on November 24, 1901, and that of her husband on April 7, 1905. During their residence in Bloomington they accumulated considerable property. To them were born three children, viz., Franklin, America, and Minerva. The latter married one Alfred Schirmer, and died a number of years prior to the death of her mother. The marital relations between Dr. Schroeder and his wife, it seems, were not at all times entirely pleasant. Dr. Schroeder was a man of great force of character, eccentric, frugal, charitable, and public-spirited. During the year 1887 the difficulties between the doctor and his wife reached such a state that Mrs. Schroeder instituted separate maintenance proceedings against him, which, however, were subsequently dismissed, and they again lived together. Upon the dismissal of this suit Dr. Schroeder, on March 26, 1887, conveyed to his wife a one-half interest in certain property owned by him in the city of Bloomington. In addition to this property it appears that Mrs. Schroeder owned a 10-acre tract of land in the suburbs of that city, known as "Villa Maria." On January 9, 1901, the property last mentioned was conveyed by her to their son, Franklin Schroe-

der, for his life, and after his death to the heirs of his body. Mrs. Schroeder exchanged her interest in the property deeded her by her husband for 160 acres of land, which she sold on January 2, 1901, to Claus Struve for \$12,160, \$1,000 of which was paid to her in cash, and in settlement of the balance she received from Claus Struve and wife a note executed by them for the sum of \$11,000, due February 28, 1911, with interest at the rate of 5¼ per cent. per annum, which was evidenced by 10 coupon notes, each for the sum of \$577.50, all of said notes being secured by a mortgage on the land. What became of the other \$160 does not appear. The cash received by her from the sale of this land was deposited to her credit in the First National Bank of Bloomington. On January 3, 1901, on account of ill health, Mrs. Schroeder was removed from her home to the Brokaw Hospital, and on January 26, 1901, at her request, she was taken from there to the St. Joseph Hospital, in Bloomington, where she remained practically all of the time until her death in the following November. America was the favorite child of Mrs. Schroeder, while it seems the doctor, believing that America was a spend-thrift, preferred the son, Franklin. Shortly after Mrs. Schroeder had been taken to the hospital, America, representing to her that she needed small sums of money from time to time, induced her mother to sign and give to her checks in blank, drawn on her account at the First National Bank. She would then fill up the blanks with larger sums than the mother intended, and in a short time the daughter had thus withdrawn practically all of her mother's money from that bank. When Mrs. Schroeder learned that her account was exhausted, she borrowed \$300 from the First National Bank, giving a note signed by herself and Edwin H. Miner, her attorney, as surety, and also delivered to the bank the Struve note and coupons as collateral security, and the money thus obtained was placed to her credit in that bank. In 1896 Herman Schroeder and his wife each executed a will, devising and bequeathing all their property to the other, and thereafter, on April 5, 1900, July 25, 1900, December 13, 1900, and on May 7, 1901, Mrs. Schroeder executed other wills, in each giving the greater portion of her estate to her daughter, America, for life, with remainder to America's children. The four last wills executed by Mrs. Schroeder were placed in the custody of her attorney, all of which, except the last one, were destroyed by him. On September 2, 1902, following the death of his wife, Dr. Schroeder executed a second will, giving to his daughter America a life interest in certain real estate in the city of Bloomington, with remainder to her son George Mahan, and the balance of his estate to his son, Franklin, and the wife and children of Franklin.

On the evening of June 10, 1901, Mrs.

Schroeder was taken from the hospital to her husband's apartments, where she remained during the evening. On the following morning Mrs. Schroeder sent for her attorney, Mr. Miner, who came to the hospital, to which she had returned, and at her request drew up for her the following instrument, which was then and there executed by her, in her husband's absence: "Bloomington, Ill., June 11, 1901. Dr. Herman Schroeder—On my death I request that you turn over to my executor named in my will dated March 7, 1901, the note placed in your charge given by Claus Struve and Mary Struve, of \$11,000, together with the coupons attached, that he, my executor, may carry out my last will and testament. Dated this 11th day of June, 1901. Maria Schroeder. Attest: Sister M. Lucy." The above instrument was then taken by the attorney and attached to Mrs. Schroeder's will dated March 7, 1901. It appears that Mrs. Schroeder was again in her husband's rooms on the 12th, 13th, 14th, and 15th of June, 1901. During that time she signed and delivered to him a check in blank upon the First National Bank, and on the 15th indorsed to him the Struve notes, and on the same day executed and delivered to him an assignment of the mortgage securing the notes. At the same time she delivered the notes and mortgage to him. It does not appear from these indorsements and the assignment that the property was transferred to him in trust. After the blank check had been given to the doctor, he went to the bank and drew out \$279.59, being the amount of Mrs. Schroeder's account there at the time, and paid off the \$300 note held by said bank against her. At this time Mrs. Schroeder and her husband were about 75 and 80 years of age, respectively. Mrs. Schroeder was of more than ordinary intelligence, and was a capable business woman. She was of an excitable temperament, and very nervous. While it appears that there were occasions when her husband mistreated her, yet the evidence tends strongly to show that she respected him, and that while she was in the St. Joseph Hospital she looked forward to his daily visits with great pleasure, and that his treatment of her, at least during that time, was kind and considerate, and all that she could have desired. The will of Mrs. Schroeder was kept by Mr. Miner until a few days after her death, when it, together with the paper executed by her on June 11, 1901, was turned over by him to the probate judge of McLean county. Miner was named in the will as executor, but refused to qualify, and the will was not filed for probate until August 27, 1904, when it was admitted to probate, and Homer W. Hall appointed administrator with the will annexed. Thereafter Hall brought suit against Dr. Schroeder to recover the value of the Struve notes. On March 30, 1905, this suit was dismissed, and on the next

day America Hoffman, in consideration of \$1,000 paid to her by her father, released him, in writing, from any and all claims that she might have against him on account of any property, money, or notes that had belonged to her mother's estate. It is contended by the appellants that the circuit court erred in not holding (1) that the writing executed by Mrs. Schroeder on June 11, 1901, followed by the delivery of the property to the trustee named therein, constituted an executed, express trust in the property on the terms declared in the will therein referred to; (2) that the defendant failed to prove that he had any title whatever to the property other than as trustee; and (3) that the relation and situation of the husband and wife and the nature and circumstances of the transaction gave rise to an implied or constructive trust.

Bracken, Young & Pierce (T. C. Kerrick, of counsel), for appellants. Stone & Oglevee and Ezra M. Prince, for appellee.

SCOTT, J. (after stating the facts as above). The principal questions in this case are questions of fact. At the time of the death of Maria Schroeder the notes and mortgage in question were in possession of her husband, Herman Schroeder, properly indorsed and assigned to him. The presumption arises therefrom that he was the legal and equitable owner of the property. For the purpose of overcoming this presumption the appellants sought first to show the existence of an express trust, by the terms of which the husband, upon the death of his wife, was to transfer this property to her executor, to be disposed of in accordance with the terms of her last will. On June 11, 1901, four days before the execution of the assignment and indorsements, she executed the instrument bearing that date, which is set out in the foregoing statement of facts, and her attorney attached it to her last will and testament, which was in his possession for safe-keeping. No citation of authority is necessary to support the proposition that the execution of this instrument could not in anywise affect the rights of Herman Schroeder, unless notice thereof was brought to him at some time prior to the death of his wife. The only thing in this record that could possibly be regarded as an indication that he had any knowledge, before her death, that she had signed this document, results from the fact that he kept a diary, in which, under the date of June 10, 1901, in his handwriting, appear these words: "Mama made testament to America." The instrument in question was not executed until June 11th. It is contended by appellants, however, that an inspection of the entries in the diary under the date line of June 10th, and under that of June 11th shows that this entry, although dated June 10th, was in fact made on June 11th. It will be observed that the language quoted

is the recital of a past event. Some years prior thereto Dr. and Mrs. Schroeder had each made a will devising and bequeathing all the property owned by him or her to the other. Thereafter the wife on various occasions made wills making other disposition of her property, and in each instance giving to America a substantial interest therein. This recital in the diary may as well have referred to the execution of such a will providing for America as to the execution of the so-called declaration of trust. At any rate, it does not appear that the language in the diary had reference to the document of June 11, 1901. The only other evidence which it is claimed shows the existence of an express trust is proof of statements made by Mrs. Schroeder not in the presence of her husband, and not a part of the transaction by which she transferred to him the mortgage and notes in question. Such statements were incompetent. There is in this record no competent evidence which fairly tends to show the existence of the express trust averred.

It is then contended that Herman Schroeder was a trustee *ex maleficio*; that he in fact held the property in trust for his wife, and, such being the case, it would pass under her will. Reliance is placed upon the presumption arising from the existence of fiduciary relations where a gift of property is made by the dependent to the dominant party, and it is contended that the existence of the relation of husband and wife in this case casts upon Dr. Schroeder's executor the burden of proving that the property was conveyed to his testate without the exercise of any undue influence by the husband affecting the volition of the wife. Wherever husband and wife reside together under the ordinary conditions of marriage, confidential relations necessarily exist between them; but in this day of the better education of woman, when she and her property have been very largely emancipated from the control of the husband, it cannot be said, as a matter of law, that he is the dominant and she is the dependent party. Whether or not that be true is a question of fact. Generally the wife is the intellectual equal of the husband, and not infrequently she is his superior. Often she has a business training that fits her to care for property better than he can care for it. Mrs. Schroeder was a woman who was nicely educated. She was refined, and of a higher degree of intelligence than her husband. She came of a class which, in the land of their nativity, was denominated the "nobility." Under the laws of that country she rightfully bore the title of baroness. He on the contrary, sprang from what is there termed "plebeian stock." He was always very proud of his wife, and very proud of the fact that she had elected to marry him. It is evident from the proof in this record that each had a warm and sincere affection for the other. He, unfortunately, possessed a violent and ungovernable temper, and its outbreaks occa-

sioned the difficulties that arose between them. At the time of the separate maintenance proceeding she secured the transfer to herself, in her individual right, of property sufficient in value and extent to support her independently. Thereafter she employed her own attorney and her own agent, and carried on her own business affairs separately and without consulting with her husband.

If, however, it be conceded that a fiduciary relation existed between them, and that he was the dominant party, and if it be further conceded that the presumption upon which appellants rely obtains, the question arises, has appellee shown, by a preponderance of evidence, the absence of fraud and undue influence? The assignment and the indorsements, by virtue of which appellee claims, were made four days after the execution of the instrument under which the appellants claim. During the intervening period Mrs. Schroeder had been staying with her husband in his apartments. On the day upon which the property was transferred to the husband, August Boeker, a real estate agent in the city of Bloomington, who had frequently acted for the husband, and who had acted for the wife in effecting the sale of the farm to Struve, was summoned to the apartments by telephone. Whether the communication came from the husband or wife does not appear. Boeker is the only witness as to what occurred there, and as to what was said by the husband and the wife. From his testimony it is clear that upon his arrival the wife was the active factor in the transaction. She knew what she wanted done, and proceeded to have it done without suggestion or assistance from her husband. The notes and mortgage were then in her possession. She at once acquainted Boeker with the events which apparently had completely destroyed her faith in her daughter's financial rectitude, and told him, in substance, that she had determined to transfer the property in question to her husband, and that her husband was to pay a promissory note or notes which she had signed, and was to supply her with all the money that she needed so long as she lived, and to this arrangement Herman Schroeder indicated his assent. Boeker went to his office, and drew the assignment of the mortgage, and returned to the apartments, where she attached her signature to the assignment, and Boeker, being a notary, took her acknowledgment. In the certificate of acknowledgment it is recited that she acknowledged the execution of the assignment "to be her voluntary act and deed." After the signing, she personally in the presence of the notary, delivered the notes, mortgage, and assignment to her husband. Charles Park, a physician, attended Mrs. Schroeder after she was in the St. Joseph Hospital, in June, 1901. After the execution of the assignment of the mortgage and the indorsement of the notes, she told him what the

daughter, America, had done, and then stated that she (Mrs. Schroeder) had given up all she had left to the doctor (meaning her husband) trusting him to do what he thought was right; that she had lost confidence in her daughter, America, and for that reason had turned over all she had to her husband; that this was the best she could do under the circumstances. Proof of other similar statements made by Mrs. Schroeder appears.

After the will of the wife had been admitted to probate, a suit in trover was brought by her representative against Dr. Schroeder, to recover the value of these notes. That suit was pending for some years, and was on March 30, 1905, dismissed. On the next day he paid to the daughter, America, \$1,000 in full settlement of all claims that she had against him on account of any property which belonged to the mother during her lifetime, particularly specifying the Struve notes; the purpose, as recited, being to transfer to the father all property to which the daughter might be entitled under the will of the mother. This is regarded by appellants as a clear admission by Dr. Schroeder that he did not have the absolute title to the notes in question. He was at the time quite ill, and died about a week later. America's importunities were no doubt constant and wearing. He possessed the right to buy his peace if he saw fit, and the fact that he made a compromise with the daughter is not controlling in this suit brought by his grandchildren.

Proof was offered in reference to Mrs. Schroeder's mental condition; and, while it is apparent that her mind was not as strong as formerly, that is readily accounted for by her prolonged illness. It cannot be reasonably contended upon this record that she lacked mental capacity to understand the ordinary business transactions of life at the time of the event out of which this litigation grows.

It is also contended by appellants that the property was transferred to Dr. Schroeder as the result of a form of duress, consequent upon the fact that the wife stood in great fear of him, and that she made the transfer of the property to him for the purpose of pacifying him, and preventing a wrong of some kind being visited upon her by him. No presumption aids this contention, and the evidence does not warrant the conclusion that she was so led or induced to convey the property to him.

We are satisfied that the preponderance of the evidence in this record warrants the conclusion that Mrs. Schroeder, feeling a just resentment toward her daughter, acting independently and of her own volition, fearing that she would not live long, transferred the absolute title to this property to her husband, without fraud or undue influence on his part, trusting in him to make proper provision for their descendants, precisely as she had trusted him at the time she entered into the ar-

rangement by which each executed a will leaving his or her property to the other.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(236 Ill. 271)

### SCHWITTERS v. SPRINGER.

(Supreme Court of Illinois. Oct. 23, 1908. Re-hearing Denied Dec. 2, 1908.)

#### 1. FRAUD (§ 57\*)—VALUE OF PROPERTY—EVIDENCE.

In an action for fraudulent representations inducing plaintiff to purchase certain of a series of notes secured by a mortgage on a worthless leasehold, a witness who had previously had charge of the leasehold property was properly permitted to testify as to the income it was producing, and that it was in litigation, and only partially rented, as affecting the value of the leasehold.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 57.\*]

#### 2. WITNESSES (§ 269\*)—CROSS-EXAMINATION—LIMITATION.

Where, in an action for false representations inducing a sale of notes secured by a mortgage on a worthless leasehold, defendant testified regarding sales of other notes of the series, the court properly limited plaintiff's cross-examination on such issue to an identification of the purchasers.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 269.\*]

#### 3. TRIAL (§ 68\*)—RECEPTION OF EVIDENCE—TIME—DISCRETION.

Plaintiff testified that H., one of defendant's witnesses, had been present at an interview in defendant's office, and had been introduced by defendant to plaintiff as M. Defendant thereafter endeavored to secure H.'s attendance, but was unable to do so until after argument to the jury had begun. *Held*, that the court's refusal then to permit defendant to examine H. to contradict plaintiff's testimony was not an abuse of discretion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 161, 162; Dec. Dig. § 68.\*]

#### 4. NEW TRIAL (§ 32\*)—GROUNDS—MISCONDUCT OF COUNSEL.

Misconduct of plaintiff's counsel not such as to affect the merits of the case, or prejudice the defense, was not ground for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 47; Dec. Dig. § 32.\*]

#### 5. FRAUD (§ 59\*)—FALSE REPRESENTATIONS—DAMAGES.

In an action for false representations inducing plaintiff to purchase certain notes of a series secured by a worthless leasehold, on which defendant was not liable, plaintiff's measure of damages was the difference between the actual value of the notes when he purchased them, and what their value would have been if the representations had been true, and interest at the statutory rate, and not at the rate specified in the notes.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60-62, 64; Dec. Dig. § 59.\*]

#### 6. TROVER AND CONVERSION (§ 53\*)—CONVERSION—MEASURE OF DAMAGES.

The measure of damages for the wrongful conversion of goods is the value of the goods at the time of the conversion, with legal interest.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 254; Dec. Dig. § 53.\*]

#### 7. INTEREST (§ 1\*)—NATURE OF RIGHT.

Interest not being recoverable at common law, its recovery depends entirely on statute.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 1; Dec. Dig. § 1.\*]

#### 8. APPEAL AND ERROR (§ 1140\*)—REMITTITUR—DISPOSITION OF CAUSE.

Where a remittitur will obviate an error resulting from the court's charge on the measure of damages, such remittitur, in the absence of other error, will be accepted and the judgment affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462, 4470; Dec. Dig. § 1140.\*]

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; A. H. Chetlain, Judge.

Action by J. F. Schwitters against Warren Springer. From a judgment for plaintiff affirmed by the Appellate Court (137 Ill. App. 103), defendant appeals. Affirmed.

Douglas C. Gregg and William J. Ammen, for appellant. Frank P. Sadler and Ellsworth T. Martin, for appellee.

DUNN, J. The appellee sued appellant in an action on the case for fraud and deceit, whereby the appellee received in exchange for eight hundred acres of land in Colorado two notes for \$1,000 each, which were worthless. The notes were two of the series of \$75,000 described in the case of *Leonard v. Springer*, 197 Ill. 532, 64 N. E. 299, and the declaration is substantially a duplicate of the declaration in that case so far as it relates to the fraudulent scheme of deceit conceived and carried out by the appellant for the purpose of swindling the purchasers of the series of notes mentioned and the execution of the deeds, notes, and trust deed involved in that swindling scheme. The declaration was amended on the trial so as to aver that the defendant falsely represented that the notes were gilt edged and the property securing them was worth at least twice the incumbrance on it, and that the plaintiff relied upon such representations, as well as the statements appearing on the face of said notes and the indorsements thereon.

The evidence tended to support the material averments of the declaration, and it is not contended that the declaration did not state a cause of action, nor that the judgment should be reversed because the evidence does not sustain the declaration, but it is insisted that various errors occurred at the trial which require a reversal of the judgment. Objection was made to permitting Mr. Epps, who had charge of the leasehold property in 1898 and later, to testify as to the income it was producing, on the ground that it was only partially rented, was in litigation and in the hands of a receiver. The income-producing capacity of the property was material, as affecting the value of the leasehold. The circumstances mentioned

were proper for consideration in this connection, as well as the fact, if such was the fact, that the property was not rented to the best advantage of which it was capable, but they affected only the weight, not the competency, of the evidence.

The appellee asked appellant in regard to sales of other notes of the series, and on cross-examination the court permitted inquiries to be made of appellant concerning the persons to whom such other notes were sold. Appellee sought to ascertain whether there had not been trouble with each purchaser, but the court refused to allow this investigation and limited it to the identification of the purchasers. This was not error.

Appellee testified that one of the appellant's witnesses (Haines) had been present at an interview in appellant's office, and had been introduced by appellant to appellee as Maginnis. After this testimony, appellant endeavored to secure Haines' attendance, but was unable to do so until after the argument to the jury had begun. He then asked the court to permit him to examine the witness for the purpose of contradicting appellee, but the court refused to do so. It was within the discretion of the court to permit this to be done, and it does not appear that the discretion was abused.

A large number of instances of alleged improper conduct on the part of the appellee's counsel during the trial and argument of the case has been called to our attention which, it is claimed, were prejudicial to appellant. In much the larger number of such instances no objection or exception appears in the record. Counsel for appellee was guilty of improper conduct. He was offensively persistent in the repetition of questions to which objections had been sustained and in attempting to press his claims which had been repeatedly overruled by the court. The court more than once threatened to fine him, and his conduct was annoying and reprehensible, but his misconduct was not such as to affect the merits of the case or prejudice the defense. We cannot say that it prevented a fair trial or that a new trial should have been granted on account of it.

All the instructions given at the instance of the appellee are criticised by appellant's counsel, as well as the refusal of most of those requested by the appellant and not given. Except in one particular, we do not regard the objections to the instructions given as well taken, and everything in the refused instructions to which appellant was entitled was contained in other instructions given. The fourth instruction given for the plaintiff told the jury substantially that the measure of damages was the difference between the actual value of the notes when traded to the plaintiff and what their value would have been if the representations made to the plaintiff had been true, and that in determining this the jury might take into consideration the unpaid interest which had

accrued to the plaintiff on said notes according to their terms to the time of the trial. That part of the instruction was right which told the jury that the measure of damages was the difference between the actual value of the notes and what their value would have been if the representations made had been true, but so far as the interest is concerned, it was wrong. The notes bore 7 per cent. interest after maturity, and the effect of this instruction was to allow the plaintiff to recover that rate of interest. The measure of damages for the wrongful conversion of goods is the value of the goods at the time of the conversion, with legal interest. *Jane-way v. Burton*, 201 Ill. 78, 66 N. E. 337. In an action on the case for fraudulent representations in the sale of property, the measure of damages is the difference between the value of the property as it is and what it would be worth if the representations had been true. *Antle v. Sexton*, 137 Ill. 410, 27 N. E. 691; *Drew v. Beall*, 62 Ill. 164. Here the trade was consummated October 19, 1898. The notes for \$2,000, with 6 per cent. interest per annum for 15 months, were due November 6, 1898, and would then amount to \$2,150. The appellee's damages, under the rule just mentioned, could not at that time have exceeded \$2,150. The promise to pay that amount of money on November 6th, could not be worth more than the money itself on October 19th. By the payment of that sum the appellant could have discharged himself from all obligation to appellee. Appellant was not liable on the notes. He did not guarantee their payment. His only liability arose out of the fraud practiced on appellee. He was under no contract obligation, and did not agree to pay interest. His liability was only that which the law imposed. At common law interest was not recoverable in any case. Its recovery depends entirely upon the statute. *City of Pekin v. Reynolds*, 31 Ill. 529, 83 Am. Dec. 244; *Illinois Central Railroad Co. v. Cobb*, 72 Ill. 148. Where property has been wrongfully taken or converted into money, interest may be recovered (*Illinois Central Railroad Co. v. Cobb*, supra; *Northern Transportation Co. v. Sellick*, 52 Ill. 249; *Chicago & Northwestern Railway Co. v. Ames*, 40 Ill. 249; *Hale v. Barrett*, 26 Ill. 195, 79 Am. Dec. 387), but under the statute interest at a rate exceeding 5 per centum per annum can be recovered only by virtue of a contract. There was no contract, and appellant was therefore liable for interest only at the statutory rate of 5 per cent. In *Keaggy v. Hite*, 12 Ill. 99 (an action of trover for a promissory note), it was held that the plaintiff, if entitled to recover, is entitled to a verdict for the amount of the note at the time of the conversion. In *Sturges v. Keith*, 57 Ill. 451, 11 Am. Rep. 28, where the articles converted were railway stocks, the plaintiff was permitted in the trial court to recover the market value of the stock at the time of the trial, together with

all dividends paid since the conversion. The stock had greatly increased in value in the interim. This court held that the true measure of damages was the current market value of the property at the time of the conversion, with interest from that time until the trial, and not the value of the property at any subsequent date. In this case the measure of damages was the value of the note at the time the appellee took it, and the appellant was liable for interest at the legal rate. It was therefore erroneous to instruct the jury that it was proper to take into consideration the unpaid interest which had accrued to the plaintiff on the said notes according to their terms to the time of the trial. This made the measure of damages the amount due on the notes at the time of the trial, and is inconsistent with the case of *Sturges v. Keith*, supra.

Appellee in his brief offers to remit the sum of \$243.16 if the instruction is held to be erroneous in regard to the rate of interest. Such remittitur will obviate the error, and the judgment of the Appellate Court will be affirmed as to the residue of \$2,949.04 as of the date of the judgment of the superior court. The costs in this court will be paid by the appellee.

Judgment affirmed.

(236 Ill. 444)

**SPENCE v. CENTRAL ACCIDENT INS. CO.**

(Supreme Court of Illinois. Oct. 26, 1908. Rehearing Denied Dec. 3, 1908.)

**1. INSURANCE (§ 265\*)—"WARRANTY"—"REPRESENTATION."**

A warranty in insurance enters into and is a part of the contract, and must be literally true to permit a recovery on the policy, while a representation is not a part of the contract, but an inducement thereto. A representation must relate to a material matter, and is only required to be substantially true.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 560; Dec. Dig. § 265.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6108-6110; vol. 8, pp. 7396-7404, 7833.]

**2. INSURANCE (§ 264\*)—WARRANTY—PART OF CONTRACT—CONSTRUCTION.**

A warranty in insurance must necessarily appear in the contract itself, and courts will not construe a statement as a warranty unless the language of the policy is so clear as to preclude any other construction.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 562; Dec. Dig. § 264.\*]

**3. INSURANCE (§ 264\*)—WARRANTY—PART OF CONTRACT—STATEMENTS IN APPLICATION.**

Where a policy by express terms makes the application a part of the contract, or where it declares that the application is the basis on which the contract is made, or where the policy is declared to be issued on the faith of the application, representations in the application are a part of the policy and are warranties, but a mere reference to the application in the policy, without indicating a purpose to make it a part of the policy, is insufficient to change

statements in the application from representations into warranties.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 562; Dec. Dig. § 264.\*]

**4. EVIDENCE (§ 419\*)—PAROL EVIDENCE—CONSIDERATION.**

A recital of a given consideration may be contradicted by parol for all purposes except to destroy the legal effect of the instrument.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1912; Dec. Dig. § 419.\*]

**5. INSURANCE (§ 151\*)—CONTRACTS—APPLICATION AS A PART OF POLICY.**

A recital in a policy that it is issued in consideration of the warranties and agreements in the application and of a specified sum is a mere acknowledgment by the insurer of a valuable consideration, which is so far binding as to preclude either party from destroying the legal effect of the policy by showing that no consideration was given, but it does not make the application a part of the policy.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 151.\*]

**6. INSURANCE (§ 151\*)—CONTRACTS—APPLICATION AS PART OF POLICY.**

Whether the application for insurance is a part of the policy is determined only from the language of the policy, and the application cannot be considered on that question.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 308; Dec. Dig. § 151.\*]

**7. INSURANCE (§ 264\*)—REPRESENTATIONS—STATEMENTS IN APPLICATION—FALSITY AND MATERIALITY.**

Where an application for insurance is not a part of the contract, the statements contained therein are mere representations, and not warranties, and a policy may be avoided on proof of the falsity and materiality of a representation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 562; Dec. Dig. § 264.\*]

**8. INSURANCE (§ 668\*)—REPRESENTATIONS—MATERIALITY—QUESTION FOR JURY.**

The materiality of a representation in insurance is sometimes a question of law, where the statement is made in response to a direct inquiry, or where by the contract the parties have settled the materiality by agreement.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1735; Dec. Dig. § 668.\*]

**9. INSURANCE (§ 265\*)—REPRESENTATIONS—MATERIALITY.**

An application for an accident policy recited that the applicant applied for a policy based on the following statements of facts, all of which he warranted to be true, and that he agreed that the application and warranty should be the basis of the contract. The policy, by way of recital, stated that it was issued in consideration of the warranties and agreements in the application and of a specified sum. *Held*, that the application was not made a part of the policy, and a statement in the application as to the age of the applicant was a mere representation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 560; Dec. Dig. § 265.\*]

**10. INSURANCE (§ 668\*)—ACCIDENT INSURANCE—REPRESENTATION—MATERIALITY.**

Whether the false representation of an applicant for an accident policy that he was 62 years of age, when he was 64, was material, *held* for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1735; Dec. Dig. § 668.\*]

Cartwright, C. J., and Hand, J., dissenting.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Error to Branch Appellate Court, First District, on Error to Superior Court, Cook County; Axel Chytraus, Judge.

Action by Mary C. Spence against the Central Accident Insurance Company. There was a judgment of the Appellate Court affirming a judgment for defendant, and plaintiff brings error. Reversed and remanded.

Henry S. Wilcox (Jesse Wilcox, of counsel), for plaintiff in error. Musgrave, Platt & Lee, for defendant in error.

VICKERS, J. This is an action of assumpsit on an accident insurance policy brought by Mary C. Spence against the Central Accident Insurance Company to recover \$5,687.50, which the company promised to pay to the plaintiff in the event of the accidental death of her husband, Robert Spence. The insurance company, by several special pleas, alleged a breach of warranty as to the age of the assured at the time the policy was applied for. The plaintiff below demurred to these several pleas, which demurrer was overruled, and she elected to abide by her demurrer. To the fourth plea, which set up that the assured in and by his application represented that he was 62 years of age, when, in fact, he was over the age of 62 and was of the age of 64, the plaintiff replied, by leave of court, first, that the age of Robert Spence was not material to the risk assumed under said policy; second, that the understatement of the age of Robert Spence did not increase the risk or hazard of the defendant. The court sustained a demurrer to these replications, and the plaintiff elected to abide by her replications to the fourth plea, whereupon judgment was rendered against her for costs. This judgment having been affirmed by the Appellate Court for the First District, the plaintiff below has sued out a writ of error to obtain a further review of the judgment.

The policy and the application therefor are both set out in *hæc verba* in the declaration. The only question involved in the record is whether the statement of the age of the assured in the application is a warranty or a representation. If the former, the judgment must be affirmed; but, if the statement is only a representation, the judgment will have to be reversed and the cause remanded for a new trial. There is a well-defined difference between a warranty and a representation in the law of insurance. A warranty enters into and is a part of the contract, and must be literally true in order to entitle a party to recover upon a policy of insurance, while a representation is not a part of the contract, but is an inducement thereto. A representation must relate to a material matter, and is only required to be substantially true. *Continental Life Ins. Co. v. Rogers*, 119 Ill. 474, 10 N. E. 242, 59 Am. Rep. 810; *Minnesota Mutual Life Ins. Co. v. Link*, 230 Ill. 273, 82 N. E. 637; *Metro-*

*politan Life Ins. Co. v. Moravec*, 214 Ill. 186, 73 N. E. 415.

In his application for the policy in question the assured stated: "I hereby apply for an accident policy, to be based upon the following statement of facts, all of which I hereby warrant to be true: My full name is Robert Spence; height 5 ft. 10 in.; weight 134 lbs.; age sixty-two years. My residence is Chicago, Illinois. My post-office address is 122 La Salle street. My occupations are fully described as follows: Collector publishing house." The application also contained the following: "I hereby agree that this application and warranty, together with the premium paid by me, shall be the basis of the contract between the company and me, and I accept the policy which said company shall issue upon the application, subject to all conditions, provisions and classifications contained in such policy or referred to therein, which I understand cannot be altered, changed or waived by any agent of said company before or after the issuing thereof." If the language above quoted from the application was in the policy or by reference thereto made a part of the policy, it would be much easier to sustain the defense than it is under the facts of this record. But these statements are only found in the application. A warranty, being a part of the contract itself as contradistinguished from a representation, which is a mere inducement to the contract, must necessarily appear in the contract itself. In *Mutual Benefit Life Ins. Co. v. Robertson*, 59 Ill. 123, 126, 14 Am. Rep. 8, this court, said: "A warranty is in the nature of a condition precedent. It must appear on the face of the policy, or if on another part of it or on a paper physically attached it must appear, that the statements were intended to form a part of the policy, or, if on another paper, they must be so referred to in the policy as clearly to indicate that the parties intended them to form a part of it. A warranty cannot be created nor extended by construction"—citing *Reynolds on Life Insurance*, 85 et seq.; *Campbell v. New England Ins. Co.*, 98 Mass. 381; *Burritt v. Saratoga Ins. Co.*, 5 Hill (N. Y.) 188, 40 Am. Dec. 345; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567.

Defendant in error contends that the application in this case is a part of the policy. The only language in the policy that makes any reference to the application is found in the first sentence of the policy, where it is recited: "In consideration of the warranties and agreements in the application for this policy and of \$25 does hereby insure Robert Spence, of Chicago, State of Illinois, by occupation a collector publishing house," etc. It will be observed that the reference here to the application does not expressly make it a part of the policy; nor does such effect necessarily follow by a fair construction of the language, even if a warranty could thus be imported into the contract.

The doctrine of warranty, in the law of insurance, is one of great rigor and frequently operates very harshly upon the assured, and courts will never construe a statement as a warranty unless the language of the policy is so clear as to preclude any other construction. As was said by Justice Gray in *McClain v. Providence Savings Life Ass'n*, 110 Fed. 80, 49 C. C. A. 31: "The practical operation of such literal warranties is so often harsh and unfair that courts require their existence to be evidenced clearly and unequivocally, and are not inclined to allow it to rest upon a mere verbal interpretation where a reasonable construction of a contract as a whole will authorize a different meaning. All reasonable doubts as to whether statements inserted in or referred to in an insurance policy are warranties or representations should be resolved in favor of the insured." By statute at least two states (Pennsylvania and Ohio) have eliminated warranties from the law of insurance in those states, and the constitutionality of such statutes has been sustained by the Supreme Court of the United States. *Hancock Mutual Life Ins. Co. v. Warren*, 181 U. S. 73, 21 Sup. Ct. 535, 45 L. Ed. 955. The usual method adopted by insurance companies to make the statements and stipulations embraced in the application a part of the policy is to refer to the application and by express terms make it a part of the contract, or they are declared to be the basis upon which the contract is made, or the policy is declared to be issued upon the faith thereof. May on Insurance (2d Ed.) § 158. Where this course is pursued, there is no room for doubt. A mere reference to the application in the policy is not sufficient. If the reference appears to be for a special purpose and not with a view to import the application into the policy as a part of the contract, the statements it contains will not thereby be changed from representations into warranties. When the reference to the application is expressed to be for another purpose, or when no purpose is indicated to make it a part of the policy, it will not be so treated. *Jefferson Ins. Co. v. Cotheal*, supra; *Snyder v. Farmers' Ins. & Loan Co.*, 13 Wend. (N. Y.) 92; *Campbell v. New England Life Ins. Co.*, supra. In *Daniels v. Hudson River Ins. Co.*, 12 Cush. (Mass.) 423, 59 Am. Dec. 192, Shaw, Chief Justice, said: "If by any words of reference the stipulations in another instrument, such as the proposal of application, can be construed a warranty, it must be such as to make it in legal effect a part of the policy." The language in reference to the consideration in the policy in question is not contractual, but merely by way of recital. "In consideration of the warranties and agreements in the application and of \$25" is no part of

the written contract, in the sense that it embodies any of the engagements or agreements of the parties. It is a mere recital of a consideration, which is always open to contradiction by parol. Page on Contracts, § 1203. The recital of a given consideration is not a promise to pay it. If it were, parol evidence could not be received to contradict the recital. It has been held in many cases in this state, and is the settled law, that a recital of a given consideration may be contradicted by parol evidence for all purposes except to destroy the legal effect of the instrument. *Illinois Central Ins. Co. v. Wolf*, 37 Ill. 354, 87 Am. Dec. 251; *Morris v. Tillson*, 81 Ill. 607; *Koch v. Roth*, 150 Ill. 212, 37 N. E. 317. The effect, and the only effect, of the recital in the policy, is to show that the company acknowledged a valuable consideration, which is so far binding as to preclude either party from destroying the legal effect of the policy by showing that no consideration was, in fact, given. Certainly a mere recital such as the one in this policy falls far short of an expressed stipulation that the application is made a part of the policy, which, under the law, is necessary before it can be so treated. The application itself cannot be considered in determining the preliminary question whether it is a part of the policy. This fact must affirmatively appear from the policy itself. It is only after it is determined from a consideration of the language of the policy that the two papers constitute the contract that the application can be resorted to. The application not being a part of the contract, any statements contained therein are mere representations, and not warranties. May on Insurance, § 158. As such, they may avoid the policy if found to be false and material, within the legal meaning of these terms. The materiality of a representation is sometimes a question of law, where the statement is made in response to a direct inquiry or where by the contract the parties have settled the materiality by agreement. But this is not true in this case under either division of the rule.

The court erred in holding that the statement in the application that the assured is 62 years of age was a warranty. Such statement is merely a representation, the falsity and materiality of which are questions of fact, and should have been disposed of by the trial court as such.

For the errors indicated, the judgments of the Appellate and trial courts are reversed, and the cause remanded to the superior court of Cook county for further proceedings in conformity with the views herein expressed.

Reversed and remanded.

CARTWRIGHT, C. J., and HAND, J., dissent.

(236 Ill. 476.)

**MIDLAND TELEGRAPH CO. v. NATIONAL TELEGRAPH NEWS CO. et al.**

(Supreme Court of Illinois. Oct. 26, 1908. Rehearing Denied Dec. 2, 1908.)

**1. TELEGRAPHS AND TELEPHONES (§ 16\*)—LEASE OF OTHER COMPANIES—ULTRA VIRES ACTS.**

A corporation with power to install a system of telegraph wires and instruments for transmission of messages by electricity in the usual way that telegraph messages are sent leased the property and business of a corporation with power to install a system of wires and instruments for transmission by electricity of sporting news and grain market and Board of Trade quotations which were received by their customers in their respective offices by means of a "ticker," and guaranteed the payment of the rent reserved in a similar lease by another corporation, similar to the latter, to third persons. *Held*, that there was no such difference between the business authorized to be carried on by the former corporation and that of the latter two corporations as to constitute the lease to the former corporation and its guaranty of payment of rent on the other lease ultra vires.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 10; Dec. Dig. § 16.\*]

**2. TELEGRAPHS AND TELEPHONES (§ 16\*)—POWERS OF COMPANY—ULTRA VIRES ACTS—GUARANTY.**

A guaranty of the payment of the rent reserved in a lease of the property and business of a corporation which was engaged in transmitting by electricity sporting news and grain market and Board of Trade quotations, which were received by their customers in their respective offices by means of a "ticker," by another corporation which was engaged in transmitting by electricity messages in the ordinary way, was not ultra vires, where such guaranty redounded to the financial benefit of the latter corporation.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 16.\*]

**3. CORPORATIONS (§ 646\*)—FOREIGN CORPORATIONS—COMPLIANCE WITH REQUIREMENTS BEFORE DOING BUSINESS—TELEGRAPH COMPANIES.**

Hurd's Rev. St. 1903, c. 32, §§ 67b, 67c, 67d, forbidding foreign corporations, except railroads or telegraph companies "which have heretofore built their lines of railroad" into the state, to do business in the state until they have designated some person upon whom process can be served, does not require a foreign telegraph company to appoint such an agent before it can do business.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 646.\*]

**4. LANDLORD AND TENANT (§ 208\*)—ASSIGNMENT OF LEASE—RELEASE OF LESSEE FROM LIABILITY.**

Under a lease of the property and business of a corporation providing that it might be assigned to a corporation thereafter to be organized, but not providing that such assignment should release lessee from liability, an assignment of the lease did not relieve lessee from payment of the rent reserved.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 821; Dec. Dig. § 208.\*]

**5. CORPORATIONS (§ 557\*)—RECEIVERS—SCOPE OF RELIEF.**

It was not error for the court to allow a claim for the rent reserved in the lease of the property and business of a corporation against another corporation which had guaranteed pay-

ment in proceedings for the appointment of a receiver of the latter corporation, on the ground that such claim was a purely legal claim, and that the cross-bill by which it was brought forward was not germane to the original bill, but, the court having jurisdiction of the parties and assets of the corporation through its receiver, it had the right to allow the claim and order it paid.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 557.\*]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; Thomas G. Windes, Judge.

Bill by the Midland Telegraph Company for the appointment of a receiver of the Chicago & Milwaukee Telegraph Company and the National Telegraph News Company. From a judgment of the Appellate Court affirming a decree of the Circuit Court so far as it allowed certain claims against the Chicago & Milwaukee Telegraph Company, that company appeals. Affirmed.

Tenney, Coffeen, Harding & Sherman (Horace Kent Tenney, of counsel), for appellant. Fyffe & Adcock (Edmund D. Adcock and Cornelius Lynde, of counsel), for appellee Type Telegraph Co. Hoyne, O'Connor & Irwin, for appellee Printing Telegraph News Co.

**HAND, J.** This is an appeal from a judgment of the Appellate Court for the First District affirming a decree of the circuit court of Cook county in so far as it allowed against the appellant, the Chicago & Milwaukee Telegraph Company, a claim for rent in favor of the Printing Telegraph News Company for the sum of \$3,907.50 and a claim for rent in favor of the Type Telegraph Company for \$4,772.39.

It appears from the record that the Chicago & Milwaukee Telegraph Company was engaged in conducting a telegraph business between the cities of Chicago and Milwaukee and other points, with its office in the city of Chicago; that the Printing Telegraph News Company and the Type Telegraph Company were each engaged in carrying on what is known as the "ticker" business in the city of Chicago; that July 24, 1900, the Chicago & Milwaukee Telegraph Company leased, for the annual rental of \$6,000, for the period of 20 years, the property and business of the Printing Telegraph News Company, and that on August 1, 1900, L. M. Martin, W. R. Stewart, Jr., and F. E. Crawford leased, for an annual rental of \$2,000, for the period of 20 years, the business of the Type Telegraph Company; that Martin, Stewart, and Crawford were the owners of the stock of the Chicago & Milwaukee Telegraph Company with the exception of a few shares, and that they organized the Midland Telegraph Company and assigned to it all their stock in the Chicago & Milwaukee Telegraph Company in consideration of the issue to them of the stock of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Midland Telegraph Company; that the Midland Telegraph Company issued its bonds for the sum of \$50,000, and hypothecated the stock of the Chicago & Milwaukee Telegraph Company, which had been assigned to it by Martin, Stewart, and Crawford to secure the payment of said bonds; that Martin, Stewart, and Crawford also organized the National Telegraph News Company, of which they were the stockholders, and thereupon the Chicago & Milwaukee Telegraph Company assigned to the National Telegraph News Company the lease to it from the Printing Telegraph News Company, and Martin, Stewart, and Crawford assigned to the National Telegraph News Company the lease to them from the Type Telegraph Company, and caused the payment of the rent of \$2,000 per annum agreed to be paid by them, to be guaranteed by the Chicago & Milwaukee Telegraph Company. The property and business of the Printing Telegraph News Company and the property and business of the Type Telegraph Company were thereupon taken possession of by the Chicago & Milwaukee Telegraph Company and the National Telegraph News Company, and the business formerly carried on by the Chicago & Milwaukee Telegraph Company, the Printing Telegraph News Company, and the Type Telegraph Company was thereafter carried on by Martin, Stewart, and Crawford in the names of the Chicago & Milwaukee Telegraph Company and the National Telegraph News Company. Thereafter the Midland Telegraph Company filed a bill in the circuit court of Cook county for the appointment of a receiver of the Chicago & Milwaukee Telegraph Company and the National Telegraph News Company, alleging, among other things, that said corporations had received the proceeds of the bonds of the Midland Telegraph Company which had been issued and sold by said corporation, and the Hibernian Banking Association was appointed receiver and took possession of the business and assets of the Chicago & Milwaukee Telegraph Company and the National Telegraph News Company, which included the business and property of the Printing Telegraph News Company and the Type Telegraph Company. The claims allowed against the Chicago & Milwaukee Telegraph Company in favor of the Printing Telegraph News Company and the Type Telegraph Company, respectively, were for rent upon the leases made by said corporations bearing date, respectively, July 24 and August 1, 1900. The Chicago & Milwaukee Telegraph Company was being held liable for said rent on the ground that said corporation was the original lessee in the lease to it by the Printing Telegraph News Company and the guarantor upon the lease made to Martin, Stewart, and Crawford by the Type Telegraph Company, both of which leases had been assigned to the National Telegraph News Company.

While several of the contentions of the appellant apply to the claims of both the Printing Telegraph News Company and the Type Telegraph Company, other contentions apply to said claims severally. We will therefore take up the appellant's contentions in what we deem their logical order and dispose of them.

It is first contended that the Chicago & Milwaukee Telegraph Company, being organized as a telegraph company, did not have the power to engage in the ticker business, and that for that reason its lease with the Printing Telegraph News Company, whereby it leased the property and took over the business of that corporation for a period of 20 years, was ultra vires and void; and for the same reason it did not have the power to guarantee the payment of the rent reserved in the lease from the Type Telegraph News Company to Martin, Stewart, and Crawford, and that its guaranty was therefore ultra vires and void. The Chicago & Milwaukee Telegraph Company had the corporate power to install, and it installed, a system of telegraph wires and instruments, whereby it transmitted, by means of electricity, messages from the city of Chicago to the city of Milwaukee and other points for its patrons in the usual way that telegraph messages are sent, while the Printing Telegraph News Company and the Type Telegraph Company each had the corporate power to install, and each installed, a system of wires and instruments, and transmitted, by means of electricity, to their customers sporting news and grain market and Board of Trade quotations and other information which they had collected, which was received by their customers in their respective offices by means of an instrument called a "ticker," which printed the information transmitted, in typewriting, as it was received in the office of the customer for the information of such customer. It is apparent, we think, that the Chicago & Milwaukee Telegraph Company, the Printing Telegraph News Company and the Type Telegraph Company were each engaged in transmitting intelligence between distant points by electricity, and the transmitting of intelligence by electricity between different points would appear to be a practical, if not a strictly scientific, definition of the electric telegraph. We think it clear, therefore, that each of said corporations was engaged in the telegraph business, and that there was no such difference between the business authorized to be carried on by the Chicago & Milwaukee Telegraph Company and the business authorized to be carried on by the Printing Telegraph News Company and the Type Telegraph Company that the Chicago & Milwaukee Telegraph Company could not lease the property and business of the Printing Telegraph News Company or guarantee the rent to become due the Type Telegraph Company upon the lease made to Martin, Stew-

art, and Crawford by that corporation, and are therefore of the opinion that the contention that the action of the Chicago & Milwaukee Telegraph Company in entering into the lease with the Printing Telegraph News Company, and the guaranty by said telegraph company of the payment of said rent to the Type Telegraph Company, were invalid and ultra vires and void, cannot be sustained.

It is next contended that the guaranty of the payment of said rent to the Type Telegraph Company was ultra vires and void, as the Chicago & Milwaukee Telegraph Company had no power to guarantee the debt of Martin, Stewart, and Crawford to said Type Telegraph Company. It is undoubtedly true that a corporation generally has no power to guarantee the payment of the debts of its stockholders or directors. If, however, the debt which it guarantees is a debt the payment of which will redound to the financial benefit of the corporation signing the guaranty, it may be a valid and enforceable obligation against the corporation making the guaranty. A corporation may, for the purpose of advancing the objects and purposes for which it was created, do many acts which, except for their bearing upon the express powers of the corporation, would be ultra vires. *Kraft v. West Side Brewery Co.*, 219 Ill. 205, 76 N. E. 372. And in exercising powers conferred by its charter a corporation may adopt any proper and convenient means tending directly to their accomplishment, and not amounting to the transaction of a separate, unauthorized business. *Best Brewing Co. v. Klassen*, 185 Ill. 37, 57 N. E. 20, 50 L. R. A. 765, 76 Am. St. Rep. 26. It is apparent, we think, that the business of the Chicago & Milwaukee Telegraph Company was not entirely foreign to the business being carried on by the Printing Telegraph News Company or the Type Telegraph Company, and that its business was greatly extended and increased by obtaining, as it did, through the National Telegraph News Company, the possession and control of the property and business of the Printing Telegraph News Company and the Type Telegraph Company. We think, therefore, its guaranty of the rent agreed to be paid by Martin, Stewart, and Crawford to the Type Telegraph Company was not ultra vires and void.

It is also contended that there can be no recovery upon said guaranty against said Chicago & Milwaukee Telegraph Company, as it is said the Type Telegraph Company was a foreign corporation, and that it had not complied with the law of this state as to foreign corporations doing business in this state at the time it executed the said lease to Martin, Stewart, and Crawford, and that the lease was therefore void. The statute (*Hurd's Rev. St. 1903, c. 32, §§ 67b, 67c, 67d*), which provides that a foreign corporation shall not do business in this state

until it has designated some person in the state upon whom process can be served as its agent or representative, does not "apply to railroads or telegraph companies which have heretofore built their lines of railroad into or through this state or to insurance, banking or loaning companies." It is apparent that telegraph companies are not, as a part of their corporate powers, authorized to build railroad lines. We think, therefore, the true construction of said section is that the statute does not require a foreign telegraph company to appoint such agent or representative in this state before it can do business in the state—in other words, that the statute must be so construed as to exempt foreign telegraph, insurance, banking, and loaning companies from appointing agents or representatives in this state upon whom process can be served—and the fact that the Type Telegraph Company had not designated such an agent or representative did not avoid said lease or thereby release said Chicago & Milwaukee Telegraph Company from liability upon its guaranty of the payment of the rent due the Type Telegraph Company.

It is also urged that the assignment of the rents from the Printing Telegraph News Company to the National Telegraph News Company released said Chicago & Milwaukee Telegraph Company from its liability upon said lease. The lease expressly provides that it might be assigned to a corporation thereafter to be organized by Martin, Stewart, and Crawford, but did not provide that such assignment should work a release of the liability of the Chicago & Milwaukee Telegraph Company as lessee in said lease. We are therefore of the opinion that the Chicago & Milwaukee Telegraph Company remained liable for the payment of the rent provided to be paid in the lease from the Printing Telegraph News Company to said Chicago & Milwaukee Telegraph Company after it was assigned to the National Telegraph News Company.

It is further urged that the claim of the Type Telegraph Company is a purely legal claim, and that the cross-bill by which it was brought forward was not germane to the original bill, and that the court erred, for that reason, in allowing said claim. The circuit court had jurisdiction of the parties and of the assets of the Chicago & Milwaukee Telegraph Company through its receiver. We think, therefore, it had the right to allow said claim and order it paid out of the assets of the Chicago & Milwaukee Telegraph Company. *Gunning v. Sorg*, 214 Ill. 616, 73 N. E. 870.

It is clear from an examination of this record that the organization of the Midland Telegraph Company and the National Telegraph News Company, and the assignment of said leases to the National Telegraph News Company, and the assignment of the stock of the Chicago & Milwaukee Telegraph

Company to the Midland Telegraph Company, and the issue of the bonds of the last-named corporation and the hypothecation of the stock of the Chicago & Milwaukee Telegraph Company to secure the payment of said bonds, were brought about through the manipulations of Martin, Stewart, and Crawford, for the purpose of raising funds and to increase the extent of the business of the Chicago & Milwaukee Telegraph Company, of which they were the owners; that while the Chicago & Milwaukee Telegraph Company was ostensibly engaged in the telegraph business, and the National Telegraph News Company was ostensibly engaged in the ticker business, the stockholders and managers of said corporations were the same; that the offices of said Chicago & Milwaukee Telegraph Company and the National Telegraph News Company were at the same place; that the people in the employ of said corporations did not know by which corporation they were employed; that the funds of said corporations were often commingled, and that said National Telegraph News Company and said Midland Telegraph Company were but means used by said Martin, Stewart, and Crawford to further the venture in high finance in which they were engaged; that there was no substance to any of said corporations except the Chicago & Milwaukee Telegraph Company, which appears to have had some property and business, and which was the corporation with which and upon the strength of whose financial responsibility the leases in question were made; and, while many technical objections have been made by the Chicago & Milwaukee Telegraph Company to the payment by it of the amount due upon said leases (which objections, under other circumstances, might have some force), in view of the numerous corporations which have been organized and the manipulations of the stock of said corporations by said Martin, Stewart, and Crawford, the Chicago & Milwaukee Telegraph Company, which seems to have been the beneficiary of the said manipulations, was properly held in this proceeding liable for the rent due upon said leases.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(236 Ill. 570)

**JACOBSEN v. HEYWOOD & MORRILL  
RATTAN CO.**

(Supreme Court of Illinois. Oct. 26, 1908. Rehearing Denied Dec. 3, 1908.)

**1. APPEAL AND ERROR (§ 1094\*)—DECISIONS OF  
INTERMEDIATE COURTS—REVIEW—VERDICT—  
CONCLUSIVENESS.**

A judgment of the Appellate Court affirming a judgment of the circuit court will not be

reviewed on the ground that the verdict was against the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322, 4324; Dec. Dig. § 1094.\*]

**2. TRIAL (§ 252\*)—INSTRUCTIONS NOT BASED  
ON PROOF.**

The refusal of instructions not based on the proof is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 596; Dec. Dig. § 252.\*]

Error to Appellate Court, First District, on Error to Circuit Court, Cook County; M. F. Tuley, Judge.

Action by John N. Jacobsen, conservator, against the Heywood & Morrill Rattan Company. A judgment of the circuit court in plaintiff's favor was affirmed by the Appellate Court (140 Ill. App. 319), and defendant brings error. Affirmed.

The Heywood & Morrill Rattan Company, a corporation, has sued out a writ of error from this court to review a judgment of the Appellate Court for the First District affirming a judgment for the sum of \$2,500 recovered by Charles Timm in the circuit court of Cook county on November 27, 1901, against plaintiff in error, in an action on the case for personal injuries. The declaration, consisting of three counts, alleges, in substance, that Timm was an employé of plaintiff in error at its manufacturing establishment in the city of Chicago, and that he received the injuries complained of while assisting in unloading a boiler at its plant while working under the orders and directions of one William Green, a foreman of plaintiff in error, and Edward Robinson, an engineer in the employ of said company, who he alleges were his superiors and were appointed by the plaintiff in error to take charge of the unloading of said boiler and whose orders he was obliged to obey; that the plaintiff in error neglected to furnish a sufficient number of men and the necessary fixtures and tools to safely and properly unload said boiler; and that said Green and Robinson gave negligent orders in and about the moving of said boiler, and because of the negligence aforesaid on the part of plaintiff in error while he (Timm) was assisting in said work, in the exercise of due care and caution for his own safety, the boiler rolled upon and against him and severely injured him. To the declaration plaintiff in error interposed the general issue, and a trial by jury resulted in a verdict in favor of Timm for the sum of \$2,500, upon which the judgment of the circuit court above mentioned was entered.

On June 4, 1895, the date Timm received his injuries, he was about 50 years of age. Immediately preceding that time, for a period of about three weeks, he had been in the employ of plaintiff in error at its manufacturing establishment as a common laborer. His duties consisted in unloading and sorting lum-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ber, moving cars, and doing any other general work about the plant. At the time of the accident a boiler 50 inches in diameter, about 8½ feet long and weighing 4,200 pounds, was being delivered to plaintiff in error by a boiler company. Timm and a man by the name of Schlak, also a common laborer, William Green, a foreman, Edward Robinson, the chief engineer, Frank Bowers, an assistant engineer (all of whom were employes of plaintiff in error), and William J. Rogers (a teamster) and an assistant, in the employ of the boiler company, were engaged in unloading the boiler from the wagon on which it had been hauled upon a platform adjoining the engine room. On the wagon was an ordinary wagon box, with sides 12 inches high, in which the boiler had been hauled. It appears from the record that, when Rogers arrived at the establishment of plaintiff in error with the boiler, Robinson, after some discussion with Rogers about whose business it was to unload it, took charge of the matter, and directed Rogers to back the wagon up to a platform in front of the engine room door, which Rogers did. This platform was a few inches higher than the bottom of the wagon bed. Robinson then sent for Timm and Schlak to assist in removing the boiler from the wagon to the engine room. Green, the foreman, who was Timm's immediate superior, ordered him to work under Robinson's directions. A stonejack, crowbars, and rollers were secured, and the end of the boiler next to the platform was raised up and the rollers placed under it, and it was gradually worked endwise from the wagon to the platform. Robinson placed the rollers, Rogers and his assistant operated the stonejack in the wagon at the rear end of the boiler, and Timm and Schlak lifted and steadied the boiler with the crowbars, one on each side. After they had succeeded in getting it clear of the wagon and all but about 18 inches of the back end of it upon the platform, while Timm, Schlak, Rogers, and his assistant were taking measures to get the boiler still farther on the platform, it rolled over a short distance toward Timm, and he was knocked down by it. When this happened, he was facing the boiler, and, as he fell, he caught hold of the top of the rear end of the wagon box with his right hand, and while in that position the boiler rolled against his hand, crushing it so badly that it was necessary to have the fourth finger amputated and the hand was otherwise permanently injured. When the boiler began to roll, it was resting on two rollers on the platform, and there was nothing to prevent it from rolling to either side except its own weight and the crowbars of Timm and Schlak.

Upon the trial Timm and Schlak both testified that just before the accident occurred Robinson directed them to raise the boiler for the purpose of putting another roller under it near the rear end. Timm was then on one side and Schlak on the other. Each had a

block and crowbar, and, after each placed his crowbar in position to use as a lever by bearing down upon the upper end, the lower end being under the boiler and the block acting as a fulcrum, Robinson said: "Everything is ready. Go ahead." Both immediately bore down, and Schlak's lever first acting upon the boiler or acting with greater power than the other lever caused the boiler to lose its balance, and roll heavily and quickly toward Timm, and the injury resulted. The evidence shows that, if the boiler had been properly blocked before the order was given, the accident would not have occurred. At the close of all the evidence the court denied the motion of plaintiff in error for a directed verdict. While the cause was pending in the Appellate Court the insanity of Timm was suggested, and John N. Jacobsen, his conservator, was substituted as defendant in error.

F. J. Canty and White, Mable & Conkey (J. C. M. Clow, of counsel), for plaintiff in error. Richberg & Richberg, for defendant in error.

SCOTT, J. (after stating the facts as above). The first point made by plaintiff in error in its brief of points and authorities is: "The verdict was against the evidence," which, of course, we cannot consider. The second is: "Robinson, the engineer, was a fellow servant of defendant in error." And the third is: "Defendant in error assumed the risk of the boiler rolling." The fourth and remaining point is that the court erred in passing on instructions tendered upon the submission of the case to the jury. The assignment of errors is perhaps broad enough to question the action of the court in refusing to direct a verdict for plaintiff in error, but no such point is made by the brief. The argument pertaining to the first, second, and third points would have been entirely appropriate in the Appellate Court, where the facts could be determined, but has little or no application here, where we can only consider the law.

In view of the condition of the plaintiff in error's brief, we regard it as unnecessary to enter upon a detailed discussion of the evidence. We have read the testimony of the witnesses as abstracted, and find that there was evidence which tended to show that a negligent order of Timm's superior was the proximate cause of the accident. In giving that order the superior did not act as a fellow servant of Timm. There is no evidence which tends to show that the risk attendant upon the negligent order was assumed by the injured employé.

Instruction 1, given at the request of Timm, is objected to. The criticism offered has been several times held by this court to be without merit. It is unnecessary to again consider it or to state it here.

It is said that Timm's instruction 3 is objectionable, for the reason that it assumes

that plaintiff in error conferred authority on one of its employes to remove the boiler from the wagon, when, in fact, there was no evidence whatever in the case tending to show that such authority was conferred on anyone. An examination of the instruction shows that it contains no such assumption. It states the law in reference to the responsibility of the master for commands given by a vice principal within the scope of the authority conferred on him by the master. It might have been refused for the reason that it is abstract, but it recites the law correctly, and we think it was not misleading.

The court gave 4 instructions on the part of Timm. The plaintiff in error asked 36, of which the court gave 16 but refused 20. The issues in the case were few and simple. The direct evidence offered on the part of Timm was the testimony of himself and another witness, which covers six pages in the abstract. The same two witnesses were the only ones who testified in rebuttal, and their testimony then given, as abstracted, covers about half a page. Plaintiff in error's testimony, as abstracted, covers about 12 pages. The only controverted question of fact was as to whether or not the alleged negligent order was given by Timm's superior. Propositions of law which plaintiff in error was entitled to have given to the jury could have been, and should have been, fully and clearly stated in half a dozen instructions. Among other instructions refused were six stating the doctrine of assumed risk in various ways. No instruction on that subject was given, and it is urged that the refusal of each of the six was error. There was nothing in the proof upon which to base these instructions. The evidence offered on behalf of Timm as to the cause of the accident tended only to show that the injury resulted from the negligent order. There was no proof which could possibly be regarded as indicating an assumption of the risk resulting from obedience to that order. There was therefore no question of assumed risk in the case, and these instructions were for that reason properly refused. *Postal Telegraph Co. v. Likes*, 225 Ill. 249, 80 N. E. 136.

Complaint is also made of the refusal of instruction numbered 44 asked by plaintiff in error, which was in the following words: "The court instructs you that an employer is not an insurer of the safety of an employe." While the proposition is unquestionably accurate, we are unable to see that its refusal could have worked injury. The same thing is true of instructions numbered 30 and 31, asked by plaintiff in error. While no harm would have resulted from giving them, their refusal does not, upon this record, appear to have been erroneous.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(236 Ill. 467)

### HAGEN v. SCHLEUTER.

(Supreme Court of Illinois. Oct. 26, 1908. Re-hearing Denied Dec. 3, 1908.)

#### 1. APPEAL AND ERROR (§ 1094\*)—REVIEW—DECISIONS OF INTERMEDIATE COURTS—QUESTIONS OF FACT.

Where the judgment on a verdict as to a controverted question of fact has been affirmed by the Appellate Court, the question is not subject to review by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4322; Dec. Dig. § 1094.\*]

#### 2. PLEADING (§ 248\*)—AMENDMENT—STATEMENT OF NEW CAUSE OF ACTION—PERSONAL INJURIES.

Where, in an action for injuries to plaintiff through the falling of a brick wall he was building for defendant, the negligence charged was the unsafe condition of the foundation stone wall constructed by defendant, it not being specified wherein the wall was unsafe, an amended declaration, specifying the particulars in which it was claimed the unsafe conditions existed, did not state a new cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.\*]

#### 3. NEGLIGENCE (§ 44\*)—CONDITION OF PREMISES—INJURY TO CONTRACTOR.

An owner of land building thereon a stone foundation wall, and thereafter employing one to build a brick wall on the foundation, is liable for injuries to the latter through the falling of the brick wall as a result of the defective condition of the foundation.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 44.\*]

#### 4. NEGLIGENCE (§ 119\*)—PERSONAL INJURIES—ACTIONS—PLEADINGS—EVIDENCE.

Under the rule that recovery can be had only on the grounds of negligence charged in the declaration, where, in an action for injuries to plaintiff through the falling of a brick wall he was building for defendant on a stone foundation wall constructed by the latter, the only negligence charged was as to the character of the material used in building the stone wall, evidence as to negligence in the manner of building the wall was incompetent.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 203-211; Dec. Dig. § 119.\*]

#### 5. TRIAL (§ 105\*)—RECEPTION OF EVIDENCE—FAILURE TO OBJECT—INSTRUCTIONS TO DISREGARD INCOMPETENT EVIDENCE.

Where, in an action for injuries to plaintiff through the falling of a brick wall he was building for defendant on a stone foundation wall constructed by the latter, the only negligence charged was as to the character of the material used in building the stone wall, the refusal of defendant's request to instruct the jury to disregard incompetent testimony as to the manner of building the wall was prejudicial error, though such testimony was not objected to when offered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260-266; Dec. Dig. § 105.\*]

#### 6. TRIAL (§ 255\*)—INSTRUCTIONS—REQUESTS—NECESSITY—THEORY OF CASE.

Where, in an action for injuries to plaintiff through the falling of a brick wall he was building for defendant on a stone foundation wall constructed by the latter, owing to the unsafe condition of the stone wall, the declaration averred that plaintiff did not know, and had no opportunity of knowing, of the inferior material used in the construction and the weak condition of the stone wall, and his proof tended to support such averment, the fact that such averment was controverted by defendant's evidence did

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not require plaintiff to ask an instruction on the law of assumed risk, since a party is entitled to instructions presenting his theory of the case, and if his adversary relies on a different theory, he should ask instructions presenting it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-634; Dec. Dig. § 255.\*]

Vickers, J., dissenting.

Appeal from Appellate Court, Fourth District, on Appeal from Circuit Court, Madison County; R. D. W. Holder, Judge.

Action by James Hagen against Charles A. Schleuter. From a judgment of the Appellate Court (140 Ill. App. 84), affirming a judgment for plaintiff, defendant appeals. Reversed and remanded.

Appellee is a brick mason, and at the time of his injury, as hereinafter mentioned, together with his partner, Edward Dawes, was engaged in taking contracts for the construction of brick work. In December, 1903, appellee and his partner were employed, under a written contract, by appellant, to lay the brick in the walls of a building, then being constructed by appellant. The foundation wall on which the brick walls were to rest had already been constructed by or under the supervision of appellant. Said foundation wall was built of stone, was 9 feet high and 18 inches thick. By the terms of the agreement between the parties, appellee and his partner were to lay the brick in the walls, from the stone foundation up, for \$5.50 per thousand, appellant furnishing the brick and all other material for doing the work. The work was to be done under the supervision of the architect, who was made superintendent of the building. On the first day of March, 1904, the front wall of the building was about completed, and while appellee was engaged in laying the last course of brick, the wall fell to the ground, carrying appellee with it and seriously injuring him. This suit was brought by him against appellant to recover damages for said injuries. The original declaration was filed February 22, 1905. An amended declaration was filed September 30, 1905. An additional count was filed January 6, 1906, and another amended declaration was filed August 24, 1906. To this last declaration appellant filed pleas of not guilty and the statute of limitations. The court sustained a demurrer to the latter plea, and the cause was heard upon the declaration and plea of not guilty. The jury returned a verdict in favor of appellee for \$2,000, upon which the court, after overruling a motion for a new trial, rendered judgment. That judgment has been affirmed by the Appellate Court, and the case is brought here by further appeal.

Alex. W. Hope and B. H. Canby, for appellant. John J. Brenholt, for appellee.

FARMER, J. (after stating the facts as above). Although all controverted questions of fact were settled by the judgment of the Appellate Court, a considerable portion of an elaborate brief and argument of appellant is devoted to a discussion of the facts. It was appellant's contention on the trial that the injury to appellee resulted from the giving way of the brick wall he had built, and not from the giving way of the stone foundation wall, as alleged in the declaration. The jury found against appellant upon this question, and, the judgment rendered by the court on that verdict having been affirmed by the Appellate Court, that question is not subject to our review. The questions of law preserved for our review are: Does the declaration state a cause of action; does the amended declaration state a new cause of action; did the court err in the admission of incompetent evidence under the averments of the declaration, and did the court err in giving instructions at the request of appellee?

The original and first amended declarations averred that appellant was the owner of certain land, upon which there was erected, under his supervision and control, a foundation stone wall, upon which it was proposed to erect a brick building; that it was appellant's duty to have so built the foundation stone wall as to make it safe and sufficient to support the brick building to be erected thereon, but that, not regarding his duty, appellant wrongfully, negligently, and knowingly suffered said stone wall to remain in a bad and unsafe condition, etc., by reason whereof the brick wall fell and injured appellee. The amended declaration is more elaborate in its averments than the original, and contains averments as to the relations of the parties omitted from the original declaration, and makes the contract of employment of appellee and his partner a part of the declaration. There is no substantial difference, however, as to the negligence charged and relied upon. The additional count charges that appellant knowingly built, and permitted to be built, the foundation wall of burnt rock, old mortar, and other unsafe materials wholly unfit for use, and, knowing it to be an unsafe foundation for the brick walls suffered and permitted appellee to remain in ignorance of such defective and unsafe condition, and that, by reason of the unsafe condition of the stone wall, it gave way and caused a portion of the brick wall erected thereon to fall, thereby injuring appellee. The last amended declaration charges appellant with negligence in the construction of the foundation wall of inferior rock and mortar that had been burnt and made wholly unfit for use, that appellant knew, or might by the exercise of reasonable care have known, that the foundation wall, constructed, as it was, of inferior material, would not support

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
86 N.E.—8

the brick walls to be placed upon it, and, without warning to appellee, induced him and his partner, who were bricklaying contractors, without knowledge or an opportunity of knowing of the inferior construction and weak condition of the stone wall, to undertake to place upon said unsafe foundation wall the brick walls of the proposed building, and that while appellee was engaged in the work, exercising due care and caution for his own safety, by reason of the weak, rotten, and inferior condition of the foundation wall it gave way, throwing appellee to the ground and injuring him. The negligence charged in the original and first-amended declarations was the unsafe construction of the foundation stone wall. It was not specified in what respect the wall was unsafe. In the additional count filed January 6, 1906, and the amended declaration filed August 24, 1906, upon which the trial was had, it was averred that the unsafe condition of the foundation wall was caused by the use of defective, inferior, and unfit material in its construction. The negligent act charged in the original and last-amended declarations was the construction of an unfit and unsafe foundation wall for the support of the brick walls to be erected thereon. The last-amended declaration specifies the particulars in which it is claimed the unsafe and dangerous conditions existed, and was not the statement of a new cause of action, and the court did not err in sustaining the demurrer to the plea of the statute of limitations.

At the conclusion of appellee's evidence appellant moved the court to instruct the jury to find him not guilty, because the declaration did not state a cause of action. This motion was denied, and appellant again moved the court to instruct the jury to return a verdict of not guilty. These motions were again made at the close of all the evidence, and were again denied by the court. Appellant contends that it appears from the declaration that the relations between the parties were those of owner of the premises and contractor, and that appellant owed appellee no duty to furnish him a safe place to work. By the averments of the declaration it was the stone foundation wall that gave way and caused the accident, and not the brick wall appellee was laying, or any part of the work that appellee had been engaged to do or had done. The foundation wall had been erected by and under the direction of appellant, and appellee had nothing whatever to do with its construction. Under these conditions the rule, as between the owner of premises and the contractor, relied upon by appellant in cases where an injury results from defective work of the contractor, is not applicable. The declaration, we think, stated a good cause of action; and, as there was evidence tending to prove its allegations, the court did not err in refusing to direct a verdict.

On the trial the court permitted witnesses to testify for appellee that the manner in which the foundation wall was built was improper, unsafe, and insecure. Three of the witnesses who thus testified were architects, two of them stone masons, and one a brick mason. They testified that area walls should have been built; that the foundation wall was not bonded and tied together, as it should have been; that the stones in it were set on edge when they should have been laid flat, etc. This testimony does not appear to have been objected to at the time it was given, but appellant asked the court to instruct the jury to disregard it, on the ground that negligence in the manner of building the wall was not complained of in the declaration. We think the evidence was incompetent under the averments of the declaration, as the only negligence charged therein was as to the character of the material used in building the wall. It is well settled that a recovery can be had only on the grounds of the negligence charged in the declaration. While this evidence was not objected to at the time it was offered, the court should, when asked so to do by appellant, have instructed the jury to disregard this testimony, and its failure to do so was prejudicial error. *Lake Street Elevated Railroad Co. v. Shaw*, 203 Ill. 39, 67 N. E. 374; *Chicago Union Traction Co. v. May*, 221 Ill. 530, 77 N. E. 933.

It is contended by appellant that the court erred in giving the first and third instructions given on motion of the appellee. The first instruction told the jury that, if they believed from a preponderance of the evidence that defendant was guilty of the negligence charged in the declaration, as therein charged, and that plaintiff was injured in consequence thereof, as charged in the declaration, and that at and immediately prior to the accident he was in the exercise of due care and caution for his own safety, they should find the defendant guilty. The third instruction told the jury that, if they believed from a preponderance of the evidence that the plaintiff was injured by and through the negligence of the defendant, as charged in the declaration, without any fault or neglect on the part of the plaintiff, they should find the defendant guilty and assess the plaintiff's damages. Appellant offered evidence tending to show that the stone foundation wall and the character of the material of which it was constructed were open and visible to the view of every one, and that there was nothing to prevent any one about the wall from seeing it, and observing the character of the material it was built of. Appellee's evidence tended to show that the view of the foundation wall was obstructed by boards, so that the character of its material was not open to observation. Appellant contends that under the evidence the element of assumed risk was in the case, and that this element was ignored by the court in instructions 1 and 3 above re-

ferred to. In support of this contention Illinois Terra Cotta Lumber Co. v. Hanley, 214 Ill. 243, 73 N. E. 373, is relied upon. In that case the element of assumed risk was not negated by an averment in the declaration that the plaintiff had no knowledge of the unsafe conditions which it was alleged caused the injury, and the evidence as to whether he did know, or ought to have known, of it was conflicting; that of the defendant fairly tending to show that the risk of being injured by the means alleged in the declaration was assumed by the plaintiff. It was therefore held that two instructions which omitted the element of assumed risk, one authorizing a recovery if the plaintiff had proven his case as laid in his declaration, and the other authorizing a recovery if, while in the exercise of ordinary care, he was injured by, or in consequence of, the negligence of the defendant as charged in his declaration, were erroneous. The giving of a similar instruction was assigned as error in Springfield Boiler Co. v. Parks, 222 Ill. 355, 78 N. E. 809. The court said (page 363 of 222 Ill., page 813 of 78 N. E.): "The declaration in this case differs from the declaration in Illinois Terra Cotta Lumber Co. v. Hanley, 214 Ill. 243, 73 N. E. 373, and kindred cases relied upon by appellant. Here facts were averred in the second count of the declaration [the count upon which the case was submitted to the jury], which, if true, showed the appellee did not assume the risk which caused his injury, while such was not true of the declaration in the Hanley Case."

In Kirk & Co. v. Jajko, 224 Ill. 338, 79 N. E. 577, it was urged the trial court erred in omitting from an instruction the element of assumed risk, and the Hanley Case was relied on in support of the contention. In passing upon the question the court said (page 343 of 224 Ill., page 578 of 79 N. E.): "The instruction condemned in the case last above cited [the Hanley Case] was substantially in the form of the one given in this case, and it was held in that case erroneous, for the reason that it ignored the question of assumed risk. There is, however, a very clear distinction between that case and the case at bar. In the first and second counts of the declaration in this case plaintiff averred ignorance of the dangers attending the method of unloading the cask, and averred that he was acting under the order of the defendant at the time he was injured, while no such averment was found in the declaration in the Hanley Case." The declaration in this case averred that appellee did not know, and did not have an opportunity of knowing, of the inferior material used in the construction and the weak condition of the stone wall. This averment

as clearly negated the assumption of the risk by appellee as did the averments in the Parks and Jajko Cases, and in both of those cases the instruction complained of was held not to be erroneous. The appellee's proof tended to support the averments of his declaration that he was ignorant of the condition of the wall. The fact that this averment was controverted by appellant's evidence did not require appellee to ask to have the jury instructed upon the law of assumed risk. Upon his theory of the case, under both the averments of his declaration and the proof, this element was not in the case. A party to a suit is entitled to have instructions given presenting his theory of the case, based upon the pleadings and proof. If the opposite party relies upon a different theory, repugnant to that of his adversary, it is for him to ask for instructions presenting his theory of the case. In County of Cook v. Harms, 108 Ill. 151, it was said (page 161): "It is sufficient if it [the instruction] rests upon a hypothesis sustained by evidence, and states, accurately and fully, the law upon that hypothesis. If the evidence also fairly presents hypotheses sustaining modifying or repugnant legal propositions, those desiring to avail of such propositions may have them presented in separate instructions." See, also, American Central Ins. Co. v. Rothschild, 82 Ill. 166; Chicago & Alton Railroad Co. v. Harrington, 192 Ill. 9, 61 N. E. 622; Eames v. Rend, 105 Ill. 506. At appellant's request the court instructed the jury that the burden was upon appellee to prove every material fact necessary to constitute his cause of action, "as asserted by him and denied by the defendant, by more or a greater weight of evidence than has been offered by defendant." By another instruction given at the request of appellant the jury were told that if the plaintiff knew, or by the exercise of ordinary care might have known, of the character of the materials used in the stone foundation wall before undertaking to construct the brick work upon it, he assumed the risk of being injured thereby, and could not recover. Another instruction told the jury that it was the duty of appellee to exercise ordinary and reasonable care to ascertain the character of the material used in the stone wall, and if he failed to do so, he could not recover.

We do not think the court erred in giving the instructions complained of, at the request of appellee, but for the error in refusing appellant's instruction, as above suggested, the judgments of the Appellate and circuit courts are reversed, and the cause remanded.

Reversed and remanded.

VICKERS, J., dissenting.

(236 Ill. 450)

**BAUER v. GLOS et al.**

(Supreme Court of Illinois. Oct. 26, 1908. Rehearing Denied Dec. 4, 1908.)

**1. QUIETING TITLE (§ 44\*)—EVIDENCE OF TITLE AND POSSESSION—DEEDS AS EVIDENCE.**

A master's deed to unoccupied premises and *mesne* conveyances through other persons to complainant in a suit to quiet title are not evidence of her ownership in the absence of evidence of title or possession in herself, her grantors, or any of the parties to the decree under which the master's deed was made, since a deed for land without proof of possession of ownership in the grantor is not proof of the grantee's title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 91; Dec. Dig. § 44.\*]

**2. QUIETING TITLE (§ 10\*)—RIGHT OF ACTION—OWNERSHIP OF PLAINTIFF.**

In a suit to quiet title, complainant must prove her ownership to the premises.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 36; Dec. Dig. § 10.\*]

**3. TAXATION (§ 818\*)—ACTION TO QUIET TITLE AGAINST TAX DEED—PROCEEDINGS—COSTS.**

In a suit to remove a tax deed as a cloud on title, where, before bringing suit, no tender was made a defendant of the amount equitably due her for taxes paid on the premises, it was error, on setting aside the tax deed, to decree costs against defendant.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1618; Dec. Dig. § 818.\*]

Appeal from Superior Court, Cook County; Farlin Q. Ball, Judge.

Bill by Marie M. Bauer against Jacob Glos and others to quiet title. Decree for complainant, and defendants appeal. Reversed and remanded.

John R. O'Connor, for appellants. Jacob Glos, pro se. Albert H. Fry, for appellee.

DUNN, J. The appellee, Marie M. Bauer, filed a bill to quiet her title to certain premises in Cook county against Jacob Glos, Emma J. Glos, and August A. Timke, the appellants, and thereby sought to have canceled as a cloud upon her title a certain tax deed to Jacob Glos and certain conveyances from Jacob Glos to the other defendants. The answers of the appellants put in issue appellee's ownership of the premises. The court decreed the relief prayed for, and the defendants appealed.

The only evidence of appellee's ownership was a master's deed to Henry Bauer, dated October 15, 1900, executed pursuant to a decree of the superior court of Cook county and a sale thereunder, and subsequent deeds from Henry Bauer and wife to Albert Bauer, and from Albert Bauer to appellee. The premises were unoccupied, and there is no evidence of title or possession in appellee or her grantors, or any of the parties to the decree by virtue of which the master's deed was made. A deed for land without proof of possession or title in the grantor is not proof of title in the grantee. Metropolitan Elevated Railway Co. v. Eschner, 232 Ill. 210, 83 N. E. 809; Glos

v. Miller, 213 Ill. 22, 72 N. E. 714. In order to maintain her bill, it was necessary for appellee to prove her ownership of the premises. Hewes v. Glos, 170 Ill. 436, 48 N. E. 922. In the absence of such proof, her bill should have been dismissed.

It was also error to decree one-third of the costs against the appellant Emma J. Glos, as no tender was made to her, before filing the bill, of the amount equitably due her for taxes paid. Gage v. Goudy, 141 Ill. 215, 30 N. E. 320; Glos v. Adams, 204 Ill. 548, 68 N. E. 898.

The decree is reversed and the cause remanded.

Reversed and remanded.

(236 Ill. 511)

**WARDEN v. GLOS et ux.**

(Supreme Court of Illinois. Oct. 26, 1908. Rehearing Denied Dec. 4, 1908.)

**1. TAXATION (§ 743\*)—TAX TITLE—VOID TAX DEEDS—EFFECT.**

A grantor claiming under void tax deeds can convey nothing as against the true owner.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1485; Dec. Dig. § 743.\*]

**2. TAXATION (§ 743\*)—TAX TITLE—ACTION TO TRY TITLE—DECREE.**

The purchaser of land under void tax deeds conveyed a part of it to another, and the owner thereafter sued to cancel the tax deeds, and to prevent the purchaser under them and his grantee from asserting title, the bill alleging the sale of "a portion" of the grantor's alleged title, and the decree canceling the deed required the taxes, assessments, etc., paid by the purchaser to be refunded, but did not require any part of it to be paid to his grantee. *Meld* that, as there was nothing to show what part of the land was conveyed to such grantee, and it being incumbent upon her to show her interest in the deeds, the decree was proper.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1485; Dec. Dig. § 743.\*]

**3. TAXATION (§ 829\*)—TAX TITLE—RIGHTS OF PURCHASER OF INVALID TITLE—RIGHTS OF PURCHASER'S GRANTEE—REFUNDING TAXES.**

A conveyance of a part of land, claimed by the grantor under a void tax deed, operated as an assignment of the grantor's rights and interest to the extent of the interest conveyed, and his grantee was entitled to receive his proportionate share of the amount refunded by the owner upon the cancellation of the tax deeds, if his interest appeared from the evidence or allegations.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1644; Dec. Dig. § 829.\*]

**4. EQUITY (§ 427\*)—DECREE—RELIEF TO DEFENDANT—CONFORMITY TO FINDINGS AND EVIDENCE.**

Where a decree is entered granting affirmative relief, it must be justified, either by the facts which it specifically finds, or by the evidence appearing in the record.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1001; Dec. Dig. § 427.\*]

Appeal from Circuit Court, Cook County; Lockwood Honore, Judge.

Action by Emma C. Warden against Jacob Glos and another. From a judgment for

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaintiff, one of defendants appealed. Affirmed.

John R. O'Connor, for appellant. David G. Robertson, for appellee.

CARTER, J. Appellee filed her bill November 18, 1903, in the circuit court of Cook county, alleging that she was the owner and in possession of a certain lot in South Chicago, and that this property had been sold, at various times, for nonpayment of taxes, and tax deeds issued therefor to Jacob Glos; that on May 29, 1903, Jacob Glos assumed to convey to his wife, Emma J. Glos, appellant herein, "a portion of his alleged title," acquired under said tax deeds. On answers filed and issues joined as to both defendants a hearing was had in open court, and decree entered, finding that the court had jurisdiction of the parties and the subject-matter; that appellee was the owner and in possession of the real estate in question; that the four tax deeds described in the bill of complaint were each of them null and void; that they be canceled and set aside, as a cloud upon the title of appellee; and that the defendants, and each of them, be forever barred from asserting or claiming any right, title, or interest in said premises and every part thereof. Appeal has been prayed to this court by Emma J. Glos only.

The evidence heard on the trial before the chancellor is not in the record, not having been preserved by a certificate of evidence. Appellant first insists that, the evidence not being in the record, and there being no specific finding of facts as to her title in the decree, said decree cannot be sustained as against her, even though it does find that all the material allegations of the bill are true. *Village of Harlem v. Suburban Railroad Co.*, 202 Ill. 801, 66 N. E. 1050; *Timke v. Allen*, 225 Ill. 402, 80 N. E. 297. No point is made in the briefs of appellant that the finding of facts in the decree as to the tax deeds to Jacob Glos was not sufficient to sustain the decree as against his interest; in other words, the invalidity of the tax deeds to Jacob Glos is not questioned by appellant. It appears from the face of the pleadings that the title of Emma J. Glos is based entirely upon such tax deeds. The tax deeds being void, the deed from Jacob Glos to Emma J. Glos conveyed nothing. *McCraney v. Glos*, 222 Ill. 628, 78 N. E. 921.

The decree found that all the money for taxes, assessments, interest, and costs paid by Jacob Glos on this property should be refunded to him, that this amount was tendered to and accepted by Jacob Glos, and that the decree was satisfied in full, and it is urged that this was error, in that the decree failed to require payment to Emma J. Glos

of the portion of the money to which she was entitled under her deed. The tax deeds being invalid, the deed from Jacob Glos to Emma J. Glos conveyed no title as against appellee, but as between the grantor and grantee it operated as an assignment of the grantor's rights and interests to the extent of the quantity of the interest conveyed, and entitled the grantee, Emma J. Glos, to receive a like portion of the amount required to be refunded by the complainant upon the setting aside of the tax deeds. *Glos v. Mulcahy*, 210 Ill. 639, 71 N. E. 629; *Glos v. Casa*, 230 Ill. 641, 82 N. E. 827. The bill alleges that Jacob Glos conveyed "a portion of his alleged title" to Emma J. Glos, but there is nothing in the record to show what such portion was. The decree might have provided for a division of the money between Jacob Glos and Emma J. Glos in the proportion of their respective interests, but it was incumbent upon appellant Emma J. Glos to show what her interest was under her deed. Where a decree is entered granting affirmative relief, the rule is that the decree must be justified, either by the facts which it specifically finds, or by evidence appearing in the record (*Patterson v. Northern Trust Co.*, 230 Ill. 334, 82 N. E. 837), but if no evidence was introduced by appellant showing her exact interest, the decree as entered by the court was a proper one. It is supported by the absence of any evidence, since that is the proper decree in case there was no evidence as to her interest. *First Nat. Bank v. Baker*, 161 Ill. 281, 43 N. E. 1074. Appellee's position is very similar to that of one in whose favor a decree has been entered dismissing a bill. Appellee did not need any evidence to support her contention on this point.

The decree of the circuit court is affirmed.  
Decree affirmed.

(236 Ill. 491)

#### CHICAGO TERMINAL TRANSFER R. CO. v. PREUCIL.

(Supreme Court of Illinois. Oct. 26, 1908. Rehearing Denied Dec. 4, 1908.)

##### 1. APPEAL AND ERROR (§ 66\*)—DECISIONS REVIEWABLE.

An appeal is allowed by the statute only for the purpose of reviewing final judgments, orders, or decrees, and no appeal can be taken from an interlocutory order unless specially authorized by statute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 829; Dec. Dig. § 66.\*]

##### 2. APPEAL AND ERROR (§ 78\*)—APPEAL FROM FINAL JUDGMENT—REVIEW OF INTERLOCUTORY ORDERS.

An order denying a motion to dismiss a petition by a railway company to condemn land for want of authority to take the same is interlocutory and it is not appealable, but it is reviewable on appeal from the final judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 464-471; Dec. Dig. § 78.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**8. EMINENT DOMAIN (§ 253\*)—APPEAL FROM FINAL JUDGMENT—REVIEW OF INTERLOCUTORY ORDERS.**

In condemnation proceedings, the final order recited that the court had denied a motion to dismiss, and had found that the petitioner was entitled to condemn the property sought to be taken, and then recited a stipulation as to the compensation to be paid. The owner appealed from the order authorizing the petitioner to condemn the property, and from the order denying the motion to dismiss the petition. *Held*, that there was no appeal from the final judgment, but that the owner limited his appeal to the decision on the motion to dismiss, which appeal was not authorized by the statute.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 253.\*]

Appeal from Superior Court, Cook County; George A. Dupuy, Judge.

Proceedings by the Chicago Terminal Transfer Railroad Company against F. M. Preucil for condemnation of property for a railroad right of way. From an order denying a motion to dismiss the proceedings for want of authority to take the property, defendant appeals. Dismissed.

Franklin B. Hussey, Samuel Friedlander, and Eldon J. Cassoday, for appellant. Jesse B. Barton, for appellee.

**CARTWRIGHT, C. J.** The appellee, a corporation organized under the laws of this state, and authorized to construct, maintain, and operate a railroad from the southwest corner of Harrison street and Fifth avenue, in Chicago, southerly, westerly and southwesterly through the city of La Salle to the Mississippi river, filed in the superior court of Cook county a petition under the eminent domain act to ascertain the compensation to be paid for the south 16 feet of lot 32, in block 16, in Sampson & Greene's addition to Chicago, and appellant's leasehold interest therein, to be appropriated and used for the purposes of constructing and operating a second main track thereon. The petition was dismissed as to the owner in fee, and appellant filed a motion to dismiss the petition as to him for want of authority to take his property for the uses of appellee. The motion was accompanied by a traverse or denial of the right of appellee to take the property for various reasons. One reason specified was that in the year 1897 the appellee purchased a railroad previously constructed south of said premises, crossing Rebecca street twice on curves, and had been operating the same since said purchase, either by itself or its receiver; that the only purpose of this proceeding was to relocate the line, and do away with the old curves, making a straight line; that the purchase of the said railroad amounted to a location of the appellee's road and exhausted its power of location; and that neither the corporation nor its receiver had any lawful power or authority to relocate the railroad on a line extending in the same general direction between the

same termini. Other reasons given were that a previous proceeding in the county court between the same parties to condemn the same premises was dismissed by said court on motion of appellee, and the statute does not authorize a second proceeding between the same parties for the same purpose, and that the circuit court of the United States had no power to direct or authorize this proceeding. The court heard the evidence of the respective parties on the motion to dismiss the petition, and on March 2, 1908, overruled the motion. To the ruling of the court in overruling and denying the motion to dismiss, appellant duly excepted, and a bill of exceptions was tendered to and certified by the judge. On March 13, 1908, the parties filed a stipulation by which appellant waived a jury trial, and the question of compensation and damages was submitted to the court, with an agreement that there should be awarded by the court to appellant, as compensation for the property taken and damages to the property not taken which might be claimed under a cross-petition, the sum of \$2,500. It was agreed that the stipulation should not prejudice appellant as to his rights under the motion or in respect to taking an appeal from the decision of the court upholding the right of appellee to condemn the property and denying the motion to dismiss. The stipulation was not to be a waiver of the exception taken to the decision on the hearing of the motion. The court thereupon entered a final order reciting that the motion to dismiss the petition had been filed, and theretofore overruled, and finding that appellee was authorized to condemn the leasehold interest of appellant, to which order and ruling appellant excepted. The order then recited the stipulation of the parties as to the amount of compensation, and in accordance therewith found the full compensation and damages to be \$2,500. The order authorized appellee to enter upon the premises on payment of the compensation so ascertained, and it was ordered that, in the event of an appeal by appellant, the appellee might enter upon the use of the premises upon entering into a bond in the sum of \$3,500, conditioned for the payment of such compensation and damages as might be finally adjudged in the case. To the ruling of the court in rendering judgment of condemnation appellant excepted, and then follows this prayer for an appeal: "And now again on this day come the petitioner and Preucil, respondent, and the said respondent prays the court for an appeal to the Supreme Court of the state of Illinois from the order and judgment of the court herein that said petitioner is authorized and empowered, and has the right in law, to condemn the property of said respondent in this proceeding, and from the order of said court heretofore entered denying the motion of said Preucil to dis-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

miss the petition herein." The prayer for an appeal was allowed upon appellant giving a bond, and the appeal was perfected.

An appeal is allowed by the statute only for the purpose of reviewing final judgments, orders, or decrees, and no appeal can be taken from an interlocutory order, decree, or judgment entered in the progress of a cause unless specially authorized by statute. *Keel v. Bently*, 15 Ill. 228; *Cunningham v. Loomis*, 17 Ill. 555; *Hawkins v. Burwell*, 191 Ill. 389, 61 N. E. 68. The decision of the court on the motion and the order denying the same were interlocutory, and did not constitute a final adjudication between the parties. The court merely sustained the right of the appellee to proceed with the cause and have the compensation and damages ascertained. No appeal could be taken from that order, and the appeal finally taken was not from the final judgment but from the interlocutory order. The appellant excepted to the ruling of the court on his motion and was compelled to proceed to trial, and, if he had appealed from the final judgment, he might have assigned error on the ruling of the court in denying his motion. If that had been done, and this court had found that there was no right to condemn the property, the final judgment would, of course, have been reversed for that reason. The final order recited that the court had previously overruled the motion to dismiss, and found that the appellee was authorized and empowered, and had the right in law, to condemn the leasehold interest of appellant; and the court then proceeded to final judgment ordering that appellee enter upon the property, and the use of the same, upon payment of full compensation fixed by the stipulation. There was no appeal from that final judgment, but appellant expressly limited his appeal to the decision on the motion, on which no appeal would lie. The only appeal authorized by law would have been from the final judgment of the court, and the appeal prayed for was improvidently allowed by the court.

The appeal was dismissed.

Appeal dismissed.

(238 Ill. 429.)

SAYLOR et al. v. DUEL, City Clerk, et al. (Supreme Court of Illinois. Oct. 28, 1908. Rehearing Denied Dec. 3, 1908.)

# 1. COURTS (§ 2\*)—"JURISDICTION."

"Jurisdiction" is the power vested by law in a tribunal to hear and determine causes properly coming before it.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 1; Dec. Dig. § 2.\*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3876-3885; vol. 8, pp. 7697-7698.]

# 2. WORDS AND PHRASES—"FINAL."

"Final" means last; conclusive; pertaining to the end.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 8, p. 2772; vol. 8, p. 7663.]

# 3. INTOXICATING LIQUORS (§ 37\*)—CONTESTS—LOCAL OPTION—REVIEW—RIGHT TO APPEAL.

Under Act May 16, 1907 (Laws 1907, p. 304, § 19), providing that the county court shall have "final jurisdiction" to hear and determine a contest of a local option election, no appeal lies from the county court.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 37.\*]

# 4. CONSTITUTIONAL LAW (§ 206\*)—PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES.

Notwithstanding Act May 16, 1907 (Laws 1907, p. 304, § 19), providing that the county court shall have "final jurisdiction" to determine a local option election contest, denies an appeal from the county court, it is not in violation of Const. U. S. Amend. 14, forbidding a state to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 646; Dec. Dig. § 206.\*]

# 5. CONSTITUTIONAL LAW (§ 316\*)—DUE PROCESS OF LAW—DENIAL OF RIGHT TO APPEAL.

Notwithstanding Act May 16, 1907 (Laws 1907, p. 304, § 19), providing that the county court shall have "final jurisdiction" to hear and determine a contest of a local option election, denies an appeal from the county court, the act is not a deprivation of life, liberty, or property without due process of law, in violation of Const. U. S. Amend. 14.

[Ed. Note.—For other cases, see *Constitutional Law*, Dec. Dig. § 316.\*]

# 6. CONSTITUTIONAL LAW (§ 249\*)—EQUAL PROTECTION OF THE LAWS.

Notwithstanding Act May 16, 1907 (Laws 1907, p. 304, § 19), providing that the county court shall have "final jurisdiction" to determine a contest of a local option election, denies an appeal from the county court, the act is not a denial of the equal protection of the laws guaranteed by Const. U. S. Amend. 14, as singling out a contest of such an election from a contest of an election for any other purpose.

[Ed. Note.—For other cases, see *Constitutional Law*, Dec. Dig. § 249.\*]

# 7. STATUTES (§ 85\*)—GENERAL AND SPECIAL.

Notwithstanding Act May 16, 1907 (Laws 1907, p. 304, § 19), providing that the county court shall have "final jurisdiction" to determine a contest of a local option election, denies an appeal from the county court, the act is not special legislation within Const. art. 4, § 22, forbidding the passage of local or special laws.

[Ed. Note.—For other cases, see *Statutes*, Dec. Dig. § 85.\*]

Appeal from Du Page County Court; D. T. Smiley, Judge.

Henry E. Saylor and others filed a bond for costs and a verified petition in the county court to contest an election had under Act May 16, 1907 (Laws 1907, p. 297), to determine whether the city of Naperville should become anti-saloon territory. George C. Duel, city clerk, who alone was served, entered his appearance, as did eight other citizens, and filed a demurrer to the petition which was sustained, and petitioners appeal. Appeal dismissed.

Haight & Reuss and Botsford, Wayne & Botsford, for appellants. David F. Matchett and John S. Goodwin, for appellees.

VICKERS, J. At the election held in the city of Naperville, Du Page county, in April, 1908, the question was submitted to the voters of said city whether said city should become anti-saloon territory under the act of May 16, 1907, providing for the creation, by popular vote, of anti-saloon territory, and for the abolition, by like means, of territory so created. The city of Naperville consists of three wards, each of which constitutes a voting precinct. The result of this election, as declared by the city council acting on the returns made by the election judges, was 408 votes against the proposition submitted and 467 in favor of the city becoming anti-saloon territory. Within less than 10 days after the election Henry E. Saylor, Albert Pringnitz, Mathias W. Sander, Samuel Wehrli, and Walter Weigand, legal voters of the city of Naperville, filed a bond for costs in the county court of Du Page county and a verified petition to contest the election upon the proposition submitted, on the following grounds: (1) Because of alleged fraudulent and illegal proclamations and returns in the First and Third wards; (2) because of irregular and unlawful arrangement and construction of the polling places in said First and Third wards; (3) because of the loss of one regular, officially indorsed ballot in the First ward; (4) because of the casting of illegal votes in favor of said proposition in the First and Third wards sufficient in number to change the result of the election in the city; (5) because of fraud and misfeasance of the election officers in said First and Third wards. The city of Naperville, as a municipality, was not made a party defendant.

The prayer for process and answer to the petition is as follows: "That summons herein issue out of this court, addressed to George C. Duel, the city clerk of said city of Naperville, Du Page county, Ill., notifying said city clerk of the filing of this petition, and directing him to appear in this court on behalf of said city of Naperville on the 5th day of May, A. D. 1908, at the hour of 10 o'clock in the forenoon, in the county courtroom in the courthouse in the city of Wheaton, in the county of Du Page and state of Illinois, then and there to answer this petition, in conformity with the statutes in such case made and provided." George C. Duel, city clerk of the city of Naperville, entered his appearance, as did eight other citizens and legal voters of said city, and filed a demurrer to the petition, setting out the following causes of demurrer: First, that neither the city of Naperville, Du Page county, Ill., nor any other person, is made a defendant in or to the said petition; second, as to the matters and things contained in said bill wherein it is alleged that the polling places in the various precincts were not arranged in form as provided by law, the same and each and every one the allegations of said petition are wholly insufficient, because said petition does not allege that said illegal arrangement of

the polling places resulted or in any manner tended to prevent a free and fair election as so arranged; third, because said petition is wholly insufficient to confer any jurisdiction on this court to grant the whole or any part of the relief prayed for by said petition. The county court sustained the demurrer and dismissed the petition, to which ruling of the court the petitioners duly excepted and prayed and obtained an appeal to this court. The errors assigned call in question the ruling of the court in sustaining the demurrer and dismissing the petition.

Section 19 of the act of 1907 (Laws 1907, p. 304), under which this election was held, after providing for a contest of such election by five legal voters of any political division in which an election shall have been held as provided for in that act, provides: "The county court shall have final jurisdiction to hear and determine the merits of such cases." Under the language of this statute, we are met with the question whether any appeal lies from the judgment of the county court to this court from a judgment rendered in a proceeding to contest an election held under the statute of 1907. This question is raised by appellees in their brief, but is not discussed. It is discussed at some length by appellants in their reply brief. Since in our view this is a question of controlling importance, we regret that we have been compelled to investigate it without any brief on one side and with but little assistance from the one filed by the other. In this state the right of appeal in any case is purely statutory, with the possible exception of certain classes of cases enumerated in section 11 of article 6 of the Constitution of 1870, in which the right of appeal from the Appellate to the Supreme Court in certain enumerated cases seems to be guaranteed by the Constitution. Section 123 of chapter 46 of Hurd's Revised Statutes of 1905 provides for appeals to be taken to the Supreme Court from county and circuit courts in all contested election cases, "in the same manner and upon like conditions as is provided by law for taking appeals in cases in chancery from the circuit courts." There is no provision in the act under which this election was held granting to either party a right of appeal. Appellants contend that an appeal lies under section 123 of the general election law. Whether section 123 of the general election law could be held to apply to an election held under this statute, in the absence of any provision in the law of 1907 in relation to such appeal, is not involved; since in our view the language already quoted from section 19 must be held to take elections held under said act out of the operation of said section 123. The provision that the county court shall have "final jurisdiction" to hear and determine the merits of such cases must, we think, be construed as a denial of the right to an appeal from the judgment of the county court in contests arising under this statute. Jurisdic-

tion is the power vested by the law in a tribunal to hear and determine causes properly coming before such tribunal. "Final" means last; conclusive; pertaining to the end. Bouvier's Law Dict. By conferring upon the county court "final jurisdiction," the jurisdiction of all other courts subsequent to the determination in the county court is *ex vi* terminis excluded.

The case of *Lampson v. Platt*, 1 Iowa, 556, is an authority for the construction which we place on this statute. In that case section 12 of an act of the Legislature of the state of Iowa (Laws 1854-55, p. 231, c. 156), under which the proceeding was had, provided: "That any person feeling aggrieved by the decision of the county judge, under the ninth section of the act may appeal therefrom to the district court of the proper county, which shall have final jurisdiction over the matter and shall make such decision in the premises as justice and equity may require." An appeal was prosecuted from the district court to the Supreme Court of Iowa, and, in holding that no appeal could be taken from the judgment of the district court, the Supreme Court of Iowa, on page 558 of 1 Iowa, uses this language: "The language of the statute is not that such district court shall have power in such cases, to enter final judgment, but it shall have final jurisdiction. If the term 'final judgment' had been used, the right to appeal, in view of the general provisions of the Code, could scarcely be questioned. Between judgment and jurisdiction there is a wide and clear distinction. The one is the decision of the law given by the court as the result of proceedings therein instituted; the other has reference to the power conferred to take cognizance of and determine causes according to law and carry the same into execution." That court in dismissing the appeal made the further remark that "to our minds, the language of the law can scarcely admit of two interpretations." In *Coon v. Mason County*, 22 Ill. 666, this court construed a provision in section 38 of chapter 93 of the Revised Statutes of 1845, providing that "either party may appeal to the circuit court, where, the case being fully heard, such judgment or order shall be made thereon as the court shall deem right and which shall be a final decision," as conferring upon the circuit court the power to finally determine the cause. This court there said: "We are of the opinion that the Legislature intended to prohibit the prosecution of a writ of error as well as an appeal." *Moore v. Mayfield*, 47 Ill. 167, was an election contest. The statute then in force provided that the contest should be heard, in the first instance, by three justices of the peace, and allowed an appeal from the decision of the three justices to the circuit court under a provision that "the decision of which court shall be final." Rev. St. 1845, c. 37, § 49. It was there held that the judgment of the circuit court was final, and the writ of error

was dismissed. See *Loomis v. Hodson*, 224 Ill. 147, 79 N. E. 590.

Appellants contend that to construe this act as denying an appeal would be to single out a contest of an election held under said act from a contest of an election held for any other purpose, and that to do so would render the act unconstitutional, as being contrary to the fourteenth amendment of the federal Constitution and in violation of section 22 of article 4 of the Constitution of this state. The particular part of the fourteenth amendment of the federal Constitution which is supposed to be violated by the construction we have placed upon this statute reads as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Appellants have no privileges or immunities which are abridged by denying them a right of appeal in this case, nor are they deprived of life, liberty, or property without due process of law. Even if it could be said that a proceeding to contest an election held for the purpose of determining whether a municipality should or should not become anti-saloon territory in some undefinable way involved the life, liberty or property of the particular citizens who, availing themselves of the statutory privilege, take the initiative in bringing about such contest, the fact that the Legislature has seen proper to withhold the right of appeal would not be a deprivation of such constitutional right without due process of law. "One hearing," the Supreme Court of the United States has said, "if ample before judgment, satisfies the demand of the Constitution in this respect. \* \* \* If a single hearing is not due process, doubling it will not make it so." *Pittsburg, Cincinnati, Chicago & St. Louis Railway Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031. In the case above cited Mr. Justice Brewer uses language which seems to us applicable to the other contention of appellants in this case. On page 427 of 154 U. S., page 1117 of 14 Sup. Ct. (38 L. Ed. 1031), the learned justice said: "The power of a state to make classifications in judicial or administrative proceedings carries with it the right to make such a classification as will give to parties belonging to one class two hearings before their rights are finally determined, and to parties belonging to a different class only a single hearing." The decision above cited appears to be a sufficient answer to appellants' views, not only as to the point made that the statute as thus construed violates the fourteenth amendment of the federal Constitution, but also as to the other contention that the act is special legislation within the meaning of section 22 of article 4 of the Constitution of Illinois. This court has

held in many cases that it is not necessary that a law shall apply to all the people of the state under this clause of our Constitution. Where a class is composed of persons possessing in common some disability, attribute, or qualification, or are under some conditions marking them as proper objects in whom to vest the specific rights granted unto them, the Legislature may pass a law applicable only to such class. *Vogel v. Pekoc*, 157 Ill. 339, 42 N. E. 886, 30 L. R. A. 491. A law is general, not because it embraces all of the governed, but because it may do so when they occupy the same position as those who are embraced in its terms. *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610. The Legislature, in adopting the law granting the right to determine by vote whether a political subdivision shall become or shall continue to be anti-saloon territory, has seen proper to differentiate in several particulars the procedure for contesting such elections from the corresponding provisions found in the general election law. Thus it is provided in section 117 of the general election law that any five electors may contest an election upon any subject which may be by law submitted to a vote of the people of a county upon filing a petition in the circuit court within 30 days after the result of the election shall be determined. In a contest, for instance, of an election for the removal of a county seat, any five electors may make such contest. In respect to the number and qualifications of those who may contest, this section is similar to section 19 of the act of 1907, but in other respects there are wide differences. Under the general election law the contest is in the circuit court, while under the law of 1907 it is in the county court. Under the general law, the petitioners have 30 days in which to file the petition, while under this special statute it must be filed in 10 days; and under the general law the petitioners are not required to give a bond for costs, while under the new act a bond for costs must be filed by the petitioners before filing their petition. Besides these differences, the Legislature, for reasons which it deemed sufficient, has seen proper to provide for appeals from decisions in all contested election cases under the general law, while as to contests of election under the law of 1907 it has conferred final jurisdiction upon the county court. In doing so the Legislature has exercised its power to determine that special elections upon this particular subject shall constitute a special class, which are subject to all the provisions of the statute under which they are conducted. The act in question is not open to the constitutional objections urged against it.

There being no authority of law for taking an appeal in this case, the appeal must be dismissed.

Appeal dismissed.

(236 Ill. 417)

**SCHOFIELD v. THOMAS et al.**

(Supreme Court of Illinois. Oct. 26, 1908. Rehearing Denied Dec. 3, 1908.)

**1. WILLS (§ 117\*) — ATTESTATION — "PRESENCE."**

The attestation of a will to be in the presence of testator within the statute must take place within the uninterrupted range of testator's vision, the "presence" of testator meaning contiguity, with such an uninterrupted view between himself and the subscribing witnesses that he could see the act of attestation, whether in the same room or in an adjoining room.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 328; Dec. Dig. § 117.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5525-5526.]

**2. WILLS (§ 117\*)—ATTESTATION.**

Where the attesting witnesses testified that testatrix was not in the room when they signed her will as witnesses, and that she did not see them sign, the instrument was not attested as required by law, provided their evidence was believed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 326-331; Dec. Dig. § 117.\*]

**3. WILLS (§ 121\*) — ATTESTATION CLAUSE—SUFFICIENCY.**

It is not necessary that a formal attestation clause reciting all the facts necessary to the execution of a will be added to the instrument to make it a valid will, and an attestation clause which does not state that the witnesses signed their names in the presence of testator is not insufficient.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 318; Dec. Dig. § 121.\*]

**4. WILLS (§ 303\*)—PROBATE—EVIDENCE.**

The law does not make the probate of a will depend on the recollection or veracity of a subscribing witness, and the evidence of the subscribing witnesses is not conclusive either way, nor does the law presume that they are more or less truthful than others.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 711; Dec. Dig. § 303.\*]

**5. WILLS (§ 289\*) — ATTESTATION CLAUSE — PRESUMPTIONS.**

Where the attestation clause to a will did not state that the witnesses signed their names in the presence of testatrix, no presumption could be raised from the attestation clause as to the presence of testatrix at the time the subscribing witnesses attested the will, and, to authorize probate of the will, the evidence other than the attestation clause must convince the court that testatrix was present when the subscribing witnesses signed their names.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 656; Dec. Dig. § 289.\*]

**6. WILLS (§ 114\*) — EXECUTION — STATUTORY REQUIREMENTS.**

A will must be attested in the manner prescribed by law, and no other method can be adopted, though in the opinion of the court it would be as effective.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 277; Dec. Dig. § 114.\*]

**7. WILLS (§ 302\*) — EXECUTION — EVIDENCE—SUFFICIENCY.**

In proceedings for the probate of a will, evidence held to show that the subscribing witnesses did not sign their names in the presence of testatrix.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 700; Dec. Dig. § 302.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**8. TRIAL (§ 386\*)—TRIAL BY COURT—PROPOSITIONS OF LAW.**

The provision of the practice act relating to propositions of law in cases tried by the court requires them to be submitted only in cases where the parties are entitled to a jury trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 901-902, Dec. Dig. § 386.\*]

**9. WILLS (§ 329\*)—PROBATE PROCEEDINGS—REVIEW.**

The provision of the practice act relating to propositions of law in cases tried by the court without a jury does not apply to a proceeding for the probate of a will, in which the parties are not entitled to a jury trial, and hence in such a proceeding it is not necessary to submit propositions of law to the court.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 329.\*]

**10. WILLS (§ 360\*)—PROBATE PROCEEDINGS—REVIEW—MOTION FOR NEW TRIAL—NECESSITY.**

One appealing from a decree admitting a will to probate may raise the question of the sufficiency of the evidence, though no motion for a new trial was made in the trial court.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 825; Dec. Dig. § 360.\*]

**11. APPEAL AND ERROR (§ 294\*)—OBJECTIONS BELOW—MOTION FOR NEW TRIAL.**

A motion for a new trial, as a prerequisite to questioning the sufficiency of the evidence on appeal, is only necessary where the case was tried by a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1727-1735; Dec. Dig. § 294.\*]

**12. WILLS (§ 297\*)—EXECUTION—EVIDENCE—ADMISSIBILITY.**

Evidence of declarations of testatrix that she intended to make a will in favor of a designated person, and that she had executed such a will, was inadmissible on the issue whether the will was properly attested.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 694; Dec. Dig. § 297.\*]

Appeal from Circuit Court, Cook County; G. A. Carpenter, Judge.

Proceedings by John T. Schofield for the probate of the will of Jane Ottman, deceased, in which Aaron Thomas and others appeared as contestants. From a judgment of the circuit court admitting the will to probate, on appeal from a decree of the probate court denying probate, contestants appeal. Reversed and remanded, with directions.

J. Marion Miller and John M. Humphrey (George M. Stevens, of counsel), for appellants. Frank H. Graham, E. B. Oresap, and Johnson & Lowenthal (Amos C. Miller, of counsel), for appellee.

**CARTER, J.** The alleged will of Jane Ottman was refused probate by the probate court of Cook county, and, on appeal, the circuit court of that county found the instrument to be the last will of the said testatrix, and ordered it admitted to probate. Appellants excepted to this order and judgment of the circuit court, and have brought the case here by appeal for review.

The matter of the probate of this instrument has been in this court twice before.

*Schofield v. Thomas*, 226 Ill. 631, 80 N. E. 1085; *Schofield v. Thomas*, 231 Ill. 114, 83 N. E. 121. The questions as to testamentary capacity, undue influence, and formalities of execution of said will did not, however, arise in those cases. Questions of practice and jurisdictional questions only were discussed therein. Jane Ottman at the time of the making of this instrument was aged about 65 years. Her husband died several years before. She lived on Paulina street, near Fulton, in the city of Chicago, and had property, partly consisting of store and residence premises in that vicinity, amounting in value to some \$20,000. About a year before her will was made she had fallen and broken her leg at the neck of the femur, making a very painful injury, and requiring her to walk thereafter with a crutch or cane. Appellee, John T. Schofield, had resided with Mrs. Ottman and her husband at intervals during Mr. Ottman's life, and after his death Schofield had resided with Mrs. Ottman in the house on Paulina street and had acted in the capacity of caretaker for her buildings. It appears to have been understood in the neighborhood and by both witnesses to the instrument in question that Schofield was Mrs. Ottman's nephew, but, in fact, he was no relation. A few days before the execution of the will, Schofield informed Charles Lange, the proprietor of a drug store in the vicinity, and Dr. McCollum, who treated Mrs. Ottman when she broke her leg, that she intended to have an attorney draw up her will, and he wanted them to be witnesses. April 2, 1902, Schofield came after Lange and the doctor, and together they went to the Paulina street residence. R. L. Rowden, who drew the will, was there when the witnesses reached the residence. The two witnesses testified that they went into the sitting room, where there was a table, and that then Schofield went into the adjoining bedroom and came back with Mrs. Ottman, whom he assisted in walking. They do not agree fully as to just what took place while she was in the room. The doctor thinks she said "Good morning," and that the will was read over partially to her by Rowden. Lange does not think she said anything while she was in the room, but merely nodded her head when she came in, and does not recall that any part of the will was read to her. They agree that she sat down at a table when she was brought into the room and signed the instrument, and was then assisted by Schofield back to the room from which she came. Both of them testified that she did not ask them to sign as witnesses, or state that it was her last will. Both also testified that she could not see them when they signed the instrument as witnesses, and that they signed at the request of Schofield and Rowden after Mrs. Ottman had been assisted out of the room. A diagram of the house introduced in evidence shows that the position of the

table on which the instrument was signed was such that neither the will nor the witnesses as they signed could have been seen by a person in the room to which Mrs. Ottman went, unless such person's head was thrust through the open door into the room in which the will was signed. Appellee claims that the testatrix remained in the room while the witnesses were signing their names to the will. The only evidence in support of this contention is that of R. L. Rowden, who drew the instrument. He testified that, when Schofield brought in the two witnesses, the testatrix arose and introduced him to both of them, shook hands with them, and, after some little conversation, said to the two men that she wanted them to be witnesses to her will, and then asked Rowden to read it, and that thereupon he read it out loud in the presence of all, after which the doctor rose and offered his chair to the testatrix and she sat down and signed the will, then walked back to the sofa where she had been sitting before and remained there while the two witnesses signed. The will was dated April 2, 1902. The attestation clause reads as follows: "This instrument was on the day of the date thereof signed, published and declared by the said testator, Jane Ottman, to be her last will and testament, in the presence of us, who at her request have subscribed our names thereto as witnesses, in the presence of each other." The two witnesses testify positively that the testatrix was not in the room when they signed as witnesses, and that she did not see them sign. While authorities have been cited by appellee to show that the witnesses need not necessarily have been in the same room with testatrix at the time they signed, his contention is that she remained in the room all the time. This court has frequently held that the attestation of a will, to be in the presence of the testator within the meaning of the statute, must take place within the uninterrupted range of testator's vision; that the "presence" of the testator means contiguity, with such an uninterrupted view between the testator and the subscribing witnesses that he could, if so disposed, see the act of attestation, whether in the same room or in an adjoining room. *Calkins v. Calkins*, 216 Ill. 458, 75 N. E. 182, 1 L. R. A. (N. S.) 393, 108 Am. St. Rep. 233; *Drury v. Connell*, 177 Ill. 43, 52 N. E. 368; *Witt v. Gardiner*, 158 Ill. 176, 41 N. E. 781, 49 Am. St. Rep. 150. This question is so fully discussed in these decisions that it is unnecessary to amplify what was there said. If the evidence of the attesting witnesses is to be believed, then the instrument in question was not attested in the manner required by law.

Appellee contends that the testimony of Dr. McCollum taken in the probate court shows that he was not certain that Mrs. Ottman was not in the room at the time he signed as a witness; that he there testified that "I think she was not in the room," while on the trial in the circuit court he

testified positively that he knew she was not in the room. He explained this in his testimony before the latter court by saying that people often use the word "think" for "know," and that is the way he used it in his testimony before the probate court. Taking into consideration all his testimony before the probate court, we think the conclusion, even from that alone, is that he wished that court to understand that Mrs. Ottman was not in the room at the time he signed as a witness. The doctor also testified that the testatrix was addicted to the use of intoxicating liquors, and that he thought she was more or less under the influence of liquor at the time she signed the will. While he hesitated some as to giving this testimony, it is evident that in his opinion she was not in a condition to sign the will. It is contended that no reliance can be placed on his testimony, because, if he believed that she was not in condition to sign, he should not have acted as a witness. While on the witness stand in the circuit court he apparently realized the inconsistency of this, and explained that his signing under these circumstances grew out of the fact that he thought it was a mere matter of form; that he was told by Schofield that he (Schofield) was the only relative; that witness was also unfamiliar with the law relating to wills and the strictness required in their execution, this being his first experience. The other witness, Lange, testified that the testatrix, when signing the will, was sort of sickly or drowsy and looked feeble, but that he had no means of knowing whether she was drunk or sober.

Appellee further contends that the testimony of Rowden is consistent with all the other surrounding facts and circumstances as to the signing of the will. The attestation clause did not state that the witnesses signed their names in the presence of testatrix. It is not necessary, however, that a formal attestation clause reciting all the facts necessary to a correct execution of the will be added to the instrument to make it a valid will. *Mead v. Presbyterian Church*, 229 Ill. 526, 82 N. E. 371, 14 L. R. A. (N. S.) 255; *Calkins v. Calkins*, supra; *More v. More*, 211 Ill. 268, 71 N. E. 988. It was held by this court in *Crowley v. Crowley*, 80 Ill. 469, where the two witnesses to the will could not identify the document as the one they had signed and could not state that the testator was of sound mind and memory at the time the writing was executed, that the evidence of the person who wrote the will that the testator was of sound mind, and that he executed it in the presence of the two witnesses, uncorroborated, was not sufficient to admit the will to probate. This doctrine has been quoted with approval several times by this court. This court has also said that the law does not require the probating of a will to depend upon the recollection, or even the ve-

racity, of a subscribing witness. The law, for wise and obvious reasons, requires such instruments to be executed and attested with such precautions as will usually guard against fraud. If the forgetfulness or falsehood of subscribing witnesses can invalidate a will, it would be easy in many cases to use such artifices or corruption as would render the best will nugatory. Their evidence is not conclusive either way, nor does the law presume that they are either more or less truthful than others. *Gould v. Theological Seminary*, 189 Ill. 282, 59 N. E. 536; *Mead v. Presbyterian Church*, supra. And in the *Gould Case* we quoted with approval from *Orser v. Orser*, 24 N. Y. 51, that "a will duly attested upon its face, the signatures to which are all genuine, may be admitted to probate, although none of the subscribing witnesses are able to swear, from recollection, that the formalities required by the statute were complied with, and even although some of them should swear positively that they were not, if the other evidence warrants the inference that they were." We also quoted with approval in the *Gould Case* from *In re Kellum's Will*, 52 N. Y. 517, that "if the attestation clause is full and the signatures genuine and the circumstances corroborative of due execution, and no evidence disproving a compliance in any particular, the presumption may be lawfully indulged that all the provisions of the statute were complied with, although the witnesses are unable to recollect the execution or what took place at the time." No presumption, however, can be raised from this attestation clause as to the presence of the testator at the time the subscribing witnesses attested the will. To authorize the probating of the will, the evidence, other than this attestation clause, must convince the court that the testatrix was present when the subscribing witnesses signed their names. Admitting, for the sake of the argument, that it is clearly shown on this record that this will was signed by testatrix without undue influence and while she was of sound mind and memory, and that there was no fraud or imposition practiced upon her, yet the Legislature has determined in what manner the will must be attested and no other method can be adopted, "although, in the opinion of the court, it would be just as effective. To adopt any other rule would open a limitless field as to what would be equivalent to a compliance with the provisions of the statute." *Calkins v. Calkins*, supra. In order to decide that the will was properly probated, it is necessary for the court to hold on this record that the testimony of witness Rowden is more worthy of belief than the testimony of the two subscribing witnesses.

It should be noted at this point that appellants contend that Rowden was incompetent because of his interest in the result of the will. They offered testimony tending to show

that he made statements before the trial that, if the will was upheld, Schofield was to give him half of the estate. Appellee contends that this court has held that declarations of a witness before he is called, as to his interest, do not disqualify him, and that, therefore, the testimony as to these declarations of Rowden was incompetent; that such declarations are no more than hearsay testimony, and therefore inadmissible to prove a disqualifying interest. *Waughop v. Weeks*, 22 Ill. 350. Appellants urge that, even though this be true, the testimony as to declarations made by Schofield to the same effect are admissible as to the interest of Rowden (*Egbers v. Egbers*, 177 Ill. 82, 52 N. E. 285; *Blattner v. Wels*, 19 Ill. 246); and that the evidence they produced of this character was sufficient to disqualify Rowden. On the record before us the admissibility of his testimony is not free from doubt; but, even if it be held to be competent, we are of the opinion that it is not of such a character as to overcome the testimony of the two subscribing witnesses and justify this court in holding that they signed the will in Mrs. Ottman's presence. Rowden testified that he was admitted to the bar in St. Louis, Mo., in 1891, and came to Chicago in 1895, where he worked apparently for two years in a clerical position. Since that time he testifies he has been engaged in "a specialty in the line of practicing law." What that is we cannot gather clearly from the record, unless it be representing corporations in the collection of bills and claims or looking after outside interests for them on the road. From 1897 until 1903 he appears to have had headquarters in various law offices in Chicago—at 95 Dearborn street, 52 Dearborn street, 155 Washington street, and the Schiller building, on Randolph street. He states that he was never admitted to the bar in Illinois, though a part of the time he was in Chicago he held himself out as a practicing attorney. An attorney's card was introduced in evidence by the appellants announcing him as an attorney at law in the Schiller building in Chicago. Lange, one of the subscribing witnesses, testified that this card was given to him by Schofield before the will was written, with the statement that Rowden was his attorney. Rowden denies that he occupied an office in the Schiller building or had a card of this kind previous to September or October, 1902. He testifies that the first he knew about Mrs. Ottman was the receiving of a letter from her just before April 1, 1902, requesting him to draw a will for her, and that in response to this letter he went to her residence, 42 Paulina street; that on rapping she came and opened the door, and he introduced himself to her; that she invited him in and they talked at length about drawing the will; that Schofield was in the room with her; that he had never met him before. The inference from his testimony is that Schofield took no part in the conversation about the will. He testified that, after talking over the

details, the testatrix gave him a description of the property, and told him how she wanted the will drawn; that, after paying her just debts and putting up a tombstone for herself and husband, she wanted all her property to go to Schofield because he had looked after her interests so faithfully; that, in accordance with the understanding of the previous day, he came back April 2d with the will drawn, and after reading it over to Mrs. Ottman she said that was just the way she wanted it and requested Schofield to go and get the subscribing witnesses; that he never saw Schofield again until after Mrs. Ottman's death in October, 1902, when the will was brought to him by Schofield for probate; that as attorney he presented the will for probate in the probate court, and has appeared since in the various proceedings in the various courts, not as an attorney, but as a witness in behalf of the will. He left Chicago in the year 1903, and since then has had his headquarters in St. Louis, but has been out on the road most of the time. He was at San Antonio, Tex., just before he came to testify in the trial of this case. For the purpose of showing that Rowden was familiar with the drafting of wills, the appellee proved by Rowden that he was county judge of Logan county, Colo., elected in 1887. Rowden also testified that he had been clerk of the United States court in Oklahoma under Harrison's administration. On cross-examination he admitted that he had not been clerk, but was only acting as deputy, but had stated that he was clerk on direct examination, because, as a matter of fact, he did all the work and had been accustomed to call himself clerk. We have stated at some length the facts with reference to the testimony as to Rowden's business and professional career because we think it has a bearing on the reasonableness of his story. The mere reading of his testimony impresses one with the improbability of several of his statements as to how he came to draft the will and what took place in connection with its preparation and execution. The evidence shows conclusively that Schofield looked after all of the testatrix's affairs after her husband's death. Indeed, this fact is the basis of any reasonableness which might be claimed for the will giving substantially all of her property to him and failing to give anything to her sisters, nephews, and nieces, who are appellants in this proceeding. Why, after Schofield, who was looking after all of her business affairs, had made preparations for the witnesses some days before the will was drawn, Mrs. Ottman should write a letter to an entire stranger—a man who was not in the general practice of law and who was not admitted to practice law in Illinois—to come and draft the will, cannot be satisfactorily explained on this record. Rowden says the letter from her could not be found. There is testimony tending to show that Schofield and Rowden were together in a saloon in the vicinity the day the will was signed or

shortly before that, and that they were drinking with testatrix in her house the day the will was executed. The claim of appellants that the testimony of Rowden as to what took place when he first met testatrix on April 1st, as well as when the will was executed, is so filled with details that it is fairly open to the charge of being prepared for the occasion, finds some justification. To illustrate: He stated first that the testatrix, in telling him how she wanted the will drafted, stated that after her just debts were paid, etc. The trial court stopped him, and asked him if she used the word "just," and Rowden said he was not sure whether she had or not. While not impossible, it is certainly improbable that he should remember all the details just as they took place in the manner he has testified to them.

Appellee argues that the testimony of the subscribing witnesses is unworthy of belief because of the inconsistencies of the testimony in the trial court as compared with their testimony when the will was offered for probate. While there were some discrepancies and inconsistencies, we find nothing more than is liable to happen in the testimony of any witness given on the same subject-matter after an interval of several years. Nothing in the record tends to show that either of the subscribing witnesses had any interest in this will or in the result of the contest. They appear to be men in good standing in their business and profession. It is urged by appellee as showing the interest of the subscribing witnesses that they had an interview with an attorney for appellants previous to the probating of the will. It is manifest, however, that there was nothing uncommon or peculiar about this. The interview with Dr. McCollum was at his office and with Lange at his place of business. We find nothing in the record tending to show any reason why they should testify falsely in the case. In this connection it may be noted that the argument of appellee that Rowden, because of his experience in drafting and probating wills while he was acting as county judge in Colorado, would necessarily be familiar with the law on the subject as to the formalities to be observed in the execution of a will, proves too much. If he were so familiar with the formalities, why, it may be asked, did he not prepare the attestation clause so as to show that the subscribing witnesses attested the will in the presence of the testatrix, if they, in fact, did so? Not only this attestation clause, but all the facts in the record, except Rowden's testimony, are consistent with the testimony of the subscribing witnesses that the testatrix was not present at the time they subscribed their names. All the testimony in the record is so inconsistent with any other theory that we are constrained to set aside the judgment and decree of the trial court in ordering the will to be probated.

Appellee argues that, as no propositions of law were submitted to the court to be given

or denied, no questions of law are presented on this record. We have held that in proceedings of this kind for the probating of a will the parties are not entitled to a jury trial; that the matter of the probate of a will is for the court. *Moody v. Fount*, 208 Ill. 78, 69 N. E. 831; *Schofield v. Thomas*, 231 Ill. 114, 83 N. E. 121. The provision of the practice act relating to propositions of law in cases tried by the court without a jury applies only to cases where parties are entitled to a jury trial and does not apply to a case of this kind. *People v. Chicago, Burlington & Quincy Railroad Co.*, 231 Ill. 112, 83 N. E. 120, and authorities there cited.

The point is also made by appellee that appellants cannot raise the sufficiency of the evidence on this hearing because no motion for new trial was made by them in the trial court. A motion for new trial is only necessary where a case has been tried by a jury. *Guyer v. Davenport, Rock Island & Northwestern Railway Co.*, 196 Ill. 370, 63 N. E. 732. There was an exception in this case to the judgment and order properly preserved by bill of exceptions. *People v. Chicago, Burlington & Quincy Railroad Co.*, *supra*.

The conclusion reached that the statutory formalities as to execution were not complied with, also renders it unnecessary for us to consider the question whether the proof shows that testatrix was of sound mind and memory. The fact that there is evidence tending to show that at various times before the will was made she stated she was going to leave a will in favor of Schofield, and that after it had been executed she stated to some of her neighbors that such a will had been drawn, can have no bearing on the question as to whether the will was properly attested.

For the reason that the instrument in question was not attested by the subscribing witnesses in the presence of testatrix, the judgment of the circuit court is reversed and the cause remanded to that court, with directions to enter an order refusing its probate.

Reversed and remanded, with directions.

(236 Ill. 551)

#### LONG v. BARTON et al.

(Supreme Court of Illinois. Oct. 26, 1908. Rehearing Denied Dec. 3, 1908.)

#### HUSBAND AND WIFE (§ 33\*)—MARRIAGE SETTLEMENTS—ENFORCEMENT.

A divorced wife who accepted the provisions made for her in lieu of dower by the decree of divorce will be held to have abandoned all claim under an antenuptial contract, whereby she was to receive a certain sum in lieu of dower.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 33.\*]

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, Vermillion County; M. W. Thompson, Judge.

Proceedings for the allowance of the claim

of Josephine Long against the estate of Phillip H. Barton, deceased, of whose will John M. Barton and others were executors. The county court allowed the claim, and, on appeal to the circuit court, the same result was reached. The Appellate Court reversed the judgment of the circuit court and refused to remand the cause, and claimant appeals. Affirmed.

Mabin & Morris, for appellant. J. B. Mann, for appellees.

VICKERS, J. This is an appeal from a judgment of the Appellate Court for the Third District reversing, without remanding, a judgment of the circuit court of Vermillion county.

The facts, which are not in dispute, are as follows: On October 1, 1901, appellant, Josephine Long, and Phillip H. Barton, in contemplation of a marriage thereafter to be celebrated between them, entered into the following antenuptial contract: "Know all men by these presents, that I, Phillip H. Barton, of Danville, Vermillion county, Illinois, hereinafter known as the party of the first part, and Miss Tonie Long, of the city of Danville, county of Vermillion, state of Illinois, hereinafter known as the party of the second part, witnesseth: That the said party of the first part, for and in consideration of the second party being joined with the first party in wedlock, and after said marriage said first party hereby agrees that said second party shall after his death, in lieu of dower, have the sum of \$5000, to be paid out of the estate of the said first party after all just debts and funeral expenses of the said first party have been paid. Second party agrees, in consideration of said \$5000 to be paid as above recited, agrees to relinquish and waive all her dower rights of the estate of the said first party that may accrue to her by reason of the marriage of the said first party to the said second party under the laws and statutes of the State of Illinois. Witness our hands and seals this first day of October, 1901. Phillip H. Barton. [Seal.] Tonie Long. [Seal.]" On the day following the execution of this contract the parties thereto were married. They lived together as husband and wife until 1904, when appellant obtained a divorce from her husband in the circuit court of Vermillion county on the charge of extreme and repeated cruelty. By the decree appellant was allowed \$2,000 as a gross sum in full of all of her claim in and to the property of her husband. The payment of the \$2,000 to appellant was directed to be made upon the execution and delivery to her husband of a quitclaim deed releasing all her interest in the real estate of her said husband. It was further provided in said decree: "The payment of the said sum of \$2,000 by defendant to complainant shall also be considered as in lieu of and

in full satisfaction of complainant's contingent right of dower and all other rights in the lands and tenements of defendant now owned by him and by him hereafter acquired." The appellant accepted the \$2,000 awarded her by the decree. Philip H. Barton died testate, and appellees, John M. Barton and Charles L. English, were appointed executors of his will. Appellant, claiming that she was entitled to receive the \$5,000 named in the antenuptial contract, filed a claim against the estate of Philip H. Barton for that sum. The county court of Vermillion county allowed said claim, and upon an appeal to the circuit court by the executors the same result was reached. The Appellate Court, as already indicated, reversed the judgment of the circuit court and refused to remand the cause, and it is this latter judgment that appellant seeks to have reviewed by this appeal.

By her acceptance of the \$2,000 under the provisions of the divorce decree appellant must be held to have waived her right to dower in her husband's lands. The antenuptial contract is not an unconditional promise to pay \$5,000, but it is to be paid in lieu of dower. If appellant had died before her husband, all rights under the antenuptial contract would have been extinguished. The effect of the antenuptial contract was to substitute a sum of money for appellant's right of dower in her husband's land. Anything that would extinguish her right of dower would extinguish that which by agreement was substituted in its place. This rule has been recognized in the following decisions of this court. *Clark v. Lott*, 11 Ill. 105; *Jordan v. Clark*, 81 Ill. 405; *Lennahan v. O'Keefe*, 107 Ill. 620; *Adams v. Storey*, 135 Ill. 448, 26 N. E. 582, 11 L. R. A. 790, 25 Am. St. Rep. 392. In the last case cited it was held that the right to dower was barred by an annuity given for life in a divorce decree which makes the annuity a lien and charge upon the husband's real estate, where the wife has taken her support and maintenance under the decree. Appellant, having accepted the provisions made for her by the decree in lieu of dower, must be held to have abandoned all claim to that which, under the contract, represented her dower.

The judgment of the Appellate Court for the Third District is affirmed.  
Judgment affirmed.

(236 Ill. 408)

#### PEOPLE v. FRANKENBERG.

(Supreme Court of Illinois. Oct. 26, 1903. Rehearing Denied Dec. 3, 1903.)

#### 1. LARCENY (§ 57\*)—EVIDENCE—SUFFICIENCY.

Where an attorney, obtaining judgments on claims in his hands for collection, and procuring executions, under which chattels were levied on

and placed in a warehouse, with knowledge of the satisfaction of the judgments, removed the chattels from the warehouse and appropriated them to his own use, a finding that the conversion was with a felonious intent, authorizing a conviction of larceny, was warranted.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 150-151; Dec. Dig. § 57.\*]

#### 2. LARCENY (§ 63\*)—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to show that an attorney feloniously converted goods levied on under executions issued on judgments procured by him on claims in his hands for collection, justifying a conviction of larceny, notwithstanding the conflict in the evidence.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 163; Dec. Dig. § 63.\*]

#### 3. LARCENY (§ 14\*)—FRAUDULENT USE OF LEGAL PROCESS.

Larceny may be committed where legal process is fraudulently and feloniously used for the purpose of securing possession of the goods by the thief.

[Ed. Note.—For other cases, see *Larceny*, Dec. Dig. § 14.\*]

#### 4. PROPERTY (§ 1\*)—PERSONAL PROPERTY—GENERAL AND SPECIAL OWNERSHIP.

The law recognizes a general and special ownership in personal property.

[Ed. Note.—For other cases, see *Property*, Dec. Dig. § 1.\*]

#### 5. LARCENY (§ 7\*)—PROPERTY SUBJECT TO LARCENY—OWNERSHIP.

Where a person had the general property in goods seized under execution against another, and the judgment was satisfied, he became entitled to the immediate possession thereof, and had such ownership as would support an indictment for larceny against one stealing them while in custody of the law under the execution subsequent to the satisfaction of the judgment.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 19; Dec. Dig. § 7.\*]

#### 6. CRIMINAL LAW (§ 510\*)—EVIDENCE—TESTIMONY OF ACCOMPLICE—SUFFICIENCY.

The jury may convict on the uncorroborated evidence of an accomplice.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1124; Dec. Dig. § 510.\*]

#### 7. CRIMINAL LAW (§ 822\*)—TRIAL—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

Where the court in one instruction charged that the jury should act on the testimony of an accomplice with caution, and that they ought not to convict on such testimony alone unless they were satisfied, beyond all reasonable doubt, of its truth, an instruction that accused might be convicted on the uncorroborated testimony of an accomplice if the jury believed that such testimony was true was not erroneous for failing to advise that the jury should act on the evidence of an accomplice with caution.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.\*]

#### 8. CRIMINAL LAW (§ 811\*)—TRIAL—INSTRUCTIONS—UNDUE PROMINENCE TO TESTIMONY.

Where only one witness was an accomplice, an instruction that accused might be convicted on the uncorroborated testimony of an accomplice, and, if the jury believed that the testimony of the witness was true, they could act on it as true, and that the jury should act on the testimony of an accomplice with caution, etc., was not erroneous as attaching undue importance to the testimony of the accomplice.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1971; Dec. Dig. § 811.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**9. CRIMINAL LAW (§ 829\*)—TRIAL—INSTRUCTIONS—REFUSAL.**

It is not error to refuse instructions which are mere repetitions of those given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

**10. CRIMINAL LAW (§ 834\*)—TRIAL—INSTRUCTIONS—IMPROPER INSTRUCTIONS.**

Instructions not containing accurate statements of the law, and not relating to questions involved in the case, are properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2013, 2014; Dec. Dig. § 834.\*]

**11. CRIMINAL LAW (§ 1169\*)—APPEAL—HARMLESS ERROR—ERRONEOUS ADMISSIONS OF EVIDENCE.**

On a trial for larceny committed by an attorney by converting to his own use goods levied on under an execution issued on a judgment obtained by him as attorney, the error in admitting in evidence a registered letter, returned unclaimed, addressed to the officer making the levy, notifying him to return the chattels, and informing him that the judgment had been satisfied, the letter not having been sufficiently connected with accused, was not prejudicial to him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.\*]

Error to Criminal Court, Cook County; M. W. Pinckney, Judge.

George Frankenberg was convicted of larceny, and he brings error. Affirmed.

Walter A. Lantz and Julian C. Ryer, for plaintiff in error. W. H. Stead, Atty. Gen., and John J. Healey, State's Atty. (Robert E. Turney and John T. Fleming, of counsel), for the People.

**VICKERS, J.** At the April term, 1906, of the criminal court of Cook county, an indictment was returned charging George Frankenberg and John R. McDonnell with the larceny of certain household goods belonging to Lucy J. Kimball. The cause was tried at the March term, 1908. At the conclusion of all the evidence, the trial court directed a verdict of not guilty as to John R. McDonnell and a verdict of guilty was rendered by the jury as to George Frankenberg. The value of the property stolen was found to be \$350. After overruling a motion for a new trial and in arrest of judgment, the court sentenced Frankenberg to imprisonment in the penitentiary at Joliet as provided by law. Frankenberg has sued out a writ of error for the purpose of bringing the record of his conviction into review in this court.

This case grows out of the same transactions upon which the prosecution was based in the case of Luddy v. People, 219 Ill. 413, 78 N. E. 581, 8 L. R. A. (N. S.) 508. The two cases are substantially alike in many respects. The property alleged to have been stolen is the same in both cases. Plaintiff in error at the time of the alleged theft was, or pretended to be, an attorney at law and engaged in the collecting business. Four small claims came into the hands of the plaintiff in error against H. C. Kimball,

Aaron Blinski, and W. W. Phelps. These claims were for wages due certain parties who had been employed in the laundry business which had been conducted by Kimball, Blinski, and Phelps as a partnership, under the name and style of "The Ivory Laundry." The claims which came into plaintiff in error's hands for collection were in favor of Maggie Hern, Elizabeth Schoen, Emma Rich, and Delbert Barnhart. The claims were for one or two weeks' wages due the claimants. These claims were brought to plaintiff in error by W. W. Phelps. Soon after the claims were received, plaintiff in error brought suits before John R. McDonnell, a justice of the peace of the town of Lyons, Cook county, Ill. On July 26, 1904, the four cases came on for a hearing before the justice of the peace. At the time of the trial H. C. Kimball appeared and presented receipts from the several plaintiffs, purporting to be in full of the several demands sued upon. Upon investigation, it appeared, however, that Kimball had paid about one-third of the several claims, although the receipts acknowledged payment in full. The justice deducted the amount actually paid and rendered judgment against the defendants for the balance, together with the costs, \$5 in each case, as an attorney fee for the plaintiff in error. The amounts of the several judgments are as follows: Maggie Hern, \$16.50; Elizabeth Schoen, \$5.65; Delbert Barnhart, \$15; Emma Rich, \$4.55. On the same day that these judgments were rendered, executions were sworn out and placed in the hands of W. J. Luddy, a constable, for collection. On July 28th the constable, accompanied by his son, W. J. Luddy, Jr., went to the residence of H. C. Kimball, at No. 6458 Jackson avenue, in the city of Chicago, to make a levy to satisfy the executions. Upon arriving at the Kimball residence, the constable found no one at home except a servant. The constable was about to levy the executions upon a piano, but was informed by the servant girl that the piano did not belong to the Kimballs. W. J. Luddy, Jr., testifies that he went to a telephone and called up plaintiff in error, and was told by plaintiff in error to proceed and make a levy upon the household goods and have them conveyed to a warehouse, and to conceal the name on the wagon in which the goods were to be hauled. A levy was made, by virtue of each of the four executions, upon the household goods, and the goods were loaded into a wagon and conveyed to Phinney's warehouse, at Sixty-Ninth street and Evans avenue. The evidence shows that the name on the wagon was covered with a rug. The goods were stored at Phinney's warehouse, and receipts were taken for them and delivered to plaintiff in error. The goods remained in the Phinney warehouse for some

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

considerable time, and it is a matter involved in some controversy as to what became of the goods after they were thus stored by the constable. At the time the levy was made H. C. Kimball and his wife, Lucy J. Kimball, were not at home. Lucy J. Kimball, who appears to have been the owner of all the goods levied upon, was visiting in Michigan. Where H. C. Kimball was on the day the levy was made does not appear from the evidence. He was not at home. On August 3d following the levy H. C. Kimball paid the several judgments to the parties entitled to them, and they each executed a satisfaction piece. Plaintiff in error admits in his testimony that these satisfaction pieces were shown to him by Kimball and his attorney, Hooper, a few days after the judgments were rendered. The date upon which the satisfaction pieces were exhibited to the plaintiff in error, according to the evidence of Kimball and Hooper, was August 10th. At the time the satisfaction pieces were presented to plaintiff in error he said to Hooper, "You have settled with these people," and plaintiff in error made a note of the satisfaction pieces. Hooper and Kimball were trying to find Luddy, the constable, so as to procure a release of the levies. Plaintiff in error was either unable or unwilling to give the parties any information as to the whereabouts of the constable, although the evidence shows he had an office with the plaintiff in error and kept the papers pertaining to business given him by plaintiff in error in a desk in that office. W. J. Luddy, Jr., testifies that about the 11th of August he went with plaintiff in error to Phinney's warehouse, and that he and plaintiff in error removed most of the Kimball goods to plaintiff in error's residence at No. 265 East Sixty-Sixth place. Lucy J. Kimball and her husband testified that they afterward saw several articles of furniture belonging to Lucy J. Kimball in plaintiff in error's house. Among the articles identified by the Kimballs are a golden oak dresser, identified by Mrs. Kimball by certain spots on it; a rocking chair, identified by Mrs. Kimball as belonging to her by a small chip being out of it under the seat; a sewing machine and a davenport, the davenport being identified by a peculiarity of one of the casters. Plaintiff in error contradicts all this testimony relating to the goods being in his possession, and testifies that no part of the Kimball goods was ever in his house or in his possession, and the two persons named by young Luddy as the parties who hauled the goods from the warehouse to plaintiff in error's residence contradict Luddy, and testify that they did not haul, or assist in hauling, any goods from the warehouse to the Frankenberg place. Plaintiff in error insists that under this evidence the verdict of the jury ought to be set aside because it is not supported by the evidence.

It will be seen from the foregoing statement of the evidence that the question thus raised is largely dependent upon the credibility of the witnesses. None of the witnesses whose testimony has been thus far referred to are impeached or otherwise discredited, except in so far as they may be discredited by other witnesses giving contradictory accounts of the transactions. If plaintiff in error went to the warehouse, and took these goods and removed them to his place, and afterwards sold them and appropriated the proceeds to his own use, the jury would be warranted in finding him guilty of larceny. After the satisfaction pieces had been exhibited to him, showing that the judgments had been paid in full, any appropriation or conversion of the goods to his own use might well be found to have been with a felonious intent. Plaintiff in error does not rest his defense upon the ground that he had any pretense of right to take these goods from the warehouse, but he denies taking them at all. We think the evidence of Mrs. Kimball and her husband, to the effect that they found her goods in the plaintiff in error's house, is reasonable and consistent. The manner in which Mrs. Kimball identifies the different articles of furniture shows she had that accurate knowledge which only a woman who had owned and used the articles in her own housekeeping would be expected to have. She mentions the spot on the dresser, the chip out of the rocker, and the peculiarity in the castor belonging to the davenport with such particularity of description as to exclude the possibility that she was mistaken about finding her goods in the possession of the plaintiff in error. The only way to reach the conclusion that the goods of Mrs. Kimball were not in the house of plaintiff in error is to reject the testimony of the Kimballs as unworthy of belief. There is no direct testimony in the record contradicting the evidence of the Kimballs except the evidence of plaintiff in error. As already shown, the testimony of young Luddy is to the effect that he assisted the plaintiff in error in removing these goods from the Phinney warehouse to plaintiff in error's residence. All these witnesses were before the jury, and their credibility was a question for the jury to determine. We are not inclined to disturb this conviction on the ground that there is not sufficient evidence to support the verdict.

Plaintiff in error also insists that there is no proof of a felonious taking, such as is necessary to support a conviction of larceny under a common-law indictment for that offense. This contention proceeds upon the assumption that the original taking of the goods under the execution was legal or at least not criminal. We do not find it necessary, under the proofs in this case, to decide whether the conviction could be sustained on the theory that the original taking was

felonious, and that plaintiff in error was co-operating with and aiding, abetting, and encouraging the party who actually took the goods. That larceny may be committed where legal process is fraudulently and feloniously used for the purpose of securing possession of the goods by the thief has long been recognized by the common law. 1 Hawk. P. C. 333, par. 12; 1 Hale's P. C. 507; Aldrich v. People, 224 Ill. 622, 79 N. E. 964, 7 L. R. A. (N. S.) 1149, 115 Am. St. Rep. 166. The law recognizes two kinds of ownership in personal property: General and special. Whether the levy upon the goods of Lucy J. Kimball by virtue of an execution against other persons would give the officers so levying the execution a special property in the goods seized we need not stop to discuss. It is certain that Lucy J. Kimball had such a general ownership in these goods as would support an indictment for larceny against any one who feloniously stole them while in the custody of the law under the executions. Lucy J. Kimball not only had the general property in the goods seized, but after the judgments were satisfied she became entitled to their immediate possession. This was the status of the property at the time it was removed from the warehouse.

Plaintiff in error, by his counsel, raised the question whether this conviction can rest on the mere failure of the plaintiff in error to order or direct the constable to release the levy and restore the goods to the owner. This is not the foundation upon which the conviction rests. Plaintiff in error is not guilty of larceny because of a mere omission or neglect on his part to take affirmative action to have the goods restored to Mrs. Kimball, but he is guilty because he feloniously took the goods from the warehouse and converted them to his own use after he knew that the judgments under which they had been seized had been satisfied. Such a taking is such a violation of the general ownership of Lucy J. Kimball as will support a conviction for larceny under a common law form of indictment.

Plaintiff in error next insists that the trial court erred in giving instruction No. 11 on behalf of the people. That instruction is as follows: "The court instructs the jury that under the law of this state the defendant may be convicted upon the uncorroborated testimony of an accomplice; and if the jury believe, from the evidence in this case, the testimony given by the witness W. J. Luddy is true, then they can act upon the same as true. The testimony of an accomplice, like all the other evidence in the case, is for the jury to pass upon." The complaint made concerning the above instruction is that it does not contain a correct statement of the law. This criticism is not well taken. The law of this state is that the jury may convict upon the uncorroborated evidence of an accomplice where the jury believe the evidence of such accomplice to be true and worthy of

belief. Gray v. People, 26 Ill. 344; Earl v. People, 73 Ill. 329; Honselman v. People, 168 Ill. 172, 48 N. E. 304; Kelly v. People, 192 Ill. 119, 61 N. E. 425, 85 Am. St. Rep. 323.

It is further insisted that this instruction should not have been given without a modifying clause advising the jury that they should act upon the evidence of an accomplice with care and caution. At the instance of plaintiff in error the court gave the jury the following instruction: "The jury are instructed that, while it is the rule of law that a person may be convicted upon uncorroborated testimony of an accomplice, still the jury should always act upon such testimony with great care and caution, and subject it to careful examination in the light of all other evidence in the case, and the jury ought not to convict upon such testimony alone, unless, after a careful examination of such testimony, they are satisfied, beyond all reasonable doubt, of its truth." The giving of this instruction at the instance of plaintiff in error removes the objection now under consideration to instruction No. 11. It also answers the first objection made.

It is next objected that instruction No. 11 is erroneous for the reason that it singles out the evidence of W. J. Luddy, thereby making his evidence unduly prominent before the jury. Taking the two instructions together above set out, the reference to Luddy as an accomplice tended to affect his testimony unfavorably before the jury. There was no other person who testified before the jury in this case to whom the word "accomplice" could have referred. This being true, we see no substantial difference between referring to him as an "accomplice" in plaintiff in error's instruction and as W. J. Luddy in connection with the word "accomplice" in the other instruction. The jury would clearly understand both instructions as applicable to the testimony of the same person. While it is true, as a general rule, this court does not approve of instructions that single out the evidence of a particular witness, for the reason that such practice has the effect of giving undue prominence to the testimony thus specifically referred to, yet in this case we do not think the instruction could have been understood by the jury as an intimation that the court attached any undue importance to the testimony of Luddy.

Plaintiff in error complains of the refusal of the court to give a number of instructions offered by him. We have carefully read all of these refused instructions and compared them with the instructions given on behalf of plaintiff in error, and we find that instructions A, B, and D, which were refused, are mere repetitions of what is found in other instructions given, and for this reason they were properly refused. The other instructions the refusal to give which is the subject of exceptions were properly refused, some of them because they did not contain accurate statements of the law, and others because

they related to questions not involved in the case. The court gave 27 instructions to the jury—12 for the people and 15 for plaintiff in error—which fairly covered all the questions involved in the case. There was no error committed in the refusal of the court to give any of the instructions complained of.

The plaintiff in error finally complains that the court erred in admitting in evidence a registered letter written by Lucy J. Kimball to the constable, notifying him to return her goods, and informing him that the judgments had been satisfied and satisfaction pieces filed with the justice of the peace. This letter was written on August 15th and was sent by registered mail to W. J. Luddy, constable, 95 Washington street. The evidence shows that the letter was returned unclaimed. The evidence does not show that plaintiff in error had any knowledge of this letter, although it was addressed to his office. While we do not think the letter was sufficiently connected with plaintiff in error to justify its admission in evidence, still we see nothing in the letter that was prejudicial to plaintiff in error.

Finding no reversible error in the record, the judgment of the criminal court of Cook county is affirmed.

Judgment affirmed.

(236 Ill. 316)

**LESLIE E. KEELEY CO. v. HARGREAVES et al.**

(Supreme Court of Illinois. Oct. 28, 1908. Rehearing Denied Dec. 2, 1908.)

**1. COURTS (§ 219\*)—APPELLATE COURTS—JURISDICTION—FREEHOLD.**

Where, notwithstanding the setting aside of a deed was incidental to the main purpose of the bill, the effect of the decree was absolutely to cancel title to land in which a freehold was claimed, a motion to transfer the cause from the Supreme Court to the Appellate Court, on the ground that no freehold was involved, will be denied.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 557; Dec. Dig. § 219.\*]

**2. APPEAL AND ERROR (§ 870\*)—DECISIONS REVIEWABLE—GRANTING OF PRELIMINARY INJUNCTION.**

The granting of a preliminary injunction cannot be assigned for error, on appeal from a decree making the injunction permanent, it being merely interlocutory and open to review only upon an appeal taken under § Starr & C. Ann. St. 1896, c. 110, par. 107.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 870.\*]

**3. TRADE-MARKS AND TRADE-NAMES (§ 93\*)—UNFAIR COMPETITION—ACTIONS—EVIDENCE—SUFFICIENCY.**

Evidence, on a bill to restrain the disclosure of any knowledge acquired as to the composition, formulae, or methods of compounding remedies to cure drunkenness, and to restrain the selling or administering of such remedies, held to show that the discovery of such remedies was made by the person under

whom complainant claimed, and not by such person and one of the defendants jointly.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 93.\*]

**4. TRADE-MARKS AND TRADE-NAMES (§ 75\*)—UNFAIR COMPETITION—FRAUD.**

A false representation as to the ingredients of a remedy, or the manufacturer by whom made, is such a fraud upon the public as will preclude equitable relief against unfair competition.

[For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 86; Dec. Dig. § 75.\*]

**5. TRADE-MARKS AND TRADE-NAMES (§ 75\*)—ACTIONS—PERSONS ENTITLED TO SUE—FRAUD UPON PUBLIC.**

A continued use of the fac simile of the autograph of the discoverer of a cure for drunkenness, on bottles containing the remedy, after his death is not such a fraud upon the public as to preclude equitable relief against unfair competition, as it cannot be regarded as a representation of any fact, in connection with the contents of the bottles, further than that it was a genuine product.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 86; Dec. Dig. § 75.\*]

**6. ASSIGNMENTS (§ 34\*)—ORAL ASSIGNMENTS—SUFFICIENCY.**

A verbal transfer of the formulae for a remedy to cure drunkenness to a corporation for its use and benefit, and in payment for its capital stock, and a long-continued use under a claim of ownership acquiesced in by the owner, was sufficient to transfer the owner's rights in the formulae without a written assignment.

[Ed. Note.—For other cases, see Assignments, Dec. Dig. § 34.\*]

**7. ASSIGNMENTS (§ 74\*)—SECRET PROCESSES—TITLE OF ASSIGNEE.**

Transferee of the rights of the discoverer of secret formulae for a remedy to cure drunkenness holds those rights as exclusively as the discoverer.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 138; Dec. Dig. § 74.\*]

**8. PARTNERSHIP (§ 262\*)—DISSOLUTION—ESTOPPEL TO DENY—NEGLIGENCE.**

Where a partner acquiesced for 18 years in a dissolution of the partnership, and transferred to the remaining partners all interest which might remain to him therein, his neglect bars him from thereafter claiming that he was ignorant of his rights respecting a dissolution of the partnership.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 262.\*]

**9. TRADE-MARKS AND TRADE-NAMES (§ 84\*)—SECRET PROCESSES—UNFAIR COMPETITION—INJUNCTION—DEFENSES.**

On a bill by a corporation to restrain the disclosure of formulae for a remedy to cure drunkenness, and the making, selling, or administering of such remedy, the regularity of complainant's organization or proceedings is of no importance.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 84.\*]

**10. EVIDENCE (§ 314\*)—HEARSAY EVIDENCE.**

On a bill to restrain the disclosure of formulae for a remedy to cure drunkenness, and the making, selling, or administering of such remedy, statements by the discoverer of the remedy as to his investigation of the causes and cure of drunkenness were objectionable as hearsay, so far as they were mere narrations of past occurrences.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 314.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**11. EVIDENCE (§ 220\*)—ADMISSIONS—ACQUITTANCE.**

On a bill to restrain the disclosure of formulae for a remedy to cure drunkenness, and the making, selling, or administering of such remedy, statements of the discoverer of the remedy, made in the presence of a defendant, as to his investigation of the causes and cure of drunkenness were admissible, on the issue whether defendant had any part in the discovery.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 771-778; Dec. Dig. § 220.\*]

**12. EVIDENCE (§ 121\*)—RELEVANCY—RES GESTÆ.**

On a bill to restrain the disclosure of formulae for a remedy to cure drunkenness, and the making, selling, or administering of such remedy, statements by the discoverer of the remedy as to his work of investigation then in progress, or cases then under treatment, were admissible as part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 121.\*]

**13. TRADE-MARKS AND TRADE-NAMES (§ 93\*)—UNFAIR COMPETITION—SECRET PROCESSES—INJUNCTION—EVIDENCE—ADMISSIBILITY.**

On a bill to restrain the disclosure of formulae for a remedy to cure drunkenness, and the making, selling, or administering of such remedy, statements by the discoverer of the remedy as to his work of investigation then in progress, or as to cases then under treatment, were admissible to fix the time of his investigation as to his relations and acquaintance with a defendant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 93.\*]

**14. APPEAL AND ERROR (§ 882\*)—INVITED ERROR—PREPARING FINDINGS.**

Where, at the close of the evidence, appellant's counsel suggested that he submit findings, which he thought the master ought to report, and the master stated that, if both sides were satisfied, they might file suggestions as to what should be found, and the master, having the prepared findings of each party before him, prepared his own findings from the evidence, and reported accordingly, appellant cannot complain of the method adopted by the master, since it was at his own suggestion, though the master should arrive at his conclusions from his own investigation, rather than from the findings presented to him by the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3607; Dec. Dig. § 882.\*]

**15. APPEAL AND ERROR (§ 873\*)—REVIEW—SCOPE.**

On appeal from a final decree, review cannot be had of the denial of a motion, made after final decree, to set aside all the proceedings subsequent to the order of reference, because the master was not the legally appointed regular master, and because the judge had no authority to enter the order continuing him as special master after a change of venue had been taken.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 873.\*]

Appeal from Circuit Court, Livingston County; T. M. Harris, Judge.

Bill by the Leslie E. Keeley Company against Frederick B. Hargreaves and others. Decree for complainant, and defendants appeal. Affirmed.

W. H. Ketcham and Clyde B. Thompson (Strawn & Strawn, of counsel), for appellants. R. S. McIlhuff and B. R. Thompson (Charles E. Pickard, of counsel), for appellee.

DUNN, J. This appeal is from a decree making perpetual an injunction against the defendants, in a bill filed by the appellee, the Leslie E. Keeley Company, against Frederick B. Hargreaves, the Fred. B. Hargreaves Company, and others.

The bill alleged the incorporation of the complainant under the laws of Illinois, having its principal place of business at Dwight, in Livingston county; that Leslie E. Keeley, a practicing physician, about 1880 discovered a new remedy for drunkenness and similar diseases, and began to administer the same; that about 1881, for the purpose of carrying on and developing the business in connection with said remedies, a partnership was formed between the said Keeley and Curtis J. Judd, Frederick B. Hargreaves, John R. Oughton, and James Halpin, with written articles of copartnership, whereby it was, among other things, expressly provided that each member of the firm should jealously guard all information pertaining to the compounding of said remedies, their constituent parts and elements, and should under no consideration divulge any information whatever concerning their manufacture to any one; that if any partner should so impart any of said information, his connection with said business should immediately determine; that if any partner sold his interest, he agreed to keep secret all his knowledge of and concerning the nature and manufacture of said remedies, and not to divulge any of such knowledge to any one whatsoever without the written consent of all of the then surviving partners; that to the said Oughton, as a pharmacist, was confided the preparation and ingredients of the secret remedies, and the secret was imparted to him by Keeley, as a secret and confidential communication, for that purpose; that the remedies were administered to a large number of patients; the treatment became very successful, and the remedies acquired a great reputation; that about March 20, 1886, the connection of the said Frederick B. Hargreaves with the partnership was severed, and for a valuable consideration he, by an instrument in writing, sold all his interest (except the accounts, notes, two deeds, and one mortgage) in the said partnership to the said Judd, for the use of the remaining members; that afterwards, by two certain instruments in writing, the first about January 7, and the second about September 26, 1887, he sold to the Leslie E. Keeley Company all his interest in the matters excepted from the first transfer; that about March 25, 1886, Halpin sold his interest to the remaining partners; that about April 3, 1886, the complainant corporation was duly incorporated, and Keeley, Judd, and Oughton, the sole remaining partners, became the sole subscribers to its capital stock, and in payment therefor gave over and sold to the corporation the entire assets, good

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

will, and business of the copartnership, together with the right to make, administer, and sell the said secret remedies discovered by Keeley; that complainant continued the business, which grew rapidly, and is of great value to the complainant; that the objects for which the corporation was formed were enlarged, branch institutes were established at various places, and the secret remedies were sold by complainant to them, and administered there by skilled physicians, instructed under the direction of Keeley during his lifetime, and since his death by other physicians instructed by him, or by others in complainant's employ; that the complainant became the owner of certain real estate described in the bill; that Keeley died February 21, 1900, and since his death the medical direction of the business has been supervised, and the administration of the secret remedies directed, by physicians regularly licensed and instructed in the administration of the said remedies; that from the time of the discovery the secret of the remedies has been jealously and carefully guarded, and, aside from the good will, is the chief and most valuable asset of the complainant, and if it should be made public, the business of the complainant would be destroyed; that Frederick B. Hargreaves has given out that he knows the secret of the remedies as prepared by Keeley and by the copartnership, and became so acquainted with it while associated with Keeley and a member of the copartnership; that defendants have entered into a conspiracy wrongfully to use said Hargreaves' alleged knowledge of the secret remedies, and to that end have formed a corporation to sell and administer such remedies; that said Hargreaves is to disclose his alleged knowledge of the secret remedies, and proposes to sell to defendant company remedies made in accordance with the secret formulæ used by Keeley, the partnership, and complainant, the knowledge of which he claims to have; that defendant company proposes to purchase of said Hargreaves such remedies, and to sell and administer the same; that said Hargreaves has contracted to give the company his exclusive services in the preparation of such remedies, the knowledge of which he gained, if he possesses it, while associated with Keeley and the copartnership; that defendants are about to open at Dwight an institution for the preparation and administration of such remedies, compounded under said Hargreaves' direction, and to offer and sell such remedies to others, and to so-called Keeley Institutes, at a lower price than sold by complainant; that said Hargreaves and wife, in pursuance of said conspiracy, have conveyed to William H. Ketcham an undivided interest in certain property now owned by the complainant, which constitutes a cloud on the complainant's title; that the defendants pretend that said Hargreaves has some interest in complainant's business, and is at liberty to sell

the secret acquired while associated with Keeley, and to prepare and sell remedies compounded in accordance with the secret formulæ used by Keeley, but complainant alleges that if said Hargreaves does know the secret formulæ, or has any material knowledge of it, he obtained it wholly through his confidential relations with Keeley and by reason of his being a copartner, and would therefore, after having sold his interest in the copartnership, be debarred, in equity and good conscience, from ever thereafter using the same for his own benefit or the benefit of any other person than complainant.

The bill prays for an injunction restraining the said Frederick B. Hargreaves from disclosing to his codefendants, or any other person, any knowledge acquired, directly or indirectly, from the said Keeley, or by reason of Hargreaves' membership in the said copartnership, as to the composition, formulæ, or methods of compounding the said remedies, and from making remedies in accordance with the knowledge derived, directly or indirectly, from the said Keeley, or while a member of said partnership, or from advertising that he will make such remedies, and restraining the other defendants from selling or administering such remedies, and from disclosing any information which they may have derived from Hargreaves in regard to them; also restraining Ketcham from setting up any claim, by virtue of the deed from the said Frederick B. Hargreaves to him, to the real estate therein described, and restraining both Ketcham and Hargreaves from making any conveyance of any interest therein, and for a decree that the conveyance from said Hargreaves to Ketcham of the said real estate be set aside as a cloud upon the complainant's title. Separate answers were filed by the various defendants, putting in issue the allegations of the bill. The claim of the defendants is that the discovery of the remedies mentioned in the bill was not made by Dr. Keeley, but was made by Dr. Keeley and Frederick B. Hargreaves jointly; that they together prepared, compounded, and administered the remedies, and began to place them on the market pursuant to a verbal agreement between them, and that later the partnership mentioned in the bill was formed, its name being afterward changed to "The Leslie E. Keeley Company," but that Hargreaves never transferred or parted with his interest in the formulæ for the preparation of said medicine. The answers deny that Hargreaves' connection with the partnership was severed in March, 1886, or that he assigned his interest to Judd for the other partners, but aver that Hargreaves was at that time forced by Keeley to retire from active participation in the business of the partnership. The incorporation of the defendant is neither admitted nor denied, but it is averred that, notwithstanding the alleged incorporation, the copartnership continued to do business under the same name and in the

same way as before, under the management of Keeley, Judd, and Oughton, three of the partners, until the death of Dr. Keeley, in 1900; that the real estate described in the bill was purchased with the profits of the partnership business, the title was taken in the name of the partnership, and Hargreaves was entitled to his proportionate share thereof, namely, two-tenths. The answers also charge that the complainant, in the conduct of its business, practices fraud upon the public by representing the remedies sold by it to contain gold, when, in fact, they do not contain gold; by falsely representing its remedies to have been put up under the personal supervision of Dr. Keeley, long after his death, and by using the name of Dr. Keeley, on the labels put upon the bottles in which the remedies are sold, without stating that he is dead. A motion was made to transfer the cause to the Appellate Court for the Second District, on the ground that no freehold is involved, and was taken with the case. The bill prays for a decree setting aside the deed from Hargreaves to Ketcham. Ketcham's answer claims title through that deed, and the decree sets it aside. The assignments of error question the sufficiency of the allegations of the bill in regard to the real estate, and the appellants' argument very briefly mentions the point. The relief is, of course, incidental to the main purpose of the bill, but the effect of the decree was absolutely to cancel Ketcham's title to the land in which he claimed a freehold. His claim may have been ill founded, but it was a claim of freehold, and in such case an appeal properly lies to this court. The motion to transfer the cause will therefore be overruled.

The first assignments of error are directed against the action of the court in granting a preliminary injunction without notice, and without sufficient verification of the bill, and various alleged defects in the bill are suggested. The granting of a preliminary injunction cannot be assigned for error. *Tunison v. Chamblin*, 88 Ill. 378. It is merely interlocutory, and is open to review only upon an appeal taken in the manner provided in the act to provide for appeals from interlocutory orders. 3 Starr & C. Ann. St. 1896, p. 3171, c. 110, par. 107. The injunction was made perpetual by the final decree, and in the review of that decree it is immaterial whether or not a preliminary injunction was issued, or, if it was, whether it was rightly or wrongly issued.

The first question of material importance in the case is whether the discovery of the remedies involved in the controversy was made by Dr. Keeley alone, or by Dr. Keeley and Frederick B. Hargreaves acting together. The evidence shows that Dr. Leslie E. Keeley came to Dwight in 1866, and began the practice of medicine. The record discloses nothing of his life before that time, except that he was a native of Ireland, was a graduate

of the Rush Medical College in 1864, and, according to his own statement, was a surgeon in the Union army during the Civil War. He was successful in his practice, and acquired a good reputation in the community as a physician, and also as a man of intelligence and of education. He was the physician of the Chicago & Alton Railroad Company. In the army he had seen much drunkenness, and he became interested in seeking a remedy for it. He regarded it as a disease rather than a vice, and frequently discussed it, giving his views and telling of his efforts towards finding a remedy for the disease, and of his belief that he had discovered such a remedy. He lamented, also, the insufficiency of means at his command to launch his remedy on the market, and sought financial aid for that purpose. His conversations of this character are testified to by numerous witnesses, most of them entirely disinterested, covering a period of at least 10 years prior to 1880. Dr. Keeley experimented with his remedy before 1880 upon a man by the name of Miller, also upon James Martin and John Campbell, and the experiment was successful in the case of Martin, and at least for a time in the other cases. The testimony leaves no doubt in the mind that for many years prior to 1880 Dr. Keeley was deeply interested in the question of a medical cure for drunkenness; that he had investigated the subject and made experiments; that his experiments were partially successful; that he believed he had discovered the remedy he sought, and wanted to get it into general use, but lacked means for that purpose. Campbell took the cure late in 1879 or early in 1880. It is at this point that Frederick B. Hargreaves comes into the case. He was born in London, England, in 1847, and lived in various places in that country until he was 25 years old, when he came to this country. During the last two or three years he lived in England—though he cannot say accurately how long—he was a minister of the gospel of the Wesleyan denomination. On coming to this country, in 1872, he lived first at Gardner, a few miles north of Dwight, where he stayed about 15 months, and was pastor of the Presbyterian church. He then went to Dwight, and was pastor of the First Presbyterian church there a few months, after which, while still living at Dwight, he became pastor of the Presbyterian church at the Pound schoolhouse, six miles south of Dwight, in the next township. He soon left this church on account of his drinking, and after that practiced law in justices' courts at Dwight, having never studied law or been admitted to the bar. In 1877 he went on the lecture platform, and was later vice president of the Illinois State Temperance League, and continued a lecturer until 1880, when his association with Dr. Keeley in a business way began. Hargreaves' account of this beginning is that his mention to Dr. Keeley of the case of Dr. Dodd, with whom they were both acquainted,

brought out the fact that they were both acquainted also with one thing that was said to be a sure cure for the whisky habit. Later Keeley told Hargreaves he had tried the cure and had good results. Hargreaves being skeptical, they then agreed to make a test by trying the remedy on a saloonkeeper in Dwight, who took it and was temporarily benefited. Hargreaves, being satisfied with this test, and sure the remedy was a good thing, urged putting it upon the market as a patent medicine, but Keeley, having regard for his professional reputation, was unwilling to do so. While the matter was under discussion Dr. Keeley treated Campbell's case, and after his recovery Campbell was taken into the business, and he and Hargreaves went to Bloomington to get it started. They were gone several weeks, during which time they treated a sewing machine agent named Dalibi, advertised the remedy, and Hargreaves wrote circulars, letters, and newspaper articles for this purpose.

After the return of Campbell and Hargreaves to Dwight, Dr. Keeley and Hargreaves bought Campbell's interest. Hargreaves wrote, and in April, 1880, published, "A Review of Dr. L. E. Keeley's Recent Discovery of the Chloride of Gold Cure for Drunkenness," which he signed as vice president of the Illinois State Temperance League, in which he described Dr. Keeley's researches and experiments extending over a period of 15 years, and stated that Dr. Keeley had, as a result of his persistent effort, discovered this remedy. He testified in this case that the statement was untrue, and Dr. Keeley's army experience as therein stated mythical; that he objected because the statements were not true, but Dr. Keeley overcame his scruples by saying it was Keeley's personal statement, and he alone was responsible for it, and therefore Hargreaves would not be incriminated by it. Hargreaves also testified that the sanitary and dietary regulations were prepared mostly by himself, and that in the preparation of the opium cure he did the investigating; that both he and Dr. Keeley were very ignorant on the subject; that he got the literature and medical works, read them very fully, made a careful study of the subject, and at night, or when driving with Dr. Keeley, gave him a résumé of what he (Hargreaves) had thought out and studied. Later, when it was thought advisable to have in the advertising literature a pathology of inebriety, Dr. Keeley said he knew nothing about it, and could not write one. Therefore arrangements were made with Dr. Romaine J. Curtis, of Joliet, who wrote the pathology, and sent it to Dr. Keeley, who turned it over to Hargreaves. The latter adapted it for publication, and it was published. Hargreaves claims to have known all the formulæ for the preparation of all the remedies from the times of their respective origin; that he was the leading spirit in the inves-

tigation of the subject, and in starting and pushing the business of putting the remedies on the market; that his knowledge of and interest in them was the same as that of Dr. Keeley, and that the latter did not discover the remedies, as alleged in the bill. Outside Hargreaves' own testimony there is very little evidence in the case tending to sustain this position. There is a mass of evidence from the other partners and the employes during the time prior to 1886, when his participation in the business ceased, that during that time, while a partner in the firm, his duties, as those of the other partners, were entirely subordinate, and under the direction, in every particular, of Dr. Keeley, who controlled the business as if it were his own. The articles of partnership themselves provided that Dr. Keeley should have general control of the business, with power to determine any partner's connection with the business for a violation of the covenants of the agreement or for neglect of duty. Mr. Oughton, who was a pharmacist in the drug store of Mr. Seymour in Dwight in 1879, was employed by Dr. Keeley to prepare the remedy used in Campbell's case, and has ever since been engaged in the preparation of the various remedies used and sold by the appellee. He has been the president of the corporation since Dr. Keeley's death. He knows the formulæ used in the compounding of the remedies sold by appellee, and says that he received them from Dr. Keeley alone; that during Hargreaves' connection with the partnership he had nothing to do with putting up the medicine, and knew nothing about it; that he wrote the letters and circulars under the direction of Dr. Keeley, and did whatever the doctor directed him to do. The testimony of Mr. Judd, who has been a partner and stockholder since 1881, is to the same effect, and so of all who had opportunity to observe and know the relation of Hargreaves to the business. Hargreaves in his writings represented the discovery of the cure as Dr. Keeley's alone, and many witnesses testify to frequent conversations, in Hargreaves' presence, in which Dr. Keeley gave an account of his investigations of drunkenness while in the army and afterward, and of his experiments and the discovery of his remedy. No claim was ever heard from Hargreaves until shortly before the beginning of this suit, either that he was acquainted with the formulæ for the preparation of Dr. Keeley's remedies, or that he had had a part in the discovery of them. Hargreaves denies all these conversations of Dr. Keeley in his presence, in regard to the discovery of the remedies, and in so doing contradicts a number of apparently credible witnesses. He also testifies that Dr. Keeley feared that it would injure his professional reputation to be known in the business, and it was therefore agreed that he should be known in it profes-

sionally only, and should have all the credit of the discovery, but that Hargreaves should look after the commercial part of the business, yet from the beginning the business was conducted in the name of Dr. Keeley alone, and the articles of copartnership entered into in 1881 placed him in sole and absolute control of the business in every department.

It is impossible to discuss in greater detail, within reasonable space, the very voluminous evidence contained in this record. It is convincing that there is no foundation for the claim that Frederick B. Hargreaves had any connection with the discovery of the remedies put forth under the name of Dr. Keeley. The circumstances of his education, occupation, reputation, and conduct, as well as his written and oral statements, are at variance with the claim he now makes. Our attention is called to the fact that the bill required the answers to be under oath, and that they are sworn to. Giving the defendants all the advantage in regard to the evidence to which their sworn answers entitle them, no other conclusion than that we have stated can be reached upon this issue.

It is very earnestly argued in behalf of appellants that appellee does not come into court with clean hands, and that it was, at the time of filing the bill, itself engaged in deceiving the public by representing, through the labels placed upon the bottles in which its remedies were sold, that gold was one of the elements entering into such remedies. It is also claimed that the labels used upon the bottles when the bill was filed, four years after Dr. Keeley's death, contained the statement that the remedies contained in such bottles were prepared under Dr. Keeley's personal direction, which was manifestly untrue. It is claimed, also, that it was a fraud to use the fac simile of Dr. Keeley's signature on the bottles without stating that he was dead. There is no doubt about the position that a false representation as to the ingredients of which a remedy is composed, or the manufacturer by whom it is made, will constitute such a fraud upon the public as will deprive the person employing such false representation in his business of the protection of a court of equity against unfair competition in such business. A court of equity will not enjoin the fraud or unfair competition of rivals in business in order that a complainant, guilty of such misrepresentation, may have a monopoly in deceiving the public. The trouble with the application of the rule in this case is that the evidence does not show such a situation. Counsel for appellants argue this proposition as their foremost proposition in this court, but they do not refer to a single item of evidence sustaining their contention of fact. We have found that labels were introduced in evidence containing the representations complained of, but the evidence does not show that such labels were in use

at the time of the commencement of this suit. The fac simile of the autograph of Leslie E. Keeley was used by complainant on its bottles for many years before the death of Dr. Keeley, during all which time he was president of the corporation. It was merely a means of identification, and the continuance of its use after his death was not fraudulent. It could not be regarded as a representation of any fact in connection with the contents of the bottle further than that it was the genuine product of the Leslie E. Keeley Company.

It is insisted that the bill fails to allege, and the evidence fails to show, that the complainant ever acquired, or now owns, the rights of Keeley and Hargreaves, or either of them, in the formulæ for the remedies in question. The bill alleges, and the proof shows, that after the formation of the partnership, the firm, through Oughton, one of the partners, compounded the remedies, making use of the formulæ given to him by Dr. Keeley; that Hargreaves sold and assigned to the other partners all his interest in the partnership, as did Halpin also; that immediately after the dissolution of the partnership, occasioned by the withdrawal of these two partners, the complainant corporation was formed, and Keeley, Judd, and Oughton, the three remaining partners, who had succeeded to all the assets, business, and good will of the partnership, subscribed for all the capital stock of the corporation, and in payment therefor sold and gave over to the complainant the entire assets, good will, and business of the partnership, including the right to make, administer, and sell the remedies discovered by Keeley. We have held that the proof shows that the remedies were discovered by Keeley. The formulæ for their compounding were his. They were not assigned to complainant by any instrument in writing, but the testimony is clear that they were actually given over to the complainant for its use and benefit and in payment for its capital stock, and for many years the complainant, while Dr. Keeley was its president, with his consent, under the claim of rightful ownership knowingly acquiesced in by him, has been using these formulæ as the most valuable part of its property. The law does not require the assignment of such property to be in writing. In this case there was a verbal transfer by the owner for a valuable consideration, under which there has been a long-continued use under a claim of ownership acquiesced in by the original owner, and this is amply sufficient to transfer the owner's right.

Appellants have not contended that an injunction should not be granted if Hargreaves obtained his information from Dr. Keeley by reason of the opportunities presented by his relation to the business as a partner, and if he was bound by an agreement not to divulge it. We have seen that his information, if he has any, was so acquired, and that he

was bound by contract not to divulge it. Dr. Keeley's rights in the knowledge having become the property of the complainant, it holds those rights exclusively, as did Dr. Keeley, and the defendants have no greater right to use the knowledge of Hargreaves, if any, to the detriment of complainant than to the detriment of Keeley.

It is contended that Hargreaves was unjustly forced out of the partnership by Keeley, and that therefore his rights therein were not cut off, and the partnership was not dissolved. By two instruments executed by him voluntarily, long after Dr. Keeley terminated his connection with the firm, Hargreaves transferred to the firm every kind of remaining interest he might have therein. He says he supposed under the partnership agreement Dr. Keeley had a right to terminate his interest, and that there was only one copy of the agreement, and that was kept in the safe, so that he could not examine it and learn his rights. There is no evidence that he ever asked to see this agreement. His opportunity for knowledge of it was the same as that of the other partners, and no doubt he would have been permitted to examine it had he requested an examination. He acquiesced for 18 years in the dissolution of the partnership, and the transfer of his interest therein to the other partners, and his neglect now bars him from saying that he was ignorant of his rights.

It is also said that the organization of the complainant corporation and its subsequent proceedings were irregular, and that the business conducted by the corporation was really but a continuation of the partnership business, and therefore the complainant corporation cannot maintain this suit. So far as the appellants are concerned, the regularity of appellee's organization or proceedings is of no importance. But the record shows an organization regularly had. Whether proper records have been kept or not, whether appellee had the right to take a conveyance of real estate or not, does not concern the appellants, and the large volume of evidence taken upon questions concerning the organization and proceedings of the appellee uselessly incumbers the record. The same may be said of the evidence concerning Dr. Keeley's will and the administration of his estate.

Objection is made to the admission of Dr. Keeley's statements in regard to his investigation of the causes and cure of drunkenness, on the ground that they were hearsay. So far as these statements were mere narrations of past occurrences, the objection is well taken. Most of these statements, however, were repeatedly made in Hargreaves' presence, and were admissible for that reason. Many of them were statements made concerning his work of investigation then in progress, or cases then under treatment, and were admissible as parts of the *res gestæ*, or for the purpose of fixing the time of his investigation

with reference to his relations and acquaintance with Hargreaves. Without regard to what was improperly heard, the other evidence was amply sufficient to justify the decree that was rendered.

Objection was made to the alleged action of the master in permitting appellee's solicitor to prepare the findings contained in his report. Evidence was heard by the chancellor, and the master testified that at the conclusion of the taking of the evidence appellants' counsel suggested that he would like to submit findings which he thought the master ought to report to the court. Thereupon the master stated that, if both sides were satisfied, they might file with him suggestions of what they thought ought to be found, and it was then agreed that both sides should do so. Both sides did so, and the master, having the prepared findings of each party before him, prepared his findings in accordance with his own consideration of the evidence, and made his report accordingly. A master should arrive at his conclusions from his own impartial investigation of the evidence and the law, rather than from the consideration of two ready-made sets of findings presented to him by the contending parties. But the method adopted by the master was taken at the suggestion of appellants, and they cannot now complain of the course adopted at their suggestion. The case is unlike that of *Fitchburg Steam Engine v. Potter*, 211 Ill. 138, 71 N. E. 933, where a complete report prepared by the counsel for one party was, without the knowledge of the other, accepted by the master and presented as his own. Here both parties agreed to and participated in the course pursued. No unfair or improper motive or act on the part of the master is alleged. The findings are his findings. The evidence sustains them, and improper conduct is not shown on the part of the master to justify setting aside his report.

Irregularity is also claimed in the appointment of a special master in the case, and in the making of an order of reference therein by Judge Patton, from whom a change of venue had been before granted. The taking of testimony under this order and before the special master was continued, from time to time, for several months. No question was ever made as to the regularity of his appointment, and no objection was ever made to his acting as special master until after the final decree was rendered and the defendants had prayed an appeal. Then a motion was made by the defendants to set aside all the proceedings subsequent to the order of reference, because the master, U. W. Lowderback, was not the legally appointed regular master, and because Judge Patton had no authority to enter the order continuing him as special master after a change of venue had been taken from him. This motion was overruled, and no appeal was taken from the order overruling it. This order is not before us for review. The appeal is from the final decree,

and brings up nothing happening after the taking of the appeal.

The decree of the circuit court will be affirmed.

Decree affirmed.

(236 Ill. 281)

**McFALL v. KIRKPATRICK et al.**

(Supreme Court of Illinois. Oct. 26, 1908. Rehearing Denied Dec. 2, 1908.)

**1. LIFE ESTATES (§ 8\*)—ADVERSE POSSESSION BY OR UNDER LIFE TENANT.**

Land was conveyed to a trustee to collect rents, etc., to pay them to the beneficiary during her life, and to convey the land to her appointee by will, but the beneficiary conveyed the land to defendant, and thereafter devised it to plaintiff under the power. *Held*, in ejectment, that, since the deed to defendant conveyed at least the beneficiary's life estate, his possession could not be adverse to the appointee under the power, as the latter's estate did not begin until the termination of the life estate, so that there could be no adverse possession against the exercise of the power, and the action was not barred by limitations.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 24-26; Dec. Dig. § 8.\*]

**2. LIFE ESTATES (§ 23\*)—CONVEYANCE BY LIFE TENANT—RIGHTS OF PURCHASER.**

Where land was conveyed to a trustee to collect rents, etc., and to pay them to the beneficiary during her life, and to convey to her appointee by will, the land to go to her heirs in default of an appointment, the grantee of the beneficiary during her life took at least an estate for her life.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 44; Dec. Dig. § 23.\*]

**3. EJECTMENT (§ 9\*)—RIGHT OF ACTION—TITLE TO SUPPORT ACTION.**

In ejectment, legal titles alone can be adjudicated.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16, 17; Dec. Dig. § 9.\*]

**4. TRUSTS (§ 38\*)—CREATION—TRANSFER OF LEGAL TITLE—ACCEPTANCE BY TRUSTEE.**

Where land was conveyed to a trustee to collect rents, and pay them to the beneficiary, and convey to her appointee by will, a delivery of the deed to the trustee and his acceptance was essential to transfer the legal title to him; since, unless the trust is raised by law, a trustee cannot be compelled to accept.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 54; Dec. Dig. § 38.\*]

**5. TRUSTS (§ 140\*)—ESTATES OF TRUSTEE AND BENEFICIARY—EXTENT OF INTEREST.**

Where land was conveyed to a trustee, for a consideration paid by the beneficiary, to collect rents, etc., and to pay them to the beneficiary during her life, and to convey to her appointee by will, and, in default of an appointment, the land to go to her heirs and assigns, to her and their use forever, an equitable life estate was limited to the beneficiary.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 140.\*]

**6. TRUSTS (§ 135\*)—OPERATION—ESTATE OF TRUSTEE—ACTIVE TRUSTS—STATUTE OF USES.**

Where a trustee is required to convey title to the beneficiary on the happening of a certain event, the trust is not a passive trust, and the

statute of uses does not vest title in the beneficiary, as the uses remain mere equitable estates, and the statute does not operate until the active duties of the trustee have been performed.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 178; Dec. Dig. § 135.\*]

**7. TRUSTS (§ 135\*)—OPERATION—ESTATE OF TRUSTEE—ACTIVE TRUSTS—STATUTE OF USES.**

Where land was conveyed to a trustee to collect rent, etc., and pay them to the beneficiary during her life, and to convey to her appointee by will, the trust was an active one, and could not be executed by the statute of uses until the trustee had conveyed to the testamentary appointee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 178; Dec. Dig. § 135.\*]

**8. TRUSTS (§ 134\*)—CONSTRUCTION—ESTATE OF TRUSTEE—NECESSITY OF LEGAL TITLE.**

If a trustee is required to convey land, the legal title must vest in him, and if he is required to pass a fee, he must have a fee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 177; Dec. Dig. § 134.\*]

**9. TRUSTS (§ 234\*)—EXECUTION—POWERS IN TRUST—CONVEYANCE TO APPOINTEE OR HEIRS—NECESSITY.**

Where land was conveyed to a trustee to collect rents, and pay them to the beneficiary during her life, and to convey to her appointee by will, and, in default of appointment, the land to go to her heirs and assigns, to her and their use, the entire legal title passed to the trustee, and no use remained in the grantor, and on the beneficiary's death a conveyance from the trustee is necessary to pass title, either to her appointee by will, or to her heirs in default of an appointment.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 405; Dec. Dig. § 234.\*]

**10. DEEDS (§ 128\*)—CONSTRUCTION—RULE IN SHELLEY'S CASE.**

The rule in Shelley's Case, is an inflexible rule of property, and is not intended to effectuate the intention of the parties.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 413; Dec. Dig. § 128.\*]

**11. TRUSTS (§ 140\*)—CONSTRUCTION—ESTATE OF BENEFICIARY—EQUITABLE FEE.**

Where land was conveyed to a trustee to collect rents, and pay them to the beneficiary during her life, and to convey to her appointee by will, or, in default of an appointment, the land to go to her heirs, the limitation to her heirs was of the same kind and quality as the life estate to her, and under the rule in Shelley's Case, she took an equitable fee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 136; Dec. Dig. § 140.\*]

**12. POWERS (§ 34\*)—INSTRUMENT OF EXECUTION—"INSTRUMENT IN NATURE OF WILL."**

A power of appointment, to be exercised by an instrument in the nature of a last will and testament, meant that it was to be exercised by will, since an "instrument in the nature of a will" means a will.

[Ed. Note.—For other cases, see Powers, Dec. Dig. § 34.\*]

**13. POWERS (§ 21\*)—CONSTRUCTION—POWERS APPENDANT.**

Appendant or appurtenant powers are annexed to the estate of the donee, and must be executed wholly or partly out of the estate, so that a lease by a life tenant who has power to lease must commence during his life.

[Ed. Note.—For other cases, see Powers, Cent. Dig. § 65½; Dec. Dig. § 21.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**14. POWERS (§ 15\*)—CONSTRUCTION—POWERS APPENDANT—CONVEYANCE OF ESTATE—EXTINGUISHMENT OF POWER.**

The exercise of a power appendant is optional with the donee of the power, and an alienation of the estate extinguishes the power, where it cannot thereafter be exercised without defeating the estate granted, since the exercise of the power would destroy the grant.

[Ed. Note.—For other cases, see Powers, Cent. Dig. § 31; Dec. Dig. § 15.\*]

**15. POWERS (§ 15\*)—CONSTRUCTION—POWERS APPENDANT—EXTINGUISHMENT OF POWER.**

Where land was conveyed in trust to collect rents, etc., and pay them to the beneficiary during her life, and to convey to her appointee by will, the land, in default of appointment, to go to her heirs, the equitable fee being in the beneficiary, the power was appendant to her estate, and she could dispose of the remainder to any one she chose, and by the conveyance of her estate during life the power was extinguished, and could not afterwards be exercised in derogation of her grant; and that the statute of uses would have otherwise executed the power on her death, even if true, would be immaterial, since the power was extinguished forever.

[Ed. Note.—For other cases, see Powers, Cent. Dig. § 31; Dec. Dig. § 15.\*]

**16. TRUSTS (§ 131\*)—OPERATION—STATUTE OF USES—EXECUTION OF TRUST.**

In order that the statute of uses may apply, there must be a cestui que use in being, in whom the legal title may vest, so that, where land was conveyed in trust for the use of a beneficiary for life, and to convey it to her appointee by will, even if the statute would execute the use, it would do so only after her death upon having made the appointment.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 175; Dec. Dig. § 131.\*]

**17. TRUSTS (§ 140\*)—NATURE—"EXECUTED TRUST"—RULE IN SHELLEY'S CASE—APPLICATION.**

Where land was conveyed to a trustee to pay rents, etc., to the beneficiary for life, and to convey to her appointee by will, or, in default of appointment, the land to go to her heirs, the trust was an "executed trust" in the sense that term is used, the trust being completely limited and defined by the instrument creating it, and the rules of property apply, so that the beneficiary could convey her equitable estate and exclude the heirs.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 186; Dec. Dig. § 140.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2563-2564.]

**18. JUDGMENT (§ 112\*)—DEFAULT—DEFAULT IN APPEARANCE—MATTERS ADMITTED.**

In a suit to quiet title to land purchased by complainant from a cestui que trust, allegations that the legal title never vested in the purported trustee were admitted by the trustee and cestui que trust by their default in appearance.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 203-200; Dec. Dig. § 112.\*]

**19. JUDGMENT (§ 747\*)—CONCLUSIVENESS—MATTERS CONCLUDED.**

In a suit to quiet title to land, conveyed by a cestui que trust to complainant by mesne conveyances, the various deeds being set out, the court having jurisdiction to determine whether the legal title to the land ever passed to the alleged trustee prior to its conveyance by the cestui que trust, and the effect of the mesne conveyances, the cestui que trust and the trustee being made defendants, the bill quieting title in

complainant was final and conclusive upon the parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1289; Dec. Dig. § 747.\*]

**20. JUDGMENT (§ 660\*)—CONCLUSIVENESS—ERRONEOUS JUDGMENT.**

The conclusiveness of a decree is not destroyed by the fact that the court may have erred.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1171; Dec. Dig. § 660.\*]

**21. JUDGMENT (§ 678\*)—CONCLUSIVENESS—PERSONS CONCLUDED—PERSONS REPRESENTED BY PARTIES—APPOINTEE UNDER POWER.**

Land was conveyed in trust to pay rents to the beneficiary during life, and to convey to her appointee by will, or, in default of appointment, the land to go to her heirs. The beneficiary conveyed the equitable fee during her life, and the grantee brought suit to quiet his title, making the trustee and beneficiary defendants, and alleged that the legal title never passed to the alleged trustee, and asked that his apparent title be conveyed to complainant, which was decreed. Held, that the decree was binding upon a subsequent appointee of the beneficiary by will under the power, the beneficiary representing such appointee; the interest of parties not before the court in such cases being protected by those over whom the court has jurisdiction.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 678.\*]

**22. JUDGMENT (§ 681\*)—CONCLUSIVENESS—PERSONS CONCLUDED—PERSONS REPRESENTED BY PARTIES—CONTINGENT REMAINDERMEN.**

Where the owner of a vested estate is before the court, the interest of a contingent remainderman will be bound, though he is not before the court, the owner representing him.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1202; Dec. Dig. § 681.\*]

**23. TRUSTS (§ 203\*)—UNAUTHORIZED CONVEYANCE OF TRUST PROPERTY—EFFECT.**

If a trustee had the legal title to land, a deed by him would pass title, whether it was made rightfully or in violation of his trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 273; Dec. Dig. § 203.\*]

**24. QUIETING TITLE (§ 52\*)—JUDGMENT IN REM—DEED CONVEYING LAND—DECREE OF THE COURT—EFFECT.**

A master's deed conveying land to complainant, in a suit to quiet title, would pass the legal title of the defendant therein as effectually as a deed.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 52.\*]

Dunn, Scott, and Vickers, JJ., dissenting.

Appeal from Circuit Court, Christian County; A. M. Rose, Judge.

Action by Fountain T. McFall against Henry Kirkpatrick and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

E. F. O'Farrell, Chafee & Chew, J. O. McBride, and William M. Provine, for appellants. Frank P. Drennan, for appellee.

**CARTWRIGHT, C. J.** This action of ejectment was brought by Fountain T. McFall, appellee, in the circuit court of Christian county, against Henry Kirkpatrick and others, the appellants, to recover the possession of the east one-half of the west one-half of lot 5, in

block 3, in Railroad addition to Pana, in said county. The plaintiff by his declaration claimed title in fee, and the defendants pleaded the general issue and several special pleas. The issues were tried by the court without a jury, and a judgment was rendered in favor of the plaintiff, from which the defendants appealed.

The facts are not disputed, and are as follows: On March 29, 1858, Elias P. Sanders was the owner of the premises, and with his wife made a deed of the same to William A. Goodrich, in form of bargain and sale, with full covenants of warranty. Following the names of the parties, the purpose of the conveyance is stated as follows:

"Whereas, Eliza Jane Houston, wife of James W. Houston, of Pana, in said county and state, being desirous of purchasing the premises hereinafter described and of holding the same to her own purpose, use and benefit and of enjoying the same peaceable, rents, issues and incomes arising therefrom during the term of her natural life, free from the control, liabilities or interferences of any husband that she now has or may hereafter have. [The deed then recites a consideration of \$150 paid by Eliza J. Houston and a further consideration of \$1 paid by Goodrich, followed by words of conveyance to Goodrich.] In trust and to and for the several uses, interest and purposes hereinafter mentioned, namely:

"First—In trust to have the same and to take and collect the rents, issues and profits thereof, and out of the same to keep the said premises in good order and repair, and to pay all taxes, assessments and charges that may be imposed thereon.

"Second—In trust to pay the residue of such rents, issues and income to the said Eliza J. Houston upon her sole and separate receipt, to the interest that she may enjoy, possess and have the same free from the control, interference or liabilities of any husband she now has or may have hereafter during the term of her natural life.

"Thirdly—In trust to convey the said land to such person or persons as she, the said Elvira J. Houston, by her last will and testament, or by an instrument in the nature of a last will and testament, subscribed by her in the presence of two credible witnesses. And it is hereby expressly declared by the parties that upon the decease of the said Elvira J. Houston the said trusts shall cease and determine, and the land and premises above described shall belong, in fee simple absolute, to such person or persons as the said Elvira J. Houston shall, as aforesaid, direct and appoint, and in default of such appointment then to her heirs and assigns, to her and their use forever."

On April 16, 1859, Eliza J. Houston and her husband executed a warranty deed for the premises to Zephaniah R. Porter, and the title conveyed by that deed passed, through sundry mesne conveyances, to William B. Lit-

tle. On March 16, 1871, William B. Little filed his bill in equity, in the circuit court of Christian county, against Eliza J. Houston, Elias P. Sanders, and William A. Goodrich, setting out the deed from Sanders, and the various conveyances by which he acquired title, and alleging that the consideration for the deed from Sanders was paid by James W. Houston, husband of Eliza J. Houston; that Goodrich never paid anything, and had no knowledge of the conveyance to him, and never assented to it, or acted in any way under the deed; that Eliza J. Houston and her husband conveyed the premises to Porter for a consideration of \$300, in fee simple, and the title thereby conveyed had passed to the complainant; that the legal title was apparently in Goodrich, who ought to make a deed to the complainant, and that Eliza J. Houston fraudulently claimed right and title to the premises, and was trying to induce Goodrich, in whom the legal title apparently was, to convey the premises by deed, as the said Eliza J. Houston might designate. The prayer of the bill was that the court would decree that the said Goodrich should make to complainant a deed of release and quitclaim of the premises; that all rights, titles, and interests, of every nature and kind whatsoever (if any), of the said Sanders and the said Eliza J. Houston, be extinguished or decreed to be in the complainant; and that the court would quiet the title to said premises and remove the outstanding legal title in Goodrich and decree the same to the complainant. The venue was changed, by agreement, to Shelby county, where the bill was dismissed as to Sanders. Eliza J. Houston and Goodrich were defaulted for failing to answer the bill, in pursuance to a rule theretofore entered by the court, and a final decree was entered at the September term, 1872, reciting that the matters and things alleged in the bill were taken as confessed by Goodrich and Eliza J. Houston. The court decreed that William A. Goodrich should within 30 days convey, by deed of quitclaim, all the right, title, and interest which he took in and to said premises by virtue of the deed from Sanders; that on failure to make said deed the master in chancery should execute the same for him; that all the right, title, and interest of Eliza J. Houston by virtue of the trust deed was in, and rightfully belonged to, the complainant, and that his title should be, and was, quieted as against the said Goodrich and Eliza J. Houston. On December 12, 1872, the master in chancery executed a deed to William B. Little in pursuance of the decree. On February 8, 1879, the administratrix of the estate of William B. Little, who was then deceased, conveyed the premises to the defendant Henry Kirkpatrick. From the date of that conveyance Kirkpatrick has been in possession of the premises, has erected valuable improvements thereon, and has paid all taxes. On March 17, 1891, Eliza J. Houston made her last will and testament, and by the second

paragraph devised to her brother, the plaintiff, Fountain T. McFall, all her property. By the third paragraph she referred to the deed from Sanders to Goodrich, and the power therein conferred upon her, and declared as follows: "Now, therefore, in pursuance of the power and authority conferred upon me in and by said deed, I do hereby will, devise and bequeath to my said brother, Fountain T. McFall, the remainder, in fee simple absolute, of the lands and premises mentioned in said deed, to have and to hold unto the said Fountain T. McFall and his heirs and assigns forever." Eliza J. Houston died on November 30, 1905, and the will was admitted to probate. There is no evidence that the deed to Goodrich, the trustee, was ever delivered to him or in his possession, or that he ever took possession of the property, or collected any rents, issues, or profits, or accepted the trust.

One ground upon which a reversal of the judgment is asked is that the cause of action was barred by the statute of limitations. It is contended that the decree of the circuit court of Shelby county and the deed of the master in chancery constituted color of title, and such color of title, with the subsequent conveyance to Henry Kirkpatrick, and his possession, with payment of taxes, constituted an effectual bar to the plaintiff's claim. It is not contended that any statute of limitations ran against the exercise of the power by Eliza J. Houston, if the power existed when it was exercised. There could be no adverse possession as against the exercise of that power; and, if the plaintiff became vested with the legal title at all, it was by the exercise of the power when the will of Eliza J. Houston became effective, in 1905, at her death. There is no statute of limitations which could begin to run against the plaintiff until the power was exercised, and no action could be brought to attack a possession of Kirkpatrick which was not adverse to the plaintiff. There can be no doubt that the deed of Eliza J. Houston to Porter conveyed at least an estate for her life, and the possession of any one under that title could not be adverse to the appointee under the power, whose right or estate could not begin until the termination of the life estate. The cause of action was not barred by any statute of limitations. *Mettler v. Miller*, 129 Ill. 630, 22 N. E. 529; *Turner v. Hause*, 199 Ill. 484, 65 N. E. 445; *Weigel v. Green*, 218 Ill. 227, 75 N. E. 913; *Schroeder v. Bozarth*, 224 Ill. 310, 79 N. E. 583; *Willhite v. Berry*, 232 Ill. 331, 83 N. E. 852.

The plaintiff could only recover by proving that he had the legal title to the premises at the commencement of the action, and the important question to be determined is whether he had such title. In ejectment legal titles alone can be considered and adjudicated; and, unless the plaintiff showed a good legal title, the judgment was wrong, regardless of any question of equities. *Hague v. Porter*, 45 Ill. 318; *Mester v. Hauser*, 94 Ill. 433;

*Hayden v. McCloskey*, 161 Ill. 351, 43 N. E. 1091. The title of the plaintiff depends solely upon the power of Eliza J. Houston to appoint the estate to him, and that rests upon the deed made by Sanders to Goodrich on the 29th day of March, 1858, and its taking effect, as a transfer of the legal title, by a sufficient delivery. In order that the legal title should pass to Goodrich as trustee, it was essential that the deed should be delivered to and the trust accepted by him. Whatever equities may have resulted to Eliza J. Houston and her heirs by the making of the deed and the payment of the consideration, a delivery of the deed to the grantee and an acceptance of the same by him was essential to a transfer of the legal title. *Dale v. Lincoln*, 62 Ill. 22; *Moore v. Flynn*, 135 Ill. 74, 24 N. E. 844; *Brown v. Brown*, 167 Ill. 631, 47 N. E. 1046; *Dagley v. Black*, 197 Ill. 53, 64 N. E. 275; *Loring v. Hildreth*, 170 Mass. 328, 49 N. E. 652, 40 L. R. A. 127, 64 Am. St. Rep. 301; 28 Am. & Eng. Ency. of Law (2d Ed.) 896. The subject of delivery will receive attention hereafter, in connection with the chancery proceeding; but for the present we assume that the deed of trust was valid, and took effect by a sufficient delivery, so as to transfer the legal title to Goodrich.

By that deed the premises were conveyed, for a consideration paid by Eliza J. Houston, the purchaser, to Goodrich, under an active trust to take and collect the rents, issues, and profits, to keep the premises in good repair, to pay all taxes, assessments, and charges, to pay the residue of the rents, issues, and incomes to said Eliza J. Houston during her natural life, and to convey the premises to such person or persons as she by her last will and testament, or by an instrument in the nature of a last will and testament, should appoint. It was declared that at the death of Eliza J. Houston the premises were to belong, in fee simple absolute, to the appointee, and in default of appointment then to her heirs and assigns, to her and their use forever. Assuming the delivery of the deed to Goodrich, and an acceptance of the deed and trust by him, the legal title passed to Goodrich, for the purposes of the trust, and an equitable life estate was limited to Eliza J. Houston. By the same instrument there was a limitation to her heirs at law, which could only be defeated by the exercise of a power in her to appoint the estate to some one of her own choosing. The trust was an active one, and was not executed by the statute of uses. It could not be so executed until the trustee should have completed the last active duty imposed upon him by the deed, which was to convey the premises to the appointee of Eliza J. Houston after her death. If any duty is imposed on a trustee to convey the estate, he must take and hold the legal title for that purpose, and the operation of the statute is excluded until the duty is performed, and the uses remain mere equitable estates. 1 *Perry on Trusts* (5th Ed.) § 305. In

case, of an appointment the legal title would remain in Goodrich until he should make a conveyance to an appointee; and, if he held the legal title for any purpose, it could only be transferred by a conveyance. The statute of uses could not operate at all in such a case, for the reason that the legal title would be transferred by the conveyance, and not by any operation of the statute. Where a trustee is required to convey title to beneficiaries on the happening of a certain event, the trust is not a passive or dry trust, and the statute of uses does not operate to vest the title in the usee. *Lawrence v. Lawrence*, 181 Ill. 248, 54 N. E. 918. If a trustee is directed and empowered to convey land, the legal estate necessarily vests in him; and, if he is required to convey a fee, the fee must be conferred upon him. *Preachers' Aid Society v. England*, 106 Ill. 125; *Coryell v. Klehn*, 157 Ill. 462, 41 N. E. 864; *Glover v. Condell*, 163 Ill. 566, 45 N. E. 173, 35 L. R. A. 360. In *Meacham v. Steele*, 93 Ill. 135, the court repudiated a supposed test that the statute will intervene wherever no one but a cestui que trust has any beneficiary interest in the estate, which it was said was no test at all. The court said that the true test, where the trust is an expressed one, is to look at the terms of the instrument creating it to ascertain what duties are imposed on the trustee, and then determine whether or not they have been performed; and, if it appears that they have not, the trust still exists, and the statute has not intervened. In this case the duty imposed upon Goodrich to convey to the appointee of Eliza J. Houston has not been performed; and, if the legal title ever vested in him, it is still there, leaving out of view the chancery proceeding and the master's deed.

The deed of Sanders was made to Goodrich and his successors and assigns in trust, not for the lifetime of Eliza J. Houston, with a legal remainder to her heirs, but as an absolute conveyance of the whole legal title, with the use in her for her lifetime, and an equitable right to a conveyance of the legal title in her appointee or heirs, so that there was no use remaining in the grantor awaiting a possible appointment, and the entire estate passed by the deed. The third paragraph of the deed declared that at the death of Elvira (Eliza) J. Houston the trust should cease, and the premises should belong in fee simple absolute to her appointee, or, in default of appointment, "to her heirs and assigns, to her and their use forever." To hold that a legal remainder was thereby limited would require striking out that part of the same clause by which the trustee took the legal title in trust to convey to the appointee, and that would be a violation of all rules of construction. If we give effect to all the provisions of the deed, we must hold that, upon the death of Eliza J. Houston, her appointee, or, in default of appointment, her heirs, would be entitled to a conveyance in fee simple absolute, and that accords with

the rules of construction applied by the courts. The appointee and heirs are connected in the same sentence; and, if it was intended there should be a conveyance to one, there must have been the same intention as to the others. There is no ground for separating them and declaring the estate of one legal and the other equitable.

Inasmuch as Goodrich took the legal title, which he would hold until the active duty of making a conveyance had been performed, the limitation in the deed to the heirs at law of Eliza J. Houston was of the same kind and quality as her life estate, both being equitable. The rule in *Shelley's Case*, which is an inflexible rule of property in this state, therefore gave to Eliza J. Houston an equitable fee. *Baker v. Scott*, 62 Ill. 86; *Brislain v. Wilson*, 63 Ill. 173; *Kales on Future Interests*, § 133. Although the rule is a rule of property, and is not intended to effectuate the actual intention of the parties, its operation in this case does not defeat such intention. Eliza J. Houston was the purchaser of the premises, and paid the consideration, and the declared purpose of the trust was to give her the property free from the control of her husband. It was a simple case of a purchase of premises, which she desired should be free from the control of her husband, but which she could devise or otherwise would go to her heirs at law. The appointment was to be by her last will and testament, or by an instrument in that nature, and an instrument in the nature of a will means a will, since no other instrument is in the nature of a will. *Sugden on Powers*, 121.

The legal title being in Goodrich, and the equitable fee in Eliza J. Houston, the power which was given to her was appendant or appurtenant to her estate. Powers are appendant or appurtenant when the donee has an estate in the land, and the power is to take effect wholly or in part out of that estate. A power is appendant when the estate created by its exercise affects the estate and interest of the donee of the power. *Farwell on Powers*, 8. Appendant or appurtenant powers are annexed to the estate of the donee, and when created are to be executed out of and must be concurrent with and have their being and continuance, at least for some part, out of the estate of the donee. *Powell on Powers*, 10. If one is tenant for life, with power to lease in possession, any lease made by him must commence during his life. The power is appendant to his estate, and the effect of the power is to prevent the lease terminating by his death. 2 *Hilliard on Real Prop.* 823; *Williams on Real Prop.* (17th Ed.) 130. The exercise of a power appendant is optional with the donee of the power, and an alienation of his estate extinguishes the power. 2 *Hilliard on Real Prop.* 843. If lands are settled on one with a power of appointment to uses, and upon him in fee if he fail to

appoint, he may alien the estate as his own and will thereby defeat and extinguish the power. Washburn on Real Prop. § 1668. If lands are limited to such uses as A. shall appoint, and, in default of appointment, to the use of A. and his heirs, he may dispose of the lands, either by an exercise of the power, or by conveyance of his estate. If he exercises the power, the estate limited to him in default of appointment is destroyed, but if he conveys his estate, the power is extinguished. Williams on Real Prop. (17th Ed.) 446. If the donee of the power has an estate in the land, and the exercise of the power would necessarily affect his estate, as where a tenant in fee has power to appoint to others in fee, an alienation of his estate will destroy the power, since it would be a fraud on the alienee if the grantor could thereafter, by exercising the power optional with him, derogate from his own grant. 1 Tiedeman on Real Prop. 642. If a donee has a fee subject to a power to appoint the fee to another, and the donee conveys the whole estate, the alienation of the estate operates as an extinguishment of the power, where it cannot be exercised without defeating the interest granted. The power is denied, because the exercise of it would be derogatory to the grant, which cannot be permitted. 1 Sugden on Powers (8th Ed.) 74, 75; 2 Chance on Powers, 31-49. In the case of *Penne v. Peacock* (Cases in Equity, Temp. Talbot) Jane Peacock conveyed certain premises to trustees in fee, in trust to pay the rents and profits of her sole and separate use for her life, and after her decease in trust for such uses as she should by her last will limit and appoint, and for want of such appointment then to her own right heirs forever. She married, and her husband mortgaged part of the lands to the plaintiff for £1,000, for a term of 500 years, and then a fine was levied by husband and wife, who both declared the uses of the fine, as to the mortgaged premises, to be for securing the principal and interest. Lord Chancellor Talbot held that the power was not a naked power or power in gross, but was appendant and annexed to her inheritance, and so destroyed by the fine, since a lease and release, or any other conveyance, would carry with them all powers that are joined to the estate. The Lord Chancellor said that "it must inevitably follow that an estate for life limited to the wife and the remainder limited to her own right heirs, in default of any appointment made by her last will, are both disposed of by the fine."

Sugden says (volume 1, p. 40): "(20) Where an estate is limited to such uses as A. shall appoint, and, in default of and until appointment to him in fee, the power is clearly appendant and by a conveyance of his interest would be destroyed. \* \* \* He gives *Penne v. Peacock* as an example, and further says: "(22) The same rule is applied to personal estate. Therefore, where

a man was, under a will, tenant for life of certain funded property, and then for such persons, etc., as he should appoint by will, and in default of appointment the trust was for his executors or administrators, it was held that he might assign the fund absolutely; and, where, in default of appointment, the fund is settled on another, the donee may, with the concurrence of that person, make a present title to the fund, for, by analogy to powers on real estate, such a power may be parted with; that is, released or extinguished. *Kirkpatrick v. Capel*, V. C. T. T. 1819, M. S.; *Webb v. Lord Shaftesbury*, 3 Myl. & Kee. 599; *Cherry v. Boulton*, 2 Kee. 324. (23) It is to be observed that as to the destruction of the power the effect is the same, although the estate is conveyed by operation of law. Thus it has been determined that, where a man, tenant for life, with remainder over, and the ultimate remainder to himself in fee, with a power of revocation, became bankrupt, and the intermediate estates had become incapable of taking effect, the life estate and remainder in fee, or rather the fee in possession, vested in the assignees, and his power of revocation was gone. *Anon. Lofft*, 71; *Doe v. Britain*, 12 Barn. & Ald. 93. See *Thorpe v. Goodall*, 17 Ves. Jr. 388, 360." In 2 Coke upon Littleton the rule is stated in Butler and Hargrave's Notes, 243b: "(4) As to powers relating to the estate of the donee of the power in the land: Such of those powers as are in the nature of powers appendant to the estate may, it is agreed, be extinguished by the release, feoffment, fine, or common recovery of the donee of the power. These powers also are liable to be extinguished or suspended by any of the conveyances which are said not to operate by transmutation of the possession, as bargains and sales, leases and releases, and covenants to stand seised, for whoever has any estate in the land may convey that estate to another, and it would be unjust that he should afterwards be admitted to avoid or to do anything in derogation from his own grant. Any assurance of this nature, therefore, which carries with it the whole of the grantor's estate, is a total destruction of the powers appendant to that estate."

The estate which *Eliza J. Houston* attempted to create in the plaintiff by the exercise of the power was to be raised, not only out of the power, but also out of her own estate; and, that being so, she had a right to extinguish the power, and could not afterward exercise it in derogation of her grant. The power was an authority to dispose of the remainder for the benefit of any person she might choose, and to declare in whom and in what manner the title should vest at her death. It is not limited or special, and it was not a power in the nature of a trust which she was bound to exercise, either in favor of some particular person or class of persons. The deed created no fidu-

clary relation between Eliza J. Houston and any person or class of persons; and, the exercise of the power being appendant to her estate, she could not be permitted to defeat the estate conveyed by her by afterward exercising the power.

Counsel for appellee takes the position that, upon the death of Eliza J. Houston the statute of uses executed the trust, and the legal title vested in the plaintiff as appointee, who could then bring ejectment. It cannot be true in this case, under any view of the law, that the statute of uses executed the trust upon the death of Eliza J. Houston, for the reason that the trustee was to retain title for the purpose of making a conveyance to the appointee; and, if it were true, it could have no influence or effect upon the decision of the case. Of course, if the power was appendant to the estate of Eliza J. Houston, and her deed was effective to extinguish the power, it would make no difference that at some time in the future the statute of uses would otherwise execute the use by transferring the legal title to her appointee. In other words, if the power was extinguished by the execution of her deed, it was extinguished forever.

On the general question whether the statute of uses ever operates to divest the title of a trustee whose active duties have ceased, the courts are not agreed, and there have been expressions in the decisions of this court which are not harmonious. In *Harris v. Cornell*, 80 Ill. 54, which was a proceeding in equity to impeach a decree for fraud, the court stated, with an explanation that it was a mere remark, that an assignee in bankruptcy, when the debts of the bankrupt were outlawed, and the purposes of the trusts accomplished, ceased to have any title, and the owner of the trust became, by operation of law, reinvested with a legal title, and could sue in ejectment. In that case the property of the bankrupt was vested in the assignee, by the law, for certain purposes, and not by any instrument of conveyance. In *McNab v. Young*, 81 Ill. 11, which was also a proceeding in equity to set aside deeds and question the title acquired at a judicial sale, there was a trust deed in the nature of a mortgage to secure an indebtedness, and the court, in discussing the question whether the grantee in the trust deed was a necessary party, said that if the purposes of the trust had been accomplished, the grantor would have been vested with the legal title. It was afterward held, in an action of ejectment, that the title of a mortgagee in fee is in the nature of a base or determinable fee, and that the term of its existence is measured by that of the mortgage debt, which eliminated any question of the statute of uses. *Barrett v. Hinckley*, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331. The views of the court on that subject were again stated in *Lightcap v. Bradley*, 186 Ill. 510, 58 N. E. 221. In *Kirkland v. Cox*, 94 Ill. 400,

which was an action of ejectment, and the first and only case in which the question was actually involved and a decision necessary, the court, referring to the former cases, said that the statements therein were unadvisedly made, and that "the true doctrine in regard to active trusts, and that adhered to by this court, is expressed in *Valette v. Bennett*, 69 Ill. 632, that, where the legal title is vested in the trustee, nothing short of a reconveyance can place the legal title back in the grantor or his heirs, subject, of course, to the qualification that under certain circumstances such reconveyance will be presumed without direct proof of the fact." In *Moll v. Gardner*, 214 Ill. 248, 73 N. E. 442, which was another suit in equity, the court affirmed a decree requiring a trustee to execute deeds of conveyance to the beneficiaries of a trust. In the course of the opinion it was said that a trust which is active may become passive after all of the active duties have been performed, and the trust may become executed by the statute of uses and the title vest in the remainderman. Authorities are referred to in support of that doctrine, and, among others, the case of *Kirkland v. Cox*, *supra*, which holds the contrary, and the case of *Meacham v. Steele*, *supra*, where it was said that often the objects of a trust become defeated, or for some cause performance becomes impossible, and then the trust becomes a use and is executed by the statute. That rule did not apply to the case under consideration, and the citation of *Kirkland v. Cox* shows that there was no intention to overrule the decision in that case. To hold that the statute had executed the use, and vested the legal title in the beneficiaries, would have been wholly inconsistent with the affirmance of the decree requiring the trustee to convey the legal title. There would have been no ground for equitable interference if there was no existing trust, but the legal title had been vested in the cestui que use, so that he could sue in ejectment. *Perry on Trusts* is there cited, and that author says that, where the active duties of the trustee have ceased, and the whole beneficial interest in the trust estate is in the cestui que trust, the statute of uses generally executes the legal title of the trustee to the cestui que trust, but that there are cases where, the active duties of the trustee having ceased, the legal title does not pass without a conveyance. In such cases it is the duty of the trustee to convey the legal title to the cestui que trust, or to such person as he shall appoint; and under proper circumstances a presumption will be raised that the duty has been performed. 1 *Perry on Trusts*, § 851. In this case the active duty of making a conveyance has not been performed, and the legal title must remain in the trustee until that is done. *Cary v. Slead*, 220 Ill. 508, 77 N. E. 234, a suit in equity, and *Reichert v. Missouri & Illinois Coal*

Co., 231 Ill. 238, 83 N. E. 166, a suit on a contract brought by trustees, contain expressions similar to those of *Moll v. Gardner*, but the question was not involved in either case. The decision in *Kirkland v. Cox* has never been criticised or disapproved, and there is no contrary decision where the question was involved, and the real effect of the cases in equity is that, when active duties have ceased, it is the duty of the trustee to convey the legal title.

But whatever theory may be adopted as to the operation of the statute of uses when active duties have ceased, it could not apply to this case, where the active duty of making the conveyance has not been performed; and, if *Eliza J. Houston* had an equitable fee when she made her deed to *Porter*, the deed would transfer that fee. It would make no difference what might occur after the destruction of the power. All the authorities are agreed that certain things must concur, or the statute does not apply. There must be a cestui que use in esse, in whom the legal title may vest. If an estate is limited to the use of some one not in esse or capable of being ascertained, the statute cannot have any operation until the cestui que use comes into being or is ascertained. 2 *Washburn on Real Property*, 113-115. If the statute of uses would execute the trust, it would only be in case of appointment by will, and at the death of *Eliza J. Houston*, when the will would become effective. The trust was an "executed trust" in the sense in which that term is used by the courts. *Massey v. Huntington*, 118 Ill. 80, 7 N. E. 269; *McCartney v. Ridgway*, 160 Ill. 129, 43 N. E. 826, 32 L. R. A. 555. The trust was created by a deed so clear and certain in all its terms and limitations that the trustee had nothing to do but to carry out all the provisions of the instrument according to its letter. In such a trust the rules of property govern; and, "if in an executed trust an estate is given to A. in trust for B. for life, with remainder to his heirs, B. takes an equitable fee, and may convey the equitable inheritance and exclude his heirs." 1 *Perry on Trusts*, § 359.

As we hold that *Eliza J. Houston* had an equitable fee, which she might convey, and her power of appointment was appurtenant or appurtenant to her estate, it is not necessary to inquire what the effect would have been if the power were considered as a power in gross, which would be the case if she had only a life estate, and the estate to be created by virtue of the power was to take effect after the termination of her estate, but it has been held that a power in gross may be released or extinguished by the donee. 22 *Am. & Eng. Ency. of Law* (2d Ed.) p. 1131; 1 *Sugden on Powers* (3d Am. Ed.) 153.

As before noted, a delivery to and acceptance by *Goodrich* was necessary in order to vest the legal title in him, and the question whether a court of equity would protect the beneficiary is not involved in this case, where

the inquiry is merely concerning the legal title. Unless a trust is raised by law, no one can be compelled to undertake a trust. In an expressed trust no title vests in the trustee unless he expressly or by implication accepts the trust, or in some way assumes its duties and liabilities. 1 *Perry on Trusts*, § 259. Whether a failure to deliver the deed to *Goodrich*, or the fact that he did not accept the trust or act under the deed, would invalidate it, or enable the court to appoint another trustee makes no difference here. The bill in equity filed by *Little* alleged that *Goodrich* never paid any consideration and had no knowledge of the conveyance to him, and that he never assented to it or acted in any way under it. If that was true, the legal title never passed to him, and the truth of the allegation was admitted, both by him and *Eliza J. Houston*, by their default. The bill also alleged that the deed was made in satisfaction of an indebtedness from *Sanders* to *James W. Houston*, and that the legal title to the premises of record was apparently in *Goodrich*, but the beneficial owner had conveyed her title, and the complainant was possessed of it. The bill set out the deed of *Eliza J. Houston* and husband in *hæc verba*, and it did not purport to convey an estate for her life, but did purport to convey a fee simple absolute. The court was asked to quiet the title so conveyed, and the court, in entering the decree, was dealing with the fee, and not with any life estate of *Eliza J. Houston*. The averments of the bill had no relation to any life estate, but it was charged that *Eliza J. Houston* was trying to induce *Goodrich* to convey the premises by deed, as she might designate. The complainant asked that the apparent legal title in *Goodrich* should be conveyed to him, and the court so decreed. The court had jurisdiction to hear and determine the question whether the deed had ever been delivered, and what was the legal effect of the various deeds set out in the bill, and the decree was final and conclusive upon the parties. *Harmon v. Auditor of Public Accounts*, 123 Ill. 122, 13 N. E. 161, 5 *Am. St. Rep.* 502; *Stoff v. McGinn*, 178 Ill. 46, 52 N. E. 1048; *Franklin Union v. People*, 220 Ill. 355, 77 N. E. 176, 4 L. R. A. (N. S.) 1001, 110 *Am. St. Rep.* 248. Any person to whom *Eliza J. Houston* might afterward appoint the estate by will was not ascertained, and could not have been made a party even if the will had then been made, since it would be ambulatory and ineffective as an appointment until her death. In such a case it would be intolerable that the court should be powerless to inquire into and determine the fact whether the trust deed was delivered to and accepted by *Goodrich*, merely because there was a possibility that the power would be exercised in the future in favor of some person then unknown. If such an argument were to prevail, it would often happen that the settlement of a title to land would have to re-

main in abeyance for an indefinite period of time in cases where possible contingent interests were shown to exist.

As said by the Supreme Court of Massachusetts in *Loring v. Hildreth*, supra: "If a deed purporting to create such interests were inadvertently or fraudulently put on record, if such a deed were stolen, or even forged, and put on record by the thief or forger—nay, even if a forgery were committed in the registry of deeds by making what appeared to be a record of such a deed, when in fact no such deed or form of deed existed—the courts would be powerless to inquire into and determine the facts, because parties purporting to have possible contingent interests could not be brought in or represented. In this way a title might be tied up for an indefinite period by an unauthorized or criminal act, with no power in the courts to afford a remedy. Such a result should not be reached except upon most stringent reasons of necessity." The courts are not powerless in such a case, where the interests of parties not before the court are sufficiently protected by those over whom the court has jurisdiction. Where the owner of a vested estate is before the court, the interests of a contingent remainderman will be bound although he may not be formally made a party. *American Bible Society v. Price*, 115 Ill. 623, 5 N. E. 126; *Temple v. Scott*, 143 Ill. 290, 32 N. E. 868; *McC Campbell v. Mason*, 151 Ill. 500, 38 N. E. 672. When the bill was filed, the plaintiff in this case had no interest, and was not ascertained even as one who might have a possible future interest by the exercise of the power of appointment. The trustee, who it was alleged had never assented to or acted under the trust, and to whom the deed was not delivered, was a party, and so was the one by whose act alone any future interest could be brought into existence. Eliza J. Houston, the donee of the power, was the only one who could bring into existence any other estate or turn the course of the ownership of the property, and surely she represented her own appointee as fully and completely as any one having a future contingent interest could be represented in any case. The court did not expressly adjudicate against the power of appointment, but on the default and confession by the defendants of the facts alleged in the bill, the court quieted the title of the complainant to the premises, and ordered Goodrich to convey all the right, title, and interest which he took by the deed. The apparent title of Goodrich was transferred by the deed executed in pursuance of the decree; and, if he had any title, it now rests in the defendant Henry Kirkpatrick. The binding force of the decree cannot be affected by any question whether the court reached a correct conclusion, or properly construed the deeds set out in the bill. The doctrine of *res judicata* does not rest on such a ground. If Goodrich had the legal title, a deed by him would pass

that title, and defeat an action of ejectment against the grantee, whether the deed was rightfully made, or made in violation of the trust under which the title was held (*Walton v. Follansbee*, 131 Ill. 147, 23 N. E. 332) and the master's deed, made in his behalf in pursuance of the decree, would not be less effective to transfer any title he had. The legal title alone is involved in this case, and there is no view presented by counsel which would justify a finding that the plaintiff is the legal owner of the premises, or that he can maintain an action of ejectment.

The judgment of the circuit court is reversed, and the cause remanded.

Reversed and remanded.

DUNN, J. (dissenting). The foregoing opinion holds that the trust deed from Sanders to Goodrich conveyed an equitable fee to Mrs. Houston, that her deed to Porter conveyed such fee to him, and, if so, that a consideration of any other question in the case becomes unnecessary. We do not concur in this conclusion as to the effect of the trust deed. It is reached by the improper application of the rule in *Shelley's Case* to the conveyance. Under that rule if, in any instrument, an estate for life is given to the first taker, and the remainder is limited, either mediately or immediately, to his heirs, the first taker takes the whole estate; if the limitation is to the heirs of his body he takes a fee tail; if to his heirs, a fee simple. But the rule requires that both the life estate and the estate in remainder shall be of the same quality—that is, both legal or both equitable—and where one of the estates is legal, and the other equitable, the rule does not apply. *Preston on Estates*, 263; 2 *Washburn on Real Prop.* § 1610; *Glover v. Condell*, 163 Ill. 568, 45 N. E. 173, 35 L. R. A. 360. In the case cited the court said, on page 588 of 163 Ill., page 180 of 45 N. E. (35 L. R. A. 360): "The rule in *Shelley's Case* applies to equitable as well as legal estates, but requires that both estates, the prior estate limited to the ancestor, and the subsequent estate limited to the heirs, shall be of the same quality—that is, both legal or both equitable—because if the prior estate is an equitable or trust estate, and the subsequent estate is a legal one, the two do not unite as an estate of inheritance in the ancestor. 4 *Kent's Com. marg.* pp. 210, 211. Thus, if the legal estate is given to A. in trust for B. for life, and the legal remainder to the heirs of B. at his death, the rule cannot apply, as the legal and equitable estates cannot so coalesce as to give B. either a legal or equitable fee. 1 *Perry on Trusts* (3d Ed.) § 358. So, also, if the trustee holding the property for A. for life has active duties to perform, but at the death of A. the trust for the heirs is merely passive, the statute will execute the use, so that the estate of the heirs is a legal one, while the prior estate is equitable. 22 *Am. & Eng. En-*

cy. of Law, p. 509, and cases in note 4."

Here the conveyance was declared to be in trust to pay the residue of the income, after the payment of certain charges thereon to Mrs. Houston during her life, and after her death to convey to her appointee by will. This was clearly an equitable estate for life in Mrs. Houston. But by the express terms of the deed it was further provided that the trust should cease and determine at Mrs. Houston's death, and, in default of appointment, the premises should belong in fee simple to her heirs. No conveyance by the trustee to the heirs was contemplated, but upon her death without appointment the fee simple was to go to her heirs by force of the original conveyance. This was a legal estate in the heirs. The deed to Goodrich contained no words of inheritance, but, whatever may have been the title conveyed to him, the grantor had the right to limit and control the estate granted in such manner as he saw fit. Conceding that Goodrich took a fee by the terms of the trust deed, yet the grantor had a right to make such fee determinable upon the happening of a valid condition subsequent, and limit the fee upon the happening of such condition to another. Such a limitation could not be made by a deed at common law, which took effect by transmutation of possession, but is perfectly feasible in a conveyance taking effect under the statute of uses, as does a deed of bargain and sale, which was the form of conveyance here. *Abbott v. Abbott*, 189 Ill. 488, 50 N. E. 958, 82 Am. St. Rep. 470; 2 Washburn on Real Prop. § 1634; 4 Kent's Com. 296. The deed of bargain and sale derives its effect from the statute of uses. 3 Washburn on Real Prop. § 2236. The grantor in a trust deed, though the title is granted in fee simple to the grantee, may make the fee determinable upon such lawful event as he chooses, and thereupon give it to a successor in trust, or in such other way as he sees fit. He may convey to a trustee for a limited period, and provide that at that period another may take. He may direct that on the death of the trustee another person, or a court of competent jurisdiction, may appoint a successor, and in such case the successor named in the deed, or by the person or court authorized to appoint, will succeed to the estate of the original trustee, without the necessity of any conveyance from his heirs, *Morrison v. Kelly*, 22 Ill. 609, 74 Am. Dec. 169; *Craft v. Indiana, Decatur & Western Railway Co.* 166 Ill. 580, 46 N. E. 1132; *West v. Fitz*, 109 Ill. 423; *Lake v. Brown*, 116 Ill. 83, 4 N. E. 773; *Reichert v. Missouri and Illinois Coal Co.*, 231 Ill. 238, 83 N. E. 166. Such transfers of the title can only occur by force of the statute of uses, under which all deeds in use in this state take effect, and are springing or shifting uses, which take effect in derogation of the prior estate which they displace. Here the event

upon which the estate of the trustee was to determine, so far as the heirs were concerned, was the death of Mrs. Houston without making an appointment by will. Upon the occurrence of this event it was expressly declared by the grantor that the estate of the trustee should cease and the premises belong to the heirs. The grantor had a right to so limit the estate; and, had the event of Mrs. Houston's death without making an appointment occurred, her heirs would have succeeded to the estate by force of the deed of trust without any other conveyance. Their estate was therefore a legal one, and, Mrs. Houston's life estate being equitable, the rule in *Shelley's Case* does not apply, and did not enlarge her estate to a fee.

Since Mrs. Houston's interest in the premises terminated with her life, her deed to Zephaniah K. Porter, though purporting to convey the fee, could have no effect beyond her life. A tenant for life, with power of appointment of the fee, has no interest but for his life. No one can take by transmission from him, though he might take by the power. A conveyance of the fee, whether intended as an execution of the power to appoint by will or an absolute conveyance, is not such a thing in reference to which the purchaser can be aided. *Reid v. Shergold*, 10 Ves. 370. By her deed Mrs. Houston did not attempt or purport to exercise the power of appointment given her by Sanders' deed to Goodrich, and had she done so, the attempt would have been ineffectual, for that deed authorized the execution of the power only by will or an instrument testamentary in character. "In *Swift v. Castle*, 23 Ill. 209, it was held a married woman can only convey her trust property (as a marriage settlement) in the manner authorized, and for the purposes specified, in the deed creating the trust; and the same rule, obviously, must apply to the exercise by her of a power of appointment under articles of marriage settlement." *Breit v. Yeaton*, 101 Ill. 242. Courts cannot dispense with the form prescribed for the execution of a power; and, if the instrument conferring a power of appointment defines the mode in which the power must be executed, that mode must be adopted. If it is required to be executed by deed, it cannot be done by will, and if a will is required, a deed will not suffice. *Fairman v. Beal*, 14 Ill. 244; *Bentham v. Smith, Cheves' Eq.* 33, 34 Am. Dec. 599; *Moore v. Dimond*, 5 R. I. 121; *Starnes v. Allison*, 39 Tenn. (2 Head) 221; *Reid v. Boushall*, 107 N. C. 345, 12 S. E. 324; *Gaskins v. Finks*, 90 Va. 384, 19 S. E. 166; *Porter v. Thomas*, 23 Ga. 467; *Reid v. Shergold*, *supra*. Here, by the deed conferring the power, it was to be exercised by will only, and in default the property was to go to the heirs of Mrs. Houston.

The execution of the power by Mrs. Houston, though she had theretofore parted with the title by a deed purporting to convey

the fee, was a valid appointment. A tenant for life may execute a power of appointment as to the reversion, though he may have aliened his own life estate, and though he may have attempted to convey the fee. *Learned v. Tallmadge*, 26 Barb. 444; *Gaskins v. Finks*, supra; *Porter v. Thomas*, supra; *Leggett v. Doremus*, 25 N. J. Eq. 122. The grant to a life tenant of a power to appoint does not enlarge his estate in the land. *Keays v. Blinn*, 234 Ill. 121, 84 N. E. 628. The power is not itself an interest in the land. *Porter v. Thomas*, supra. Where there is an express limitation for life, with power to dispose by will, the interest is equivalent only to an estate for life. *Reid v. Shergold*, supra; *Bentham v. Smith*, supra; *Tomlinson v. Dighton*, 1 P. Wms. 271.

The power in this case was not a power appendant; that is, a power which the donee is authorized to execute wholly or in part out of the estate limited to him, and which depends upon such estate. It is a power in gross; that is, a power which one having an interest in the land has to create an estate only which will not attach on the interest limited to him, or take effect out of his own interest. Since Mrs. Houston's estate was for her life only, and the power was to be exercised by will, which could not take effect until her death, when her own estate had terminated, the estate for life had no concern in it, and the power was in gross. 1 *Sugden on Powers* (3d Am. Ed.) 107. An assignment of the whole estate of the life tenant does not affect such a power; and, although the tenant for life assume to pass a fee, yet if his conveyance be by deed of bargain and sale, as was the case here, the power will not be destroyed. 1 *Sugden on Powers* (3d Am. Ed.) 145. Mrs. Houston's conveyance to Porter could have no operation to extinguish the power by way of estoppel. It was no more than a quitclaim deed of her interest in the land. Even if the power could be extinguished by covenants in a deed, the covenants in this deed were not binding upon her. The deed was executed on April 16, 1859, before the enactment of any of the laws enlarging the powers of married women to contract. She was subject to all the disabilities which the common law imposed upon married women. Her deed had only such effect as the statute gave it. The statute authorized her to convey her interest in land by joining with her husband in the execution of the deed and acknowledging it in the manner provided by the statute. The deed was then declared effective to convey her interest in the land, but the statute expressly provided that no covenant contained in the deed should be binding on her. It had no effect upon an after-acquired title, but was operative only as a quitclaim deed of her present interest. Such a deed could have no effect on the power.

The title of Eliza J. Houston was recorded. Her grantee presumably took with full notice of what that title was. So did his successive

grantees, down to and including the appellants. But it is claimed that the decree of the Shelby county circuit court freed the premises from the trust therein created by Sanders' deed, cut off the power of appointment conferred on Mrs. Houston, and enlarged appellants' estate to a fee simple. Nothing of the kind appears in the decree, and, in fact, it did not affect the title so far as the power of appointment and the interest of the beneficiaries thereof were concerned. The bill in that case alleged that E. P. Sanders was the owner of the premises, and that he made the deed to Goodrich, which was set out in *hæc verba*, the whole consideration therefor being paid by James W. Houston, and that neither Eliza J. Houston nor Goodrich paid anything for the premises; that afterward said Houstons, husband and wife, conveyed the premises to Zephaniah K. Porter in fee simple; that the said James W. Houston afterward died, and that, by a series of conveyances from Porter and his grantees, the said premises have been conveyed in fee simple to the complainant, William B. Little. It is then averred that the said Eliza J. Houston now fraudulently claims the right and title to said premises, and threatens to sue the complainant, and denies that he has any right or title to said premises, and that she is now wrongfully trying to sell said premises, and to induce Goodrich, in whom the legal title of record is, to convey said premises as she may direct; that having conveyed all her interest, right, and title in and to the said premises, both in law and equity, it would be against equity and good conscience to permit her to set up any interest or claim to said premises, and a fraud upon the rights of the complainant; that the said trustee, Goodrich, ought to make complainant a deed to said premises, and is ready and willing to do as the court shall order in the premises. The prayer was that Goodrich be decreed to quitclaim the premises to complainant, that all the right, title, and interest of Eliza J. Houston in the premises be extinguished or decreed to be in complainant, that the title to said premises be decreed to be quieted, and that Goodrich's legal title be decreed to complainant.

The decree was by default, and ordered Goodrich, within 30 days, to convey by deed of quitclaim, without saying to whom, all the right, title, and interest which he took in the premises by virtue of the trust deed from Sanders, and that on his failure to make said deed the master make it for him, that all the right, title, and interest, both at law and in equity, which the said Eliza J. Houston took in said premises by virtue of said trust deed cease and be held for naught, and be declared to be in and rightfully belong to the complainant, and that the complainant's title in and to said premises be quieted as against said Goodrich and Eliza J. Houston. There was no allegation in the bill, and nothing in the prayer or the decree, in regard to the power

of appointment or the estate to be created hereby, except that the existence of the power appears from the trust deed, which is set out. There is no attempt to cancel or to reform the deed, limit its effect, construe its terms, terminate, annul, or limit the trust, or restrain or control the exercise of the power of appointment. The allegation of the payment of the consideration by James W. Houston is immaterial. The material averments show the conveyance of the title to Goodrich in trust, Mrs. Houston's interest as cestui que trust for life, her conveyance to the complainant, her denial of any interest in him, and assertion of her own title and threat to sue him. There is no allegation of any fact in regard to the trustee or his title, except that he has the legal title in trust, as provided in the deed, and no prayer except that the legal title be conveyed to the complainant. There is no prayer that the trust or the power of appointment be declared void, modified, terminated, or affected in any way, no allegation on which such prayer could be based, and no such decree. The decree directs the trustee to convey the title acquired by the trust deed, but not to the complainant. The court did not, and on this bill could not, decree that such conveyance should be free of the trust, or that the trust should be terminated. The trustee did not convey, but the master conveyed to the complainant (Little) the right, title, and interest of the trustee (Goodrich) in the premises by virtue of the trust deed. The title so conveyed was only the title which the trustee had—that is, the title in fee—subject to the trust imposed thereon by the deed. The grantee (Little) took the title of Goodrich—the fee—subject to the trust. The court had no right to annul any of the provisions of the trust deed so far as the power was concerned. It was not asked to, and it did not.

The complainant by the decree was declared invested also with all the right, title, and interest, both at law and in equity, which the said Eliza J. Houston took in the said premises by virtue of said trust deed. That interest was the right to receive the net income during her life. The power of appointment was no interest in the property. Even if she might have executed the power of appointment in favor of herself, she could not be treated as the owner. No title or interest in the thing vests in the donee of the power until he exercises the power. *Gilman v. Bell*, 99 Ill. 144. A power does not, of itself, confer any interest in the subject-matter upon the donee. 22 Am. & Eng. Ency. of Law (2d Ed.) 1095; *Carver v. Astor*, 4 Pet. (U. S.) 92, 7 L. Ed. 761. The subject of a power is the property of the donor, not of the donee of the power; and, when the power is executed, the person taking under it takes under him who created the power, and not under him who executes it. *Bingham's Appeal*, 64 Pa. 345;

*Leggett v. Doremus*, supra. If the power is executed, the property passes under the original deed or will, through the execution of the power, to the person designated; and, if not executed, it remains to be affected by the other provisions of the instrument, or is not disposed of. *Collins v. Wickwire*, 162 Mass. 143, 38 N. E. 365; *Keays v. Blinn*, supra. Upon the death of Mrs. Houston nothing remained for the trustee to do but convey to her appointee, and the trust, having therefore become passive, was executed by the statute of uses, and the appellee became at once invested with the legal title. *Moll v. Gardner*, 214 Ill. 248, 73 N. E. 442; *Meacham v. Steele*, 93 Ill. 135; *Cary v. Slead*, 220 Ill. 508, 77 N. E. 234; *Lynch v. Swayne*, 83 Ill. 336; *Glover v. Condell*, supra. The plaintiff deduced title regularly from the common source, and neither the deed from Eliza J. Houston, the decree of the Shelby county circuit court, nor the statute of limitations is sufficient to defeat his right.

In my opinion the judgment of the circuit court should be affirmed.

SCOTT and VICKERS, JJ. We concur in the views expressed in the foregoing opinion of Mr. Justice DUNN.

(236 Ill. 369)

SMITH v. CHICAGO, P. & ST. L. RY. CO.  
(Supreme Court of Illinois. Oct. 26, 1908. Rehearing Denied Dec. 3, 1908.)

1. APPEAL AND ERROR (§ 1094\*)—REVIEW—FACTS—CONCLUSIONS OF INTERMEDIATE APPELLATE COURT.

The amount of damages caused by a negligent act or omission is purely one of fact, finally settled by a judgment of the Appellate Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4348; Dec. Dig. § 1094.\*]

2. MASTER AND SERVANT (§ 177\*)—INJURY TO SERVANT—RAILROADS—INCOMPETENT EMPLOYEES—LIABILITY.

Under a declaration against a railway company for death of an engineer in a collision of his engine with a work train, based upon negligence in employing the servants in charge of such train, the company is not liable, though the death resulted from such servants' negligence, unless it resulted from their incompetency, combined with the company's failure to use reasonable care in selecting them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 352; Dec. Dig. § 177.\*]

3. MASTER AND SERVANT (§ 279\*)—NEGLIGENCE IN EMPLOYMENT—EVIDENCE.

A servant's conduct on a single occasion might sufficiently show his unfitness, and the employer's negligence in retaining him after such occurrence; but, if an employer uses reasonable care in selecting an employé, and does not know of his incompetency, he is not responsible for consequences resulting on the single occasion when incompetency was shown.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 974; Dec. Dig. § 279.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**4. MASTER AND SERVANT (§ 279\*)—RAILROADS—CONDUCTORS—NEGLIGENT EMPLOYMENT—EVIDENCE—SUFFICIENCY.**

Evidence, in an action against a railway company for the death of an engineer in a collision of his engine with a work train, *held* to sustain a finding that the work train conductor was incompetent to his superintendent's knowledge, and that reasonable care was not used in employing him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 975; Dec. Dig. § 279.\*]

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, Sangamon County; James A. Creighton, Judge.

Action by Gertrude Smith against the Chicago, Peoria & St. Louis Railway Company for negligent death. From a judgment of the Appellate Court for the Third District, affirming a judgment for plaintiff, defendant appeals. Affirmed.

Wilson, Warren & Child, for appellant. Albert Salzenstein and T. J. Condon, for appellee.

**CARTWRIGHT, C. J.** The appellee, Gertrude Smith, brought this suit in the circuit court of Sangamon county, as administratrix of the estate of her deceased husband, George Smith, against the appellant, the Chicago, Peoria & St. Louis Railway Company of Illinois, to recover the damages occasioned by the death of her husband, an engineer in the service of appellant, who was killed by a collision of his engine with a work train of appellant. The ground of liability alleged was a failure of the defendant to exercise reasonable care in the employment of the engineer and conductor in charge of the work train, who were alleged to be incompetent, and through whose incompetency the collision and the death of plaintiff's intestate were caused. The plea was not guilty, and upon a trial of the issue the plaintiff obtained a verdict for \$10,000. The court, after overruling a motion for a new trial, entered judgment on the verdict, and the Appellate Court for the Third District affirmed the judgment. Counsel for appellant say: "The errors relied upon are (1) there is no evidence of the incompetency of the conductor sufficient, in law, to sustain a judgment; (2) the amount of the judgment is excessive"—and both of these propositions are elaborated in the argument.

We feel certain that the learned counsel who present and argue the second proposition that the damages awarded by the jury are excessive would be quite unwilling to have us attribute their course to ignorance of the law, and it is fair to assume that they do not expect any attention to be given to the point further than to be again admonished that it cannot be raised. The proposition that the amount of damages caused by negligent act or omission is purely one of fact, finally settled by the judgment of the Appellate Court, is one about which there never

could have been any doubt, and yet this court has been required to make that statement in a multitude of cases, running through more than 100 volumes of the Reports. In 1883, in the case of *Wabash, St. Louis & Pacific Railway Co. v. Peyton*, 106 Ill. 534, 46 Am. Rep. 705, the court said (page 539 of 106 Ill.): "It is likewise insisted that the damages are excessive. Appellant refers to no text-book or reported case which holds that the assessment of damages is a question of law. On the other hand, by every rule of law it must be considered a question of fact. It is averred as a fact in the declaration. It is traversed as a fact, and never questioned by demurrer. On the trial damages are proved by evidence, and they are found by the jury, and not by the court. The proposition seems so obvious that it should not require the decision of a court to establish the proposition." If attorneys have not yet learned of this obvious proposition by its wearisome repetition in so many cases, it would seem to be of no use to state any principle of law in the decisions of the court.

The other alleged error questions the ruling of the trial court in refusing to direct a verdict of not guilty on motion of the defendant; and it is insisted that the evidence tending to support the cause of action alleged in the declaration, together with all reasonable inferences which the jury might draw therefrom, was insufficient, as a matter of law, to sustain the verdict. The accident happened in this way: On October 4, 1905, John Cuthbertson was in charge of a work train of the defendant as conductor, and the train was being used to transport ballast from a quarry two miles north of the railroad yards of defendant at Alton to a point five miles south of Alton. The engineer was William Scherrer. On that day they started from the railroad yards at Alton north, with the engine running backwards, and the tender in front, and drawing three cars. There was at the time a heavy fog, so that an object could not be seen more than about 20 feet beyond the tender. The rules required that at such times two white lights should be displayed, the same as at night, and this was not done. It was also the duty of both the conductor and engineer, before starting upon a trip, to inspect the train register and ascertain whether a south-bound train, No. 53, had passed. The engineer, Scherrer, although he knew the rule, made no examination. The conductor, Cuthbertson, examined the register and informed the engineer that train No. 53 had passed, notwithstanding the register plainly showed that it had not. On the way to the quarry there was a collision with train No. 53, upon which George Smith was engineer, and his death was caused thereby.

That the death of Smith was caused by

the negligence of the engineer and conductor was proved, but the defendant would not be liable, under the declaration, for an injury caused by their negligence unless it resulted from their incompetency, combined with the failure of the defendant to use reasonable care in their selection. It was necessary for the plaintiff, not only to prove incompetency of the engineer or conductor, or both, but also negligence of the defendant in employing them, or one of them. The mere happening of an accident would not ordinarily raise a presumption of incompetency (Mobile & Ohio Railroad Co. v. Godfrey, 155 Ill. 78, 39 N. E. 590), but the conduct of a person on a single occasion may be entirely sufficient to demonstrate his unfitness, and, after such an occurrence, to charge the employer with a failure of duty in keeping him in the service. If the employer used reasonable care in the selection of the servant, and had no knowledge of his incompetency, the employer would not be responsible for the consequences resulting on the single occasion when incompetency was manifested. The conduct of the engineer and conductor on this occasion fairly tended to show the unfitness and incompetency of both for the positions in which they had been placed, but the evidence did not show that the engineer had previously manifested any want of competency or that the defendant did not use reasonable care in his selection. The fact that the engineer disregarded and neglected his duty in failing to supply lights, and examine the register at the time of the accident, would only affect the liability of the defendant for afterwards retaining him in its employ.

The conductor, Cuthbertson, was about 36 years of age, and began work as a railroad employé in August, 1890, and thereafter worked as a brakeman on the Grand Trunk Railroad for 7 years. In October, 1897, he commenced work for the defendant as a switchman in the yards at Alton, and worked in that capacity until some time in 1902. He then worked 11 months for another road as foreman of a switch engine, and then returned to the defendant, and again worked for it as a switchman. In the absence of the yard foreman Cuthbertson sometimes took his place for a day or two and occasionally worked as engine foreman in the yard, but his work, for about 8 years before the accident, was in the railroad yards. He testified that he had not had any experience at all as a freight conductor and not much as a work-train conductor, except doing a little work outside of the yards. All his experience had been in the switchyards, and the duties of a switchman are so different from those of a conductor on the road that experience in one position does not qualify a person to fill the other. The general rule is that a person, before being permitted to

run a train as conductor, must serve a term as a brakeman, and then submit to an examination as to his capacity and experience to qualify him to take charge of a train as a conductor. In September, 1904, Cuthbertson desired to be placed in charge of a work train, and at his request the defendant's local agent at Alton applied to Schaff, the superintendent, to secure the position, and received a letter from him containing this statement: "I do not think that Cuthbertson is a competent man to put on this work train." In January, 1905, the superintendent was asked why he did not give Cuthbertson charge of the construction train referred to, and he replied that "Cuthbertson was not competent to take hold of that work." In September, 1904, and January, 1905, the superintendent of defendant did not regard Cuthbertson as competent to take charge of a work train; and, unless the superintendent afterward satisfied himself of his competency, he was guilty of negligence in employing him. Cuthbertson had no experience, between the time that he was rejected as incompetent and June, 1905, which could qualify him to fill the position as conductor. There were a new set of rules in force July 1, 1905, and some time in June, shortly before they went into effect, the superintendent called several employés into the baggage room at Alton, and questioned them upon the new book of rules. Cuthbertson testified that he was not examined as a conductor between September, 1904, and 1905, and that he could not swear whether the examination in the baggage room was a conductor's examination or not. The evidence favorable to the plaintiff fairly tended to prove that Cuthbertson was incompetent to fill the position of conductor, that the superintendent knew him to be incompetent, and that reasonable care was not used in employing him. The trial court therefore did not err in refusing to direct a verdict of not guilty.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(236 Ill. 9)

#### GATHMAN v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 26, 1908.)

##### 1. MASTER AND SERVANT (§ 264\*)—INJURIES TO SERVANT—ACTIONS—VARIANCE.

In an action by an employé of a city against the city and another employé for personal injuries, where the declaration alleged that the accident was caused by the negligence of the "defendants," but thereafter the action was dismissed as to the other employé, so that the declaration, without amendment, charged the city with the negligence causing the injury, that the evidence showed that such other employé was not present when the accident occurred was not a variance, since his dismissal eliminated him from the case.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 264.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**2. MUNICIPAL CORPORATIONS (§ 753\*)—TORTS—NEGLIGENCE OF EMPLOYÉS—ACTIONS—VARIANCE.**

Where one, regularly appointed a city bridge tender, employed and paid others to do the work, with the city's knowledge, the negligence of such others while tending to bridge was that of the, regularly appointed tender; and hence, in an action against the city, proof that such employés were negligent sustained an averment of negligence of the tender.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1586; Dec. Dig. § 753.\*]

**3. MASTER AND SERVANT (§ 287\*)—INJURIES TO SERVANT—FELLOW SERVANTS—EXISTENCE OF RELATION—QUESTIONS FOR JURY.**

Whether servants of a common master are fellow servants is usually a question of fact, and never becomes one of law, unless the proved facts show the relation to exist so clearly that all reasonable minds would concur as to its existence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1062; Dec. Dig. § 287.\*]

**4. MASTER AND SERVANT (§ 287\*)—INJURIES TO SERVANT—FELLOW SERVANTS—EXISTENCE OF RELATION—QUESTION FOR JURY.**

In an action by an employé against a city for injuries sustained while working under a city bridge, whether plaintiff and defendant's employés at the bridge were fellow servants held for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1062; Dec. Dig. § 287.\*]

**5. MASTER AND SERVANT (§ 196\*)—FELLOW SERVANTS—NATURE OF COMMON SERVICE.**

To make employés fellow servants of each other so as to preclude a recovery by one for negligence of the other, they must be directly co-operating in the same line of employment, or their usual duties must bring them into habitual association, so that they may exercise a mutual influence conducive to caution.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 486-492; Dec. Dig. § 196.\*]

**6. MASTER AND SERVANT (§ 203\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—EXTENT.**

As a general rule, a servant assumes only the ordinary risks of the business in which he is employed.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 538-543; Dec. Dig. § 203.\*]

**7. MASTER AND SERVANT (§ 216\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—NEGLIGENCE OF OTHER SERVANTS.**

Where an employé of a city was ordered to take measurements under a city bridge, and the city's employés at the bridge promised not to raise the bridge until plaintiff signaled, plaintiff did not assume the risk of injuries sustained because such other employés negligently raised the bridge without signal.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 567-573; Dec. Dig. § 216.\*]

**8. MUNICIPAL CORPORATIONS (§ 753\*)—TORTS—NEGLIGENCE OF EMPLOYÉS.**

Where a regularly appointed city bridge tender employed and paid others to perform the work, with the knowledge and consent of the city, the city became liable for the negligence of such employés to the same extent as for the negligence of the regularly appointed tender, even though they were not paid by the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1586; Dec. Dig. § 753.\*]

**9. BRIDGES (§ 37\*)—TORTS—WAYS FOR WHICH CITY IS LIABLE—PUBLIC BRIDGES.**

A city is liable for injuries resulting from the operation of a lift bridge, which formed part of a public street, and was under the city's control, in the same manner as for negligence as to its streets.

[Ed. Note.—For other cases, see *Bridges*, Cent. Dig. §§ 98-107; Dec. Dig. § 37.\*]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; Paul McWilliams, Judge.

Action by Ludwig A. D. Gathman against the city of Chicago. From a judgment of the Appellate Court (139 Ill. App. 253), affirming a judgment for plaintiff, defendant appeals. Affirmed.

This was an action on the case commenced by Ludwig A. D. Gathman against the city of Chicago and James O'Connor, in the circuit court of Cook county, to recover damages for a personal injury alleged to have been sustained by him while in the employ of the city of Chicago, through the negligence of the defendants. The plaintiff dismissed the case as to O'Connor, and thereafter there was a trial upon a declaration containing one count (to which the general issue was filed), which, in substance, charged that on January 10, 1901, the defendant the city of Chicago owned, controlled, and operated a certain bridge, known as the "Van Buren Street Bridge," in said city, and employed the defendant James O'Connor as a bridge tender thereon, and to have charge of the machinery and attachments of said bridge for the operation thereof, and to raise and lower the same; that on said day the plaintiff was also employed by the said defendant the city of Chicago as a machinist, and was by said defendant ordered to make certain measurements, and to perform certain work on the said Van Buren Street Bridge, and beneath and about the same; that while he was in the performance of said work, and at work beneath the bridge, the said defendants carelessly and negligently set the machinery of said bridge in motion, and that, while the plaintiff was exercising reasonable care for his own safety, because of the negligence of the defendants, he was caught between two heavy pieces of iron, and was greatly and permanently injured. At the first trial the jury returned a verdict, under the direction of the court, against the plaintiff, upon which the court rendered judgment in favor of the city, which judgment was reversed by the Appellate Court. 127 Ill. App. 150. Upon the second trial the plaintiff recovered a verdict for the sum of \$5,000, upon which judgment was rendered against the city, which judgment has been affirmed by the Appellate Court for the First District, and a further appeal has been prosecuted to this court.

The Appellate Court in its last opinion made the following statement of facts, which we find, from an examination of the record,

to be substantially correct: "Appellee, at the time of his injury, had been in the employ of the city for a number of years in the bridge department, a subordinate department of the department of public works of the city. A Mr. Willman had immediate charge of the bridge department, under Patrick White, the superintendent of bridges, and had authority to give directions to appellee. January 10, 1901, Mr. Willman directed the appellee to go to the Van Buren Street Bridge, and take a measurement of the stroke of the arm of the heel lock when the bridge was stationary, and then the bridge tender would raise the bridge for him to take another measurement, so as to get the full stroke of the arm. The evidence tends to prove that, in order to ascertain the full stroke of the arm, it was necessary to take one measurement when the bridge was stationary and another when it was raised. Van Buren street lies east and west, and the bridge in question is across the Chicago river on the line of Van Buren street, and connects the part of the street east of the river with the part west of it, so that when it is closed it is a part of the street. The bridge is a rolling lift bridge, and is operated by machinery moved by electrical power. The machinery which operates the east part of the bridge is under the street on the east side, and that operating the west part under the street on the west side. The parts of the bridge each side of the center are operated separately by separate machinery, and each part requires a man to operate it, so that the operation of the bridge requires at least two men. There is a shanty at the southeast corner, and another at the northwest corner, of the bridge, in which are situated the appliances to turn on and regulate the power which moves the bridge machinery. When either part of the bridge is raised, the end next the approach to the bridge goes up. To take measurements as directed, it was necessary for the appellee to go beneath the part of the bridge which lay east of the center when the bridge was closed or stationary. James O'Connor was the bridge tender at the time of the accident, having been regularly appointed as such by the mayor of the city, with the concurrence of the city council. The actual work of operating the bridge was done by James O'Brien, who operated the part of it east of the center, and by James McDonald, who operated that part of it west of the center. These men were not employed or paid by the city, but were hired and paid by James O'Connor, the bridge tender. Patrick White, superintendent of bridges, testified that he 'had authority, if he saw a man operating a bridge improperly, to discharge him, or make him leave that work: that it made no difference who he was, if he was doing something wrong, he could discharge him immediately.' Appellee testified that after he was directed by Willman, as above stated,

he went to the bridge, and into the bridge-house on the east side, and told O'Brien that he was sent there to take a measurement; that he would take one measurement first, and then would signal him (O'Brien) that he had taken that measurement, and for him to lift the bridge, and then he would take the other, and when through would signal him to lower the bridge, and O'Brien said, 'it was all right.' The appellee further testified that after the conversation above mentioned, and four or five minutes before he went beneath the bridge, he went to the west side of the bridge, and talked with McDonald, and then went back to the east side and repeated to O'Brien what he had said to him before. McDonald, who operated the west side of the bridge, testified that plaintiff came to him about 10 o'clock, and said he wanted to take some measurements, and would want the bridge raised, and witness told him to notify the operator on the other side, and plaintiff said he would do so, and give that operator the signal when he was ready, and the arrangement was that plaintiff and his helper, James Burke, were to notify the operator on the east side of the bridge when they were ready to have that side raised, and that four or five minutes after plaintiff went underneath the bridge, witness was signaled from the east side to raise the bridge; that it was necessary for witness, to raise his part of the bridge five feet to unlock the bridge, so as to allow the east half to be raised. It appears from the evidence that James J. Kennedy, a common laborer, who had been employed occasionally by McDonald and O'Brien to assist them, and paid by whichever of them employed him, was on the bridge at the time in question. He testified that he was in the shanty at the east end of the bridge when the plaintiff was on his way below, and that O'Brien, who was shovelling snow at the time, told witness to get ready to make a lift—to go ahead and make the lift, as plaintiff wanted to make some measurements—and witness signaled to McDonald, who signaled back that he was ready, and rang the bell to clear the bridge and started to raise his end when the west side went up several feet; that witness turned on the current, and started to raise the east end, when he heard a voice, 'Stop! for God's sake, stop!' and witness shut off the current. He also testified that before he made the lift he received no signal from below. While plaintiff was underneath the floor of the bridge, with James Burke, his helper, and engaged in making the first measurement of the arm of the heel lock, the power was turned on, the machinery set in motion, and the east half of the bridge raised without any signal from either him or Burke. The consequence was that appellee was caught and crushed between the moving arm of the heel lock and an iron column, and was seriously, and, as the evidence tends to prove, permanently injured."

Edward J. Brundage, Corp. Counsel, and John R. Caverly, City Atty. (Edward C. Fitch and Charles B. Stafford, of counsel), for appellant. Charles J. Trainor, for appellee.

HAND, J. (after stating the facts as above). It is first contended that there was a fatal variance between the declaration and the proof in this: That the declaration charged that O'Connor was the employé of the city, responsible for the accident which caused the injury of appellee, while the evidence showed that O'Connor was not present at the time of the accident, but that the actual work in raising the bridge at the time appellee was injured was performed by James O'Brien and James McDonald, who were in the employ of O'Connor, and not in the employ of the city. There are two satisfactory answers to this position of the city: First, by the dismissal as to O'Connor he was eliminated from the case, and the declaration thereafter, without amendment, charged the city with the negligent acts which caused the injury to the appellee; and secondly, the proof sustained the averment of the declaration that it was the negligent act of O'Connor which caused the injury. The evidence showed that O'Connor, a saloonkeeper, was regularly appointed by the mayor of the city of Chicago bridge tender of the Van Buren Street Bridge; that he did not tend the bridge personally, but employed O'Brien and McDonald to do the work for him, and that James J. Kennedy, under the direction of O'Brien, set the machinery in motion on the occasion when the appellee was injured. The city knew that O'Brien and McDonald were in the employ of O'Connor, and were in actual control of the bridge. O'Brien and McDonald, therefore, as to the city, stood in the place of O'Connor, and the negligence of O'Brien in directing Kennedy to raise the bridge at the time of the injury was the negligence of O'Connor, and proof that the negligent order to raise the bridge was given by O'Brien sustained the averment of the declaration that it was the negligence of O'Connor which caused the accident.

It is next contended that O'Connor, O'Brien, McDonald, and Kennedy were the fellow servants of the appellee, and that appellee cannot recover for the negligence of O'Connor, or persons in his employ, in handling said bridge. The question whether the servants of a common master are fellow servants is usually a question of fact, and never becomes a question of law, unless the facts proven show such relation so clearly to exist that all reasonable minds will readily agree that such is the relation of the servants of the common master to each other. *Duffy v. Kivlin*, 195 Ill. 630, 63 N. E. 503; *Spring Valley Coal Co. v. Patting*, 210 Ill. 342, 71 N. E. 371; *Missouri Malleable Iron Co. v. Dillon*, 206 Ill. 145, 69 N. E. 12. Here the injured servant was performing service

in one department of the city government, and was sent by his superior officer to the bridge to make certain measurements, while the servants of the city causing the injury performed service in another department of the city government, and were under the control of other superior officers, and the servants of the city handling the bridge had nothing to do with making the measurements which appellee had been directed to make; their duties being to care for and handle the bridge. The appellee and the servants of the city who caused the injury were not, therefore, at the time of the injury co-operating with each other in the particular business of making said measurements or of raising said bridge, but at the time the appellee was injured he was engaged in one employment—i. e., in making measurements—while the other servants of the city who caused his injury were engaged in doing an entirely other thing; i. e., raising the bridge. The appellee and said servants were not therefore necessarily co-operating together at the time appellee was injured. Neither did the line of the employment, or the usual duties of the appellee and the servants of the city who operated the bridge, necessarily bring the appellee and said servants into habitual association, so that they might exercise a mutual influence upon each other promotive of the caution which would protect each other from an injury which might result from the negligence of each other. In *Chicago & Alton Railroad Co. v. Hoyt*, 122 Ill. 369, 374, 12 N. E. 225, 226, it was said: "It was said by this court in *North Chicago Rolling Mill Co. v. Johnson*, 114 Ill. 57, 29 N. E. 186, that the servants of the same master, to be co-employés, so as to exempt the master from liability on account of injuries sustained by one resulting from the negligence of the other, shall be directly co-operating with each other in a particular business—i. e., the same line of employment—or that their usual duties shall bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution." We therefore think it clear the court properly submitted the question whether the appellee and the servants of the city who controlled the bridge at the time he was injured were fellow servants to the jury as a question of fact.

It is also urged that the appellee assumed the risk of being injured by the negligence of the bridge tenders in prematurely raising the bridge while he was beneath the bridge making the measurements which he had been sent to the bridge to make. The general rule is a servant only assumes the ordinary risks of the business in which he is employed. In this case, before going beneath the bridge, he had an understanding with the servants of the city in charge of the bridge that they would not raise the bridge until he signaled them so to do, and the injury which he sub-

sequently sustained was caused by reason of the fact that said servants violated that understanding, and raised the bridge before the appellee had signaled them so to do, and without notice to the appellee that they were about to raise the bridge. Clearly the negligence of the servants of the city in charge of the bridge in raising the bridge, after they had agreed not to raise it until they had been signaled to raise the same by the appellee, was not a risk which the appellee assumed by virtue of his contract of employment with the city. In *Illinois Third Vein Coal Co. v. Cloni*, 215 Ill. 583, on page 590, 74 N. E. 751, on page 754, it was said: "When a servant enters the employment of the master, the ordinary risks of such employment which he assumes include the negligence of fellow servants associated with him, but he does not assume the risk of the negligence of employés of the same master who are not fellow servants with him." And in *Chicago & Eastern Illinois Railroad Co. v. White*, 209 Ill. 124, on page 132, 70 N. E. 588, on page 590, it was said: "A servant, however, does not assume the risk of a negligent manner of doing the work by other servants who are not his fellow servants, unless it is customary to do the work in that manner. The risk of such an act is not one of the usual or ordinary hazards of the employment."

It is also urged that the court erred in instructing the jury that the city was responsible for the negligent acts of the men in charge of the bridge in raising the same without being signaled so to do by appellee, as it is contended O'Brien, McDonald, and Kennedy were not the servants of the city. O'Connor was the regularly appointed representative of the city, and in charge of the Van Buren Street Bridge, and the city was responsible for his negligent acts done in the line of his duty. With the knowledge and consent of the city, O'Connor did not personally perform the duties imposed upon him, but the city permitted such duties to be performed by persons employed by O'Connor. When the city permitted O'Connor to employ men to operate the bridge, and the persons employed by him did operate the bridge with the knowledge and the consent of the city, we think it clear the city became liable for the negligent acts of such employés to the same extent that it was liable for the negligent acts of O'Connor, and that it cannot escape liability by reason of the fact that the men in active control of the bridge were paid by O'Connor instead of by the city. Suppose the persons employed by O'Connor operated the bridge in a negligent manner, and in consequence of such negligence a person crossing the bridge had been injured. It clearly would not have been a defense to an action brought by such person that the persons

in charge of and operating the bridge, with the knowledge and consent of the city, were paid by O'Connor instead of by the city. Our conclusion is that the city was responsible for the negligent acts of the persons in charge of said bridge, and that the court did not err in so instructing the jury.

Other instructions given on behalf of the appellee have been criticised. We think, however, the jury were instructed substantially in accordance with the law.

It is finally contended that the city is not liable to the appellee for the injury which he sustained. The bridge forms a part of one of the public streets of the city, and while it is not stationary, like the street of which, when closed, it forms a part, it is as much under the control of the city as the street, and if the servants of the city, in raising or lowering the bridge, injured a person rightfully crossing the bridge, or a person upon a boat beneath the bridge, the city would clearly be liable for such injury; and we are unable to see why the city should not be held liable to the appellee, who was lawfully upon the bridge at the time he was injured, for the negligence of the persons who were operating the bridge with the knowledge and consent of the city.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(236 Ill. 12)

#### PEOPLE v. NYLIN.

(Supreme Court of Illinois. Oct. 26, 1908.)

#### 1. INTOXICATING LIQUORS (§ 124\*)—UNLAWFUL SALES—STATUTORY CONSTRUCTION—"LIQUOR."

The measurement intended by the statute prohibiting the sale without a license of liquor in less quantities than five gallons is a measurement of the quiet liquor after it has been released from confinement and the gas, froth, or foam arising when the liquor is released from the vessel in which it is contained cannot be considered in determining the quantity of liquor.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 124.\*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4180-4182.]

#### 2. INTOXICATING LIQUORS (§ 176\*)—UNLAWFUL SALES—DEFENSES.

In a trial for violating the statute prohibiting the sale without a license of liquor in any less quantity than five gallons, evidence that defendant believed the cases sold by him to each contain five gallons or more, and that he did not knowingly sell in less quantities than five gallons, was inadmissible.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 176.\*]

#### 3. INTOXICATING LIQUORS (§ 238\*)—UNLAWFUL SALES—QUESTIONS FOR JURY.

Where, in a trial for unlawfully selling liquor in less quantities than five gallons, the evidence was conflicting as to the number of bottles in the cases sold by defendant, the question was for the jury.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 238.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

#### 4. CRIMINAL LAW (§ 404\*) — EVIDENCE — DEMONSTRATIVE EVIDENCE.

In a trial for unlawfully selling liquor in less quantities than five gallons, vessels sent by the county clerk to the Secretary of State, and tested and stamped by him as correct, under Hurd's Rev. St. 1905, c. 147, § 9, and used by witnesses in measuring the liquor sold by defendant, were admissible in evidence in the absence of proof that they were not correct measures; it being immaterial whether they belonged to the county or not, and whether the Secretary was required to test them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 891; Dec. Dig. § 404.\*]

#### 5. INTOXICATING LIQUORS (§ 236\*) — UNLAWFUL SALES—QUESTIONS FOR JURY.

In a prosecution for unlawfully selling liquors in less quantities than five gallons, evidence held to justify a finding that the method of selling was a device for the purpose of evading the law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 313-317; Dec. Dig. § 236.\*]

#### 6. CRIMINAL LAW (§ 1159\*) — APPEAL—VERDICT ON CONFLICTING EVIDENCE.

Verdicts on conflicting evidence will not be disturbed on appeal, unless palpably contrary to the decided weight of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3075, 3076; Dec. Dig. § 1159.\*]

Error to Appellate Court, Second District, on error to Mercer County Court; R. C. Rice, Judge.

Ola Nylin was convicted of violating the liquor law, and, from a judgment of the Appellate Court (139 Ill. App. 500) affirming the judgment of the county court, he brings error. Affirmed.

Cooke & Willson (Alex. McArthur, of counsel), for plaintiff in error. W. H. Stead, Atty. Gen., and William J. Graham, State's Atty., for the People.

**PER CURIAM.** Plaintiff in error was charged, by information filed in the county court of Mercer county, with unlawfully selling intoxicating liquor in less quantities than five gallons outside of any city, town, or incorporated village. The information contained 36 counts, but the last 3 counts were nolle pros'd by the state's attorney before the trial was entered upon. The trial resulted in the jury finding plaintiff in error guilty under seven counts of the information. The court overruled a motion for a new trial, entered judgment on the verdict, and sentenced plaintiff in error to pay a fine of \$75 under each of the seven counts, and to pay the costs of the prosecution. That judgment has been affirmed by the Appellate Court, and a writ of error sued out of this court to bring the record before us for review.

Plaintiff in error's place of business was but a short distance outside of the corporate limits of the city of Aledo. He claimed to be selling beer in not less than five gallon quantities in original packages. A number of errors not going to the merits of the case, such

as the ruling of the court in permitting the information to be amended, denying the motion by plaintiff in error for a continuance, the ruling of the court in impaneling the jury, assigned by plaintiff in error, do not require a discussion by us in detail. We have examined the questions, and are satisfied that no error was committed by the court in this respect, and we are satisfied with the reasoning and conclusion of the Appellate Court upon these questions.

The principal questions raised by plaintiff in error, and to which the greater portion of his brief and argument is directed, are, first, that the evidence is insufficient to establish his guilt of selling liquor in less quantities than five gallons; and, second, if he did sell in less quantities than five gallons, he did not do it knowingly, but in good faith believed he was not selling in quantities less than five gallons.

R. H. Foote testified that he bought four cases of beer of plaintiff in error in June and July, 1906; that he paid for three of them himself, and one of them was paid for by joint contributions from himself, John Y. Smith and Frank Glancy. The first three cases were of the brand called "Blue Ribbon," and the last one, purchased June 23d, was "Red, White, and Blue." The beer was what is known as lager beer. He testified the first three cases were taken from the plaintiff in error's place of business at the time they were purchased, and deposited at a convenient place until the amount of beer they contained could be measured. Foote testified each of these cases contained 26 bottles. He testified he did not take the last case purchased away from defendant's place of business, but by permission of plaintiff in error's clerks and servants took two bottles and left the remainder to be afterwards procured when desired by him. He was given a ticket upon which his name was written, and around the margin were numbers from 1 to 28. When he bought the case he paid for it, and, upon taking the two bottles, the number "2" was punched out of the ticket. The witness further testified he asked for Red, White, and Blue beer, and plaintiff in error's clerk told him he could accommodate him, and the two bottles of beer given him were branded "Red, White, and Blue." A week later he procured two more bottles of Red, White, and Blue, and his ticket was again punched. He testified to getting four bottles of beer on his ticket a few days later branded "Export." The ticket was offered in evidence and has the numbers "2," "5," and "8" punched out. The witness testified that punching the number "5" out was a mistake, that it should have been "4," and that, when he procured the last four bottles mentioned, he called the attention of plaintiff in error's clerk to the mistake, and he then punched the number "8" instead of "9," as

\*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes

would have been correct if the witness had previously been furnished five bottles. Plaintiff in error offered evidence contradictory of this testimony.

Frank Glancy testified that he, Foote, and Smith jointly purchased a case of beer and stored it away to be afterwards measured, and that he individually bought a case of Blue Ribbon beer June 30th and paid for it, but did not take it away; that he was given a ticket on which his name was written, with numbers on it; that he took two bottles at the time he paid for the case, and the clerk of plaintiff in error punched the number "2" out of his ticket; that a few days later he went back and asked for two more bottles; that he was given two bottles of "Export" and the number "4" was punched out of his ticket. He produced the ticket, which was introduced in evidence by the people.

John Y. Smith testified to being with Foote and Glancy when they jointly purchased the case of beer and took it away to be afterwards measured, and also that on June 9th he bought a case of Blue Ribbon beer himself, and took it to the place of business of L. C. Detwiler to be measured.

O. M. Wells testified that he purchased a case of beer of plaintiff in error in May, 1906, and paid \$5 for it, but did not take the case away; that he got a ticket for it, which was punched for the number of bottles of beer he took at the time he made the purchase, and that he afterwards procured all the beer his ticket called for. He was unable to tell how many times he was furnished beer and his ticket punched, but said that it was as much as five or six times.

Albert Nissen testified to buying seven or eight cases of beer during the summer of 1906. It is not clear from his testimony whether he was given tickets for all his purchases, but he was for at least a portion of them.

Melvin Nelson testified he bought a ticket good for a case of beer, and was given about half of it at the time he made the purchase and the ticket was given him, and that afterwards, and on the same day, he got the remainder of it.

Foote, Smith, and Glancy testified that there were 26 bottles of beer in each of the cases delivered to them and deposited for subsequent measurement. C. N. Brock, who was with Smith when he bought the case, testified there were 26 bottles in it. These cases were afterwards measured, from three to four witnesses assisting in the measurement of each case. They testified there were 26 bottles in each case. Twenty-five of them were measured, in the presence of the witnesses, in gallon measures that had been tested, stamped, and sealed by the Secretary of State as four-quart measures. The whole 26 bottles in one case were measured at one time. In the other cases one of the bottles was marked for identification and was pro-

duced at and measured during the trial, but not in the presence of the jury. According to the testimony of the witnesses who made the measurements, these cases of 26 bottles each contained substantially  $4\frac{1}{2}$  gallons of beer. In making these measurements the witnesses testified they consumed considerable time, so as to allow foam that rose on the beer when poured into the measure to settle, so that the measure was full of liquid. Plaintiff in error contends that these measurements were unreliable, for the reason that the beer was charged with gas, which it is claimed is a component part of the beer, and that, when the gas was released from the bottle, it disappeared, so that a part of the contents of the bottle was not and could not be measured by the witnesses by the method they adopted. We think the Appellate Court correctly disposed of this contention in the following language: "Gas is an aeriform fluid, but it is not a liquor within the meaning of that term as used in the statute concerning intoxicating liquor. It would be nullifying the restriction which provides liquor shall not be sold in less quantities than five gallons without a license to hold that the gas, froth, or foam must be measured that may arise when the liquor is released from the pressure caused by gas in the vessel in which it is contained, whether that pressure be from fermentation or the method of bottling. We hold the measurement intended by the statute to be a measurement of the quiet liquor after it has been released from confinement and reached a quiet condition in the open air."

On the trial plaintiff in error sought to prove that he bought the beer under representations from the brewers who sold it to him that five bottles of it made a gallon. He offered to introduce in evidence bills of the brewery on which was printed, "Quarts, five to the gallon," and further offered to prove that he in good faith believed that five bottles contained a gallon of beer, and that he did not knowingly sell any one beer in less quantities than five gallons, but, on the contrary, that each case of beer contained more bottles than was represented to him by the brewery to be necessary to contain five gallons of beer. The court refused to admit all this line of proof, except as to the number of bottles he sold in each case, and instructed the jury that it was not necessary for the people to prove plaintiff in error knew the cases contained less than five gallons, and that intent or good faith on his part in making the sales was not to be considered as a defense.

The statute under which the information was filed prohibits the sale of intoxicating liquors outside of the corporate limits of cities and villages in any less quantity than five gallons and in the original packages as put up by the manufacturer. There is no qualification that, to constitute a violation of this statute, the party charged must have

knowingly sold less than five gallons. Section 6 of the dramshop act (Hurd's Rev. St. 1905, c. 43) prohibits selling or giving intoxicating liquors to a minor without the written order of his parent, guardian, or family physician, or to any person intoxicated or who is in the habit of getting intoxicated. In that statute the element of knowledge that a person to whom intoxicating liquor is sold belongs to one of the prohibited classes is omitted. In *McCutcheon v. People*, 69 Ill. 601, the indictment charged the defendant with selling intoxicating liquors to a minor. In the trial court a motion was made to quash the indictment because there was no averment that defendant knew the party he was charged with selling to was a minor, and it was also insisted that, whether the averment of knowledge was necessary in the indictment or not, proof that the defendant knew the party he was charged with selling intoxicating liquors to was a minor was necessary in order to constitute a violation of the statute. This court held the indictment good; and upon the question of the necessity of proof of knowledge said, on page 606: "The license procured under the first section of the act confers no authority on the licensee to sell intoxicating liquors to a minor except upon one condition, viz., he shall have the written order of his parents, guardian, or family physician. He is absolutely prohibited by the same section from selling to a person intoxicated or who is in the habit of getting intoxicated, and his license will afford him no protection. The law imposes upon the licensed seller the duty to see that the party to whom he sells is authorized to buy, and, if he makes a sale without this knowledge, he does it at his peril. This is the clear meaning of the law, and any other construction would render it exceedingly difficult, if at all possible, ever to procure a conviction for a violation of this clause of the statute. This construction imposes no hardship upon the licensed seller. If he does not know the party who seeks to buy intoxicating liquors at his counter is legally competent to do so, he must refuse to make the sale. It is made unlawful, either with or without a license, to sell to a certain class of persons and to another class except under certain conditions, and, if he violates either clause of the statute, he must suffer the penalties imposed for its violation. It is no answer to this view to say the licensee may sometimes be imposed upon and made to suffer the penalties of the law when he had no intention to violate its provisions. This is a risk incident to the business he has undertaken to conduct, and as he receives the gains connected therewith he must assume also with it all the hazards. Our laws make it a crime for a man to have carnal intercourse with a female under a certain age, either with or without her consent. It would shock our sense of justice to hold a party not guilty because he did not know she was

within that age prescribed by the statute, and therefore incapable of giving consent. The law makes the act a crime and infers the guilty intent from the act itself." This case was followed and adhered to in *Farmer v. People*, 77 Ill. 322. The case of *Humpeler v. People*, 92 Ill. 400, was an indictment charging the defendant with selling and giving intoxicating liquors to a person who was in the habit of getting intoxicated. On the trial the court refused to permit defendant to prove that he did not know the party he was charged with furnishing the intoxicating liquors to was in the habit of getting intoxicated, and that ruling of the court was assigned as error in this court. Upon that question this court said (page 402): "That fact, if proven, would constitute no defense to the charge in the indictment. The statute makes a sale to a person in the habit of getting intoxicated a crime, and that, too, without regard to the question whether the vendor had knowledge of the habits of the person to whom the sale was made or not." The same rule is announced in *Mapes v. People*, 69 Ill. 523.

The principles announced in these cases are applicable to the case at bar. Indeed, the peril of selling to a minor or person in the habit of becoming intoxicated would seem much greater than that of selling in less quantities than five gallons, for in the former case the obstacles in the way of ascertaining whether a person was a minor or in the habit of becoming intoxicated might be very great, while in the latter case it is within the power of the seller to ascertain the quantity of intoxicating liquors he is selling. The act prohibited by the statute under consideration is a statutory offense. The offense is selling intoxicating liquors in less quantities than five gallons. In discussing the subject of when ignorance or mistake of fact is a defense in criminal cases, *Greenleaf* (volume 3, § 21) says: "This rule would seem to hold good in all cases where the act, if done knowingly, would be *malum in se*. But where a statute commands that an act be done or omitted which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation. Thus, for example, where the law enacts the forfeiture of a ship having smuggled goods on board, and such goods are secreted on board by some of the crew, the owner and officers being alike innocently ignorant of the fact, yet the forfeiture is incurred notwithstanding their ignorance. Such is also the case in regard to many other fiscal, police, and other laws and regulations, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted, for the law in these cases seems to bind the party to know the facts and obey the law at his peril." *Commonwealth v. Weiss*, 139 Pa.

247, 21 Atl. 10, 11 L. R. A. 530, 23 Am. St. Rep. 182, was an action to recover a penalty for the sale of oleomargarine for butter. While it is not clearly stated in the opinion of the court that the defendant was a dealer, and not a manufacturer, of the product sold, as we understand the opinion such was the case. The defendant at the trial asked the court to instruct the jury if they believed from the evidence that he did not knowingly furnish or authorize to be furnished or have knowledge that any of his customers were being furnished with oleomargarine, but so far as he knew they were furnished butter, the verdict should be in his favor. This instruction was refused, and the ruling of the court in refusing it is the principal question discussed in the opinion of the court. The court cited and quoted the section from Greenleaf above cited, and in an able opinion, in which a large number of authorities are referred to, held that the legality or illegality of the sale did not depend upon the ignorance or knowledge of the party charged. The cases referred to in that opinion will be found instructive and applicable to this case. Authorities might be multiplied in support of this view, as the weight of authority in other states supports it. The construction given to similar statutes in most jurisdictions is that, where the statute does not make knowledge of the seller an element of the offense, his lack of knowledge or good faith is not a defense. There are authorities in some states to the contrary, but they are in the minority, and are contrary to the previous decisions of this court. To adopt any other rule would be in a large measure to defeat the object and purposes of the statute. In our opinion the court did not err in refusing to admit the evidence.

The plaintiff in error introduced evidence that he sold 28 bottles of beer to the case, while a larger number of witnesses testified for the prosecution that there were only 26 bottles in the cases bought by them. Which was correct was a question for the jury. *Eastman v. People*, 93 Ill. 112.

Complaint is made of the vessels used by the witnesses in measuring the beer and of their introduction in evidence by the people. The proof shows the county clerk sent these measures by special messenger to the Secretary of State to have them tested and stamped by him. Section 9, c. 147, Hurd's Rev. St. 1905, makes the Secretary of State custodian of the authorized public standards of measures, and provides that he shall prove by such standards all measures that may belong to any county and be brought to him for that purpose by the county sealer. When found accurate, he is required to stamp them with the letter "I," with a seal provided for that purpose. Whether these measures belonged to the county or not, and whether the Secretary of State was required to test

them, is immaterial. They were taken to him by a messenger of the county clerk and the Secretary did test and stamp them as correct, and, in the absence of proof to the contrary, this is sufficient evidence that they were correct measures.

The prosecution claimed on the trial that receiving pay for a case of beer by plaintiff in error and leaving the case at his place, issuing to the purchaser a ticket with numbers on it, for the purpose of enabling the purchaser to procure as many bottles of beer at a time as he desired, and have the ticket punched for the number of bottles received, was a sale in less quantities than five gallons even if the case contained that amount, and that the method of issuing tickets and delivering part at a time on presentation of the tickets was a shift or device for the purpose of evading the law. Several witnesses testified, for the prosecution, to the procuring of beer in this manner. They testified they never saw the case after paying for it, and did not know where the bottles came from they procured on tickets. Some of them testified to buying one brand and receiving two different brands of beer on the ticket issued therefor. Two employees of plaintiff in error testified that, when the witnesses for the prosecution bought cases and received tickets instead of taking the case of beer away, they separated the case from the stock, marked it, and allowed no one to have beer out of it except the man holding the ticket for it. The court, by proper instructions, submitted to the jury for its determination, under the evidence, whether this was a shift or device to evade the law. As we have before said, the credibility of the witnesses was the province of the jury to determine. If they gave credit to the testimony of the witnesses for the prosecution, they were justified in finding that sales made in this manner were a violation of the law. We cannot say that they were not justified in giving credit to the witnesses for the prosecution. In criminal as well as civil cases great weight is to be given to the verdicts of juries upon controverted questions of fact, and they will not be disturbed by courts of appellate jurisdiction unless palpably contrary to the decided weight of the evidence. *Steffy v. People*, 180 Ill. 98, 22 N. E. 861; *People v. Horchler*, 231 Ill. 566, 83 N. E. 428. On the merits of the case we are unable to say that the proof offered on the part of the prosecution was insufficient to establish the plaintiff in error's guilt.

We shall not extend this opinion by a discussion of other errors assigned by plaintiff in error. We have examined them, and find no prejudicial error in the record that would justify a reversal of the judgment.

The judgment of the Appellate Court is therefore affirmed.

Judgment affirmed.

(236 Ill. 30)

# MANN v. ILLINOIS CENT. TRACTION CO. et al.

(Supreme Court of Illinois. Oct. 26, 1908.)

## 1. APPEAL AND ERROR (§ 1094\*)—REVIEW—DECISIONS OF INTERMEDIATE COURTS—QUESTIONS OF FACT.

In an action for injuries from negligence, where there is any evidence fairly tending to establish plaintiff's case, its sufficiency is not open to inquiry in the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4322; Dec. Dig. § 1094.\*]

## 2. MASTER AND SERVANT (§ 217\*)—INJURIES TO SERVANT—ASSUMED RISK—OPERATION OF RAILROADS.

Decedent while a motorman of an interurban car, received injuries in a collision with another car at a passing point, from which he died. The collision was caused by decedent's inability to stop his car in time, owing, plaintiff claimed, to the slippery condition of the tracks, due to wet weeds permitted to grow thereon, which were broken down and crushed on the rails. The place where the accident occurred was not the usual stopping place, but was selected because the car he was directed to pass was delayed, and there was no evidence that intestate knew of the effect of the weeds at that point on his ability to stop the car. *Held*, that intestate was not bound to know such effect, and that he did not assume the risk as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-583; Dec. Dig. § 217.\*]

## 3. TRIAL (§ 190\*)—INSTRUCTIONS—ASSUMPTION OF FACTS.

An instruction charged that it was a master's duty to exercise reasonable care to furnish the servant a reasonably safe place to work, and another charged that a servant assumed only such risks as were usually incident to his employment, and any extraordinary hazards of which he had notice, or which, by the reasonable exercise of his faculties, he could have noticed, but that he did not assume the risk of dangers known to the master, or which by the exercise of reasonable care could be known to, and avoided by, the master, provided such dangers were unknown to the servant, and could not have been known to him by the ordinary exercise of his faculties. *Held*, that such instructions were not objectionable as assuming that defendant failed to furnish deceased with a reasonably safe place to work.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-435; Dec. Dig. § 190; Cent. Dig. Master and Servant, § 1147.]

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, Sangamon County; James A. Creighton, Judge.

Action by Elias B. Mann, as administrator of Earl Buehler, deceased, against the Illinois Central Traction Company and others. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendants appeal. Affirmed.

Graham & Graham, for appellants. Brown, Wheeler, Brown & Hay and Hamilton & Catron, for appellee.

FARMER, J. This is an appeal from a judgment of the Appellate Court for the Third District, affirming a judgment of the

circuit court of Sangamon county for \$2,500, recovered by appellee in a suit for damages for the death of Earl Buehler, his intestate, alleged to have been caused by the negligence of appellants. The declaration contained one count, and averred that appellants were operating an electric railway, upon which the cars were equipped with air brakes; that appellants allowed grass and weeds to grow up along their track and between the rails; that when the grass and weeds became wet with dew, they weighted down upon the track, and were mashed upon the rails and made the stopping of the cars thereon difficult by making the rails slippery; that on the night of August 17, 1905, deceased, who was employed on said road as motorman, tried to stop his car, and was prevented by the slippery condition of the rails, caused by the weeds, and that his car collided with another car, and so injured him that he died. The deceased was in the employ of appellants as motorman from May 14 to August 17, 1905, and ran a car between Springfield and Carlinville. During this time, he left Springfield each day at 3, 7, and 11 o'clock p. m., and arrived at Carlinville two hours later, except upon the last trip, when he usually went only as far as Thayer, a station about halfway between Springfield and Carlinville, where he met a north-bound car coming from Carlinville. He would take charge of this car and surrender his car to the crew of the north-bound car, who would take it to Carlinville and he would return with the north-bound car to Springfield. Each motorman received his orders by telephone from a dispatcher at Springfield. On arriving at a stopping place the motorman would communicate with the dispatcher, and receive orders for the movement of the car. On the night of his injury deceased left Springfield at 11 o'clock p. m., and ran his car to Thayer, the usual stopping place, making several stops on the way. At Thayer he communicated with the dispatcher, and, as the north-bound car was late, was directed to proceed to Virden Siding, and meet the north-bound car at that place. At Virden Siding there is a stub switch, connected at the south end with the main track. South-bound cars have the right of way, and it was the duty of deceased, upon his arrival at that place, to stop his car on the main track 100 or 200 feet north of the switch, and wait until the north-bound car went into the switch. When this was done, the crews exchanged cars. The south-bound car would proceed on the main track, and after passing the switch, the north-bound car would return to the main track and proceed north to Springfield. Upon reaching Virden Siding deceased did not stop his car north of the switch point, but proceeded south to a point about 300 feet south of the switch, where his car collided with the north-bound car. It appears from the evidence that at the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

place of the accident the track was slightly downgrade to the south; that the main track at Virden Siding was overgrown with grass and weeds from 12 to 18 inches high; that the grass and weeds were so high that they were made greasy by contact with the axles of the car, to which lubricating oil was applied, and that the wheels of the cars would crush the weeds and grass on the rails; and that there was a heavy dew on the night of the accident, and immediately after the collision there were crushed weeds and grass on the rails, and the track was slippery and greasy. It is not shown at what point deceased applied the air to the brakes to stop his car at this switch, but when the conductor, who had been standing on the rear end of the car, stepped off at a point about 200 feet south of the switch, the air had been applied to the brakes, the wheels of the car were sliding on the rails, and the car was moving at a speed of about 12 miles per hour, and so continued for about 100 feet, when it collided with the approaching north-bound car. The headlight on the north-bound car was burning, and from this point an approaching north-bound car could be seen for a distance of 2 or 3 miles. The force of the collision crushed in the vestibule of the south-bound car, knocked the front truck from under the north-bound car, broke its windows and vestibule, and its platform went over the platform of the car deceased was operating, and crushed him, where he was found with his hand on the controller.

Appellants in their statement say they contend there is no evidence that deceased was exercising due care; that there is no evidence that the presence of weeds made it more difficult to stop the car, or that the presence of weeds was the cause of the failure of deceased to stop his car; that there is no evidence appellants were guilty of negligence in permitting weeds to grow along their track, and that there is no evidence that the deceased did not have equal opportunity with appellants to know of the presence of weeds and their effect upon stopping cars. In their argument appellants say they insist there was no sufficient evidence upon these questions to authorize a recovery. Much of their brief and argument is devoted to a discussion of the sufficiency of the evidence. It is well understood, of course, that in cases of this character, where there is any evidence fairly tending to establish the plaintiff's cause of action, its sufficiency is not open to inquiry in this court. It would not be profitable to either of the parties for us to set out in detail the substance of the testimony. We have examined it sufficiently to know that it fairly tended to prove the allegations of the declaration necessary to authorize a recovery, and we could say neither more nor less if we should take the pains to analyze the evidence. There was no conflict in the testimony. Appellants called but one wit-

ness, and the subject upon which he testified cannot be said to raise a conflict in the testimony. We may say, however, upon the question whether it should be held, as a matter of law, that deceased assumed the risk of injury from the negligence complained of in the declaration, the evidence shows that deceased had been in appellant's employment as a motorman for about three months prior to the accident, during which time he passed over the track at the place where he was injured several times each day. The evidence further shows that Virden Siding was not the regular meeting place of cars operated by deceased with other cars. The usual place was Thayer, but, on account of the north-bound car being late on the night in question, deceased was ordered to meet the north-bound car at Virden Siding. It is not shown that deceased had any other opportunity for knowing the condition of the track at Virden Siding than such as could be observed in passing over it without stopping. The evidence also tends to show that a heavy dew tended to weight the weeds and grass down on the rails; and, the evidence not showing that deceased had occasion to stop at Virden Siding before, we think it cannot be said, as a matter of law, that he was bound to know the condition of the weeds and grass on the track, and the effect they would have when he attempted to stop the car. Under the evidence, whether he knew, or should have known, these things and assumed the risk of injury thereby was a question of fact properly submitted by the court to the jury.

Objection is made to instructions 1 and 2, given on behalf of appellee. Instruction 1 informs the jury that it is the duty of the master to exercise reasonable care to furnish the servant a reasonably safe place in which to work. Instruction 2 is as follows: "The court instructs the jury that a servant assumed only such risks as are usually incident to his employment, and any extraordinary hazard of which he has notice, or which by the reasonable exercise of his faculties he could have noticed, but he does not assume the risks of danger known to the master, or which by the exercise of reasonable care should be known to the master, or which can be avoided by the master by the exercise of reasonable care, provided such dangers are unknown to the servant, and could not have been known to him by the ordinary exercise of his faculties." The complaint made of these instructions is that they assume appellant failed to furnish deceased a reasonably safe place to work. This criticism appears to us without foundation. Both state the law correctly, the first one in abstract form, but it announces a rule of law that was applicable to the case.

We find no justification in this regard for reversal by this court of the judgment of the Appellate Court, and it is therefore affirmed.

Judgment affirmed.

(226 Ill. 36)

**BRADBURY et al. v. VANDALIA LEVEE & DRAINAGE DIST.**

(Supreme Court of Illinois. Oct. 26, 1908.)

**1. DRAINS (§ 63\*)—ACTIONS FOR FLOODING LANDS—DECLARATION.**

A declaration in an action against a drainage district averring that a levee caused the waters of a river to rise above the levee at a place where plaintiffs' lands were situated, but not averring damage to any lands except plaintiffs', was not subject to special demurrer on the ground that it charged that other lands besides plaintiffs' had been damaged, since the averment as to raising the water at such place above the levee was only made in connection with plaintiffs' lands, and not lands not owned by them.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 63.\*]

**2. DRAINS (§ 63\*)—DRAINAGE DISTRICTS—LIABILITY FOR FLOODING LANDS.**

A drainage district organized pursuant to Laws 1879, p. 120, together with the amendments thereto, section 2 of which makes the lands embraced in the district liable for damage sustained by lands above such district by the construction of any levee, ditch, or drain, is liable for damage to lands resulting from the construction of a levee below them, and thereby obstructing the natural flow of a river in times of floods so as to hold the same back upon the lands.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 63.\*]

**3. EMINENT DOMAIN (§ 31\*)—DRAINAGE OF LANDS—"PUBLIC USE."**

Lands taken or damaged by a drainage district for its purposes are taken or damaged for a "public use."

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 77; Dec. Dig. § 31.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5825-5837; vol. 8, p. 7774.]

**4. DRAINS (§ 63\*)—DRAINAGE DISTRICTS—LIABILITY FOR FLOODING LANDS.**

A drainage district organized under Laws 1879, p. 120, together with the amendments thereto, which act is based upon Const. art. 4, § 31, authorizing the General Assembly to pass laws permitting the construction of drains and levees for agricultural, and other purposes across the lands of others, is not relieved from liability for damage to lands resulting from the construction of a levee below them obstructing the natural flow of a river in times of floods so as to hold the same back upon the lands, on the ground that the damage resulted from the exercise of the police power of the state through the district, as a mere governmental agency, where, so far as appears, the district was organized to improve the lands for agricultural purposes, and upon the petition of a majority of the owners.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 63.\*]

Appeal from Appellate Court, Fourth District, on appeal from Circuit Court, Fayette County; A. M. Rose, Judge.

Action by John Bradbury and another against the Vandalia Levee and Drainage District. From a judgment of the Appellate Court affirming the judgment of the circuit court for defendant, plaintiffs appeal. Reversed and remanded, with directions.

Brown & Burnside, for appellants. B. W. Henry and Albert & Matheny, for appellee.

CARTWRIGHT, O. J. The circuit court of Fayette county sustained the demurrer of appellee, the Vandalia Levee and Drainage District, to the amended declaration of appellants, John Bradbury and Mary Bradbury, filed in this action of trespass on the case for damages to appellants' lands, resulting from the construction by appellee of a levee along the Kaskaskia river and across the bottom lands to the bluffs bordering on the same. Appellants stood by their declaration, whereupon judgment was rendered against them for costs, and on appeal to the Appellate Court for the Fourth District the judgment was affirmed. From the judgment of the Appellate Court, this appeal was taken.

The declaration contains four counts, the first of which avers that the plaintiffs are the owners of and in possession of a tract of land containing about 18 acres, on the west side of the Kaskaskia river, which flows in a southwesterly direction through the county of Fayette; that, before the building of the levee by defendant, the lands were not subject to overflow by the freshets or floods of said river and were valuable farming lands; that the defendant is a drainage district organized on or about September 9, 1902, under the act entitled "An act to provide for the construction, reparation and protection of drains, ditches and levees, across the lands of others, for agricultural, sanitary and mining purposes, and to provide for the organization of drainage districts," in force May 29, 1879 (Laws 1879, p. 120), together with the amendments thereto; that the plan of the improvement, as fixed by the decree of the county court of said county, included the construction of a levee along the east side of the Kaskaskia river, beginning at the mouth of Lynn creek, about a quarter of a mile down the river from the plaintiffs' lands, and extending down the river about 12 miles, and also a levee from the mouth of said creek in an easterly direction to the bluffs; that during the summer of 1904 the defendant caused said levee to be erected about 8 feet in height and 4½ feet wide on top, with no outlet from the river into the lands lying on the east side; that at the time of floods and freshets said river overflows its banks and inundates a strip of land about 2 miles in width; that, by reason of the construction of the levee, the flood channel below the lands of plaintiffs is narrowed and in some places does not exceed 300 feet; that by reason of the construction of the levee the waters of the river were caused to rise much higher on the west side of the river and above the levee, and to thereby overflow the plaintiffs' lands in time of freshets; that their lands were damaged and injured, the crops growing thereon were destroyed, the soil was washed away, and the lands rendered unwholesome and unhealthy and depreciated in value, and that, by reason of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

section 2 of said act under which the defendant was organized, it became liable to pay the plaintiffs their said damages. The third count is substantially the same as the first, and the second and fourth contain the same averments as the first respecting the plaintiffs' lands, the organization of the district, and the effect of the levee as an obstruction to the flow of the waters, but they charge that the defendant wrongfully caused the levee to be constructed, and that before the building of the levee the plaintiffs' lands were only overflowed in times of extreme floods, whereas since that time they are overflowed and damaged and rendered unwholesome in times of only moderate floods and freshets. The demurrer is both general and special, and alleges as special ground of demurrer that the declaration charges that other lands besides those of the plaintiffs have been damaged. The declaration avers that the levee caused the waters of the river to rise much higher on the west side and above the levee, which might include lands not owned by the plaintiffs, but there is no averment of damage to any lands except those of the plaintiffs, and no cause of action is stated or attempted to be stated as to any other lands. The lands of the plaintiffs are on the west side of the river above the levee, and the averments as to raising the water on that side and above the levee are only made in connection with those lands. The declaration is not obnoxious to the special ground stated.

The declaration states facts showing injury and damage to the plaintiffs' lands resulting from the act of the defendant in building the levee below them, and thereby obstructing the natural flow of the waters of Kaskaskia river in times of floods and freshets so as to hold the same back upon said lands, and the substantial question raised by the demurrer is whether the defendant is liable for such damage. If an individual owner of the land where the levee was constructed had done the same acts as the defendant, he would be liable for the consequent damage. He would have no right to build a levee which would prevent the escape of the flood waters, and thereby flood the lands of the plaintiffs. In *Stout v. McAdams*, 2 Scam. 67, 33 Am. Dec. 441, the court said: "There can be no doubt that every flowing back or throwing water upon the land of another is such an act as entitles the individual injured to his action." That case arose from the obstruction of a natural water course by a dam, and the principle has been applied by this court alike to obstructions to the natural flow of surface waters and natural water courses. *Gillham v. Madison County Railroad Co.*, 49 Ill. 484, 95 Am. Dec. 627; *Gormley v. Sanford*, 52 Ill. 158; *Ohio & Mississippi Railway Co. v. Webb*, 142 Ill. 404, 32 N. E. 527; *Rock Island & Peoria Railway Co. v. Krapp*, 173 Ill. 219, 50 N. E. 663; *Pinkstaff v. Steffy*,

216 Ill. 406, 75 N. E. 163. In *Gillham v. Madison County Railroad Co.* the doctrine of the civil law by which the owner of lower ground has no right to erect embankments whereby the natural flow of the water from the upper ground shall be stopped was adopted; and in *Gormley v. Sanford* it was held that there was no difference in principle whether the water comes from the clouds above or has fallen upon remote hills and comes thence in a running stream. The court said (page 162 of 52 Ill.): "The cases asserting a different rule for surface waters and running streams furnish no satisfactory reason for the distinction. \* \* \* The right of the owner of the superior heritage to drainage is based simply on the principle that nature has ordained such drainage, and it is but plain and natural justice that the individual ownership arising from social laws should be held in accordance with pre-existing laws and arrangements of nature. As water must flow, and some rule in regard to it must be established where land is held under the artificial titles created by human law, there can clearly be no other rule at once so equitable and so easy of application as that which enforces natural laws." Again, in *Pinkstaff v. Steffy*, it was considered that there could be no difference whether the water that submerged the land of Steffy came from the hills above the land or from the overflow of the stream along the same.

Under the rule of the civil law adopted by this court, the right of drainage is governed by the law of nature, and the lower proprietor cannot do anything to prevent the natural flow of surface water and cast it back upon the land above (30 Am. & Eng. Ency. of Law [2d Ed.] 326); and this court recognizes no distinction between surface waters and those flowing in a natural water course. In *Burwell v. Hobson*, 12 Gratt. (Va.) 322, 65 Am. Dec. 247, it was contended that a riparian proprietor may lawfully protect his property from floods by erecting a dike or other obstruction on his own land, though its necessary effect may be to turn the superabundant water on the land of his neighbor, but the court said: "Such a distinction between the ordinary and extraordinary flow of a stream is not laid down or recognized by any elementary writer nor in any adjudged case, so far as I have seen. The utmost extent to which the authorities seem to go in that direction is that a riparian proprietor may erect any work in order to prevent his land being overflowed by any change of the natural state of the stream and to prevent its old course from being altered (Angell on Water Courses, § 333), but he has no right, for his greater convenience and benefit, to build anything which in times of ordinary flood will throw the water on the grounds of another proprietor so as to overflow and injure them."

The question in this case is whether an ag-

gregation of landowners can, by voluntarily accepting the privileges conferred by the levee act and organizing a drainage district, erect a levee which obstructs the natural flow of water and injures the land of another and the district incur no liability. It is contended that there is no such liability because the drainage district is an involuntary quasi public corporation, which is neither liable for its own torts or the wrongs or negligence of its officers. It is first to be observed that in this case it is not necessary to the maintenance of the action that the corporation or its officers should have been guilty of either wrong or negligence. The first and third counts aver that the scheme of the improvement as fixed by the decree of the county court included the construction of the levee, which was erected in accordance with said decree. Under those counts the damage resulted, not from negligence or improper construction, but from the adoption of the plan of drainage to benefit the lands within the district; and in *Stout v. McAdams*, supra, which was an action on the case, it was held that, although the act of one person may be in itself lawful, yet, if in its consequences it necessarily damages the property of another, the party occasioning the damage is liable to make reparation commensurate to the injury he has caused. The defendant has power to exercise the right of eminent domain and to have the damage to lands occasioned by the construction of its works determined. Lands taken or damaged by a drainage district for its purposes are taken or damaged for a public use, and compensation must be made therefor. *Wabash Railroad Co. v. Coon Run Drainage & Levee District*, 194 Ill. 310, 62 N. E. 679; *Juvinall v. Jamesburg Drainage District*, 204 Ill. 106, 68 N. E. 440. If a drainage district actually takes land, compensation must be made before the land is appropriated, and, if the district concedes that damage will result to lands, such damages may be assessed under the law of eminent domain; but if the district does not concede, in the first instance, that damage will result, an action on the case is an appropriate remedy to determine the question whether lands will be damaged and to recover the damages. Under the Constitution private property cannot be taken or damaged for a public use without just compensation, and this gives a right of action. The demurrer admits that plaintiffs' lands have been damaged for a public use, and that the damage has not been ascertained or paid.

On the proposition that the defendant is an involuntary quasi public corporation, and for that reason not liable to respond in damages for any of its acts, the case of *Elmore v. Drainage Com'rs*, 135 Ill. 269, 25 N. E. 1010, 25 Am. St. Rep. 863, is relied upon. That was a suit by an owner of lands included in the district who had been assessed for draining his lands, and after the pay-

ment of his assessment the district, without his knowledge or consent, enlarged the boundaries and discharged so much water into the ditches on his land that the ditches would not carry it, and also did the work so carelessly and negligently as to overflow and submerge his lands. There was a judgment against the plaintiff on a general demurrer, and the charge of the declaration was negligence in the construction of the drains and in connecting the drains and ditches of the added territory with the drains on plaintiff's lands without enlarging such drains sufficiently to carry off the increased volume of water. The substantial grounds of the decision were that it would be presumed that the plaintiff was fully compensated in the original assessment for his lands taken for the ditch and all damages consequent upon its construction for the original purpose; that, if by the enlargement of the district an additional burden of water was cast on his lands, the consequent damages should have been assessed by a jury and paid by the district, but that the damages claimed in the declaration were either caused by the wrongful act of the commissioners in discharging the new and additional waters upon the plaintiff's premises or occasioned by negligence or misconduct on their part for which the remedy must be against them personally. Under that decision the landowner was not bound to suffer the injury, but could have enjoined the district until his damages on account of the additional burden of water had been assessed and paid. The court held that the drainage district was not a private corporation, formed by voluntary agreement for private purposes, which was undoubtedly correct. It was also said that while drainage districts had been classed as municipal corporations in *Commissioners of Havana Tp. v. Kelsey*, 120 Ill. 482, 11 N. E. 256, and other cases, there were substantial grounds of distinction, and that they were to be regarded as mere public involuntary quasi corporations, and therefore not liable to respond in damages to an individual injured by the negligent or wrongful act of their officers, agents, or servants. That doctrine was repeated in *Heffner v. Cass and Morgan Counties*, 193 Ill. 439, 62 N. E. 201, 58 L. R. A. 353, but it is quite evident that it needs some revision or limitation. The ground of distinction between corporations which are liable for the negligent or wrongful act of their agents or servants and those which are not is that public involuntary quasi corporations are mere political or civil divisions of the state created by general laws to aid in the general administration of the government and are not so liable, while those which are liable have privileges conferred upon them at their request, which are a consideration for the duties imposed upon them. *Kinnare v. City of Chicago*, 171 Ill. 332, 49 N. E. 536. Neither the state nor any part of it is divided

by the Legislature into drainage districts, nor do they have public duties thrust upon them without their consent. The organization of a drainage district is for the sole and exclusive benefit of the territory within the district (Commissioners of Union Drainage District v. Highway Com'rs, 220 Ill. 176, 77 N. E. 71), and the lands within the district are assessed to pay the whole costs on the theory that they alone are benefited. A drainage district can only be organized upon the petition of a majority of the owners of lands within the proposed district who shall have arrived at lawful age and who represent one-third of the area of the lands to be reclaimed or benefited, and the organization is not different, in principle, from the organization of cities, villages, or towns under a general law, on a petition of a certain proportion of the legal voters within the territory. It is correct to say that a drainage district is a quasi corporation if the act under which it is organized does not make it a corporation in fact, but it is not created for political purposes or for the administration of civil government. Undoubtedly a drainage district is not liable for the unauthorized acts of its commissioners for which they are personally liable, but the district is clothed with the power of eminent domain for the purposes of its organization, and is prohibited by the Constitution from taking or damaging lands without making compensation therefor. If no means were furnished with which to pay such damages, that fact would furnish no authority for causing such damage, and the obvious result would be that acts causing damage to others could not be performed at all. That is not the case, however, as to this district. Section 2 of the act under which the defendant is organized provides that lands embraced in drainage districts organized under it shall be liable for any and all damages which may be sustained by any lands lying above such drainage district by the construction of any levee, ditch, or drain in such district under the act. The statute declares the liability and the law contemplates that it shall be enforced by an assessment upon the lands. No other kind of action could be brought to charge the lands in the district with the damages to plaintiffs' lands than the one adopted here, and, if damages should be recovered, they are to be collected by assessment against the lands.

But it is further contended that the defendant is not liable because the injury resulted from the exercise of the police power of the state through the district, as a mere governmental agency. The removal of large bodies of stagnant water which produce malaria and breed disease is conducive to the health and welfare of the public, and such removal is within the police power of

the state (Green v. Swift, 47 Cal. 536), and there have been cases where the drainage of lands for that purpose was referred to the police power residing in the state. The basis for the law under which the defendant is organized, however, is found in section 31 of article 4 of the Constitution, which provides that "the General Assembly may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes, across the lands of others, and provide for the organization of drainage districts and vest the corporate authorities thereof with power to construct and maintain levees, drains and ditches, and to keep in repair all drains, ditches, and levees heretofore constructed under the laws of this state, by special assessments upon the property benefited thereby." The act under which the defendant is organized provides for drainage for agricultural or sanitary or mining purposes, to be maintained by special assessment upon the property benefited thereby. If the county court finds that the proposed drains, ditch, or ditches, levee, or other works is or are necessary or will be useful for the drainage of the lands proposed to be drained thereby for either agricultural or sanitary or mining purposes, the district is to be organized. It is not contended that any other than sanitary purposes come within the undefined limits of the police power, and districts formed under the act are not necessarily organized as a police regulation to drain lands which would be a menace to public health or a breeder of malaria and disease. So far as appears, this district, with its scheme for a levee, was organized for the purpose of improving the lands within the district for agricultural purposes, which is not an exercise of the police power, and it was organized upon the petition of a majority of the owners of lands in the belief that they would be benefited by the organization. To deny to the plaintiffs a recovery of the damages which they have suffered by the effort of the owners of lands within the district to benefit themselves would be against natural right and every sentiment of justice, and we find no sufficient reason for exempting the district from liability, whether the levee is regarded as a wrongful obstruction to the waters of the river or as a lawful one under the decree of the county court.

The circuit court erred in sustaining the demurrer and the Appellate Court erred in affirming the judgment. The judgments of the Appellate Court and circuit court are reversed and the cause is remanded to the circuit court, with directions to overrule the demurrer.

Reversed and remanded, with directions.

(236 Ill. 64)

## PEOPLE ex rel. BIGGS v. SMITH.

(Supreme Court of Illinois. Oct. 26, 1908.)

## PAUPERS (§ 5\*)—OVERSEER OF THE POOR—APPOINTMENT AND TENURE OF OFFICERS.

Hurd's Rev. St. 1905, c. 107, § 18, makes supervisors in counties under township organization ex officio overseers of the poor, but provides that in counties of 4,000 inhabitants, upon the supervisor's request, the county board may appoint an overseer of the poor and fix his term of office, which shall not exceed the term of the board. A supervisor of a township in a county of more than 4,000 inhabitants requested the county board to relieve him of the duties of overseer of the poor "for his term," whereupon the board appointed an overseer for the ensuing year, who acted until the board making the appointment was succeeded by a new board. On the organization of the new board, the supervisor stated that he would perform the duties of his office as ex officio overseer of the poor for the ensuing year, but the board nevertheless appointed an overseer. *Held*, that the new board could not appoint an overseer of the poor upon the request made to the old board.

[Ed. Note.—For other cases, see Paupers, Dec. Dig. § 5.\*]

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, Sangamon County; R. B. Shirley, Judge.

Information in the nature of quo warranto by the people, on the relation of H. H. Biggs, to test the title of R. P. Smith to the office of township overseer of the poor. From a judgment of the Appellate Court affirming a judgment of the circuit court for Smith, relator appeals. Affirmed.

Appellee, R. P. Smith, was at the regular election in April, 1906, elected supervisor of Capitol township, Sangamon county, for the term of two years. By virtue of his office of supervisor, the statute made him overseer of the poor of Capitol township. By section 18, c. 107, Hurd's Rev. St. 1905, it is provided that in counties under township organization supervisors shall be ex officio overseers of the poor in their respective towns, and that in townships containing 4,000 inhabitants or more, upon the written request of the supervisor, "the county board may appoint an overseer who is a resident of such town, fix his compensation and term of office, which shall not exceed the term of said board." Capitol township, in Sangamon county, contains more than 4,000 inhabitants, and after his election in 1906 appellee sent to the board of supervisors the following communication: "Springfield, Ill., April 10, 1906. To the Honorable Board of Supervisors of Sangamon County: The undersigned supervisor of the township of Capitol, in said county, would respectfully request this honorable body to relieve him of the duties of overseer of the poor of Capitol township for his term. R. P. Smith, Supervisor at Large, Capitol Township." Thereupon the board of supervisors appointed an overseer of the poor for the ensuing year and fixed his compensation. Said appointee gave bond

and entered upon the duties of his position, and continued to discharge said duties until the board making the appointment was succeeded by the new board, which was organized on the 9th day of April, 1907. Immediately upon the organization of the board of supervisors in 1907, the appellee presented to the board a communication, in which he stated that he would perform the duties of his office as ex officio overseer of the poor for Capitol township during the ensuing year. The board of supervisors, however, on the 15th of April, 1907, appointed relator overseer of the poor of said Capitol township for the ensuing year at a salary of \$100 per month. Relator gave the bond required by the board, which was approved, and demanded of appellee the books and papers belonging to the position of overseer of the poor. Appellee refused to deliver them to him, and thereupon an information in the nature of quo warranto was filed in this case by appellant, in which it was charged that relator was the lawful overseer of the poor of said Capitol township, but that appellee had unlawfully usurped and intruded into and holds said office of overseer without any warrant or right whatever. The information contained the usual prayer that the appellee be required to show by what authority he claimed to be overseer of the poor of Capitol township. Appellee filed a plea setting up his election and qualification as supervisor in 1906; the communication addressed to the board that year by him, asking to be relieved of the duties of overseer of the poor; the appointment of an overseer by the board for that year; also the communication addressed by him to the new board upon its organization in 1907, stating that he would perform the duties of overseer of the poor, and alleging that he did thereupon enter upon the discharge of said duties and has so continued since that time. A demurrer was filed by appellant to this plea, but was overruled, and, appellant electing to stand by the demurrer, judgment for appellee was entered and the costs taxed against the relator. That judgment has been affirmed by the Appellate Court, and the case is brought to this court by appeal from said Appellate Court.

F. L. Hatch, State's Atty. (E. S. Smith, of counsel), for appellant. Albert Salzenstein and Edmund Burke, for appellee.

FARMER, J. (after stating the facts as above). Appellant's contention is that, when appellee requested the board of supervisors to relieve him of the duties of overseer of the poor "for his term," it amounted to a resignation or relinquishment of the duties of overseer of the poor for the full term of his office as supervisor, and that he could not again assume those duties during his term,

and that the appointment of relator as overseer of the poor by the new board was valid. Appellee contends that he could not resign as overseer of the poor without resigning the office of supervisor, but could only request the board to relieve him of those duties by appointing some person to perform them, that such appointment could only be made for a period not to exceed one year, and that upon the expiration of the term for which said appointment was made the duties of the supervisor as overseer of the poor again devolved upon him. It is not disputed that the term of the board to which appellee made his request expired upon the organization of the board of supervisors in 1907, and that the term of the overseer appointed by the old board also expired at that time. It then remains to be determined whether the new board could appoint an overseer of the poor upon the request made to the old board.

When appellee was elected and qualified as supervisor, he became overseer of the poor by virtue of his election and qualification to that office. Overseer of the poor is not an office, but the duty of caring for the poor is by law made one of the duties to be performed by the supervisor by virtue of his office as such supervisor. The statute providing for the relief of a supervisor, at his request, from the duties of overseer of the poor, does not contemplate a resignation of an office, but simply relief from certain duties. The office to which the duties of overseer of the poor attaches is that of supervisor, and the only duty of that office that the incumbent may be relieved of, upon his request, is that of overseer of the poor. Asking to be relieved of those duties is not a resignation of any office. The authorities cited by counsel upon the subject of the resignation of an office are not applicable here. A supervisor could not resign as overseer of the poor without resigning his office as supervisor. All he could lawfully do while holding the office of supervisor was to request the county board to relieve him from the duties of overseer of the poor for such time as the board had authority to relieve him. That is what he did. While it is true that in doing so he used the words "for his term," this meant no more than that he did not care to discharge the duties of overseer of the poor during his term of office, and that he desired to be relieved of those duties for such a period of time as that board might lawfully relieve him. The board appointed a person to perform those duties for a period of one year. They could not appoint for a longer time. When this period expired, as it did in this case by the organization of the new board, the duties of overseer of the poor again devolved upon appellee, whose duty it was then to perform them or by request in writing ask the new

board to relieve him of them. The request to the old board was not a request to the new board, and the new board in this case could not act upon the request made to the old board; and whether or not appellee notified the new board of his determination to resume the duties imposed upon him by law as overseer of the poor those duties devolved upon him immediately upon the expiration of the term of the person appointed by the old board, and continued as a duty to be performed by him so long as he held the office of supervisor, or until he proceeded in accordance with the statute and requested the new board to relieve him of those duties and they complied with his request. No request was made to the new board that appointed relator for such relief, and its action in appointing him was without authority of law, and void. The trial court therefore did not err in overruling the demurrer to appellant's plea.

The judgment of the Appellate Court is therefore affirmed.

Judgment affirmed.

(236 Ill. 49)

**RACKEMANN et al. v. TILTON et al.**

(Supreme Court of Illinois. Oct. 26, 1908.)

**1. WILLS (§ 614\*) — CONSTRUCTION — TESTAMENTARY TRUSTS.**

Testator's will indicated an intention to distribute his entire estate to five of his children equally. By paragraphs 3 and 4 he gave to his sons G. & C. each one-fifth, and by paragraph 5 one-fifth was bequeathed in trust for his daughter E., remainder to three of her children on their attaining 25 years of age. He then, by paragraphs 7 and 8, identical in form, bequeathed one-fifth of his estate in trust for each of his sons F. and W. The trustee as to these shares was directed to pay over such sums as he might deem expedient to the beneficiaries; they being authorized to dispose of the remainder of their shares in the family by will. The clauses also declared that if, on the death of the beneficiary, the shares had not been paid over to him, or if he should not have disposed thereof by will, the remainder should be divided among testator's children named in the third, fourth, and fifth clauses and the survivor of the two provided for in the seventh and eighth clauses, "subject to the same trusts and provisions on which they respectively received their portions of the estate." *Held*, that on the death of F. without having exercised the power of appointment, and before his estate had been delivered to him by the trustee, W. took a life estate in one-fourth of the property devised in trust for F., subject to the provisions of the eighth clause of the will, and that, on W.'s death, the fee in such interest was distributable, not to his heirs, but to the heirs and devisees of the children mentioned in such other clauses, and this though such construction operated to create an intestacy as to an infinitesimal part of the estate.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 614.\*]

**2. WILLS (§ 449\*) — PRESUMPTION AGAINST INTESTACY — REBUTTAL.**

Where the portion as to which testator died intestate under a particular construction of his will is so small that it has no visible form nor appreciable value, the presumption that he did

not intend to die intestate, and that such construction was therefore inconsistent with testator's intent, might be rebutted by slight circumstances.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 965; Dec. Dig. § 449.\*]

**3. JUDGMENT (§ 713\*)—CONSTRUCTION OF WILL—CONCLUSIVENESS.**

Where the question as to the extent of the interest of two devisees in the remainder created by a particular clause of the will did not arise, and was neither presented nor considered in a prior action to construe the will, an evident inaccuracy in the decree rendered in that action as to the interest of one of such devisees was not controlling in a subsequent proceeding in which such devisee, who was alone affected by the former inaccurate provision, consented to a modification thereof.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1234-1241; Dec. Dig. § 713.\*]

**4. TRUSTS (§ 271½\*)—TRUSTEES—POWERS—PARTITION.**

A trustee under a will may not partition the trust property to each of the owners without the control of some court.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 271½.\*]

**5. TRUSTS (§ 271½\*)—TRUST PROPERTY—PROCEEDINGS BY TRUSTEE.**

On the termination of a trust, the trustee may invoke the jurisdiction of equity to partition the property among the beneficial owners.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 271½.\*]

**6. PARTITION (§ 95\*)—FORM OF DECREE—FINDINGS OF FACT.**

A partition decree, finding that certain of the parties to the suit are owners of the real estate in controversy, fixing the interest of each, and decreeing partition accordingly, was not defective because without general findings of fact.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 300-316; Dec. Dig. § 95.\*]

**7. PARTITION (§ 114\*)—PROCEEDINGS BY TRUSTEE—ALLOWANCE FOR ATTORNEY'S SERVICES.**

Where a testamentary trustee, on the termination of the trust, properly instituted suit for partition of the property which was of great value, and the trustee's solicitors correctly set out the interest of the parties under the will, an allowance of \$1,500 for their services was proper.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 447; Dec. Dig. § 114.\*]

**8. TRUSTS (§ 317\*)—PROCEEDINGS BY TRUSTEE—TRUSTEES' SERVICES—ALLOWANCE.**

Where a trustee during the carrying out of the trust deducted current and usual percentages for his services, and in a suit brought by him for partition would have little or nothing to do except to distribute what money was in his hands, in case the property was divided in kind, and, if not, the distribution would be made by a master, an allowance of \$3,000 for his services in the partition suit was excessive, and should be reduced to \$1,500.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 444, 460; Dec. Dig. § 317.\*]

Appeal from Circuit Court, Cook County; Lockwood Honore, Judge.

Suit by Felix Rackemann, as successor in trust under the will of John Hancock, deceased, and others, against Mary Ellen Tilton and others, for a construction of the will. From an adverse decree, defendants appeal. Affirmed.

John Hancock, of Boston, in the state of Massachusetts, died April 1, 1859, leaving a last will, dated April 1, 1857. Francis V. Balch was trustee under the will for two of the legatees, Franklin and Washington Hancock, and upon the death of Franklin filed a bill in the circuit court of Cook county for partition and for a construction of clause 7 of the will, under which the trust estate had been held for Franklin. The cause was heard in the circuit court of Cook county and a decree rendered that the president and fellows of Harvard College had no interest in the property under the will of Charles Lowell Hancock, one of the devisees under the will of John Hancock, who died testate after the death of his father, John Hancock, and before the death of Franklin. From that decree Harvard College appealed to this court. This court reversed the decree of the circuit court and remanded the cause, with directions to the circuit court to enter a decree in accordance with the opinion then filed. *Harvard College v. Balch*, 171 Ill. 275, 49 N. E. 543. After the cause was remanded in accordance with the directions given in our former opinion, except for an inaccuracy noted in the opinion which follows this statement. The property involved is located on South Water street, in Chicago, between La Salle street and Fifth avenue, and was at one time all held in trust for Franklin and Washington Hancock. The property was paying satisfactory returns in the way of rentals, and by common consent of the parties interested no actual division thereof was made, although a decree for that purpose had been entered under the direction of this court. The case was continued from time to time on the docket of the circuit court until after the death of Washington Hancock, another of the beneficiaries under the will, which occurred August 27, 1904. Balch died in 1898, and Felix Rackemann was thereupon substituted as trustee. After the death of Washington Hancock the trustee, Rackemann, filed the present supplemental bill for partition and for the purpose of obtaining a further construction of the will in view of contingencies and complications that had resulted from the death of Washington Hancock, and which, it was thought, were not covered by the opinion of this court, or the decree entered in pursuance thereof, in the original proceeding.

John Hancock by his will devised and bequeathed his estate to five of his children, except that he made to others certain specific bequests not necessary to be here considered, and which will accordingly be disregarded by us in this case. In order to understand the precise questions now presented, it is necessary to consider only the following portions of that will, to wit:

"(3) I give and bequeath to my son George

Hancock one-fifth part of my estate, deducting from his portion whatever may be due on a settlement of my account.

"(4) I give and bequeath to my son Charles Lowell Hancock one-fifth part of my estate, deducting from his portion whatever may be due on settlement of my account.

"(5) I give and bequeath one-fifth part of my estate in trust, and direct the increase thereof to be paid over, in equal quarterly payments, to my daughter, Elizabeth Lowell Moriarty, beyond the control of any husband she may have, and her sole receipt for the same shall be sufficient. At her decease I direct so much of the said income as may be sufficient, to be appropriated for the support and education of the children of my said daughter, to-wit, John Hancock Moriarty, Joseph Moseley Moriarty and Elizabeth Hancock Moriarty, till each child shall arrive at the age of twenty-five years, when one-third of the whole principal remaining in trust is to be paid each child, excepting Elizabeth Lowell Hancock Moriarty, whose share is to be secured and divided as herein-after mentioned. If any one of the said children of my said daughter shall die before reaching the age of twenty-five years, his or her share shall go to the survivors or survivor equally, to be paid at the same time as he or she receive his or her share. Should any child of my said daughter marry and have issue, such issue shall represent the parent, notwithstanding the parent may not live to the age of twenty-five years. It is my will that the income of the share of Elizabeth Lowell Hancock Moriarty shall be secured to her in equal quarterly payments, beyond the control of any husband she may have, and at her death the principal shall be divided among her children, and if she leaves no children, I direct it to be divided between her brothers, John H. Moriarty and Joseph M. Moriarty, equally, or their children."

"(7) I give and bequeath one-fifth part of my estate to a trustee upon trust, to invest the same and appropriate so much of the income thereof as he in his discretion shall think needful for the support of my son Franklin. It is my will that the trustee may pay over to my son his portion of my estate at such time and in such sums as he may deem expedient, desiring him to consult the interest and welfare of my son, and that my son, in case his portion of my estate is not paid to him as aforesaid, shall have power to dispose of the same by will, in the family. I direct that at the decease of my son, if his portion of my estate should not have been paid over to him, as aforesaid, or if he should not have disposed of the same by will, the whole sum remaining in the hands of the trustee shall be divided among my other children, to-wit, George, Charles Lowell, Elizabeth Lowell and Washington, in the same way, subject to the same trusts and provisos, upon which they respectively receive their

portions of my estate. It is my will that my son may appoint his own trustee.

"(8) I give and bequeath one-fifth part of my estate to a trustee, upon trust to invest the same and appropriate so much of the income thereof as he in his discretion shall think needful for the support of my son Washington. It is my will that the trustee may pay over to my son his portion of my estate at such time and in such sums as he may deem expedient, desiring him to consult the interest and welfare of my son, and that my son, in case his portion of my estate is not paid to him as aforesaid, shall have power to dispose of the same by will, in the family. I direct that at the decease of my son, if his portion of my estate should not have been paid over to him, as aforesaid, or if he should not have disposed of the same by will, the whole sum remaining in the hands of the trustee shall be divided among my other children, to-wit, George Charles Lowell, Elizabeth Lowell and Franklin, in the same way, subject to the same trusts and provisos, upon which they respectively receive their portions of my estate. It is my will that my son may appoint his own trustee."

It will be observed that clauses 7 and 8 are identical in phraseology, except that in 8 Franklin's name appears where Washington's name appears in 7, and Washington's name appears in 8 where Franklin's name appears in 7. Franklin and Washington each died without any part of the principal of the fund held in trust having been paid to him, and without exercising the power of appointment given by the will of his father. All the other children of John Hancock mentioned in the portion of the will above quoted predeceased Washington.

When this case was here on the former appeal, the primary question involved was whether, after the death of Franklin Hancock without having exercised the power of appointment, and before any part of the principal of the fund had been distributed to him by the trustee, the other four children named in the portion of the will above set out took a vested or contingent remainder in the property bequeathed for the use of Franklin Hancock. It was then determined that the remainder was vested, and that the portion of that property that vested in Charles Lowell Hancock passed to Harvard College under the residuary clause of the will of Charles, who predeceased Franklin. The principal question involved in the present litigation is: Did Washington Hancock take an equitable fee in the one-fourth of that portion of the estate in the hands of the trustee for Franklin subject to the life estate of the latter, or did he take only such interest with such rights and powers as was conferred upon him by clause 8 regarding the property by that clause bequeathed? Upon this question

the circuit court held that the interest of Washington Hancock in the one-fifth interest held by the trustee for Franklin was subject to all the provisions of clause 8 of the will, and that it stood upon the same footing as the property bequeathed to Washington, or for his use, by that clause. A decree awarding partition and appointing commissioners was then entered, and from that decree this appeal is prosecuted.

The value of the real estate involved is \$200,000, all of which passes under clauses 7 and 8 of the will, being that portion of the estate of John Hancock originally distributed under those clauses. There was also in the hands of the trustee approximately \$11,000, arising from the rents of the property. The decree directs him to distribute that money to the parties in proportion to their interests in the real estate as fixed by that decree. Appellants Ellen Tilton and Della Clegg are daughters of James Scott Hancock, a son of John Hancock not named in the portion of the will above set out, and, their father having died prior to the death of Washington Hancock, they inherit from their uncle, Washington Hancock, a portion of all of the property of which he was seised in fee at the time of his death. Their first contention is that, upon the death of Franklin Hancock before the principal of the fund was distributed to him by the trustee and without exercising the power of appointment, under the will of his father, the one-fifth devised in trust for him under the will of John Hancock passed in equal parts to his four surviving brothers and sisters, or to the representatives of such of them as had predeceased Franklin; that the one-fourth of the property held by the trustee for Franklin which passed to Washington vested in him an equitable fee, his trustee holding the legal title; and that upon the death of Washington Hancock intestate such interest passed, under the statute of descent, to the legal heirs of Washington Hancock.

It is not necessary to set out in detail the interest that each party would receive if appellants' contentions be sustained. Appellants take an interest in the property irrespective of the decision of questions here involved. Their interest will, however, be materially increased if their views be adopted.

Albert M. Kales, for appellants. Holt, Wheeler & Sidley, Runnells, Burry & Johnstone, and Thomas G. Vent, for appellees.

SCOTT, J. (after stating the facts as above). The interest which Franklin Hancock took in the estate of his father is fixed by clause 7 of the will. The interest which Washington Hancock took in the vested remainder created by that clause is determined by the referential words found therein and by the language of clause 8 of the will, by which the primary provision for Washington

was made. By that referential provision Washington takes the one-fourth of the one-fifth devised by clause 7, after the termination of Franklin's life estate, in the same way, subject to the same trusts and provisos upon which he received his portion (to so designate it) of the estate of John Hancock. That portion last mentioned he held for life with a power of appointment by will, the legal title being vested in a trustee, who had authority to distribute to him the principal of the estate if he saw fit, and in that portion there was a vested remainder in the other four children named in the portion of the will set out in the foregoing statement, which might be defeated by a distribution of the principal to Washington or by the exercise of the power of appointment. It is entirely apparent that, if the ordinary significance be attached to the words found in the referential clause, Washington, subject to his brother's life estate, would take, with reference to the vested remainder created for him by clause 7, the same interest, right, and power as, and no greater interest, right, or power than, given him in reference to the property bequeathed by clause 8; that after the death of Franklin and Washington, nothing having been done to defeat the vested remainders created by clauses 7 and 8, the title to all of the property bequeathed by those sections would pass to the legatees named in clauses 3, 4, and 5 of the will, or, in the event of their death, to those who represent them, and this was the view adopted by the chancellor and embodied in his decree. While it appears clear, upon an inspection of the will alone, that this conclusion is correct, appellants insist that this result involves an absurdity which could not have been contemplated by the testator, and for that reason, among others, the conclusion must be erroneous. Stated briefly, the alleged absurdity is this: If Washington took an interest in the vested remainder created by clause 7 it would be a vested remainder in one-twentieth of the estate, and, if he held that one-twentieth subject to the same terms, conditions, and restrictions as he held the property bequeathed by clause 8, then, as clauses 7 and 8 are identical except as to the substitution of the names of Franklin and Washington each for the other, Franklin would have a vested remainder back in the one-fourth of that one-twentieth, or in the one-eighth of the estate, and Washington would have a vested remainder back in the one-fourth of that one-eighth, or the one-three hundred and twentieth of the estate, and so on in unending succession, the result being that by this mathematical demonstration an infinitesimal fraction of the estate, being the least possible portion thereof more than nothing, would never vest by virtue of the will in those who take under clauses 3, 4, and 5 of the will. These mathematical oscillations would result immediately upon the death of John Hancock, and are of no

practical importance. They can be made use of only in tracing the precise course of the title to those who hold under clauses 3, 4, and 5. The absurdity consists only in the fact that according to this demonstration the testator died intestate as to a portion of his estate represented by the smallest fraction that can be expressed by our system of numbers. The chancellor's view does not require the destruction of that portion of the estate nor violate any fixed rule of construction, but results only in the intestacy of John Hancock as to that portion of his property. The chancellor disregarded that fraction and treated it as though it had been vested in those who took under clauses 3, 4, and 5, giving to those who took under those clauses the same interest in the property as though this negligible fraction had passed to them. This error is not reversible, as we held in *Glos v. Furman*, 164 Ill. 585, 45 N. E. 1019, that one-vigintillionth of one-vigintillionth of a fraction of the east inch of a tract of real estate could have no practical existence for the purposes for which lands are acquired and held. Indeed, counsel for appellants does not contend that the decree should be reversed because that inconsiderable fraction of the title was decreed to those who hold under clauses 3, 4, and 5. The only importance attached to this array of figures is that it shows that such a result as the one reached by the circuit court could not have been intended by the testator. We think the reasoning too refined for the affairs of a practical world. The decree of the chancellor is based on the theory that the testator, by the language used, disregarded, and died intestate, as to that small portion of his estate. Appellants argue that this construction overthrows the presumption that the testator intended by his will to dispose of all his property, and insist that a construction should be resorted to that would defeat intestacy as to any part of the estate. Where the portion as to which the testator died intestate, under a particular construction of the will, is so small that it has no visible form and no appreciable value, this presumption may be rebutted by a very slight circumstance.

The appellants' contention that Washington took in the vested remainder created by clause 7 an equitable fee subject to the life estate of Franklin involves an incongruity of more practical moment than that shown by the mathematical demonstration alluded to above. For some reason the testator regarded Franklin and Washington as not capable of exercising proper care for the conservation of the property the income from which he desired them to enjoy. Consequently he hedged their dominion over that property with the restrictions found in clauses 7 and 8 as to the property conveyed by each of those clauses, respectively. But, if appellants' contention be correct, he gave Washington absolute dominion over the vested remainder which he took under clause

7, and, had Franklin's death occurred the day after the death of his father, Washington would have been at liberty to scatter to the four winds that one-twentieth of the estate which he obtained by the provisions of clause 7. Why such care so far as the property in which Washington took an interest under clause 8, and such absence of restraint upon his power to dispose of the property in which he took an interest under clause 7? We think the conclusion reached by the chancellor, which involves merely the holding that the testator died intestate as to the smallest possible fraction of his property, more reasonable than the theory, in view of the referential words used, that he intended to give an equitable fee to Washington in the property passing to him under clause 7, while placing upon his right to the property passing under clause 8 the restrictions found therein.

The case principally relied upon by counsel for appellants in this connection is *Shanley v. Baker*, 4 Ves. 732. In that case the testator devised certain leasehold houses in trust for the separate use of his granddaughter to receive the rents for the remainder of the term, and certain other property of the same character to his daughter for her separate use during her life, she to receive the rents thereof during the unexpired terms, and, after her death, to her children, if any, if none, to fall into the residue, and the residue he devised in trust for the use of his daughter and granddaughter, to be divided equally between them, and to be paid and applied in like manner as the rents and profits of the leasehold premises were to be paid. It was there held that the words of reference in the residuary clause, "in like manner," had relation, not to the extent of the interests which the daughter and granddaughter should take in the residue, but to the provision that they should take for their separate use, and that they therefore took the residue absolutely; the words "in like manner" meaning only "for their separate use," and not indicating estates for life. Following that reasoning, as he says, counsel urges that the referential words found in the will of John Hancock, to wit, "in the same way, subject to the same trusts and provisos, upon which they respectively receive their portions of my estate," should be given like construction, and held to mean only that Washington's interest in the vested remainder created by section 7 should be held in the same way as the property which he held under clause 8—that is, it should be held in trust for him—and that the words should not be held to limit the extent of the interest of Washington in such vested remainder; that, therefore, Washington, subject to Franklin's life estate, took an equitable fee absolutely in the one-fourth of the property which passes under clause 7. The referential words in the case at bar designate and apply the provisions of the clause to which they refer

with greater accuracy than did those involved in the Shanley Case. Here Washington's vested remainder was to be held, not only in the same way, but also "subject to the same trusts and provisos" upon which he received his principal bequest. We think it is only by disregarding the language last quoted that the result sought by appellants can be reached.

It is then urged that the decree entered in the circuit court in accordance with the directions given by this court when the cause was first here is an adjudication in favor of appellants as to the construction to be placed upon the referential words. That decree found that Elizabeth L. H. Wood, as the daughter of Elizabeth Lowell, one of the children (then deceased) of the testator mentioned in clause 5 and in clause 7 of the will, took absolutely and in fee one-twelfth of the property in which a vested remainder was created by clause 7, and, if the view now contended for by appellees be correct, she would have taken that interest not in fee, but as the beneficiary of a certain trust and subject to the terms and conditions mentioned in clause 5. The decree now appealed from alters the earlier decree in this respect, and provides that this one-twelfth interest is to be held in trust for Mrs. Wood in the manner provided by section 5 of the will, and that her interest therein is precisely the same as her interest in the property specifically mentioned in clause 5. Mrs. Wood does not object to this alteration of the earlier decree, but consents thereto, and agrees that the former decree was inaccurate in finding that she took this one-twelfth absolutely. Moreover, if the former decree is to be looked to for the purpose of determining the question now before us it will be found inconsistent with itself, because it provided that of the property in which there was a vested remainder under the seventh clause, "an undivided four-sixteenths thereof belongs to Felix Rackemann, as trustee, as aforesaid, for Washington Hancock." The words "as aforesaid" in that portion of the decree we think refer to the portion of the will providing for a trustee for Washington, and, had the question now before us been under consideration, these words would have been consistent only with the theory that Washington took, in reference to the property conveyed to him by clause 7, only the same right, interest, and power that he took with reference to the property bequeathed by clause 8. In the former suit, however, the principal question adjudicated by the court was as to whether the remainder created by clause 7 was vested or contingent; the conclusion being that it was vested, and that as a result thereof the interest of Charles Lowell Hancock therein, who predeceased Franklin, passed under the residuary clause of the will of Charles, devising and bequeathing the residue of his estate to the president and fel-

lows of Harvard College. The question as to the extent of the interest which Mrs. Wood or Washington took in the remainder created by clause 7 did not arise, was neither presented nor considered, and the evident inaccuracy in the decree in reference to the character of the interest of Mrs. Wood cannot be regarded as now controlling.

It is also insisted that the form of the decree is wrong. The will authorized the trustee to divide the property bequeathed by clauses 7 and 8, respectively, upon the termination of the respective life estates, and it is said that under these circumstances the trustee has no power to sell, but that it is his duty to convey to each of the owners of the property his, her, or its undivided interest therein. The decree does not authorize the trustee to sell the property. Manifestly he should not be permitted to partition and set off a separate parcel to each of the owners thereof without the control of some court to which the parties aggrieved, if any, by the partition made by him could apply for protection. To convey to each of the owners an undivided part, as counsel insists he should do, is not to divide the property but to leave it undivided. The trustee has invoked the power of a court of equity to partition this property in accordance with the rights of the respective parties therein. We think the method pursued unobjectionable and a substantial compliance with the will.

It is then urged that the decree is without general findings of fact upon which it is based. The decree is an ordinary decree in partition. Its form has been used in this state for at least 25 years without objection thereto having been made, so far as we are advised. It finds that certain of the parties to this suit are the owners of this real estate, and fixes the interest of each therein and decrees partition accordingly. Counsel fails to state what particular facts should have been found that are omitted, and we are unable to discover any material omission.

The supplemental bill was filed by the solicitors for the trustee, and it correctly set up the interests of the parties, and asked that the will be given a construction in accordance with the theory of the trustee as to the rights of the owners of the real estate as that theory was disclosed by that bill. Counsel for the trustee seem to have taken no part in the contest over the construction of the will, but that has been carried forward by counsel for appellants on the one side and counsel for Harvard College on the other. The decree allowed for the solicitors for the trustee as compensation for their services the sum of \$1,500, and to the trustee "for his services in this cause and for making proper distribution of said estate herein" the sum of \$3,000. These allowances are attacked by appellants. In view of the great value of the interests in-

volved, in view of the fact that the solicitors for the trustee correctly set out the interests of the parties by the supplemental bill, and in view of the testimony taken on the trial with reference to the value of the services of these solicitors, we are not disposed to disturb the allowance made for them. We think, however, that the allowance made to the trustee for his services is excessive. At the time the allowance was fixed Mr. Rackemann had been trustee for about 10 years, receiving the trust estate upon the death of the former trustee, Mr. Balch, who had been his partner in business. During the time Mr. Rackemann has been trustee he has deducted from the rentals collected, current, and usual percentages for his services. The allowance was made for his services to the estate rendered in this suit and for making distribution of the entire estate. He states in this court, by his solicitors, that actual partition of the property "seems feasible and the parties in interest are now planning such partition." If such actual partition should be made in this proceeding, no further service in reference to the principal of the estate will be required at the hands of Mr. Rackemann. All that he will be required to do farther will be to distribute the money in his hands. If the property is found to be indivisible the proper course is for the court to direct a master, special commissioner or other officer to make sale and distribute the proceeds. For the services rendered by such master, special commissioner or other officer the fees allowed by law to a master may be paid, and Mr. Rackemann, as trustee, will have nothing to do either with the sale or distribution of the proceeds. For such service as he has rendered in reference to setting this proceeding on foot and conducting the litigation, and for such service as he may render in distributing the rentals on hand at the time the decree was entered, we think \$1,500 is sufficient compensation. An allowance was also made to the solicitor for appellants and to the solicitors for Harvard College for services rendered by them in aiding the chancellor to arrive at a correct construction of the ambiguous clauses of the will. Some objections have been made to these allowances by the briefs. These objections we cannot consider on account of the lack of necessary assignments of error and cross-error.

The decree now under review will be modified by striking therefrom, in that portion thereof fixing the allowance to the trustee for his services, the figures "3,000" and inserting in lieu thereof the figures "1,500." In all other respects that decree will be affirmed. The costs of this court will be adjudged one-half against appellants and one-half against appellees.

Decree modified and affirmed.

(236 Ill. 69)

**McGUIRE v. BOYD COAL & COKE CO.**  
et al.

(Supreme Court of Illinois. Oct. 26, 1908.)

**1. INJUNCTION (§ 48\*)—RESTRAINING TRESPASS—ADEQUACY OF LEGAL REMEDY.**

Where there are continuing and repeated trespasses of a grave character, causing irreparable injury and the absolute destruction of complainant's property, equity will interfere by injunction, though for a single act of simple trespass to property there is an adequate remedy at law; and hence, in cases of the extraction of ores or coal from a mine, the cutting down of timber, or the extraction of oil or gas, an injunction will be granted.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 101; Dec. Dig. § 48.\*]

**2. APPEAL AND ERROR (§ 184\*)—OBJECTIONS NOT MADE BELOW—ADEQUACY OF LEGAL REMEDY.**

An objection that one suing to restrain defendant from mining coal, and for an accounting for coal taken, has an adequate remedy at law, presented for the first time on appeal, comes too late.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1179-1183; Dec. Dig. § 184.\*]

**3. MINES AND MINERALS (§ 52\*)—TITLE—EVIDENCE.**

Where, in a suit to restrain the mining of coal, the description in a deed conveying to complainant seams of coal is by itself inaccurate, but, by reference to recorded deeds, is made certain, and complainant's grantor was in possession under a deed purporting to convey the entire fee to him, complainant's deed was prima facie evidence of title in him to the coal.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 52.\*]

**4. MINES AND MINERALS (§ 51\*)—WRONGFUL REMOVAL OF MINERALS—MEASURE OF DAMAGES.**

The measure of damages for knowingly and wrongfully mining the coal of another is the value of the coal at the mouth of the pit, less the cost of conveying it there from the place where mined, which is the cost of loading and hauling the coal to the foot of the shaft, hoisting and dumping it into the car at the top; and, as between the wrongdoer and the owner, the general expenses of operation of the mine must be charged to mining, and not to transportation.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 141; Dec. Dig. § 51.\*]

**5. MINES AND MINERALS (§ 52\*)—RESTRAINING INTERFERENCE WITH THE COAL OF ANOTHER—EXTENT OF RELIEF.**

Where one wrongfully drove entries through the coal of another, the court, on enjoining the former from taking the coal of the latter, properly enjoined him from going into or using such entries.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 52.\*]

Appeal from Circuit Court, Randolph County; Charles T. Moore, Judge.

Suit by E. B. McGuire against the Boyd Coal & Coke Company and another. From a decree for complainant, defendants appeal. Affirmed.

Willam M. Shuwerk and James H. Martin, for appellants. R. J. Goddard and H. Clay Horner, for appellee.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

DUNN, J. Appellee, E. B. McGuire, filed his bill in the circuit court of Randolph county against the appellants, the Boyd Coal & Coke Company and W. R. Borders, in which he sought a perpetual injunction restraining them from mining coal from the seams underlying certain land, and for an accounting for coal already taken. A preliminary injunction was granted, which, after a hearing in open court, was made perpetual, and appellants were decreed to pay to appellee \$10,634.65, being for 28,000 tons of coal at 37½ cents per ton, in addition to \$134.65, the cost of a survey of the mine. The pleadings put in issue complainant's title to the coal. A freehold being thus involved, an appeal to reverse the decree has been prosecuted directly to this court.

The evidence shows that the complainant owned the seams of coal in question, but not the surface of the land, and that the defendant Borders owned the coal underlying the adjoining land, which he had leased to his codefendant, the Boyd Coal & Coke Company, of whose capital stock of \$112,000 he owned all but four shares. The company, under his express direction, knowingly and intentionally went over the line and mined complainant's coal for some time before this bill was filed, and until the injunction writ was served upon them.

It is first insisted that complainant's remedy at law was complete and adequate, and that therefore a bill in equity will not lie to enjoin a trespass. This is the rule as to a single act of simple trespass to property; but, where there are continuing and repeated trespasses of a grave character, causing irreparable injury and the absolute destruction of the complainant's property, equity will interfere by injunction. *Village of Itasca v. Schroeder*, 182 Ill. 192, 55 N. E. 50; *City of Joliet v. Werner*, 166 Ill. 34, 46 N. E. 780; *Edwards v. Haeger*, 180 Ill. 99, 54 N. E. 176; *City of Peoria v. Johnston*, 56 Ill. 45. Where irreparable mischief has been done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, the cutting down of timber, the removal of coal, or the extraction of oil or gas, an injunction will be granted. *Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566. The objection that appellee had an adequate remedy at law was not presented to the circuit court by demurrer or answer to the bill, but is presented here for the first time. It comes too late. The existence of a remedy at law cannot be set up, on appeal, to defeat an injunction, when it was not presented by way of demurrer or answer to the bill. *Monson v. Bragdon*, 159 Ill. 61, 42 N. E. 383; *Village of Vermont v. Miller*, 161 Ill. 210, 43 N. E. 975; *Kaufman v. Wiener*, 169 Ill. 596, 48 N. E. 479.

It is next insisted that the evidence fails to show that appellee was the owner of the coal, because the description in the deed of conveyance to him is defective. The description in the deed is inaccurate, but by reference to two other recorded deeds, which were offered in evidence, it is made entirely certain. His grantors are shown to have been in possession under a deed purporting to convey the entire fee to them, and their deed to the appellee of the underlying coal was therefore prima facie evidence of title in him.

Appellants contend that the court adopted a wrong theory as to the measure of damages. Both parties agree that the measure of recovery which should be allowed is the value of the coal at the mouth of the pit, less the cost of conveying it there from the place where mined. *Illinois & St. Louis Railroad Co. v. Ogle*, 92 Ill. 353; *McLean County Coal Co. v. Long*, 81 Ill. 359. Appellants insist, however, that all work connected with the production of the coal, except the actual cost of separating it from its natural position in the ledge by the miner, and the first cost of construction of the mine, of the sinking the shaft, and of permanent structures, should be charged to transportation. We do not assent to this. The only deduction from the value of the coal at the mouth of the pit to which appellants are entitled is the amount paid for loading and hauling it to the foot of the shaft, hoisting and dumping it into the car at the top. As between the wrongdoer and the owner of the coal, the general expenses of operation of the mine do not enter into the question. As between them, such expenses must be charged to mining, and not transportation. The cost of loading at the face of the mine was 27½ cents per ton. The weight of the evidence shows the cost of transportation to the foot of the shaft, hoisting and dumping, to have been from 20 to 25 cents a ton. The coal was worth 85 cents to 90 cents a ton at the mouth of the mine. The court found the value, less the cost of transportation from the face of the mine, to be 37½ cents a ton, and this finding is in accordance with the evidence. The engineer who made the survey testified that 27,647 tons of complainant's coal had been taken out. Deducting the impurities claimed to exist in the coal, and adding the coal mined after the survey was made, and before the service of the writ of injunction, the court found that appellants had taken 28,000 tons of coal, and such finding was justified by the evidence.

The injunction restrained appellants from entering into or using the entries driven through appellee's coal for any purpose, and it is insisted that it should not have been made perpetual. The seams of coal belonged to appellee. The appellants had no right there. They had wrongfully driven the entries, absolutely without right. It was prop-

er, while enjoining the taking of appellee's coal, to enjoin appellants from going into or using the entries.

The decree was right and it will be affirmed.

Decree affirmed.

(236 Ill. 73)

**FOULD DE GRASSE v. H. W. GOSSARD CO.**

(Supreme Court of Illinois. Oct. 26, 1908.)

**1. APPEAL AND ERROR (§ 719\*)—REVIEW—ERRORS NOT ASSIGNED.**

Errors not assigned on appeal from the Appellate Court to the Supreme Court cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 719.\*]

**2. APPEAL AND ERROR (§ 78\*)—RIGHT TO APPEAL—"FINAL DECREE."**

On a bill for accounting under a license to use a patent, a decree finding facts substantially as alleged in a bill and ordering a reference, and ordering that, in stating the account, the master make specific charges against defendant, and that defendant disclose specified facts within its knowledge, and reciting that the court retained jurisdiction to enter such further order and decree as the case might require, was appealable as a final decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 473-474; Dec. Dig. § 78.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2774-2798; vol. 8, p. 7063.]

**3. APPEAL AND ERROR (§ 78\*)—RIGHT TO APPEAL — DECREE — FINALITY — "FINAL DECREE."**

A decree may be final, though it directs a reference.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 473-474; Dec. Dig. § 78.\*]

Carter, J., dissenting.

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; Thomas G. Windes, Judge.

Bill by Consuelo Fould De Grasse against the H. W. Gossard Company. From an order of the Appellate Court for the First District dismissing defendant's appeal from a decree for complainant, defendant appeals. Reversed and remanded.

This is a bill in chancery filed by appellee against appellant, setting up a certain alleged contract dated August 1, 1903, which provides that appellant shall have the exclusive right to manufacture and sell in the United States corsets embodying certain patented busks during the life of said patent, and shall pay as royalty to appellee 4 francs on each corset and make at least 2,160 corsets each year; that appellant should make to the complainant quarterly reports of the number manufactured and sold, and for any failure to make such reports complainant might, by giving notice, terminate such license. The alleged contract further provided that, if at the end of any year the sum paid as license fees should not amount to at least \$1,728 for each year by giving a like notice,

the license might be terminated, but such termination of such license should not affect the liability for license fees then due. The bill alleges that appellant has manufactured a large number of corsets embodying said device in busks, and has failed to keep proper books and make reports to complainant, or pay anything whatsoever as agreed in and required by said contract; that on October 14, 1905, on account of such failure, notice was given and the contract was terminated, appellee demanding the return of said original letters patent and an accounting, both of which demands appellant refused; that other persons and corporations have manufactured and sold large numbers of said corsets for appellant and under its direction, and that the number of corsets embodying said invention sold by appellant, or for it and under its direction, has been largely in excess of said minimum number, 2,160; that the number of such corsets is unknown to appellee and cannot be ascertained except by an accounting; that the accounts and information in relation to such manufacture and sale are exclusively within the knowledge and control of appellant, and that appellee is entitled to an examination and inspection of said books and records; that by mutual mistake the said letters patent were misdescribed as 803,191 instead of 703,191. The bill prays that the contract, as to the mistake in the number of the patent, may be reformed; that said contract may be enforced and a discovery may be made of the number of corsets manufactured or sold, and that appellant may be directed to produce its books, etc., for the inspection of appellee; that an accounting may be had and appellant be decreed to pay the amount found due, and for general relief. A general and special demurrer having been overruled, appellant elected to stand by its demurrer, whereupon the bill was taken as confessed and a decree entered which made findings of fact substantially as alleged in the bill, and ordered that the cause be referred to a master in chancery to take proof and report to the court the account stated; that the books and records be produced by appellant and witnesses examined; that in stating the account the master charge the defendant with the minimum sum of \$1,728 per year during the time the contract was in effect, amounting to \$3,792, and also with four francs for each corset embodying said busks manufactured and sold by or on behalf of said appellant in excess of the minimum annual number, 2,160, and that the master correct the contract by indorsing on its face the correct number of the letters patent; that appellant disclose and make answer as to certain specified facts within its knowledge. The decree, in conclusion, ordered "that the court retains jurisdiction herein for the purpose of entering such further order and de-

cree herein as the case may require." An appeal was thereupon prayed and allowed to the Appellate Court for the First District. In that court a motion was made by appellee to dismiss the appeal because the decree was interlocutory and not final. This motion was taken with the case, and on January 14, 1908, that court entered an order dismissing the appeal on the ground that the order and decree of the circuit court "is interlocutory only, and is not a final decree, from which an appeal to this court may be taken." From this order an appeal has been taken to this court.

Edmund S. Carr, for appellant. Shope, Zane, Busby & Weber (Hayes McKinney, of counsel), for appellee.

FARMER, J. (after stating the facts as above). Appellant first contends that the bill is not so drawn as to authorize a court of equity to take jurisdiction in the matter; that the charge of fraud is too general, and that the bill does not show that a discovery is indispensable to the attainment of justice, or that the facts sought to be discovered are material; that it does not name the officer or agent who has knowledge of the facts sought to be discovered; that the bill shows there were no mutual accounts to be adjusted, and that, therefore, equity does not have jurisdiction; and that there was an adequate remedy at law. A sufficient answer to all these points is that the assignments of error in this court do not relate to any of these questions, but exclusively to the alleged errors of the Appellate Court in holding that the decree of the circuit court was interlocutory, and not final.

The only question open for our consideration is whether the Appellate Court erred in dismissing the appeal on the ground that the decree appealed from was not a final decree in the sense that authorized an appeal to be prosecuted from it, but was interlocutory merely. The decisions of the various courts of this country are not in entire harmony as to whether decrees settling the rights of the parties in substance, but referring the cause to a master for some particular purpose, are final decrees. This court, however, is committed to the doctrine that decrees of the character here in question are final in the sense that an appeal may be prosecuted. The decree was a final adjudication of the rights of the parties and of appellant's liability to appellee, as charged in the bill. It found appellant liable to appellee for \$3,792—a sum certain—and an additional sum of 4 francs for each corset embodying appellee's improvement manufactured and sold by appellant, or by any one else by its direction, during the life of the contract between the parties, in excess of the minimum number of 2,160; and, for the purpose of determining whether there was an excess, and, if so, how many corsets in excess of

said minimum number had been sold by or under the direction of appellant, it was ordered to produce its books and records for examination. No mutual accounts were to be adjusted between the parties, and the reference was only for the purpose of determining the amount appellant should be charged with, if anything, in addition to the amount found due from it to appellee by the court. This was to be determined by testimony, all of which was in the knowledge and under the control of appellant, as to whether appellant had manufactured and sold more than the minimum number of corsets provided for in the contract. If it had, it was liable to appellee for 4 francs for each of said corsets; and, if it had not, its liability would remain \$3,792.

In *Stahl v. Stahl*, 220 Ill. 188, 77 N. E. 67, the decree found that a conveyance of real estate to certain parties was constructively fraudulent, and that the grantees held the property in trust for the benefit of all of the children of the grantor, seven in number, each of whom was in equity the owner of the one-seventh part thereof, and that said children were entitled to one-seventh of the rents of the said real estate from the date of its conveyance by their mother, and the cause was referred to the master for an accounting in that respect. An appeal was prosecuted from that decree to this court, where a motion was made to dismiss it on the ground that it was not a final decree. The motion was reserved to the hearing, and upon consideration it was denied; the court holding that the decree finally determined the equitable ownership of the property, and adjudged that John Stahl held the title in trust for the benefit of the children of Fredericka L. Stahl, his grantor, but that, in so far as it referred the case to the master for an accounting, the decree was interlocutory. The bill in *Allison v. Drake*, 145 Ill. 500, 32 N. E. 537, prayed that a former decree of the court in a partition suit and a subsequent conveyance and execution sale of certain land claimed by complainants be set aside and for an accounting. Upon a hearing a decree was entered setting aside the proceedings and decree in the partition suit, also the conveyance mentioned in the bill. The decree found the interest of the several parties to the suit in the land as alleged in the bill, ordered partition thereof, appointed commissioners to make said partition, and also decreed that an accounting be had for the use and occupation of the land, and referred the cause to the master for that purpose. An appeal was prosecuted from that decree, and a motion was made in this court to dismiss the appeal on the ground that it was not final. The court said (page 510 of 145 Ill., page 539 of 32 N. E.): "This contention is based upon the fact that the decree, after definitely and finally determining the rights of the parties by vacating and setting aside the decree in

the former partition suit and all proceedings thereunder, and ordering a reconveyance to the complainants by the representatives of Allison of lots 1 and 2, and also fixing the respective interests of the several joint tenants in the land in controversy, and ordering partition thereof between them, and appointing commissioners for that purpose, also awards the complainants an accounting in respect to the use and occupation of the lands, and refers the cause to the master to take and state such account. We are of the opinion that the decree is final so as to authorize an appeal to this court, notwithstanding the order for an accounting. A final decree is not necessarily the last order in the case, as orders sometimes follow merely for the purpose of carrying out or executing the matters which the decree has determined, but, when it finally fixes the rights of the parties, it is final, and may be reviewed on appeal or writ of error." In *Gray v. Ames*, 220 Ill. 251, 77 N. E. 219, this court considered the question whether a decree was final which ordered the specific performance of a contract to convey real estate and an accounting for the rents and profits of the real estate during a certain time and referring the cause to the master to state the account. The principles governing the taking of the account were fixed by the decree. The court said (page 254 of 220 Ill., page 220 of 77 N. E.): "A final decree is one which fully decides and finally disposes of the entire merits of the case. Some other order or decree of the court may be necessary to carry into effect the rights of the parties or some incidental matter may be reserved for consideration, which decision, either one way or another, cannot have the effect of altering the decree by which the rights of the parties have been declared. A decree is final even where, as a mere incident to the relief, granted, it directs a reference to a master to state an account. Where accounts are to be settled between the parties and the decree contains an order of reference by which the accounts are to be stated according to certain principles fixed by the decree, such order of reference will not have the effect of rendering the decree interlocutory." In *Klein v. Independent Brewing Ass'n*, 231 Ill. 594, 83 N. E. 434, the decree, in addition to granting complainants other relief, directed an accounting and referred the cause to a master to take and state the account in accordance with directions given by the decree. Upon the question being raised in this court as to whether the decree was final or not, it was held to be final to the extent that it settled the rights of the parties and an appeal might be prosecuted from it.

It was held in *Piper v. Piper*, 231 Ill. 75, 83 N. E. 100, following *Crowe v. Kennedy*, 224 Ill. 526, 79 N. E. 626, that a decree for partition and appointment of commissioners is a final adjudication of the rights of the

parties, although the report of the commissioners thereafter to be made is subject to be modified or set aside upon objections being made to it, and although a report that the land is not susceptible of division, if approved, would necessitate another decree for its sale. A decree for partition and appointment of commissioners was held a final, appealable decree in *Rhodes v. Rhodes*, 172 Ill. 187, 50 N. E. 170, and *Jackson v. Jackson*, 144 Ill. 274, 83 N. E. 51, 36 Am. St. Rep. 427. In *Myers v. Manny*, 63 Ill. 211 (a bill to foreclose a mortgage) it was said (page 213): "Such a decree has always been regarded as so far final that it may be reviewed on appeal or error. It is only necessary that the rights of the parties in the controversy be settled and determined to make the decree final so as to authorize it to be reviewed. It is not the last order in the case approving of the sale, the execution of the deed, or the report of the officer that the writ of assistance has been executed that is the only final decree in the case from which an appeal or writ of error may be prosecuted, nor is it the approval of the master's report that the decree has been executed in other cases, but it is the decree which fixes and settles the rights of the parties." A decree may be final even though it directs a reference to the master. *Beebe v. Russell*, 19 How. 283, 15 L. Ed. 668; *Stovall v. Banks*, 10 Wall. 583, 19 L. Ed. 1036; *Mills v. Hoag*, 7 Paige (N. Y.) 18, 31 Am. Dec. 271. The case of *Chicago Building Society v. Haas*, 111 Ill. 176, was a bill of review to set aside and impeach a decree on the ground that it was obtained by fraud, and for an accounting. A decree was entered setting aside the decree sought to be impeached, and the case was referred to a master in chancery to take and state the account. On appeal to this court from that decree, the question of its being a decree from which an appeal would lie was not raised, but in *Adamski v. Wiczorek*, 170 Ill. 373, 48 N. E. 951, where the question of what is a final or appealable decree was under discussion, the court cited *Chicago Building Society v. Haas*, supra, as a case in which the rights of the parties were finally determined by the decree appealed from, so that this court might properly entertain the appeal.

Under the decisions in this state, the decree appealed from settled the rights of the parties and an appeal might be properly prosecuted therefrom. The Appellate Court therefore erred in dismissing the appeal, and its judgment will be reversed and the cause remanded to that court for further consideration not inconsistent with the views herein expressed.

Reversed and remanded.

CARTER, J. (dissenting). I cannot agree with the conclusion in the foregoing opinion that the decree of the circuit court was final. In my judgment it was interlocutory. The courts have not laid down a satisfactory def-

nition of what is an interlocutory decree. Generally, when anything is to be done to complete the decree, it is not final, but interlocutory. 2 Daniel's Ch. Pl. & Pr. (6th Am. Ed.) \*986, note 8. "It is not practicable to settle any test which will be applicable in every case, so as to separate into classes those orders which are appealable, and those which are not. There are many cases which are obviously appealable. There are some as obviously not appealable. But there is an intermediate class which cannot be reduced to any fixed rule. When this latter class is to be dealt with, it would seem that this court is called upon to exercise a special judgment in each case, in view of its peculiar circumstances." *Camden & Amboy Railroad Co. v. Stewart*, 21 N. J. Eq. 484; 2 Beach on Modern Eq. Pr. § 938. When a decree leaves something more to be done than the mere ministerial execution of an order, it is interlocutory and not final for the purpose of appeal, even though it settles the equities of the bill. *Lodge v. Twell*, 135 U. S. 232, 10 Sup. Ct. 745, 34 L. Ed. 153; 2 Beach on Modern Eq. Pr. § 949. Where the basis of a decree embracing the equities of a bill is found, but the distribution among the parties in interest depends upon the facts to be reported by the master, until the court shall have acted upon such report and sanctioned it the decree is not final. *Craighead v. Wilson*, 18 How. 199, 15 L. Ed. 332.

This court held on a bill for partnership accounting that an interlocutory decree settling the rights of the several partners and determining the basis of the settlement should be first entered, and then that the cause should be referred to a competent master to state the accounts. *Moss v. McCall*, 75 Ill. 190. To the same effect are *Mosier v. Norton*, 63 Ill. 519; *Moffett v. Hanner*, 154 Ill. 649, 39 N. E. 474. In *Chicago & Northwestern Railway Co. v. City of Chicago*, 148 Ill. 141, 35 N. E. 881, we said (page 153 of 148 Ill., page 883 of 35 N. E.): "A judgment or decree is said to be final when it terminates the litigation between the parties on the merits of the case, so that, when affirmed by the reviewing court, the court below has nothing to do but to execute the judgment or decree it had already entered, and when the complainant or plaintiff is entitled to have the decree or judgment carried immediately into execution. Where a decree or judgment is final, the proceedings under it are only a mode of executing it, like the award of an execution." In *Gage v. Eich*, 56 Ill. 297, the same situation as to pleadings existed as in this case, and the order entered after the defendant had elected to stand by his demurrer stated "that all the material facts alleged in said bill of complaint are true, and that the said complainants are justly and equitably entitled to the relief therein prayed for. \* \* \* This

court \* \* \* doth order that it be and it hereby is referred to one of the masters of this court to compute and ascertain the amount justly due and owing to the defendant." In deciding this case we said that "it is a well-settled rule in equity practice, as well as in proceedings at common law, that no appeal lies from any interlocutory order, merely," and that "in this case there has been no final decree,—nothing, indeed, but overruling a demurrer to the bill and a reference to the master to state an account and to report the same to the court. The case is yet in fieri, and no appeal can lie."

This decree contains no provision that appellant should pay any amount ordered to be charged against it in the accounting, and no execution was ordered or could issue thereon. Before the appellee could receive any relief thereunder, it required a further order of court deciding equities that were material to the issues. It might readily be apprehended from the pleadings that one of the chief points of contention before the master in the taking of evidence and on any report made by him would be whether corsets manufactured by appellant were manufactured under this contract or under some other rights of appellant acquired either by a patent of its own or by license from others, so that the master would have something more than the mere mathematical work of computing the number of corsets manufactured. The circuit court by the decree in question merely declared the rights of the parties and the rules to be adopted in stating the account. Material issues still remain undisposed of. If the reformation of the contract and the order that appellant should pay appellee \$1,728 per year for the three years in question were the only material points covered by the bill, then appellant's contention should be upheld. The decree, however, provides otherwise. Apparently the provisions just referred to are but a small part of the controversy. Appellant should not be permitted to bring its case here by piecemeal, but the case should be finally disposed of on all the material issues before it is entitled to appeal. *Sholty v. Sholty*, 140 Ill. 81, 29 N. E. 1041.

I think this decree is interlocutory, and not final, because it does not fully decide and fully dispose of the merits of the case. *Mills v. Hoag*, 7 Paige (N. Y.) 18, 31 Am. Dec. 271; *Gray v. Ames*, 220 Ill. 251, 77 N. E. 219. It is not final also because the appellee, in whose favor it is made, cannot obtain any benefit therefrom without again having the case passed upon by the trial court. *Johnson v. Everett*, 9 Paige (N. Y.) 636.

On the facts set out in the pleadings I am of the opinion that the judgment of the Appellate Court should be affirmed, and the order in question held to be interlocutory.

(236 Ill. 83)

**SUPERIOR COAL CO. v. E. R. DARLINGTON LUMBER CO.**

(Supreme Court of Illinois. Oct. 26, 1908.)

**CONTRACTS (§ 117\*)—VALIDITY—RESTRAINT OF TRADE.**

A contract that if defendant would buy coal of plaintiff at wholesale, and retail it at a specified point, plaintiff would not sell to any other dealer at that place, was not void as in restraint of trade and against public policy.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554-589; Dec. Dig. § 117.\*]

Appeal from Circuit Court, Macoupin County; Robert B. Shirley, Judge.

Action by the Superior Coal Company against the E. R. Darlington Lumber Company. From a judgment of the Appellate Court for the Third District, affirming a judgment for plaintiff, defendant appeals. Affirmed.

C. C. Terry and Welty, Sterling & Whitmore, for appellant. Edw. C. Knotts, for appellee.

**HAND, J.** This was an action of assumption commenced by the appellee in the circuit court of Macoupin county against the appellant to recover the purchase price of certain coal sold and delivered by the appellee to the appellant. The declaration contained the common counts, to which appellant filed three special pleas, which averred, in substance, that it was engaged in business at Benld, in said county, which business consisted of buying coal at wholesale and selling the same at retail; that appellee was engaged in mining coal and selling the same at wholesale; that the coal the purchase price of which was the subject-matter of the suit was purchased by the appellant under a contract with the appellee, whereby it was agreed that, if the appellant would buy coal of the appellee at wholesale and retail the same at Benld, the appellee would not sell coal at wholesale to any other dealer in coal at said place, etc. A demurrer was sustained to said special pleas, and, the appellant having elected to stand by its pleas, a judgment was rendered against it for the sum of \$1,343.32, which judgment has been affirmed by the Appellate Court for the Third District, and a further appeal has been prosecuted to this court.

The contention is made in this court that the judgments of the Appellate and circuit courts should be reversed on the ground that said contract was in restraint of trade and contrary to public policy, and that the purchase price of coal delivered under said contract could not be recovered in consequence of the invalidity of said contract. We do not agree with such contention. The contract was clearly entered into by the parties for their mutual benefit and with a view to facilitate trade and increase their business, and not with a view to restrain trade or to create a monopoly in the sale of coal at the town of

Benld, and the fact that the effect of the contract may have been to incidentally restrain competition in the sale of coal at said town did not make the contract illegal and void. In *Southern Fire Brick & Clay Co. v. Garden City Sand Co.*, 223 Ill. 616, 79 N. E. 313, the validity of a contract whereby the owner of a bed of fire clay agreed with certain experienced fire clay miners and corporations to erect a plant to be operated by said fire clay miners, the product of which was to be taken by said corporations at a fixed price, the owner agreeing not to operate a fire clay plant on any other land owned or controlled by him, and the miners agreeing not to sell fire clay to any other parties than the said corporations and said corporations agreeing not to buy any fire clay except that produced at said plant, was under consideration, and it was held that, the main purpose and chief object of the parties to the contract being to foster trade and increase their business, the contract was not in restraint of trade and void, even though it might incidentally tend to restrain competition in the sale of fire clay. And in *Brown v. Rounsavell*, 78 Ill. 589, it was held that a contract to furnish for sale a certain make of sewing machines, which provided that the purchaser should engage in selling said machine and no other and to buy the same of the seller and no other, was not in restraint of trade and void.

Under the authority of these cases, and many others which have been decided by this court, the contract was not void, and it was not contrary to public policy to require the appellant to pay for the coal which it had purchased of appellee. The courts will not declare a contract void on the ground of public policy unless it clearly appears, as it does not in this case, that the contract is in violation of the public policy of the state. *Leeds v. Townsend*, 228 Ill. 451, 81 N. E. 1069, 13 L. R. A. (N. S.) 191.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(236 Ill. 95)

**LISTER v. GLOS.**

(Supreme Court of Illinois. Oct. 26, 1908.)

**1. QUIETING TITLE (§ 12\*)—RIGHT TO SUBPOSSESSION—UNIMPROVED AND UNOCCUPIED LAND.**

A bill to quiet title can be maintained only where complainant is in possession, or where the premises are unimproved or unoccupied.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 8; Dec. Dig. § 12.\*]

**2. APPEAL AND ERROR (§ 574\*)—PRESERVATION OF EVIDENCE—CERTIFICATE OF EVIDENCE.**

A party, desiring to sustain a decree based on evidence taken in open court, must preserve the evidence by a certificate of evidence, unless

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the decree finds and embodies the specific facts proved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2567; Dec. Dig. § 574.\*]

**3. APPEAL AND ERROR (§ 909\*) — REVIEW — PRESUMPTIONS.**

In a suit to quiet title, commenced June 26, 1907, the decree found that complainant, prior to and on November 22, 1895, was the owner of, and was possessed of, the real estate in controversy, and was the owner of the premises at the time she filed her bill. *Held*, that it could not be presumed in support of such decree, in the absence of a certificate of evidence, that plaintiff was possessed of the land in controversy when the bill was filed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3675; Dec. Dig. § 909.\*]

Appeal from Superior Court, Cook County; Albert C. Barnes, Judge.

Action by Margaret J. Lister against Jacob Glos and wife. Judgment for plaintiff, and defendant Jacob Glos appeals. Reversed and remanded.

John R. O'Connor, for appellant. Charles S. McNett, for appellee.

SCOTT, J. The appellee, on June 26, 1907, filed her bill in the superior court of Cook county to quiet her title to a parcel of real estate in that county. Jacob Glos and Emma J., his wife, were made defendants. By that bill it was sought to have a tax deed made to Jacob Glos canceled and set aside as a cloud upon the title of appellee. Glos and wife answered separately, replications were filed, proof was taken in open court, a decree was entered in accordance with the prayer of the bill, and Jacob Glos appeals.

No certificate of evidence was taken. The bill averred, and the answers denied, that appellee was, at the time of the filing of the bill, in possession of the real estate in question. The decree did not, in its recital of facts, find that she was so in possession at the time of the filing of the bill, and it is contended on the part of appellant that the facts found, for this reason, do not afford the necessary basis for the relief granted. A bill to quiet title can be maintained only where the complainant is in possession, or where the premises are unimproved or unoccupied. The averment that appellee was in possession at the time of the filing of the bill was material and jurisdictional in its character, and it was necessary that it should be proved. *Glos v. Kemp*, 192 Ill. 72, 61 N. E. 473; *Glos v. Miller*, 213 Ill. 22, 72 N. E. 714.

It is incumbent upon the party who desires to sustain a decree to preserve the evidence upon which it is based, by certificate of evidence, if the proof is taken in open court, or the decree must find and embody the specific facts that were proven. *Timke v. Allen*, 225 Ill. 402, 80 N. E. 297. The finding of this decree in reference to possession

is in these words: "That the complainant, prior to and on the 22d day of November, A. D. 1895, was the owner of and was possessed of that certain parcel of real estate [here follows description], and that said complainant was the owner of said premises at the time of filing her said bill of complaint." Appellee contends that, as the decree finds that she had possession in 1895, and was then the owner, and further finds that she was the owner at the time of filing her bill, a presumption exists that her possession continued from 1895 down to the time of the filing of the bill. If such a presumption arises, it is one that is not conclusive, and it may have been rebutted by other proof heard on the trial. *Hale v. Wiggins*, 33 Conn. 101. Looking at the decree in the light most favorable to appellee, if the presumption be as she contends, the decree only preserved a fact which affords evidence of a further alleged fact which it was necessary for her to establish. The decree, in cases such as this, must find the specific facts, and not merely recite the evidence of those facts. If the court found that appellee was in possession at the time of the filing of the bill, that fact should have been stated in the decree, and the absence of such a statement is here fatal.

The decree of the superior court will be reversed, and the cause will be remanded, for further proceedings not inconsistent with the views above expressed.

Reversed and remanded.

(236 Ill. 97)

**CRANE v. VILLAGE OF ROSELLE et al.**

(Supreme Court of Illinois. Oct. 26, 1908.)

**1. MUNICIPAL CORPORATIONS (§ 835\*)—USE OF STREAMS FOR DRAINAGE.**

A village through which flows a stream, being the owner of the dominant heritage, may collect its surface waters and have them pass by way of the stream through the land of a lower owner, so long as it does not cast its sewage on his land, and thereby create a nuisance, and this though it incloses the stream within the village, and collect and conduct to it the surface water, by underground tile drains, instead of surface ditches.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1785; Dec. Dig. § 835.\*]

**2. MUNICIPAL CORPORATIONS (§ 846\*)—DISCHARGE OF SEWAGE—INJUNCTION.**

Where complainant claims defendant village is draining sewage into a stream and thereby casting it on his land through which the stream runs, and defendant claims it is only drainage surface water, injunction will not be granted, no nuisance being established by a judgment at law, unless the allegations of the bill are established by clear and satisfactory evidence.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 846.\*]

**3. INJUNCTION (§ 174\*)—DISSOLUTION—AFFIDAVITS—SERVICE.**

Affidavits in rebuttal on motion to dissolve a temporary injunction filed in court by defend-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ant a week before the hearing need not be served on complainant.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 386; Dec. Dig. § 174.\*]

Error to Circuit Court, Du Page County; L. C. Ruth, Judge.

Suit by Frank R. Crane against the village of Roselle and others. Decree for defendants. Complainant brings error. Affirmed.

This was a bill in chancery brought by plaintiff in error, in the circuit court of Du Page county, to restrain defendants in error from proceeding with the construction of a sewerage system in the village of Roselle, and from trespassing upon and damaging his land. The bill alleges that complainant is the owner of a farm of 117 acres lying north of and adjoining the village of Roselle, valued at \$100 per acre, and stocked with cattle, hogs, horses, and other stock worth \$3,000; that a natural stream of water runs through the entire length of the land, into which empty a number of small springs, forming a pure, clear, safe, convenient, and healthful watering stream used by the complainant for watering said stock; that said creek follows its natural course from the east side of State road, a street of said village of Roselle; thence along the north side of Hattendorf avenue, in said village, across lots 2 and 3, in block 2, and thence into and upon the land of complainant. The bill avers that defendants are engaged in the construction of a system of sewers in the village of Roselle, and for that purpose are laying tile under the surface of the ground, which carries the sewage to and empties it into said natural water course on complainant's land; that said village is laying drains to connect houses with said tile for the purpose of discharging therein sewage of the village, and causing it to flow into said natural water course and upon complainant's land, thereby rendering unfit for use the water in said water course and discharging larger quantities of water upon complainant's land than flowed to and upon it through said natural water course.

The answer admits that the village is laying drain pipes, but denies that they are for the purpose of affording a sewerage system for said village, and avers that the village of Roselle has not over 300 inhabitants, has no system of waterworks, and does not contemplate the construction of any waterworks system; that it has no system of sewers, and no water-closets are connected with or intended to drain into any part of the drainage work under construction. The answer further avers that the ravine or gully which runs through Hattendorf avenue in said village, and thence into the water course on complainant's land, renders it impracticable to improve Hattendorf avenue without divert-

ing the water into a tile under the surface of the ground, and that the purpose of laying the tile in Hattendorf avenue is to divert the water under the surface so that the street may be improved and rendered fit for use and travel, and that the other tile drains constructed or proposed to be constructed, which empty into the larger tile in Hattendorf avenue, are constructed with catch-basins, and are intended for surface drainage only, and that none of said tile drains are constructed for the purpose of carrying sewage. The answer further avers that the natural outlet for the surface drainage of said village of Roselle is into the water course which passes upon and through complainant's land, and that the tile drain being laid will not increase the flow of water in said water course nor further pollute the stream, but is intended simply to carry the surface water from said village.

Upon filing their answer defendants served notice on complainant that they would move for a dissolution of the injunction, and in support of said motion would read certain affidavits, copies of which were attached to the notice. Before hearing the motion, the court, at the request of and accompanied by counsel for both parties, visited the village of Roselle, and went upon and examined the premises and the work sought to be enjoined. The motion was then heard by the court upon affidavits of both parties, and a decree was entered finding that the work being done by defendants was for the purpose of caring for the natural flow of water running into said creek, and that the stream had not become polluted by the construction of the drains in question. The court further found that the allegation that the village of Roselle intended to establish a system of sewers by the use of said drains was not established, and dissolved the injunction and dismissed the bill without prejudice for want of equity. Complainant brings the cause to this court by writ of error.

John E. Owens (William J. Stapleton, of counsel), for plaintiff in error. Fred A. Rathje and William R. Burleigh, for defendants in error.

FARMER, J. (after stating the facts as above). Plaintiff in error's land through which the stream runs lies north of and adjoining the village of Roselle. State road runs north and south at the west side of the village. Bokelman and Center streets are, respectively, one and two blocks east of State road, and also run north and south. Hattendorf avenue runs east and west, and is 150 feet south of complainant's farm. Chicago street also runs east and west, one block south of Hattendorf avenue. The land between Hattendorf avenue and complainant's land was formerly owned by complainant,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and was by him laid off into lots and blocks. Block 3, lying just east of State road and north of Hattendorf avenue, contains five lots, numbered from 1 to 5, respectively, beginning on east side of the block, and block 2, just east of block 3, contains four lots, also numbered from the east. The stream in question comes from the north and west, and crosses State road near the northwest corner of block 3, and runs southeast across lots 5 and 4 of said block 3, and east along Hattendorf avenue a distance of about two hundred feet; thence east along the land just south of Hattendorf avenue, to a point a short distance east of Bokelman street; thence north across Hattendorf avenue and northeast across lots 3 and 2 of block 2, into plaintiff in error's farm. Defendants cut an open ditch along the west side of State road to its intersection with Hattendorf avenue and diverted the stream into it. From this point they laid a 30-inch tile drain under Hattendorf avenue east to its intersection with Bokelman avenue, and thence northeast across lots 3 and 2 of block 2, connecting with the stream at the line of plaintiff in error's land. There is also a tile drain from Chicago street down Bokelman street, connecting with said 30-inch tile. The theory of complainant's bill is that the improvements made and contemplated to be made were for the purpose of establishing a sewerage system; that the stream on complainant's land was to be used as an outlet for the same; and that the sewage, filth, and polluted water cast in the stream on his farm constituted a nuisance that the court should enjoin. Defendants contend the drains were constructed for and intended to be confined to the carrying off of surface water that naturally flowed upon complainant's land, which proper drainage required in order to enable them to improve the streets of the village.

Complainant read in evidence five affidavits. From one affidavit it appeared that H. H. Bremer, the engineer who prepared the plans for the system of drains, told one of affiants that he had been authorized by the village to formulate plans for a drainage and sewerage system in said village, and that all sewers would drain into the main drain, and that house connections would be made from time to time. Complainant's affidavit stated that he was familiar with the proposed system of sewers, and from an examination of the same, and from conversations with the village officials, he believed that the entire sewage of the village would be discharged on his land, and that a number of houses had been connected with said sewers. The manager of complainant's farm made affidavit that the stream on complainant's farm had been used for furnishing water for his stock, but that since the laying of the drains in question he had seen filth and refuse matter flowing into the stream from the 30-inch tile drain; that such discharges were accompanied by noxious and offensive odors, ren-

dering said stream unfit for use. The affidavit of Waterman, a civil engineer, after describing the course of the stream, stated that he had made an examination with a view of ascertaining the presence of house connections with said sewers, and that he found a closet in a saloon connected with the sewers and found eight house drain connections with said sewers, four of which were new connections, also several catch-basins in Chicago avenue, and a 12-inch sewer on each side of Bokelman street connecting with said 30-inch tile. By affidavits read by defendants it was shown that the drains were not for a sewerage system, but were for the purpose of carrying off the surface water and to enable the village to improve Hattendorf avenue; that there was no system of waterworks and no water-closets in the village connecting with the drain; that the closet in the saloon building referred to and all other closets drained into cesspools, and not into the drains; that the closets of the eight buildings mentioned by complainant did not drain into the tile, but that the only drains from houses into it were a few drains for the purpose of carrying water only. The engineer denied telling complainant's witness the village was planning to install a system of sewers. It was also shown that the work done was the same as that which complainant endeavored to have the village do when he owned the land on each side of Hattendorf avenue, in order to improve the streets, so he could sell the lots; also, that complainant agreed with the purchasers of said lots that he would procure the village to make the improvements as they were made; that certain of the drains from Chicago street had been in use for more than 30 years; that the stream had been in use for more than 20 years as an outlet for the discharge of house drainage, and the tile drains and catch-basins from Chicago avenue were laid by an agreement between the village and one William Rathje, complainant's grantor, then the owner of the land in controversy.

It is clear that the stream in question is the natural outlet for the surface drainage of the village and vicinity. A consideration of the affidavits warranted the finding that the laying of the 30-inch tile in Hattendorf avenue was for the purpose only of conducting underground the stream which ran for a considerable distance down Hattendorf avenue, so that it might be improved and made passable, and that the other drains were for the purpose of collecting the surface waters from other parts of the village. The village owning the dominant heritage in this case had a right to collect its surface waters, and have them pass off over the servient heritage belonging to complainant, so long as it did not cast its sewage upon his land and thereby create a nuisance; and it makes no difference whether said surface water be collected by ditches upon the surface or by tile drains underground. *Robb v. Village of La Grange*, 158 Ill. 21, 42

N. E. 77. No nuisance having been established in this case by a judgment at law, the granting of an injunction will not be sustained unless the allegations of the bill are proven by clear and satisfactory evidence. *Robb v. Village of La Grange*, supra. The evidence as to whether any sewage of the village was turned into the stream in question was conflicting, complainant's affidavits tending to show that it was, and those of defendants that it was not. The court, at the request of counsel for both parties, viewed the premises, and from a personal inspection, in connection with the evidence, determined that the system of drainage was only for the purpose of taking care of the natural flow of the surface water, that no water-closets were connected with said drains, and that said stream was not polluted by reason of said improvements. We are of opinion that none of the allegations of the bill upon which the plaintiff in error relied for the relief prayed were proven by such clear and satisfactory evidence as to have warranted the chancellor in sustaining the temporary injunction.

Complaint is also made of the ruling of the court in admitting certain affidavits offered in rebuttal by defendants, because copies of the same had not been served upon complainant's counsel. The affidavits were merely in rebuttal, and were filed in court on November 1st and the cause was not heard until November 8th. No authority is cited by complainant for requiring such affidavits to be served on him, and we know of none. No error was committed by the court in this regard.

The decree of the circuit court is affirmed.  
Decree affirmed.

(286 Ill. 96)

#### THOMAS v. METZ et al.

(Supreme Court of Illinois. Oct. 26, 1908.)

#### 1. DEDICATION (§ 23\*)—STATUTORY DEDICATION—FORM OF PLAT.

Where a plat of a block, showing an alley extending through the center thereof, did not conform to the statute, there was not statutory dedication of the alley.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 55, 56; Dec. Dig. § 23.\*]

#### 2. DEDICATION (§ 19\*)—ALLEYS—COMMON-LAW DEDICATION—ESTOPPEL.

Owners conveying realty in a block, according to the description of a recorded plat, and by reference thereto, adopt the entire plat, with all its dedications, though the plat did not conform to the statute, and they are estopped to deny a common-law dedication of an alley appearing on the plat, which estoppel is binding on those succeeding to the title of the original owners.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 106\*)—STREETS—ALLEYS—VACATION—SUFFICIENCY.

An ordinance vacating an alley is void, where the record of the council does not show that it was passed by three-fourths majority of

all the aldermen, as required by Hurd's Rev. St. 1905, c. 145, § 1.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 221-228; Dec. Dig. § 106.\*]

#### 4. ESTOPPEL (§ 63\*)—ALLEYS—EXISTENCE.

A plat of a block, not conforming to the statute, showed an alley extending through it. An ordinance vacating the alley was void. A part of it was occupied by private persons, while a part of it remained in continual use as a way, by owners of lots in the block. *Held*, that such owners and the city were not equitably estopped from insisting on the existence of the alley remaining in use.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 63.\*]

#### 5. ESTOPPEL (§ 66\*)—ALLEYS—EXISTENCE.

A purchaser of a lot in a block, a plat of which showed an alley through it, understood at the time of the purchase that the alley was a private alley. He later obtained a deed from the owners of the fee of the alley, conveying a strip thereof. *Held*, that the purchaser was not thereby estopped from regarding the alley as a public alley.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 159-162; Dec. Dig. § 66.\*]

#### 6. EASEMENTS (§ 10\*)—RIGHT OF WAY—ACQUISITION.

Where one used a portion of an alley as a way for more than 20 years, claiming to do so as a matter of right, he acquired an easement of passage therein by user, and was entitled to have the alley remain open as a way, though the alley had been legally vacated by the municipality.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 27-33; Dec. Dig. § 10.\*]

Error to Circuit Court, Macon County; William C. Johns, Judge.

Bill by Sallie R. Thomas against Melville F. Metz and another. There was a decree dismissing the bill for want of equity, and plaintiff brings error. *Affirmed*.

On September 21, 1906, Sallie R. Thomas, plaintiff in error, filed her bill in the circuit court of Macon county against Melville F. Metz and Asbury D. Metz, defendants in error, seeking an injunction restraining them from interfering with the use and possession by plaintiff in error of a strip of land 8 feet wide and 135 feet long, in block 8, in Read & Co.'s addition to the city of Decatur, alleged to be owned by her, and for other relief. Defendants answered the bill, averring, among other things, that the strip of land in question had been laid out and platted as a public alley, and that they were entitled to the use of the same, and that complainant was not entitled to the relief sought. The cause was referred to a master, who heard the proof, and made a report finding that complainant was the owner in fee simple of the strip of land in dispute, and recommending that defendants should be perpetually enjoined from interfering with the use and possession of complainant, her heirs, or assigns in and to said strip of land. Objections to the master's report were overruled and ordered by the court to stand as exceptions, and on September 5, 1907, a decree was en-

tered by the court sustaining certain of the exceptions and overruling others, and finding, among other things, that Sallie R. Thomas is the only heir at law of Milton B. Thomas and Susan C. Thomas, and is the owner of lots 6 and 7 of the resurvey of said block 8, except a small tract in the northeast corner of said lot 6, extending north and south 25 feet, and east and west 42 feet; that Melville F. Metz became the owner of the north half of lot 5, in said block 8, by virtue of a warranty deed executed by Susan C. Thomas and Milton B. Thomas, her husband, on April 27, 1882, and that he also became the owner of the south half of said lot by virtue of a warranty deed executed by the said Susan C. Thomas and Milton B. Thomas on February 15, 1887; that the whole of said lot 5 has been sold under a foreclosure proceeding against the said Melville F. Metz and his wife in the said circuit court, and that a certificate of purchase therefor was issued by the master in chancery of said court to Asbury D. Metz, and that since the filing of the bill herein he has received from said master a deed conveying to him all of the said lot 5, and that he is now the owner of the fee in said lot.

The decree further finds that on May 16, 1875, the said block 8 was resurveyed and platted and divided into lots fronting east and west, with a 16-foot alley running through the center of said block from north to south, which resurvey and plat shows the size of said lots to be 80 feet in width north and south, and 152 feet in depth east and west; that said plat was not acknowledged by any of the owners of the lands in said block, but that it was filed for record on May 25, 1878, and recorded in the records of Macon county, and that by reason of such filing and recording of said plat the streets and alleys shown thereon became and were dedicated to the public, and a common-law dedication was thereby effected of said alley so running north and south through said resurvey of said block 8; that on September 5, 1881, the city council of the city of Decatur pretended to pass an ordinance vacating the said alley, which said pretended ordinance was and is illegal and void; that at the time said block 8 was originally laid out and platted it was owned in fee simple by Thomas H. Read, and that said resurvey was made after his death; that prior to the passage of said ordinance, in June and July, 1881, all of the heirs of the said Read conveyed to Susan C. Thomas, by quitclaim deeds, the entire 16-foot alley; that the conveyance of Milton B. Thomas and wife to Melville F. Metz of the north half of said lot 5 included no part of the said alley.

The decree further finds that on July 9, 1881, the said Susan C. Thomas and Milton B. Thomas conveyed to De Witt C. Shockley the east half of the said 16-foot alley adjoining lot 8 in said block 8, extending from the south the entire distance across said lot to

the south line of said lot 5; that on July 19, 1881, the said Susan C. Thomas and Milton B. Thomas conveyed, by deed, to David S. Shellabarger the west half of the 16-foot alley adjoining lots 2 and 3 in said block, and that on October 3, 1881, they conveyed to said Shellabarger that portion of the west half of said alley extending from the southeast corner of said lot 3 south 25 feet; that on July 9, 1881, the said Susan C. Thomas and Milton B. Thomas conveyed to James W. Haworth the east half of said alley lying immediately west of lots 1 and 4 in said block, and that said conveyances to Shellabarger and Haworth conveyed all of the said alley in said block north of the north line of said lot 5, and the north 25 feet of the west half of said alley lying west of the said lot 5; that on February 15, 1887, the said Susan C. Thomas and Milton B. Thomas conveyed to Melville F. Metz the east half of said alley lying immediately west of said lot 5, and that by the conveyances above mentioned the said Susan C. Thomas and Milton B. Thomas conveyed all of said alley to the owners of lots adjoining the same, except that portion of the west half of the alley extending north from the north line of North street 135 feet, lying immediately east of lot 7 and a part of lot 6; that subsequent to the death of Milton B. Thomas, Susan C. Thomas, his widow and the mother of plaintiff in error, erected a fence along the west side of the remaining portion of said alley on the line between said alley and lot 6, which connected with a fence then existing on the east line of said lot 7, and that said fence remained on said line until it rotted down; that after the conveyance of the east half of said alley along said lot 5 to the said Melville F. Metz, he built a barn on the north line of said lot 5, extending across the half of said alley so conveyed to him; that prior to the erection of said barn there was a gate across the east half of said alley at the north line of said lot 5, and that by opening the same persons could pass through said alley; that the said Melville F. Metz, from the time he purchased the north half of said lot 5 up to the time of the beginning of this suit, used the said alleyway in passing from the street along the south side of said block 8 to his barn and premises, and it was used by the persons occupying the south half of said lot 5; that the said Metz kept the said alleyway in repair and covered with cinders during all of the time that he was using the same; that about three years prior to the commencement of this suit the east half of said alley adjoining lot 8 was fenced in by one John Campbell, who claimed to own that portion of the alley by virtue of a deed from the said D. C. Shockley.

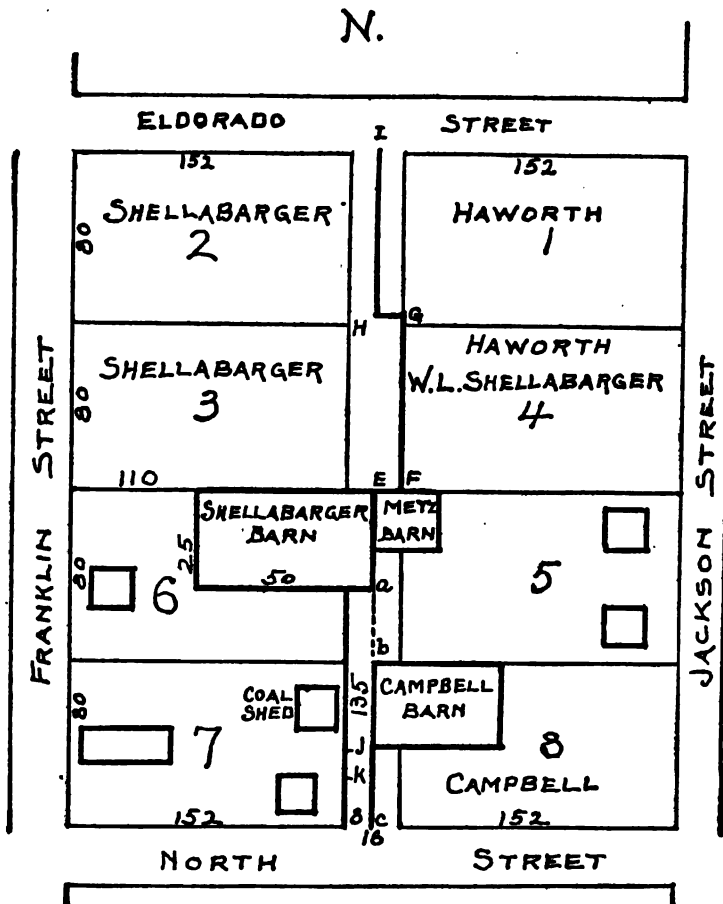
The decree further finds that there is no mode of egress from or ingress to the rear end of lot 5, except through the west half of the said 16-foot alley which is claimed by complainant; that the said Melville F. Metz

has used said alley, by passing in and over the same to and from his said premises, from the time he purchased the north half of said lot 5, continuously and without interruption, up to the time of the commencement of this suit—a period of more than 20 years; that the pretended vacation of said alley by the said city of Decatur was not done to subserve any public interest, and that the public interest did not require such vacation, but that the said pretended vacation was for the sole benefit of the heirs of said Thomas H. Read and their grantee, Susan C. Thomas. The bill was dismissed for want of equity. To review that decree Sallie R. Thomas has sued out a writ of error from this court.

From the plat found below the location of the lots in block 8, the alleyway, and the fences and barns that have been built thereon since said resurvey will appear. The plat filed and recorded at the time the resurvey was made shows an alleyway 16 feet in width, extending through the center of the block from north to south, from Eldorado to North street. The portion of the alleyway over which defendants in error contend in this suit that they now have the right to travel is the west half of the alley extending from North street to the Shellabarger barn. In

July, 1906, prior to the commencement of this suit, plaintiff in error began the erection of a fence on the east line of the west half of the alley extending from "a" to "b," indicated by the dotted line on the plat. This fence was torn down by Melville F. Metz. In August of the same year the plaintiff in error again attempted to erect a fence along this line, and it was also torn down by said Metz, who was insolvent, and the bill was filed to prevent repeated trespasses by him.

Since the purchase of the north half of lot 5 by Metz on April 27, 1882, he used continuously, up until about 1904, as an outlet from the rear of said lot, that portion of the alley extending south to North street, when the east half of the alley adjoining lot 8 was fenced in by Campbell. Since that time, in passing lot 8, Metz has been using only the west half of the alley. Upon the hearing before the master he testified that, at the time he bought the north half of lot 5, it was his understanding that there was a private alley in block 8 for the general use of the property owners; that he inferred it was a private alley, and not for use by the public. At the time of the purchase of this property by Metz the Shellabarger barn had been erected on lot 6, and across the west half of the alley ad-



joining, as indicated on the above plat, and the east half of the alley was closed by a gate extending from the northeast corner of the Shellabarger barn to the northwest corner of lot 5. Evidence was offered for the purpose of showing that the ordinance passed by the city council of the city of Decatur on September 5, 1881, to vacate the said alley, was illegal and void. It is contended by plaintiff in error (1) that the court erred in finding that the alley in question was and is a public alley; and (2) the court erred in finding that said alley was never legally vacated.

Louis A. Mills, Hugh Crea, and Hugh W. Housom, for plaintiff in error. Buckingham & Gray, for defendant in error.

SCOTT, J. (after stating the facts as above). When block 8 was resurveyed, a plat thereof was made and recorded showing a 16-foot alley extending through the center of the block from north to south. As this plat did not conform to the statute, there was no statutory dedication of the alley. Thereafter owners of real estate in that block, through whom plaintiff in error claims, conveyed realty therein according to the descriptions contained in the plat, and by reference to the plat. By so doing they adopted the entire plat, with all its dedications. They thereby became estopped to deny that there had been a common-law dedication of the alley. That estoppel is binding upon those who, like plaintiff in error, succeed to the title of such original owners. *Smith v. Young*, 160 Ill. 163, 43 N. E. 486. In 1881 the city council attempted to vacate this alley. The ordinance of vacation is void and of no effect, because it does not appear from the record of the city council that it was passed by the necessary three-fourths majority of all the aldermen of the city, as required by section 1, c. 145, *Hurd's Rev. St.* 1905. For many years prior to the filing of the bill certain portions of this alley had been occupied by private persons, and the city authorities had apparently regarded the ordinance as valid, as they had exercised no care or control over the alley after the passage of that ordinance.

Plaintiff in error contends that, while the statute of limitations may not run against the city, yet the doctrine of equitable estoppel should be applied, both against the public and against the owners of the property in the block, so that the public and such owners will be barred from asserting a right of way over any part of the ground originally surveyed for an alley. In support of this contention we are referred to *Jordan v. City of Chenoa*, 166 Ill. 580, 47 N. E. 191. In that case the entire alley had been fenced up for over 20 years, and the doctrine of equitable estoppel, based upon such nonuser, was suc-

cessfully invoked. It is apparent that no such estoppel would arise as to an alley, or part of an alley, which had been in continual use as a way. The argument of plaintiff in error now under consideration is therefore without merit as to those portions of this alley which have never been closed up, and which have never been actually occupied by any private individual, but which have been continually used as a way, as is the case with that portion of this alley which plaintiff in error now seeks to close.

It is urged, however, that Melville F. Metz is estopped to contend that this is a public alley, because it appears that he stated in his testimony that when he bought the property in the block, he understood that the alley was a private alley, and because later he obtained a deed from the parents of plaintiff in error, from whom she inherits, for a strip of ground 8 feet in width from east to west, adjoining and extending across the west end of lot 5, which lot was then owned by him. The grantors in that deed owned the fee in the alley subject to the easement therein, and his acceptance of a deed from them would convey such interest therein as they had, and is in no way inconsistent with the right which he now asserts. His belief that the alley was a private, instead of a public, way is here without significance. If it was either public or private he would have a right to use it, and with that right plaintiff in error could not interfere. The evidence does not show that Melville F. Metz has done anything upon the strength of which the owners of the property now held by plaintiff in error have acted in such manner as to confer upon plaintiff in error the right to invoke the doctrine of estoppel against him. On the other hand, after he acquired lot 5, and after the death of the father of plaintiff in error, the mother of plaintiff in error, who seems then to have been exercising control over the property, fenced lot 7, which lies west of the southern portion of the ground now in controversy, and fenced out the alley—that is, the fence was placed along the west line of the alley, leaving the alley open to use—and plaintiff in error permitted that fence to remain there for many years, and until it finally rotted down. Even had the alley been legally vacated, it is apparent from the evidence that Melville F. Metz has used the portion thereof here in controversy, as a way, for a period of more than 20 years, under such circumstances as would establish in him an easement of passage therein by user.

Under the proof in this case the claims of plaintiff in error are wholly inequitable. There is no reasonable theory upon which the relief sought could have been awarded.

The decree of the circuit court will be affirmed.

Decree affirmed.

(236 Ill. 104)

**PEOPLE v. WESTON et al.**

(Supreme Court of Illinois. Oct. 26, 1908.)

**1. CRIMINAL LAW (§ 1090\*)—APPEAL—RECORD—BILL OF EXCEPTIONS.**

Motions to change the venue or for a continuance are no part of the record, unless made so by a bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2811; Dec. Dig. § 1090.\*]

**2. WITNESSES (§ 227\*)—OATH—NECESSITY FOR—PRELIMINARY MATTER.**

To ascertain whether a deaf mute's testimony could be obtained through an interpreter, neither she nor her interpreter need be sworn.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 227.\*]

**3. CRIMINAL LAW (§ 1043\*)—APPEAL—OBJECTION NOT MADE BELOW.**

Error in allowing prosecutrix, a deaf mute, to be examined in the jury's presence, to determine whether her testimony could be obtained through an interpreter, is no ground for reversing a conviction where no specific objection was made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2654; Dec. Dig. § 1043.\*]

**4. RAPE (§ 51\*)—EVIDENCE—SUFFICIENCY.**

Evidence held to sustain a conviction of rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-77; Dec. Dig. § 51.\*]

**5. RAPE (§ 48\*)—EVIDENCE—DECLARATIONS—ADMISSIBILITY.**

In a rape trial, it was proper to show declarations by prosecutrix when rescued as to how she was treated, but not as to who the offenders were.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 67, 68; Dec. Dig. § 48.\*]

**6. CRIMINAL LAW (§ 1043\*)—OBJECTION IN LOWER COURT—SUFFICIENCY.**

Error in allowing testimony as to who prosecutrix, a deaf mute, said outraged her, is not ground for reversal where the only objection was to witness stating his "understanding" as to what prosecutrix said.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2654; Dec. Dig. § 1043.\*]

**7. CRIMINAL LAW (§ 1169\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

Error in admitting testimony was harmless to accused where another witness was permitted to testify to the same matter without objection, and where there was sufficient uncontradicted testimony to sustain the conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3138; Dec. Dig. § 1169.\*]

Cartwright, C. J., and Dunn and Scott, JJ., dissenting.

Error to Circuit Court, Franklin County; P. A. Pearce, Judge.

Harry Weston and others were convicted of rape, and they bring error. Affirmed.

C. H. Layman, W. H. Williams, and T. J. Layman, for plaintiffs in error. W. H. Stead, Atty. Gen., and W. P. Seeber, State's Atty. (B. H. Taylor, of counsel), for the People.

**FARMER, J.** The plaintiffs in error, Harry Weston, John Davis, and Louis Simpson, were found guilty in the circuit court of Franklin county upon an indictment charging them with rape upon the person of Eliza

Eason, and were each sentenced to a term of 12 years in the penitentiary. Error has been assigned on the denial of their application for a change of venue and their motion for a continuance, but these errors cannot be sustained because the action of the court has not been preserved for review. A petition and certain affidavits have been copied in the transcript filed, but they are not contained in the bill of exceptions, which makes no reference either to the application for a change of venue or the motion for a continuance. Such motions are no part of the record unless made so by a bill of exceptions. *McElwee v. People*, 77 Ill. 493; *Chicago & Eastern Illinois Railroad Co. v. Goyette*, 133 Ill. 21, 24 N. E. 549. These alleged errors therefore cannot be considered.

The third and fourth errors assigned may be treated together. They are that the court erred in permitting Nove Morgan to act as interpreter in the examination of Eliza Eason, the prosecuting witness, without being sworn, and in permitting the said Eliza Eason to give evidence by making signs, in the presence of the jury, without having been sworn. Eliza Eason was a deaf mute, and had never attended any school where deaf mutes were taught the sign language taught in such schools, and she was only able to communicate with other persons by signs of her own, which could be understood by people who were with her a considerable time. She was 57 years old, and, on account of her affliction and lack of educational advantages, was very ignorant. Her husband also, with whom she resided at the time the alleged crime was committed, was an ignorant man. At the trial W. H. Williams, a lawyer, who understood the deaf mute sign language fairly well, was sworn to act as interpreter. There was present also at the trial a man named Nove Morgan, who was a partially educated deaf mute, and, as Mrs. Eason could not make herself understood to Williams, Morgan was requested to ask Mrs. Eason questions and to interpret her answers to Williams, who then interpreted them to the court. Neither Morgan nor Mrs. Eason was sworn. A number of questions asked by counsel for the prosecution were interpreted by Williams to Morgan and by Morgan to Mrs. Eason. Her answers, so far as Morgan could understand her, would then be interpreted to Williams and by Williams to the court. The first several questions were for the purpose of ascertaining to what extent Mrs. Eason could understand questions asked her by Morgan, and to what extent she could communicate to him her answers to questions she understood in such manner as that he could understand her. This examination showed that Morgan and the witness could communicate with each other so as to be understood to some extent, but not fully, so that Morgan could communicate answers to all questions

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Intelligently to Williams. This examination was conducted in the presence of the jury. After a number of questions had been asked, Williams was directed to request Morgan to ask the witness what any men did to her, if anything, on the evening of June 4, 1907. The record shows counsel for the plaintiffs in error "objected to the question." The court stated that as it was preliminary the question might be asked. On the question being asked the witness through Morgan, she answered "two men," and Morgan stated that the witness could not understand him very well, but that he could understand her signs a little. He was then directed to ask her how the men treated her. On attempting it he was unable to make her understand. The question being again repeated, Morgan interpreted her answer, through Williams. "She says that Simpson and Weston choked her;" that one caught her by the arm, one caught her by the throat, and one scratched her. She also said that Davis and Simpson had intercourse with her, and that she did not know Weston. She was then asked, through interpreters, whether she knew the nature of an oath and the consequences of swearing to a falsehood, to which she answered she would go to hell if she told a lie. Counsel for the prosecution thereupon announced he would proceed no farther, and this is the substance of all that occurred during the time Mrs. Eason was being examined, and she was not again recalled. It was not intended that this examination was to be her testimony in the case.

Plaintiffs in error in their assignment of error say the court erred in permitting Morgan to act as interpreter without being sworn and in permitting Eliza Eason to give evidence in the presence of the jury without being sworn. The questions asked her and the answers given by her to them were not for the purpose of getting her testimony before the jury, but were for the purpose of ascertaining whether, by means of the interpreters, her testimony could be obtained. For that purpose it was not necessary that Mrs. Eason or Morgan should have been first sworn. But the examination should not have been conducted in the presence of the jury. It was intended for the court, and the jury should have been removed. The record, however, does not show that any objection was made to the examination taking place in the presence of the jury or on account of the witness and Morgan not having been first sworn. When the witness was asked what, if anything, the men did to her, counsel for plaintiffs in error "objected to the question." The court stated that, as it was preliminary, the question might be asked, and no other objection was made. While it was improper to have allowed this examination to be conducted in the presence of the jury, if counsel had objected to its being so done, they should have so stated in their objections to the court, and doubtless the jury would have

been removed. Not having made any such objection and obtained a ruling of the court thereon and preserved an exception thereto, nothing is preserved by this assignment for our review. *Graham v. People*, 115 Ill. 566, 4 N. E. 790; *Hughes v. People*, 116 Ill. 330, 6 N. E. 55.

The evidence for the prosecution abundantly established the guilt of plaintiffs in error of the crime charged in the indictment. They went together to the house on a farm in the country in the evening of June 4th, where the prosecuting witness resided with her husband. Willis McElyea, a cousin of Mrs. Eason's husband, also lived with them. When they came to the house, the manner of plaintiffs in error frightened Eason and McElyea, who saw them approaching, and Eason went in the house, closed the doors, and attempted to keep plaintiffs in error out. McElyea went into the orchard and hid. One of plaintiffs in error wore a star, and they stated they were officers and had come to arrest Eason. One or more of them had a pistol. They forced the door open, whereupon Eason seized a gun he had in the house, but, instead of using it, ran out and across the fields for help. McElyea joined him in the race, and they gave the alarm to the neighbors, none of whom lived closer than one-fourth mile to Eason's house. When the neighbors came Mrs. Eason was out in the orchard, at the edge of the woods, where she had been dragged by the plaintiffs in error and was being detained by them or some of them, and her attempts to cry out and her moanings were heard by a number of witnesses before she was rescued. We shall not go farther into the sickening details of the evidence, but it justified the jury in finding plaintiffs in error guilty of most brutally and cruelly assaulting and outraging an old, ignorant woman, who was a deaf mute. The only evidence offered on behalf of plaintiffs in error was an attempt to impeach Mrs. Eason's virtue and chastity.

Willis McElyea testified, for the prosecution, as to the frightened, bruised, and bloody condition of Mrs. Eason when she was rescued by the neighbors, and that she gave him to understand, by her method of talking by signs, that she had been dragged out to the woods and a rape committed upon her. He testified Mrs. Eason told him she was dragged out to the woods by two of plaintiffs in error, and was then asked what she said they did. He replied: "She said they committed a rape on her, the way I understood it." The record shows counsel for plaintiffs in error "then and there objected to the witness' understanding, for the reason that he apparently does not know what she did say." Without ruling upon the objection, the court inquired of the witness if he understood, from the motions and signs of Mrs. Eason, what he was telling him, to which he replied he did, and, after describing some of her motions, testified Mrs. Eason said they beat her

over the head with a stick of wood. The record shows counsel for plaintiffs in error "objected to the testimony of this witness on this point." The objection was overruled and an exception preserved. No grounds for the objection were stated by counsel. For aught that appears, this objection was based upon the same grounds as the first one, namely, to the witness testifying to his understanding, for the reason that he apparently did not understand. It was competent for the witness to testify to Mrs. Eason making complaint as to how she had been treated, but not what she said as to who the guilty parties were. If the objection had been based upon this latter ground, it would have been error to have permitted the witness to testify who Mrs. Eason said had outraged her. But that was not the basis of the first objection made, as is shown by the reasons given by counsel for making the objection; and, as the second objection was to the same statement, the court might well have understood, in the absence of any reasons being given for it, that it was based on the same grounds given for the first. That the grounds stated in the first objection were the only grounds of objection counsel intended to raise to this testimony is borne out by the assignment of error upon this question. The fifth assignment of error is that the court erred "in permitting the witness Willis McEllyea to testify as to what he understood, from the signs of Eliza Eason, about the assault." But, if it were conceded this question was properly preserved, another witness, Willford Eason, was permitted to testify to the same statements of Mrs. Eason as to who it was that outraged her, without any objection. Besides, there was an abundance of competent uncontradicted testimony sufficient to sustain this verdict, and the result would undoubtedly have been the same if this incompetent evidence had not been admitted. Where this is true, error in the admission of incompetent evidence does not require a reversal of the judgment. *Du Bois v. People*, 200 Ill. 157, 65 N. E. 658, 93 Am. St. Rep. 183; *Jennings v. People*, 189 Ill. 320, 59 N. E. 515; *Jackson v. People*, 126 Ill. 139, 18 N. E. 286.

Some other errors of minor importance are assigned, but not argued by counsel. We have examined them sufficiently to satisfy us that there is nothing in this record that would justify a reversal of this judgment, and it is accordingly affirmed.

Judgment affirmed.

CARTWRIGHT, C. J., and DUNN and SCOTT, JJ. (dissenting). W. H. Williams, being called by the people for the purpose of acting as an interpreter, was sworn and interrogated first as to his ability to communicate with and understand Nove Morgan. He was then told to ask Nove Morgan, who was present, but not sworn, as to his acquaintance with Eliza Eason, and he reported that Morgan said he knew her, but

could not tell how long—whether more than 10 years or not. Williams was then told to request Morgan to ask her what any men did to her, if anything, on the evening of June 4, 1907. The defendants, by their counsel, objected to the question, but the court overruled the objection, remarking that this was preliminary, and defendants excepted. Thereupon Williams testified that Morgan said that Mrs. Eason said that Simpson and Weston choked her; that one caught her by the arms, one by the throat, and one scratched her; and that Davis and Simpson had connection with her. Williams was then told to ask Morgan if he could find out from Mrs. Eason if she knew what the result would be if she told a lie, and he answered that Morgan said she said if she should swear to a lie she would go to hell, or down below. Counsel for the prosecution proceeded no further with the examination, and Mrs. Eason was not sworn as a witness. For whatever purpose this examination was conducted, the effect of it was to get before the jury the unsworn statement of Eliza Eason as to the matter in controversy. It is no answer to say that it was not intended that this examination should be her testimony in the case. The witness detailed from the witness stand, against the objection of the defendants, her account of the very transaction that was the subject-matter of the investigation. As evidence to be considered by the jury her statement so made was manifestly incompetent. It was mere hearsay. The jury heard it the same as any other evidence in the case, and were not instructed that it was not to be considered by them, even if it could be erased from their minds by an instruction.

It is said that the record shows only a general objection, and does not show any objection to the examination taking place in the presence of the jury. A general objection was all that was necessary, because under no circumstances could the testimony called for be competent. If it was sought to have Mrs. Eason's unsworn statement placed before the jury, that could under no circumstances be competent, because it was hearsay. If the examination was for the purpose of determining whether Morgan could understand Mrs. Eason and interpret her statement to Williams, then it was unnecessary and improper that the details of her statement to Morgan should be repeated either to the court or jury. Whether Morgan could understand and interpret was the preliminary question, and what she communicated to him was not proper to be given to the jury before that preliminary question was disposed of.

Willis McEllyea testified, over defendants' objection, as to what he learned from Mrs. Eason after she had escaped from the defendants. He testified, not only to the fact that she made complaint, but to the details of the assault upon her as he says they were

given by Mrs. Eason, and this conversation did not occur on the night of the assault, but at various times subsequently prior to the trial. Even if the fact of her complaint had been competent, the details given by her of the assault were not admissible. *Stevens v. People*, 158 Ill. 111, 41 N. E. 856. The defendants objected to the conversation when it was first asked for, and their objection should have been sustained. Later in the examination an additional objection was made because the witness was testifying to his understanding rather than what was said. The court made no ruling on this objection; but there was no waiver by the making of this additional objection of the general objection previously made to the whole conversation.

The court erred in both the particulars above mentioned in the admission of evidence. There is no ground for holding that the evidence did the defendants no harm. They were on trial for a serious crime, and, aside from the incompetent statements of Mrs. Eason, the evidence as to the particular offense charged against them was entirely circumstantial. They had the right to have this circumstantial evidence submitted to the jury and considered both with reference to their guilt and the punishment to be inflicted upon them, if they were found guilty, unaffected by the incompetent statements of Mrs. Eason, the effect of which would manifestly be to inflame the minds of the jury against the defendants. It was the province of the jury in this case to fix the length of imprisonment to be imposed, and, even though the defendants might have been found guilty without the incompetent evidence, it was of such a character as was calculated to seriously affect the punishment to be imposed, to the prejudice of the defendants.

(236 Ill. 113.)

**JONES et al. v. SUPREME LODGE  
KNIGHTS OF HONOR.**

(Supreme Court of Illinois. Oct. 26, 1908.)

**1. JUDGMENT (§ 570\*) — CONCLUSIVENESS — MATTERS CONCLUDED — CASE DISMISSED AFTER REMAND BY APPELLATE COURT.**

Where the Appellate Court of Indiana reversed a judgment and remanded the cause, and the judgment was set aside, whereupon plaintiffs dismissed the case, the judgment of the Appellate Court was not res judicata as to a subsequent action in Illinois.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1043; Dec. Dig. § 570.\*]

**2. LIMITATION OF ACTIONS (§ 27\*) — ACTIONS ON CONTRACTS — WRITTEN CONTRACTS.**

Where a benefit certificate was payable to a specified person, wife of insured, and she died before his death, the introduction of the society's by-laws to show to whom payment was to be made in case of death of the beneficiary named, did not make the certificate an oral contract, within the statute of limitations.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 132; Dec. Dig. § 27.\*]

**3. INSURANCE (§ 813\*) — MUTUAL BENEFIT INSURANCE — ACTION ON CERTIFICATE — PARTIES — JOINDER.**

Upon the deaths of some of the beneficiaries in a benefit certificate, the surviving beneficiaries may sue on the certificate without joining the administrators of those deceased.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 813.\*]

**4. INSURANCE (§ 697\*) — MUTUAL BENEFIT SOCIETIES — AGENCY OF SUBORDINATE LODGE.**

The subordinate lodge of a mutual benefit society is the agent of the supreme lodge.

[Ed. Note.—For other cases see *Insurance*, Dec. Dig. § 697.\*]

**5. INSURANCE (§ 819\*) — MUTUAL BENEFIT SOCIETIES — WAIVER OF RIGHT OF FORFEITURE — EVIDENCE.**

Evidence, as to the custom of a subordinate lodge of a mutual benefit society in receiving and crediting assessments, held to warrant a finding that prompt payment and the right of forfeiture were waived by the society.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 819.\*]

**6. INSURANCE (§ 755\*) — MUTUAL BENEFIT SOCIETIES — WAIVER OF FORFEITURE OR SUSPENSION BY SUBORDINATE LODGE.**

A subordinate lodge of a mutual benefit society may waive forfeiture or suspension of a member upon failure to pay assessments and dues promptly.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 755.\*]

**7. APPEAL AND ERROR (§ 204\*) — PRESENTATION OF OBJECTION IN LOWER COURT — SUBMISSION OF ISSUE TO JURY.**

In an action on a benefit certificate, where defendant order submitted, as the sole question at issue, whether insured elected to sever his connection with the order, or whether the order waived the prompt payment of the last assessment, it cannot on appeal question the competency of the proof of waiver.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1258-1280; Dec. Dig. § 204.\*]

**8. INSURANCE (§ 819\*) — MUTUAL BENEFIT INSURANCE — ACTION ON CERTIFICATE — EVIDENCE.**

Evidence held not to show that insured had severed his connection with a mutual benefit society.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 819.\*]

**9. INSURANCE (§ 818\*) — MUTUAL BENEFIT SOCIETIES — ACTIONS ON CERTIFICATES — ADMISSIBILITY OF EVIDENCE.**

In an action on a mutual benefit certificate, evidence that a creditor of insured sent a check to the society for the last assessment, after insured's death, which the society returned only after hearing of the death, was admissible, not to show a new contractual relation between insured or his beneficiaries and the society, but to show that the society did not at that time regard the certificate as having been forfeited.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 818.\*]

Appeal from Appellate Court, Fourth District, on Appeal from Circuit Court, St. Clair County; R. D. W. Holder, Judge.

Action by Emma Jones and others against the Supreme Lodge Knights of Honor. From a judgment of the Appellate Court for the Fourth district affirming a judgment for

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaintiffs, defendant appeals, on a certificate of importance. Affirmed.

Schaefer, Farmer & Kruger and Frederick H. Bacon, for appellant. Cullop & Shaw and Kramer, Kramer & Campbell, for appellees.

CARTER, J. Appellees brought suit in assumpsit, in the circuit court of St. Clair county, against the appellant, for recovery on a policy of \$1,000 taken out by Joseph L. Jones in the appellant company. After the pleadings were finally settled, the case was submitted to a jury, which returned a verdict for appellees for \$998.25, the amount of the certificate less one assessment, unpaid at the death of the insured. Judgment being entered by the trial court on this verdict, an appeal was prayed to the Appellate Court, where that judgment was affirmed. A certificate of importance having been granted by the latter court, the case is now brought here by appeal for further review.

Joseph L. Jones became a member of the appellant organization December 20, 1888, uniting with its subordinate lodge at Mt. Carmel, Ill. On this lodge being disbanded, his membership was transferred to Vincennes lodge, at Vincennes, Ind. He died at his home in Knobel, Ark., March 10, 1901. The beneficiary named in the benefit certificate was Belle Jones, his wife, who died before her husband. He left no children. His father, mother, and appellees herein, who are his brothers and sisters, were his heirs. The proof shows that the payments of assessments while Jones was a member of these lodges had sometimes been made during the month when due, and sometimes several days after they were due, but were always accepted and credited by the lodge officer, whose duty it was to receive and forward them. The January assessment previous to his death was paid by Joseph Sellmeyer, a creditor of Jones. March 18, 1901, Sellmeyer wrote from Knobel, Ark., to Wagner, the financial reporter of the subordinate lodge, inclosing a draft for \$1.75 for Jones' February assessment. Wagner, later on, learned that Jones died March 10th, and returned to Sellmeyer the draft received from him.

Before bringing this suit, appellees brought a suit in the circuit court of Knox county, Ind., where a judgment was obtained against appellant for \$1,000. On appeal being taken to the Appellate Court of that state, the evidence was found not sufficient to support the verdict and judgment, and the judgment was thereupon reversed for further proceedings consistent with the opinion of that court. Thereupon the judgment of the Appellate Court was certified to the circuit court of Knox county, and the judgment of the circuit court was set aside. Appellees then dismissed their suit in the circuit court of Indiana. Appellant insists that the judgment and opinion of the Appellate Court of Indiana is *res judicata* on the issues in this

cause, invoking the federal Constitution and statutes, which require that "full faith and credit shall be given, in each state, to the public acts, records and judicial proceedings of every other state." This question was fairly raised by the pleadings and proof, and the trial court, as well as the Appellate Court, ruled against the contention of appellant. This ruling, we think, is correct. This court, in *Spring Valley Coal Co. v. Patting*, 210 Ill. 342, 71 N. E. 371, discussed the question here involved, and, after reviewing the authorities, we said (page 351 of 210 Ill., page 374 of 71 N. E.): "When a cause is reversed by an appellate tribunal and remanded for a new trial, the principles announced by the appellate tribunal in its opinion, on a retrial of the case in the court to which the case is remanded, must control; but where, upon a remandment, the cause is dismissed, or the plaintiff suffers a nonsuit, and a new action is brought upon the cause of action in another forum, the principles of law announced by said appellate tribunal will not necessarily control in the decision of the case in the new forum." That case is absolutely decisive of the question here involved. We also had occasion, in the late case of *Collins v. Metropolitan Life Ins. Co.*, 232 Ill. 87, 83 N. E. 542, 14 L. R. A. (N. S.) 356, to consider this same question, with the same result. The question is so fully and exhaustively discussed in these two cases that we deem it unnecessary to extend the discussion here. Even though the circuit court of Knox county, Ind., erred in dismissing the suit, as contended, under the doctrine invoked by appellant the federal law requires the courts of this state to give full faith and credit to that finding. The opinion and judgment of the Appellate Court of Indiana is not *res judicata* as to the present action.

Appellant also contends that the plea of the statute of limitations filed by it should have been sustained, because the contract sued on was not entirely in writing, and that therefore the statute of limitations as to oral contracts must govern. It insists that in order to recover it was necessary for appellees to offer oral testimony in addition to the benefit certificate. Just what testimony is referred to is not stated, but we gather from the arguments of counsel that it was concerning the heirship. The original certificate was payable to Belle Jones, wife of the insured. The constitution and by-laws provided that, in the event of the death of the beneficiaries designated, the insurance should be paid to the widow and children, and if none, "then to his heirs." Had the wife been living at the time the suit was brought, it could certainly not be contended that the contract was not written. The certificate specifically named her, yet it would have been necessary to introduce oral evidence to identify her as the beneficiary. Her death did not change the written contract to an

oral one, and the introduction of the by-laws of the association, showing to whom the policy was then payable, does not make it an oral contract. We consider what is said in *Conductor's Benefit Ass'n v. Loomis*, 142 Ill. 560, 32 N. E. 424, cited and relied on by appellant, in harmony with this conclusion.

Appellant further contends that the motion made by it in the trial court to dismiss because of want of necessary parties should have been sustained. The father and mother of the insured, while now dead, were living at his death. It is contended that their administrators should have been joined as plaintiffs. It was held by this court, in *Supreme Lodge Knights and Ladies of Honor v. Portingall*, 167 Ill. 291, 47 N. E. 208, 59 Am. St. Rep. 296, that upon the death of one of the beneficiaries named in an insurance certificate the surviving beneficiaries may bring an action on the certificate without joining the administrator of the deceased's beneficiary. The exact question raised as to the nonjoinder of parties was passed on adversely to appellant's contention in that case, and that decision must control here.

It is contended that the court should have given a peremptory instruction to find for the defendant, as requested by appellant. The constitution of the order provides that "a member failing to pay any assessment required by law shall stand suspended, and shall not thereafter be entitled to the benefit \* \* \* until he has been duly reinstated in his subordinate lodge in accordance with the laws of the order." It is insisted that under this provision the insured, not having paid his February assessment at the date of his death, March 10th, forfeited his membership in the order. We think there is sufficient evidence in the record to show that the custom, usage, and practice of receiving and crediting assessments by the subordinate lodge was sufficient to warrant the jury in finding that prompt payment and the right of forfeiture were waived by appellant, if appellant could be bound by the acts of the officials of subordinate lodges. Whatever the holding in other jurisdictions has been, it is clear that under the decisions in this state the subordinate lodge or council of a fraternal benefit society is the agent of the supreme lodge or council, and that such subordinate lodge may waive forfeiture or suspension upon failure to pay assessments and dues promptly. *Coverdale v. Royal Arcanum*, 193 Ill. 91, 61 N. E. 915; *Grand Lodge v. Lachmann*, 199 Ill. 140, 64 N. E. 1022; *Court of Honor v. Dinger*, 221 Ill. 176, 77 N. E. 557; 2 *Bacon on Benefit Societies* (3d Ed.) § 433. Moreover, we consider that, appellant having submitted to the jury, as the sole question at issue, by its first instruction, the question as to "whether or not Joseph L. Jones in his lifetime elected to sever his connection with the defendant order and

abandon the same, or whether or not the defendant waived the prompt payment of the assessment of \$1.75 payable by said Jones on or before the last day of February, 1901," it cannot now be heard to insist that the proof of waiver was incompetent. This identical question, as well as most of the other points raised by appellant, was discussed and decided adversely to appellant in *Illinois Life Ass'n v. Wells*, 200 Ill. 445, 65 N. E. 1072. Appellant cites and quotes at length from *Northern Ins. Co. v. Grand View Building Ass'n*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, as laying down a contrary doctrine. We have already had occasion in *Orient Ins. Co. v. McKnight*, 197 Ill. 190, 64 N. E. 339, to refer to that case, and we there held that this court had adopted a different rule. We find no basis in the evidence for the contention that Jones withdrew or in any way severed his connection with the order. It is true that he attempted to have the certificate made payable to Joseph Sellmeyer as a creditor, but was informed that, under the laws of the order, this could not be done, as Sellmeyer was not related to or dependent upon him. We do not think this tended to prove that he dropped his membership. The evidence that Sellmeyer sent a check for the February installment after the death of the insured was competent, not for the purpose of proving a new contractual relation between the insured or his beneficiaries and the company, but for the purpose of showing that the company did not at that time regard the policy as having been forfeited. *Illinois Life Ins. Co. v. Wells*, supra.

The refused instructions asked by appellant each involved, in some manner, the questions heretofore discussed and decided adversely to appellant's contention, and hence they were properly refused by the trial court.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(236 Ill. 119)

#### PHILLIPS v. REYNOLDS.

(Supreme Court of Illinois. Oct. 26, 1908.)

##### 1. PARTNERSHIP (§ 5\*)—THE RELATION—PROFIT SHARING.

That plaintiff and defendant were interested in particular transactions, for the purchase and sale of real estate and the division of profits was sufficient to constitute a partnership in the particular transactions, even though no general partnership existed.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 16; Dec. Dig. § 5.\*]

##### 2. PARTNERSHIP (§ 311\*)—SETTLEMENT BETWEEN PARTNERS—VALIDITY—MISREPRESENTATION.

Where plaintiff and defendant agreed to sell land and share the profits, and defendant showed plaintiff what purported to be a written contract for its sale at a certain price in order to get plaintiff out of the transaction, when in

fact no such sale was made, and plaintiff, relying on such representation, accepted his share of the profits on the basis of the alleged sale, and made settlement without knowledge that the amount received for the land was greater than represented by defendant, he was not bound by the settlement.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 721, 723; Dec. Dig. § 311.\*]

### 3. PARTNERSHIP (§ 336\*)—ACTIONS FOR ACCOUNTING—CREDITS.

In a suit between partners for an accounting, the partnership accounts being kept by defendant, and he having transacted the partnership business and knowing of any money advanced, expense incurred, etc., of which plaintiff had no knowledge, and there being nothing to show credits due defendant, of which plaintiff had knowledge, or of any evidence in plaintiff's possession to show such credits, defendant may not object that there is no satisfactory evidence to show the true balance, as he should have claimed credits for any sum due him, the object of the hearing being to enable the parties to produce their evidence.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 336.\*]

### 4. PARTNERSHIP (§ 308\*)—ACTIONS FOR DISSOLUTION—INTEREST ON CREDITS.

Where a partnership between plaintiff and defendant was dissolved and an account stated, which, because of defendant's fraud, was not true, and plaintiff's right to recover any amount has since been contested, in a suit for an accounting, interest was properly allowed plaintiff on the amount due him from the date of the settlement between them.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 713, 714; Dec. Dig. § 308.\*]

Appeal from Appellate Court, Third District, on Appeal from City Court of Canton; P. W. Gallagher, Judge.

Action by Austin Phillips against William N. Reynolds for a partnership accounting. From a judgment of the Appellate Court affirming a decree for plaintiff, defendant appeals. Reversed and remanded.

Stevens & Horton and Lucien Gray, for appellant. Kinsey Thomas, H. M. Waggoner, and Chipperfield & Chipperfield, for appellee.

DUNN, J. Prior to April 12, 1904, appellant and appellee were engaged together in trading in real estate, and on that date entered into a written contract declaring all matters settled between them, and that two pieces of real estate, one in Canton, the other in Peoria, Ill., the title to which was in appellant, were owned by the two jointly. Afterward the appellee filed the bill in this case to set aside said contract and for an accounting. This appeal is from the judgment of the Appellate Court affirming a decree granting the relief prayed for.

The appellant denied the existence of any partnership, but in his testimony admitted that he was interested with Phillips in particular transactions for the purchase and sale of real estate and the division of profits. Even though no general partnership existed, this was sufficient to constitute a partnership in the particular transactions. Roby

v. Colehour, 135 Ill. 300, 25 N. E. 777; Winstanley v. Gleyre, 146 Ill. 27, 34 N. E. 628; Van Housen v. Copeland, 180 Ill. 74, 54 N. E. 169.

Evidence was heard relating to many transactions, but the court found that as to two only of such transactions should the appellant be required to account to the appellee. No cross-errors have been assigned, and it will therefore be necessary to consider only these two transactions. One of the transactions relates to 240 acres of land near Mexico, Mo., to which the appellant acquired title on March 1, 1903, for \$6,600, and which was afterward disposed of for a consideration of \$13,400. The land was contracted for in August, 1902, and appellant admits that the appellee was to share equally with him in the profits of the trade after allowing appellant 7 per cent. interest on the money advanced by him. He further says, however, that appellee was to assist in selling the land before the 1st of March, when appellant was required to take and pay for it, and, if the sale was not made before that time, appellee was to have no interest in it. No sale having been made before that time, appellant paid for the land, and now insists that appellee had no further interest in it. He testified, however, that he afterward bought appellee's interest in this land for the Mexico Land & Loan Company and paid him \$2.50 an acre for it. A number of witnesses testify that appellant told them that appellee was interested in this land. His partners in the Mexico Land & Loan Company, through which the land was disposed of, testify that he told them that he would have to report to appellee, and give him something in the way of profits and get rid of him. Before the land was disposed of, appellant showed appellee what purported to be a written contract with E. F. Pumphrey, one of his said partners, for the sale of the land to Pumphrey at \$32.50 an acre, and paid appellee as his share one-half of the profit of \$5 an acre thus shown. Pumphrey repudiated this document and denied ever signing it. Whether he did sign it or not, it was manifestly not intended as a sale of the land, but was a device for deceiving appellee and getting rid of him. The price received on the sale of the land was a matter peculiarly within the knowledge of the appellant. It was material for the appellee to know. He had a right to rely upon the truth of the statement of appellant, his partner, in regard to it. Appellant knowingly misrepresented it to him, and appellee, relying upon the false statement, accepted \$2.50 per acre as his share of the profits. With no further information he executed the contract of settlement on April 12, 1904. While the negotiations resulting in this agreement were pending for some time, appellee was all the time in ignorance of the amount actually

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

realized from the land, and had been led by appellant's misrepresentation to believe it much less than it was. A settlement thus obtained by deception practiced by one partner upon another will not be binding upon the confiding partner whose trust has been abused.

The other transaction concerned a house and 24 acres of land and three lots in Beardstown, Ill., owned jointly by the parties, the title being held by appellant subject to an incumbrance of \$1,076. This property was traded by appellant to George E. Massey for his interest in a stock of goods, such interest being valued at \$4,500. Appellant claims that he bought appellee's interest in the Beardstown property for the undivided half of a house and lot in Peoria and \$462 in money. Appellee claims that appellant represented to him that he had traded the Beardstown property for the Peoria property and \$924. The court found in favor of the appellee on these claims, and charged appellant with \$4,500 as the proceeds of the Beardstown property, being a profit of \$2,500, one-half of which, less the \$462 received, the appellant was decreed to pay to appellee. We do not think the evidence justifies the finding that Massey's interest in the stock of goods traded for was worth \$4,500. This stock of goods had formerly belonged to appellant at Kirksville, Mo., and had been moved to Wagoner, Ind. T., and consolidated with another stock. Appellant then sold the stock to Massey on credit. The preponderance of the evidence is that the stock at the time of the trade was not in good condition, that it would not invoice to exceed \$12,000 and was worth between 60 and 70 per cent. of the invoice, and that Massey owed appellant \$7,000 on the stock. Massey's interest in the stock could not, therefore, have exceeded the amount (\$2,000) for which appellant accounted to appellee as the proceeds of the trade.

It is contended that satisfactory evidence does not appear in the record to show the true balance between the parties. If any partnership accounts were kept, they were kept by appellant. Whatever money was advanced he advanced. In the single transaction in which he is now held to account it appears that the property was bought for \$8,900 and sold for \$13,400, and that appellant paid to appellee \$650 as his share of the profits. If any money was advanced or expenses incurred, or if any interest accrued, the appellant knew all about it and the appellee nothing. The object of a hearing is to enable the parties, respectively, to produce their evidence. There is nothing in the case made by the appellee which presupposes credits to which the appellant is entitled, of which the appellee has knowledge and evidence within his power to produce. If there are any sums for which the appellant should have credit, he had knowledge of

them and should have brought them forward at the hearing. Interest was properly charged against appellant from the date of the contract of settlement. The partnership was then terminated, and the account stated between the partners, but by the fraud of one of them the balance due was not truly ascertained, and appellee's right to recover any amount has ever since been contested. *Scroggs v. Cunningham*, 81 Ill. 110; *Robbins v. Laswell*, 58 Ill. 203; *Derby v. Gage*, 38 Ill. 27.

There was error in charging appellant with any amount on account of the Beardstown property.

The judgment of the Appellate Court and the decree of the city court of Canton will be reversed and the cause remanded to the city court, with directions to enter a decree against the appellant for \$2,750 and interest from April 12, 1904, to the date of said decree.

Reversed and remanded, with directions.

(236 Ill. 124)

PEOPLE ex rel. MOODY v. HENRY et al.

(Supreme Court of Illinois. Oct. 26, 1908.)

1. MANDAMUS (§ 90\*)—TO DRAINAGE COMMISSIONERS—MATTERS OF JUDGMENT.

Under Farm Drainage Act, § 17 (Hurd's Rev. St. 1905, c. 42, § 91), conferring power on commissioners to determine on a system of drainage, providing that "preference shall be given to tile drains whenever these will accomplish the purpose," and section 76 (section 151), providing that "these ditches, if open, shall be made of tile drains when practicable," the determination of whether a tile drain is practicable is one for the judgment of the commissioners, so that their determination cannot be controlled by mandamus, unless they are shown to have acted fraudulently or corruptly.

[Ed. Note.—For other cases, see *Mandamus*, Dec. Dig. § 90.\*]

2. PLEADING (§ 8\*)—FRAUD—FACTS.

The general allegation that a party acted fraudulently is but a conclusion, and it is necessary to aver the facts on which fraud is predicated, so that fraud is not sufficiently charged by the petition for mandamus to compel commissioners to construct a tile drain, averring that two of the commissioners are landowners in the district, and that the commissioners, from selfish motives, and to avoid paying their just proportion of the cost of extending the tile to the outlet of the ditch, and in fraud of petitioner's rights, refused to construct such tile drain to the outlet, but determined on and adopted the plan for an open ditch.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 28½; Dec. Dig. § 8; \* *Fraud*, Cent. Dig. § 37.]

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, Macomb County; W. C. Johns, Judge.

Mandamus, on the relation of John Moody, against M. L. Henry and others. From a judgment of the Appellate Court, affirming a judgment for defendants, petitioner appeals. Affirmed.

Appellant is a landowner in drainage district No. 1 in the town of Mt. Zion, Macon county, Ill., a drainage district organized under section 76, Farm Drainage Act (Hurd's Rev. St. 1905, c. 42, § 151). He filed the petition in this case against appellees, the drainage commissioners in and for said drainage district, praying a writ of mandamus, commanding said commissioners to alter the plan or system of drainage adopted by them, by substituting for an open ditch through and across the lands of petitioner, as decided upon by the commissioners, a tile drain of sufficient capacity to carry the waters of the district, instead of said open ditch. The petition avers that the petition for the organization of the district was filed with the town clerk of Mt. Zion township in January, 1906; that on February 6, 1906, the commissioners of highways of said township, acting as drainage commissioners, made a decision and finding for the organization of said district, and employed an engineer experienced in farm drainage to prepare profiles, maps, plans, and specifications for the construction of a tile drain throughout the entire length of an open ditch that ran through the district, and through petitioner's land, which had been constructed by mutual agreement of the landowners. The petition further avers that on the 9th day of March, 1906, said commissioners adopted the plan of their engineer for the laying of a tile drain, instead of the open ditch, through the district, and through the lands of the petitioner, and on that day made and filed a classification of the lands. On the 10th day of March, 1906, appellees were elected drainage commissioners within and for said district, to succeed the highway commissioners as such drainage commissioners, and the petition avers that in May following, appellees, as drainage commissioners of said drainage district, adopted a plan and system for the drainage of the land therein, by which it was proposed to put in a drain tile from the upper end of the district to within about 4,500 feet of the outlet, and as to the said 4,500 feet, it was proposed to clean out said open ditch and leave it open. This open part of the ditch runs something over a half mile through petitioner's land, but its outlet is over one-fourth mile beyond petitioner's land. It is this 4,500 feet of open ditch that petitioner complains of, and asks that the commissioners be commanded, by a peremptory writ of mandamus, to change to a tile drain of ample capacity to carry the waters of said district. The petition avers that it is practicable to construct a tile drain where it is proposed to leave an open ditch, and was so determined by the original commissioners and the engineer employed by them; that the open ditch proposed by appellees will not furnish sufficient outlet for the waters of the district, on account of the increased flow caused by the tile drain above it, and by reason thereof the water will over-

flow and damage complainant's lands and crops. It appears from the allegations of the petition that two of appellees are landowners in the district, and the petition avers that the commissioners, from selfish motives, and to avoid paying their just proportion of the cost of extending the tile to the outlet of the ditch, and in fraud of the rights of petitioner, refused to construct such tile drain to the outlet, but determined upon and adopted the plan for an open ditch. Appellees demurred to the petition. The circuit court sustained the demurrer, and, appellant abiding by the petition, it was dismissed, and judgment rendered against appellant for costs. On appeal to the Appellate Court for the Third District that judgment was affirmed, and the case is brought here by appeal from the Appellate Court.

L. A. Mills, Hugh Crea and Hugh W. Housum, for appellant. Whitley & Fitzgerald, for appellees.

FARMER, J. (after stating the facts as above). Section 17 of the farm drainage act confers power upon the commissioners to determine upon a system of drainage which shall provide main outlets of ample capacity for the waters of the district. "Preference shall be given to tile drains whenever these will accomplish the purpose, and when open drains are deemed necessary, if it be practicable, these shall follow boundary lines, and parallels, or right angles, as the case may be provided the drainage shall not be impaired thereby." Hurd's Rev. St. 1905, p. 804, c. 42, § 91. Section 76 of said act (section 151), under which this district was organized, provides that "these ditches, if open, shall be made tile drains when practicable." Appellant's principal contention is that the statute is mandatory upon the commissioners, and that they have no discretion in the determination of whether an open ditch or a tile drain shall be used. It is undoubtedly mandatory on the commissioners to act on a petition presented to them, in accordance with law, for the organization of a drainage district. The use of the words in section 17, that "preference shall be given to tile drains whenever these will accomplish the purpose," and in section 76, "these ditches, if open, shall be made tile drains when practicable," clearly recognizes that in some cases tile drains would not be practicable, and therefore preference could not be given them. A number of things are to be considered in determining whether a tile drain is practicable or not, and these things are left to be determined by the drainage commissioners, and their decision, whether correct or erroneous, cannot be reviewed and controlled by a writ of mandamus, unless it is shown they have acted fraudulently or corruptly. Certain rules of law governing the issuing of the writ of mandamus are well settled by the de-

cisions of this court. It has been decided that the petitioner must show a clear legal right to the writ, and that it will not be issued in cases where the right is doubtful or uncertain; also, that where the duty is imposed upon inferior officers to perform a specific act in the performance of which they are not given the exercise of any discretion, the writ will generally lie, but where the performance of the duty depends upon the exercise of their judgment and discretion, the writ will not lie to compel them to act in a particular manner, though, if they refuse to act at all, the writ will lie to compel them to act, but not to control their decision. *People v. Dental Examiners*, 110 Ill. 180; *County of St. Clair v. People*, 85 Ill. 396; *People v. Rose*, 225 Ill. 496, 80 N. E. 293. The case of *Peotone Drainage District v. Adams*, 163 Ill. 428, 45 N. E. 266, is not in conflict with the authorities above cited. In that case the ditch had been constructed before the petition was filed, and the claim of the petitioner was that it did not afford him an outlet for the drainage of his land located within the district. It was shown by the evidence that the petitioner's lands could not be drained by the ditch, and, although he had been taxed for its construction, he received no benefit from it. The court held that the provision of section 17 requiring commissioners to adopt a system of drainage "which shall provide main outlets of ample capacity for the waters of the district" was mandatory; and this seems clearly correct, for the power is conferred upon them, and they are given no discretion whatever with reference to constructing ditches of sufficient capacity to carry the waters of the district. If the petition in this case is good, then the decision of the commissioners as to whether they should construct tile drains or open ditches would be subject to the control of the courts in every case, for the statute does not require tile drains in all cases, but only where it is practicable.

Appellant further contends that, if the commissioners have a discretion in determining whether they will construct tile drains or open ditches, this petition shows such abuse of discretion as to amount to fraud, and that upon that theory the petition should be held sufficient. No facts are averred in the petition constituting fraud. We have set out in the preceding statement the allegations of the petition relied upon under this head. The general charge that a party acted fraudulently, or was guilty of fraud, is a statement of a conclusion, but is not a good pleading. The facts should be averred upon which the charge of fraud is based. *East St. Louis Connecting Railway Co. v. People*, 119 Ill. 182, 10 N. E. 397; *Smith v. Brittenham*, 98 Ill. 188; *Jones v. Albee*, 70 Ill. 34; 9 *Ency. of Pl. & Pr.* 686.

The circuit court properly sustained the de-

murrer to the petition, and the judgment of the Appellate Court affirming the judgment of that court is affirmed.

Judgment affirmed.

(236 Ill. 129)

# CITY OF CHICAGO v. WELLS.

(Supreme Court of Illinois. Oct. 26, 1908.)

## 1. CONSTITUTIONAL LAW (§ 251\*)—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY—LEGISLATIVE ACT OR ORDINANCE.

Under Bill of Rights, § 2, providing that no person shall be deprived of property without due process of law, no one can be deprived of property by legislative act or ordinance.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 726, 727; Dec. Dig. § 251.\*]

## 2. CONSTITUTIONAL LAW (§ 278\*)—DUE PROCESS OF LAW—"PROPERTY" AND RIGHTS PROTECTED.

The right of dominion and power of disposition over a tract of land, constituting "property," includes the right of an owner to subdivide it in such a way as he sees fit, or to leave it unsubdivided.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 278.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

## 3. CONSTITUTIONAL LAW (§ 290\*)—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY—ASSESSMENTS AND SPECIAL TAXES.

Local Improvement Act (Hurd's Rev. St. 1905, c. 24, § 547) § 41, added by amendment in 1901 (Laws 1901, p. 106), and providing that unsubdivided tracts of land may, for the purpose of spreading assessments for house drains and water service pipes, be divided into lots of a frontage of 25 feet each, etc., together with an ordinance, based thereon, dividing an unsubdivided tract into 25-foot strips and assessing each strip for the purpose of laying water service pipes in a street in front of the property, were void as violating Bill of Rights, § 2, providing that no person shall be deprived of property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 290.\*]

Appeal from Cook County Court; D. T. Smiley, Judge.

Proceedings by the city of Chicago against Jane Oreigh Wells to confirm a special assessment for laying water service pipes. From a judgment of confirmation, defendant appeals. Reversed and remanded.

John M. Blakeley, for appellant. George A. Mason, William T. Hapeman, and Eugene H. Dupee (Edward J. Brundage, Corp. Counsel, of counsel), for appellee.

CARTWRIGHT, C. J. The county court of Cook county overruled the objections of the appellant to the special assessment against her property, abutting on North Clark street, for the purpose of laying water service pipes in said street between Devon avenue and Howard street, which questioned the authority of the city to subdivide appellant's property and assess it in strips of 25 feet each. Appellant excepted, and waived a jury on the question of benefits,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which question was submitted to the court for decision. The court overruled all objections, and entered judgment of confirmation, from which judgment this appeal was taken.

The ordinance provides for laying lead water service pipes, with brass taps and stop-cocks and spiral cast-iron shut-off boxes, from the public main water pipe in the street to a point 7 feet from the street line of each of the lots, blocks, tracts, and parcels of land described therein. The appellant is the owner of a tract of land, the legal description of which is block 2, Rogers Park, Cook county, Ill. It is bounded on the east by Clark street, on the south by Touhy avenue, on the north by Rogers avenue, and on the west by the right of way of the Chicago & Northwestern Railway Company, and it has never been subdivided into lots. The ordinance divides the block into 46 strips of ground, each 25 feet in width, described in the ordinance as "N. 25 ft.—S. 25 ft. N. 50 ft.—S. 25 ft. N. 75 ft.," etc. The assessment against each of the strips is \$20.52, making a total assessment of \$948.92.

The authority to subdivide appellant's block of land is claimed by appellee under the following portion of section 41 of the Local Improvement Act (Hurd's Rev. St. 1905, c. 24, § 547), added by amendment in 1901 (Laws 1901, p. 106): "Unsubdivided tracts of land may, for the purpose of spreading assessments for house drains and water service pipes, be divided into lots of a frontage of twenty-five feet each; and any fraction of frontage then remaining may be assessed as a fractional lot." Prior to that amendment it was decided in several cases that a city had no power arbitrarily to subdivide a piece of land which the owner had allowed to remain in one parcel. In *Warren v. City of Chicago*, 118 Ill. 329, 11 N. E. 218, there was an assessment like this, for the purpose of constructing water service pipes to be laid and connected with the main water pipe, and it was held that an arbitrary subdivision of the appellant's lots for the purpose of the special assessment was without any authority, either in law or fact. In *Cram v. City of Chicago*, 139 Ill. 265, 28 N. E. 758, which was another special assessment to lay water service pipes, the ordinance subdivided the property into strips of 25 feet, each of which was assessed a certain sum. The court said that an arbitrary description, or one having no foundation in fact, could never have been contemplated by the law, and that the property should have been proceeded against, as it was known and legally described. In *People v. Cook*, 180 Ill. 341, 54 N. E. 173, where the question arose in a collateral proceeding for judgment against delinquent lands on a special assessment for laying drain pipe, it was held that the ordinance, which subdivided the tract into 44 parcels, was void. The decision was not rested on the want of an enabling act, but upon the rights of an own-

er of land. The court said (page 343 of 180 Ill., page 174 of 54 N. E.): "The owner of property cannot be compelled to subdivide his land into 25-foot strips fronting upon a street. The owner has a right to subdivide his land in such a way as he sees fit. He may use his own pleasure and best judgment in subdividing it, so that it will produce to him the best revenue. A municipality cannot dictate to the owner how he shall subdivide his land." In *Bickerdike v. City of Chicago*, 185 Ill. 280, 56 N. E. 1096, the ordinance for a sewer provided that house slants should be placed in both sides of the sewer, opposite every 20 feet of lot frontage. It was again said that a city cannot dictate to an owner how he shall subdivide his land, and that property cannot be assessed in the character of lots when not subdivided. It did not appear in that case what the house slants were, and it was assumed, as the language indicated, that they were substantial parts of the improvement, adding materially to the cost, but it appeared in subsequent cases that they were nothing more than open joints in the main pipe of the sewer, where house connections might afterward be put in and joined to the main sewer. Being nothing but open joints, they were not substantial additions to the main sewer, and in subsequent cases they were so regarded. The *Bickerdike* Case was decided in 1900, and in 1901 section 41 was amended, as above stated. In the cases which have since been considered by this court there was no subdivision of property into lots or parcels for the purpose of an assessment. In *Vandersyde v. People*, 195 Ill. 200, 62 N. E. 806, the ordinance included house connection slants every 20 feet on each side of the sewer. The question of the validity of the assessment arose in a collateral proceeding, and it was not contended that the ordinance was void, which the court said it would have been if it had provided for a subdivision of the tract of land. There was nothing from which it could be said that the provision for the openings was unreasonable, and the assessment was made upon the entire tract as a whole. In *City of Chicago v. Corcoran*, 196 Ill. 146, 63 N. E. 690, the assessment again included house slants on both sides of the sewer, opposite each 25 feet. The assessment was upon the entire tract as a whole, according to its legal description, and it was held that there was no subdivision of the property. In *Walker v. City of Chicago*, 202 Ill. 531, 67 N. E. 369, there was no subdivision of the property by the ordinance, and the same was true in *Washington Park Club v. City of Chicago*, 219 Ill. 323, 76 N. E. 383.

Section 2 of the Bill of Rights provides that no person shall be deprived of property without due process of law, and under that provision no person can be deprived of property by legislative act or ordinance. The ordinance in question does not deprive appel-

lant of her land, but it does deprive her of her control and dominion over it. In Austin on Jurisprudence (volume 2, p. 817) property is defined as follows: "Taken with its strict sense, it denotes a right— indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration—over a determinate thing." In *Rigney v. City of Chicago*, 102 Ill. 64, the court said (page 77): "Property, in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others, and doubtless this is substantially the sense in which it is used in the Constitution." In *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. Rep. 206, the same definition of property is adopted, as follows: "Property, in its broader sense, is not the physical thing which may be the subject of ownership, but is the right of dominion, possession, and power of disposition which may be acquired over it." The right of dominion, possession, and power of disposition over a tract of land includes the right of an owner to subdivide it in such a way as he sees fit, or to leave it unsubdivided. That is the principle upon which *People v. Cook*, supra, was decided, where it was held that an owner may use his own pleasure and best judgment in subdividing his land or refusing to subdivide it, and that a municipality cannot dictate to him how he shall subdivide his land, or that he shall subdivide it at all. In this case the whole assessment, amounting to \$948.92, is levied to pay for the lead pipe connections, with their appurtenances, and the effect of sustaining the attempted subdivision would be to deprive the appellant of her right to subdivide her property as she may see fit, and compel her to subdivide the entire block, with nearly 1,200 feet of frontage, into strips of 25 feet in width, fronting on Clark street, or be deprived of a greater or less number of the water service pipes. The unsubdivided tract is assessed in strips of 25 feet each, and each strip is charged with \$20.52, according to an arbitrary subdivision of the property, without the sanction of the owner. If property may be subdivided to suit the views of a board of local improvements and city council, against the will of the owner, for the purpose of special assessment, the same thing could be done under any other form of taxation, so as to compel an owner to subdivide property in only one way. The Constitution, which stands for and expresses the will of the people, prohibits an interference with rights of property by legislative enactment, and denies to the Legislature the power to provide that a municipality may subdivide the property of an owner without his consent, for any purpose what-

ever. The amendment and the ordinance based upon it are void.

The judgment of the county court is reversed, and the cause remanded.

Reversed and remanded.

(236 Ill. 134)

ECKHART v. BURRELL MFG. CO. et al.  
(Supreme Court of Illinois. Oct. 28, 1908.)

1. FRAUDULENT CONVEYANCES (§ 208\*)—VOLUNTARY CONVEYANCES FROM HUSBAND TO WIFE—RIGHT TO IMPEACH.

No one, not a creditor of the husband at the time he made a gift to his wife, can impeach the gift.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 631; Dec. Dig. § 208.\*]

2. FRAUDULENT CONVEYANCES (§ 57\*)—VOLUNTARY CONVEYANCES FROM HUSBAND TO WIFE—RIGHT TO IMPEACH.

Where partners, at the time they made gifts to their wives, had a large and prosperous business, and it appeared that they had always been able to meet their obligations promptly, and they had contracts then on hand from which they might reasonably expect to be able to meet all liabilities in favor of subsequent creditors, the gifts were not void as to such creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 155; Dec. Dig. § 57.\*]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; Thomas G. Windes, Judge.

Suit by Percy B. Eckhart, trustee in bankruptcy, against the Burrell Manufacturing Company and others. From a decree of the Appellate Court, affirming a decree dismissing the bill, complainant appeals. Affirmed.

Clarence T. Morse (Percy B. Eckhart, of counsel), for appellant. E. C. Westwood, for appellees.

VICKERS, J. Percy B. Eckhart, trustee in bankruptcy, filed a bill in chancery in the circuit court of Cook county to set aside certain conveyances alleged to have been made in fraud of creditors. The circuit court denied the relief and dismissed the bill, and that decree has been affirmed by the Appellate Court. The trustee has prosecuted an appeal to this court.

The facts are not seriously controverted. George C. and James T. Burrell were copartners in the business of contracting for the construction of grain elevators. In July, 1902, the partners withdrew \$2,900 in cash and divided it equally between their respective wives. The money was loaned to the Burrell Manufacturing Company, a corporation engaged in manufacturing elevator supplies, by the donees, who took notes from the corporation, with an agreement that the notes were to be paid by issuing certificates of stock to the parties when the capital stock was increased. The books of the copartnership were introduced in evidence, from which

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

it appears that at the time the gifts in question were made the assets of the copartnership were \$38,000 and the liabilities \$30,000. After the money above mentioned was given to the wives, the business of the partners became unprofitable to such an extent that in December following they were forced into bankruptcy. The shrinkage in the assets is explained by unexpected losses on certain contracts then on hand. The circumstances mentioned as the direct cause of such losses are that the supply men did not live up to their contracts for the delivery of material; that labor conditions became serious; that the price of labor advanced, as well as the price of material; that they had a serious loss on account of floods in Texas and quicksand at Hammond, Ind., where they had a large contract for constructing elevators. The loss at Hammond, Ind., was over \$12,000, and something near \$5,000 at El Paso, Tex. At the time of the failure, in December, 1902, the liabilities of the partnership were \$27,000 and the assets \$5,000.

This bill is filed on the theory that the firm was insolvent at the time the gift in question was made, and is intended to reach the shares of stock which were bought with the money given their wives by the partners. Only one question need be considered. There is no averment in the bill and no proof in the record that any of the creditors on behalf of whom the bill is filed were creditors at the time the alleged gift was made. No one not a creditor at the time of the transaction can impeach a gift by a husband to his wife. So far as this record shows, all of the indebtedness that existed at the time the gift was made may have been fully paid. In fact, we are inclined to agree with the Appellate Court that it is a fair inference, under the proof, that such debts were paid, and that all of the creditors represented by appellant extended credit after the assets had been reduced by the gift. In the case of *Bridgford v. Riddell*, 55 Ill. 261, this court said (page 263): "It is not doubted that it is competent for the husband to create a separate estate for his wife out of his own property, if there are no creditors of the husband at the time whose rights will be put in jeopardy; and, even if there are creditors, if the husband retains a sufficient amount to liquidate their claims, it is still lawful. No one can impeach the transaction or inquire into its propriety, unless he was a creditor of the husband at the time and was thereby injured. It has never been held, to our knowledge, that a subsequent creditor can inquire into the fairness of the transaction, even if the conveyances to the wife be regarded as voluntary conveyances, without actual consideration, for the sole purpose of creating a separate estate in the wife. It seems to us that it would be inequitable to hold that a man in his prosperous days could not create a separate estate

for the wife, which should be for her maintenance in case disaster should overtake him in his business transactions in later life, and that the estate thus created for the wife would not be beyond the reach of his subsequent creditors. The law not only sanctions such a course, but in many instances it is nothing more than simple justice to the wife. A father, under such circumstances, may make a like provision for his child, and his right to do so has been sanctioned by the highest judicial authority in this country and in England. The doctrine on these questions has been fully discussed and approved in this court in the case of *Moritz v. Hoffman*, 35 Ill. 553, and need not now be discussed as a new question." The same doctrine was announced again in *Tunison v. Chamblin*, 88 Ill. 378. On page 385 this court said: "But it is the doctrine of this court that only creditors having claims when the fraud is committed can avoid such conveyances, unless it be shown the deed was made in anticipation of incurring debts to avoid the payment of which the conveyance was made [citing cases]. And there is no evidence in this record that Chamblin's debts were then in existence. For aught that appears, the debts, however large they may have been against Tunison when the entry was made, may all have been paid. We cannot presume these debts then existed. On the contrary, we presume, if they had, that fact would have been shown." These cases have been reaffirmed in *Crawford v. Logan*, 97 Ill. 398, and *Eames v. Dorsett*, 147 Ill. 540, 35 N. E. 735.

The bill in this case is not framed on the theory that this money was given to their wives to hinder and delay the collection of debts the creation of which was then in contemplation by the parties; and, if it were, the proof in this record would not sustain a bill so drawn. The evidence shows that at the time the gift in question was made the parties were doing a very large and prosperous business and that they had always been able to meet their obligations promptly. They had contracts on hand from which they might reasonably expect, in the ordinary course of events, to be able to meet all liabilities in favor of the parties in whose behalf this bill is filed.

There being no error in the record, the judgment of the Appellate Court for the First District is affirmed.

Judgment affirmed.

(236 Ill. 138)

CORTELYOU et ux. v. BARNSDALL et al.  
(Supreme Court of Illinois. Oct. 28, 1908.)

1. MINES AND MINERALS (§ 57\*) — LEASES — CONSTRUCTION—OPTIONS.

A lease for mining for oil and gas, which grants to the lessee the right to mine for oil or gas so long as the same is produced and the royalty and rentals are paid, but which does not

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

bind the lessee to perform any obligation, is a mere option, which the lessor may withdraw before the lessee has done some act by which he binds himself to exercise the option.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 57.\*]

## 2. MINES AND MINERALS (§ 57\*) — LEASES — CONSTRUCTION—OPTIONS.

Where a lessor in an oil and gas lease, which gives to the lessee a mere option, notifies the lessee of an election to revoke the option before the lessee has done any act binding himself to exercise the option, the revocation is a withdrawal of an offer which the lessee has not accepted.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 57.\*]

Appeal from Appellate Court, Fourth District, on Appeal from Circuit Court, Crawford County; E. E. Newlin, Judge.

Suit by Allen Cortelyou and another against T. N. Barnsdall and others. From a decree of the Appellate Court, affirming a decree of the circuit court in favor of plaintiffs, defendants appeal. Affirmed.

The appellees, Allen Cortelyou and Ella A. Cortelyou, his wife, filed in the circuit court of Crawford county their bill in chancery for the cancellation of the following instrument, called in the bill an oil and gas lease:

"Agreement of lease, made this 8th day of July, A. D. 1905, between Allen Cortelyou and Ella A., his wife, of Robinson, Ill., lessor, and W. W. Seybert of McKee's Rocks, Pa., lessee, witnesseth: That the lessor hereby grant unto lessee for the term of three (3) years, (and so long thereafter as oil or gas is produced from the land leased and royalty and rentals paid by lessee therefor,) the exclusive right to mine for and produce petroleum and natural gas from and the possession of so much of eighty (80) acres of land in Crawford county, state of Illinois, as may be necessary therefor, with the right to use water and gas (if found) for the necessary engines, and to remove all machinery, fixtures, etc., placed by lessee on the premises, said land bounded: E. ½ of N. W. ¼ Sec. 30, T. 7, N. R. 12 W. No well to be drilled within three hundred feet of the buildings without lessor's consent. The lessee to deliver to lessor, in pipe line, the one-eighth (1/8) of all petroleum produced from the premises and to pay one hundred (\$100) dollars per annum for each gas well from which the gas is marketed, payable semi-annually, from the date and while the same is so utilized, and to pay all damages to growing crops. This lease is to be null and void and no longer binding on either party if a well is not commenced on this block of 1000 acres within twelve months from this date, unless the lessee shall thereafter pay annually to lessor twenty-five cents per acre per year for each year's delay in commencing said well. Each payment to extend the time for completion for one year. A deposit to the credit of lessor in Oblong Bank, Oblong,

Ill., to be a good payment of any money on this lease. Party of the first part to have free gas for the dwelling thereon by laying their own line and making connections at well, provided there is a surplus gas, and at no time to use gas out of dwelling. The lessee to have use of all casing-head gas for drilling and producing purposes, and to pipe the same to any well drilled by lessee on these premises. Party of the second part to protect all lines. All grants and covenants to extend to the heirs and assigns of the parties hereto. Lessee to bury all pipe lines below plow depth when requested.

"Witness the hands and seals of the parties.

Allen Cortelyou [Seal.]

Ella A. Cortelyou. [Seal.]

"W. W. Seybert. [Seal.]

"Witness: W. C. Cortelyou."

The bill alleged that Seybert, the lessee, paid no consideration for the contract; that the fee of the premises is in the complainant Allen Cortelyou, and that complainants were when the lease was executed, and have been ever since, residing upon the premises, which are their homestead; that Seybert is not bound by the lease to develop said premises for oil, or to complete a well on the premises at any time, or to pay complainants anything for his failure to do so, but that such action is optional with Seybert and his assigns, and that the lease is a dubious, speculative contract, liable to be defeated at any moment by Seybert or his assigns; that Seybert falsely and fraudulently represented to complainants that if they would execute the lease, he would proceed at once to develop the premises for oil or gas; that complainants relied upon said statement, and were induced by him to execute the same, but that said Seybert and his assigns have not developed said premises, nor did he ever intend to do so, but obtained said lease or option purely for speculative purposes; that Seybert falsely represented to complainants that the lease was the most liberal ever offered to landowners, and gave them a greater royalty than any lease that had ever been executed by any person engaged in the production of oil or gas, all of which was untrue and known so to be by Seybert at the time such representations were made; that complainants relied upon said statements, and were induced thereby to execute said lease, to their great injury and damage; that said lease or option was unfair, inequitable, and unjust to complainants, and attempts to bind them, but said Seybert and assigns are not bound, and the lease is without any consideration to complainants of any kind, and is void, and subject to revocation at the will of said Seybert and assigns, and is also subject to revocation of complainants at will; that in accordance with their rights they did, in March, 1906, give notice in writing to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

said Seybert and his assigns that they elected to exercise their right to revoke, and did revoke, said lease, and notified said lessee and his assigns not to enter upon said premises for any purpose; that previous to the giving of said notice neither said Seybert nor his assigns had done anything toward developing the premises for oil and gas, and had not been to any expense, in any manner, on said premises. The bill further alleged assignments by Seybert of all his interest in portions of the said premises and of undivided interests in other portions thereof, in April, 1906, to various persons and corporations, who were all made defendants to the bill, which prayed that the lease and all of the said assignments might be declared null and void and clouds upon complainants' title, and that they might be canceled and defendants enjoined from entering upon the premises or interfering with complainants' possession thereof. By an amendment to the bill it was alleged that the Minnetonka Oil Company, one of the assignees of Seybert, was a foreign corporation, and had not, at the time it received the assignment, complied with the requirements of the statute in regard to foreign corporations doing business in this state. Separate answers were filed by the various defendants. A hearing was had, the evidence being taken in open court, and a decree rendered finding all the facts as averred in the bill, except the fraud alleged, enjoining the defendants from entering upon the premises, and cancelling the lease and the assignments thereof. The decree has been affirmed by the Appellate Court, and the defendants in the circuit court prosecute this appeal to reverse the judgment of the Appellate Court.

W. W. Arnold and Eugene Mackey (McCartney & Arnold and Lee & Mackey, of counsel), for appellants. Parker & Newlin and Callahan, Jones & Lowe, for appellees.

SCOTT, J. (after stating the facts as above). After appellees notified Seybert that they had elected to revoke the option given by the lease, the appellants, as averred by their answers and shown by the proof, within 12 months from the date of the lease, made tender of the 25 cents per acre therein specified, for extending the time for the completion of the contract. This was unavailing, if, as contended by appellees, the contract was without mutuality.

Of the questions which are open for our consideration the initial one is, was Seybert in fact bound to do anything whatever under the option agreement? If not, as he had not paid anything for the option, had not acted on the agreement, and had not, after it was signed, bound himself to accept the option, appellees were at liberty to avoid the undertaking. It will be observed that the

instrument does not expressly fix a single obligation with which Seybert was bound to comply, and does not expressly recite any consideration upon which it was entered into. Appellants contend, however, that an implied covenant arises, binding Seybert to drill, develop, and operate the premises demised. Whether such an implied covenant may be gleaned from an instrument in substance, as that now before us is a question upon which the authorities in other jurisdictions are not uniform. We deem a discussion of those cases unnecessary, as the decisions of this court warrant the conclusion that this contract was without mutuality, and that the option could be withdrawn at any time before Seybert had, by some act done after the agreement had been signed, accepted or bound himself to exercise the option. In *Bauer v. Lumaghi Coal Co.*, 209 Ill. 316, 70 N. E. 634, a contract pertaining to the conveyance of a right of way for a railroad track to a proposed coal mine was involved. The agreement apparently required Bauer to convey the right of way for the sum of \$300, if the same should be deemed necessary by Rupprecht, his heirs or assigns. The purpose of Rupprecht evidently was to place himself in a position where he could acquire the right of way in case the mine which he and others proposed to open should prove rich enough to warrant the construction of a coal road. We held, however, that Rupprecht was not bound by the contract to do anything unless he elected to take the initiative, and the agreement lacking mutuality could not be enforced. In *Bruner v. Hicks*, 230 Ill. 536, 82 N. E. 888, 120 Am. St. Rep. 332, a contract similar to, and executed under like circumstances as, the one now before us was considered. We there expressed the view that the lease was obtained purely as a matter of speculation and not with a view to prospect the lands, as the lessors had been led by the lessee to believe would be done when the instrument was executed. Appellees' revocation was merely the withdrawal of an offer which Seybert had not seen fit to accept, or the retraction of an option which he (Seybert) had not elected to exercise. *McCauley v. Coe*, 150 Ill. 311, 37 N. E. 232.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(236 Ill. 143)

MARTEWICZ v. JOHN MOHR & SONS.

(Supreme Court of Illinois. Oct. 26, 1908.)

APPEAL AND ERROR (§ 1094\*)—INTERMEDIATE APPEAL—REVERSAL—FINDINGS OF FACT—WRIT OF ERROR—SCOPE OF REVIEW.

Where judgment for a servant, in an action for injuries, was reversed by the Appellate Court, and findings of fact there made that defendant was not negligent as charged, the only

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

question for review on a writ of error being whether the Appellate Court correctly applied the law to the facts found by it, the judgment must necessarily be affirmed on its findings of want of negligence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4327; Dec. Dig. § 1094.\*]

Error to Appellate Court, First District, on Appeal from Superior Court, Cook County; Ben M. Smith, Judge.

Action by Anton Martewicz against John Mohr & Sons, a corporation. Judgment for plaintiff reversed by the Appellate Court without remand (139 Ill. App. 173), and plaintiff brings error. Affirmed.

Cyrus J. Wood and Stephen Janowicz, for plaintiff in error. Calhoun, Lyford & Sheean (Robert J. Slater and Edward W. Rawlins, of counsel), for defendant in error.

HAND, J. This was an action on the case commenced by the plaintiff against the defendant in the superior court of Cook county, to recover damages for a personal injury alleged to have been sustained by the plaintiff while in the employ of the defendant. The jury returned a verdict in favor of the plaintiff for the sum of \$10,000, upon which verdict, after overruling a motion for a new trial, the court rendered judgment in favor of the plaintiff. The defendant prosecuted an appeal to the Appellate Court for the First District, which court made a finding of fact that the defendant was not guilty of the negligence charged in the declaration and reversed the judgment of the trial court without remanding the cause, and plaintiff has sued out a writ of error from this court to review the judgment of the Appellate Court.

The only question upon this record open for review in this court is: Did the Appellate Court correctly apply the law to the facts as found by that court? Manifestly, if the defendant was not guilty of the negligence charged in the declaration, there could be no recovery by plaintiff against the defendant. *Chaplin v. Illinois Terminal Railroad Co.*, 227 Ill. 166, 81 N. E. 15.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(236 Ill. 144)

### PEOPLE v. SILBERTRUST.

(Supreme Court of Illinois. Oct. 26, 1908.)

#### 1. LARCENY (§ 31\*)—INDICTMENT—REQUISITES—PROPERTY SUBJECT TO LARCENY—VALUE.

Under Hurd's Rev. St. 1905, c. 38, § 167, providing that larceny may be committed by feloniously taking and carrying away any bond, bill, receipt, or any instrument of writing of value to the owner, an indictment charging the larceny of a bill of exchange must aver the value thereof.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 76, 80; Dec. Dig. § 31.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 3991-4003.]

#### 2. LARCENY (§ 31\*)—INDICTMENT—REQUISITES—PROPERTY SUBJECT TO LARCENY—VALUE.

An indictment charging the larceny of a bill of exchange, which alleges that the bill was the property of an individual named, and was "of the value of \$150 to the First National Bank," etc., and which contains no other averment as to value, is fatally bad for failing to allege value, for the words "to the First National Bank" cannot be rejected as surplusage.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 80; Dec. Dig. § 31.\*]

Error to Criminal Court, Cook County; A. H. Chetlain, Judge.

Abraham Silbertrust was convicted of larceny, and he brings error. Reversed.

On September 7, 1907, Abraham Silbertrust, the plaintiff in error, then about 19 years of age, was convicted in the criminal court of Cook county of larceny as bailee of a certain bill of exchange or bank draft issued by the First National Bank of Chicago for the sum of \$150. After overruling his motions for a new trial and in arrest of judgment, the court entered judgment upon the verdict, and plaintiff in error was sentenced to the Pontiac reformatory. The indictment upon which plaintiff in error was tried contains four counts. By each count he is charged with embezzlement and larceny as bailee of certain bank notes of the value of \$50, and one draft, the same being an instrument in writing for \$150, of the value of \$150, to the First National Bank of Chicago, the property of Esther Silbertrust, the owner thereof. It appears from the record that the plaintiff in error is the stepson of Esther Silbertrust, the complaining witness. About January 1, 1907, Mrs. Silbertrust left Chicago for Los Angeles, Cal., where her husband, the father of plaintiff in error, was sojourning on account of ill health. On the day of her departure she stated to plaintiff in error that she did not think she would have enough money to pay his father's expenses while in California, and asked him to send her \$150 on the following day. On January 2, 1907, plaintiff in error went to the First National Bank of Chicago and purchased a bill of exchange for that sum, payable to the order of E. Silbertrust, his stepmother, drawn upon the Farmers' & Merchants' National Bank of Los Angeles, Cal. The evidence as to the source from which plaintiff in error obtained the money with which to purchase this bill is conflicting. He testified that it was paid for by a check drawn on his own personal account in the First National Bank, and in this he is corroborated by the testimony of William G. Miller, the assistant draft teller at that bank. Sam Levin, a son of Mrs. Silbertrust by a former marriage, with whom she had left the key to her safety deposit box in the Northwestern Trust & Savings Bank in Chicago, testified that during the forenoon of January 2, 1907, plaintiff in error came to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

him and suggested that they go over to the trust and savings bank, and draw out some money from the deposit box, as he wanted to send Mrs. Silbertrust a draft for \$150; that they then went over to the bank together, and the witness, after having been identified, opened the box and took out \$500, and gave it to plaintiff in error, who then said that out of that money he would send Mrs. Silbertrust \$150, and that he would deposit the rest in the bank to pay bills of the business in which the father and plaintiff in error were engaged, but that he (Levin) did not know what plaintiff in error, in fact, did with the money. Plaintiff in error's version of this transaction is that Levin did take \$500 from the safety deposit box, but that he did not give him the money. On January 24, 1907, the father having died, Mrs. Silbertrust returned to Chicago with the remains. The draft in question had not been cashed by Mrs. Silbertrust, and she brought it back with her. Shortly after her arrival at home, at plaintiff in error's suggestion, Mrs. Silbertrust, according to her testimony, turned the draft over to him for safekeeping, and afterwards made numerous requests of him to return the draft to her, but he refused so to do. He says she returned the draft to him as his property, and that she recognized his right to get the money for it for his own use. On or about February 8, 1907, it was taken by him to the First National Bank of Chicago and redeposited to his credit, upon his statement that it had never been out of his possession, and that he had not used it for the purpose intended. The draft was never indorsed or assigned by Mrs. Silbertrust. To review the judgment of the criminal court plaintiff in error has sued out this writ, and it is contended by him, among other things, that the court erred in overruling the motion in arrest of judgment.

Nicholas J. Pritzker (Louis Greenberg and E. J. Raber, of counsel), for plaintiff in error. W. H. Stead, Atty. Gen., and John J. Healy, State's Atty. (John E. Northrup, of counsel), for the People.

SCOTT, J. (after stating the facts as above). Larceny is thus defined: "Larceny is the felonious stealing, taking and carrying, leading, riding, or driving away the personal goods of another. Larceny shall embrace every theft which deprives another of his money or other personal property, or those means or muniments by which the right and title to property, real or personal, may be ascertained. Private stealing from the person of another, and from a house in the daytime, shall be deemed larceny. Larceny may also be committed by feloniously taking and carrying away any bond, bill, note, receipt, or any instrument of writing of value to the owner." Hurd's Rev. St.

1905, c. 38, § 167. There was no proof whatever to support the averments of the indictment in reference to the larceny of the bank notes. To sustain the conviction it is necessary that an averment of the value of the bill of exchange should appear in the indictment. *Brown v. People*, 173 Ill. 84, 50 N. E. 106. Each count charged that the bill of exchange was the property of Esther Silbertrust and that it was "of the value of \$150 to the First National Bank of Chicago," and neither count contained any other averment in reference to the value of the bill of exchange. It is contended, on the part of plaintiff in error, that in this condition of the record the judgment should have been arrested for lack of a proper averment of value in the indictment, while defendant in error contends that the allegation that the draft was of value to the First National Bank of Chicago is substantially a general allegation of value, or if not, that the words "to the First National Bank of Chicago" may be rejected as surplusage.

In *State v. James*, 58 N. H. 67, it was said, in reference to a printed list of names and dates, being a list kept by the owner of a newspaper of the names of the subscribers and the dates of the expiration of the subscriptions, "Its value as a statutory subject of larceny is its market value, and evidence that it is worth \$20 to its owner, and worth nothing to anybody else, does not show its market value to be \$20. To be of the market value of \$20 it must be capable of being sold for that sum at a fairly conducted sale.—At a sale conducted with reasonable care and diligence in respect to time, place, and circumstances, for the purpose of obtaining the highest price." In *Clark v. State*, 23 Tex. App. 612, 5 S. W. 178, *Smith v. State*, (Tex. Cr. App.) 44 S. W. 520, and *People v. Cole*, 54 Mich. 238, 19 N. W. 963, it was held that the value which must be proven is the market value of the property, from which the conclusion is that a general allegation of value in an indictment means market value. Under these authorities it cannot be held that an averment that the property was of a certain value "to the First National Bank of Chicago" is substantially the same as a general averment of value. Whether in this particular case the indictment would have been good had it averred the value of the bill of exchange to Esther Silbertrust, the owner thereof, and whether proof of its value to her, in the absence of proof of its market value, would warrant a conviction, under the provisions of our Criminal Code, are questions not here presented. As the words "to the First National Bank of Chicago" cannot be stricken out of the averment with reference to value without materially changing the meaning of the charge, those words cannot be rejected as surplusage. As the allegation relative to value is not such as the law requires, the indictment is as though it

contained no averment of value. For this reason the judgment should have been arrested. *Davis v. State*, 40 Ga. 229.

The judgment of the criminal court will be reversed.

Judgment reversed.

(236 Ill. 149)

**CONSOLIDATED COAL CO. OF ST. LOUIS  
v. MILLER et al.**

(Supreme Court of Illinois. Oct. 26, 1908.)

**1. STATUTES (§ 195\*)—CONSTRUCTION.**

An enumeration of certain specified things in a statute excludes all others not mentioned therein.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 273; Dec. Dig. § 195.\*]

**2. TAXATION (§ 195\*)—EXEMPTIONS—CONSTITUTIONAL PROVISIONS.**

Const. art. 9, § 3, provides that the Legislature may exempt from taxation, by general law, property of the state, counties, and other municipal corporations, real and personal, and such other property as may be used exclusively for agricultural and horticultural societies and for schools, religious, cemetery, and charitable purposes. *Held*, that the Legislature was thereby precluded from exempting any property not therein enumerated, by any form of legislation, general or special.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 313; Dec. Dig. § 195.\*]

**3. TAXATION (§ 119\*)—CAPITAL STOCK—“PROPERTY.”**

The capital stock of a corporation is “property,” within Const. art. 9, § 1, providing for the taxation of property in proportion to value.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 215; Dec. Dig. § 119.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

**4. TAXATION (§ 193\*)—STATUTORY PROVISIONS—EXEMPTIONS—CAPITAL STOCK.**

The capital stock of a corporation, not being property which the Legislature has been authorized to exempt from taxation by Const. art. 9, § 3, enumerating the property which may be exempted by general law (Laws 1905, p. 353, § 1, par. 4), attempting to exempt from taxation the capital stock of certain corporations engaged in mining and selling coal, printing or publishing of newspapers, or improving and breeding stock, is unconstitutional.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 193.\*]

**5. CORPORATIONS (§ 60\*)—“CAPITAL STOCK.”**

The capital stock of a corporation is the money contributed by the corporators to the capital, and belongs to the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 162; Dec. Dig. § 60.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 959-967; vol. 8, p. 7593.]

**6. CORPORATIONS (§ 63\*)—RIGHTS OF SHAREHOLDERS.**

A shareholder in a corporation is entitled to participate in the net profits earned by the corporation, and, on its dissolution, to a proportion of the property that remains after payment of debts; the shares being of no value independent of the interest they represent in the franchise and property of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 163; Dec. Dig. § 63.\*]

**7. TAXATION (§ 347\*)—VALUATION—LEVY—MANNER—LEGISLATIVE AUTHORITY.**

The Legislature may decide the manner in which different forms of property may be valued for taxation, and the manner in which the taxes may be levied.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 347.\*]

**8. TAXATION (§ 122\*)—CORPORATE STOCK—ASSESSMENT AGAINST CORPORATION.**

Under Revenue Act (Hurd's Rev. St. 1905, c. 120) § 1, as amended by Laws 1905, p. 353, providing for the taxation of capital stock of corporations, such capital stock and the corporation's franchise is assessable against the corporation, and not against the shareholders.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 221; Dec. Dig. § 122.\*]

Appeal from Circuit Court, St. Clair County; R. D. W. Holder, Judge.

Action by the Consolidated Coal Company of St. Louis against A. A. Miller and others. From an order sustaining a demurrer to the bill and dismissing the same, plaintiff appeals. Affirmed.

Forman & Whitnel, for appellant. W. H. Stead, Atty. Gen., and F. J. Tecklenberg, State's Atty., for appellees.

CARTWRIGHT, C. J. The appellant, Consolidated Coal Company of St. Louis, is a corporation, organized under the laws of this state for the purpose of mining and selling coal, and the shares of its capital stock are owned by different individuals. The local assessor in St. Clair county assessed, as the property of the appellant, its capital stock at a valuation of \$25,000 for the year 1907, and the board of review of the county confirmed the assessment. Thereupon appellant presented to a judge of the circuit court of the said county its bill in this case for an injunction restraining the appellees, the county clerk and his deputies, from extending upon the tax books any taxes against the appellant on such capital stock, and a temporary injunction was ordered, issued, and served. At the January term, 1908, of the circuit court the appellees appeared and filed their demurrer to the bill, which was sustained by the court, and the bill was dismissed. The appellant excepted, and by appeal brings the cause to this court.

Section 1 of the revenue act (Hurd's Rev. St. 1905, c. 120) provides that the property named therein shall be assessed and taxed except so much thereof as may be in said act exempted, and it contains in four paragraphs an enumeration of different kinds and classes of property. The fourth paragraph, as amended by the act in force July 1, 1905, is as follows: “The capital stock of companies and associations incorporated under the laws of this state, except companies and associations organized for purely manufacturing and mercantile purposes, or for either of such purposes, or for the mining and sale of coal, or for printing, or for the publishing

of newspapers, or for the improving and breeding of stock." Laws 1905, p. 353. The bill of complaint alleged that the capital stock of appellant is exempted from taxation under and by virtue of that paragraph of the revenue act, and one ground of demurrer was that the exception in favor of the appellant and certain other corporations is null and void, as in violation of the Constitution. Section 1, article 9, of the Constitution provides that: "The General Assembly shall provide such revenue as may be needful for levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property." Section 3 of the same article authorizes the Legislature to exempt from taxation, by general law, certain kinds of property, as follows: "The property of the state, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law." In the construction of statutes the rule is that an enumeration of certain specified things excludes all others not therein mentioned, and in the case of *People's Loan & Homestead Ass'n v. Keith*, 153 Ill. 609, 39 N. E. 1072, 28 L. R. A. 65, that rule was applied to the enumeration in section 8 of certain specified property which may be exempted by general law, and it was there determined that such enumeration is a clear limitation upon the power of the Legislature to exempt any other property. The capital stock of the appellant is property (*The Hub v. Hanberg*, 211 Ill. 43, 71 N. E. 826), and such capital stock does not come within the enumeration of property which the Legislature is permitted to exempt from taxation. It follows that the exception contained in paragraph 4 of section 1 of the revenue act is in conflict with the Constitution and void.

Counsel for appellant argue the question as though the limitation on the power of the Legislature related to discrimination between persons or corporations in the same situation, and discuss the question whether the supposed classification of paragraph 4 rests upon a reasonable basis. It is not conceded that the argument is well founded, or that the attempted exemption would not place an unequal burden of taxation on some property as against other property; but that is not the criterion for determining what the Legislature are authorized to do. If there is an exemption of property within the classes enumerated in the Constitution, it must be by general law, but authority is denied to the Legislature by the Constitution to exempt any property, except that which is enumerated, by any form of legislation, general or special. Any exemption from the rule of

equality established by section 1 of article 9 outside of the kinds of property enumerated in section 3 of that article is absolutely prohibited.

Counsel for appellant further contend that the holders of certificates of stock own the capital stock of the corporation, while the corporation owns its tangible property; and, if the capital stock is assessable at all, it can only be assessed by listing the shares as the property of the individuals owning them. The capital stock of a corporation is the money contributed by the corporators to the capital, and the capital stock belongs to the corporation. According to the bill, the capital stock of appellant is represented by shares issued to the subscribers to the stock, and these shares are the property of the individual shareholders, as evidenced by stock certificates. The shareholder is entitled to participate in the net profits earned by the corporation in the employment of its capital, and, upon its dissolution, to his proportion of the property of the corporation that may remain after the payment of its debts. The shares have no value independently of the interest they represent in the franchise and property of the corporation. *Porter v. Rockford, Rock Island & St. Louis Railroad Co.*, 76 Ill. 561. In the case of *People's Loan & Homestead Ass'n v. Keith*, supra, on page 620 of 153 Ill., page 1075 of 39 N. E. (28 L. R. A. 65), it was said: "While it may be conceded that the interest of a corporation in the corporate property and the interest of the stockholder in the corporation are separate interests, yet in reality they both represent one thing—the money invested in the corporation by those who organized and created it." The Legislature may decide the manner in which that property may be valued and the manner in which the tax may be levied. In *re St. Louis Loan & Investment Co.*, 194 Ill. 609, 62 N. E. 810. The Legislature having exercised lawful authority by selecting the method of reaching the result, the value of the capital stock, including the franchise, is lawfully assessed by local assessors, and to the corporation itself. *The Hub v. Hanberg*, supra.

The decision of the court on the demurrer was correct, and the decree dismissing the bill is affirmed.

Decree affirmed.

(236 Ill. 154)

PEOPLE ex rel. RING et al. v. BOARD OF  
EDUCATION OF DISTRICT NO. 24,  
ETC., SCOTT COUNTY.

(Supreme Court of Illinois. Oct. 26, 1908.)

1. MANDAMUS (§ 1\*)—NATURE OF PROCEEDING.

Under the statute, mandamus is an ordinary action at law, governed by the rules of pleading applicable to actions at law.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 2; Dec. Dig. § 1.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**2. APPEAL AND ERROR (§ 78\*)—FINAL ORDER—REVIEW.**

An order sustaining a demurrer to the second amended petition of relators in mandamus, which recites that the petitioners jointly and severally except to the ruling on the demurrer, and abide by their second amended petition, and decline to plea further, and which adjudges that defendant recover of relators the costs, is not a final order, and is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 465; Dec. Dig. § 78.\*]

**3. APPEAL AND ERROR (§ 78\*)—FINAL ORDER—REVIEW.**

A judgment for costs against the losing party is not a final determination of the cause.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 480; Dec. Dig. § 78.\*]

Appeal from Circuit Court, Scott County; R. B. Shirley, Judge.

Petition for mandamus by the people, on the relation of Jeremiah Ring and others, against the board of education of district No. 24 of Scott county, to direct the board to cause the teachers to discontinue the practice of reading passages from the Bible in the schoolroom. From an order sustaining a demurrer to the amended petition of the relators, and adjudging them liable for the costs, they appeal. Dismissed.

Thomas F. Ferns, for appellants. J. A. Warren and J. M. Riggs, for appellee.

**PER CURIAM.** This is a petition filed in the circuit court of Scott county by certain parties, who were taxpayers and residents of the school district of which appellee is the board of education, for a peremptory writ of mandamus against said board to direct it to cause the teachers to discontinue the practice of reading passages from the King James version of the Bible in the schoolrooms, from offering up the Lord's Prayer as found in that version, and singing certain hymns. Appellee filed a general and special demurrer to the petition as amended, and on hearing the circuit court entered an order sustaining the demurrer to the second amended petition of the relators, and reciting that "the petitioners jointly and severally except to the ruling of the court on said demurrer, and abide by their second amended petition, and decline to plead further, and it is further considered and adjudged by the court that the defendant have and recover of the relators their costs by them in this behalf expended." The petitioners thereupon excepted to the rendition of the judgment for costs, and jointly and severally prayed an appeal to this court on the ground that a constitutional question was involved.

Appellee insists that the judgment order sustaining the demurrer was interlocutory, and not final, and was therefore not appealable. *Knapp v. Marshall*, 26 Ill. 63; *Gage v. Rohrbach*, 56 Ill. 262; *Fleece v. Russell*, 13 Ill. 31; *Gage v. Eich*, 56 Ill. 297; *March v. Mayers*, 85 Ill. 177; *Campbell v. Powers*,

139 Ill. 128, 28 N. E. 1062; *Livingston County Building Ass. v. Keach*, 213 Ill. 59, 72 N. E. 769. Appellants concede that an order sustaining a demurrer is not a final and appealable one, but insist, as this order further recited that the appellants elected to abide by their petition, declined to plead further, and judgment for costs was rendered, that therefore it was a final order. Appellants contend, and we think that the wording of the order sustains the contention, that the judgment order shows that the court sustained the general demurrer. Under our statute, mandamus is an ordinary action at law, and is governed by the same rules of pleading as are applicable to any other actions at law. *Dement v. Rokker*, 126 Ill. 174, 19 N. E. 33; *People v. Crabb*, 156 Ill. 155, 40 N. E. 319. This court, in *Chicago Portrait Co. v. Crayon Co.*, 217 Ill. 200, 75 N. E. 473, discussing a judgment order almost in the identical language of that here under consideration, held that it was not final, and that the statute only authorized appeals from final judgments, and said (page 201 of 217 Ill., page 473 of 75 N. E.): "The circuit court merely sustained a demurrer to the declaration, and neither adjudged that the plaintiff take nothing by the writ, nor that the defendant go hence without day, and the judgment contained no words of equivalent meaning. There was no trial of any issue resulting in a finding for the defendant, as there was no issue to be tried, and there was nothing in the nature of a determination of the rights of the parties. Such a judgment is not final." As was said by this court in *Wenon v. Fossick*, 213 Ill. 70, 72 N. E. 732, the question here is not whether final judgment should have been entered against the defendant, but whether it was so entered. These decisions are conclusive on the questions here raised. We held in both of them that a judgment for costs against the losing party was not a final determination of the cause. See, also, on this point, *Larkins v. Terminal Railroad Ass'n*, 221 Ill. 428, 77 N. E. 678, and *Sullivan v. People*, 224 Ill. 468, 79 N. E. 695.

As the present appeal is prosecuted from an interlocutory order merely, it must necessarily be dismissed.

Appeal dismissed.

(236 Ill. 157)

**POGUE v. ROWE, Constable.**

(Supreme Court of Illinois. Oct. 23, 1908.)

**1. STATUTES (§ 63\*)—TOTAL INVALIDITY—EFFECT.**

The bulk sales act (Laws 1905, p. 284) being unconstitutional, an assignment for the benefit of creditors is not void because it does not comply with its terms.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 47; Dec. Dig. § 63.\*]

## 2. BANKRUPTCY (§ 9\*)—REQUISITES—STATUTES.

Though the national bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) suspends the state statute as to voluntary assignments for the benefit of creditors, a debtor may still make a common-law assignment for the benefit of creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 78; Dec. Dig. § 9;\* Assignments for Benefit of Creditors, Cent. Dig. § 88.]

## 3. BANKRUPTCY (§ 9\*)—VALIDITY—PASSING OF TITLE.

A common-law assignment for the benefit of creditors executed while the national bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) is in force, passes, as far as the state statute as to voluntary assignments for the benefit of creditors is concerned, the title of the property to the assignee, so that he may maintain replevin for the same as against an officer levying thereon under an execution against the assignor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 78; Dec. Dig. § 9;\* Assignments for Benefit of Creditors, Cent. Dig. § 88.]

## 4. REPLEVIN (§ 11\*)—RIGHT OF ACTION—DEMAND—NECESSITY.

An assignee in a common-law assignment for the benefit of creditors may maintain replevin for goods taken from his possession by an officer levying thereon under an execution against the assignor, without first making a demand on the officer for the return of the chattels.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 85-97; Dec. Dig. § 11.\*]

Error to De Kalb County Court; W. L. Pond, Judge.

Action by James B. Pogue, trustee, against W. H. L. Rowe, constable. There was a judgment for defendant, and plaintiff brings error. Reversed and remanded.

In 1906 John Clausen was a merchant in De Kalb county, owning a stock of merchandise and some other personal property. He was insolvent. He made a common-law assignment to J. B. Pogue for the benefit of his creditors, and Pogue took possession of the stock of merchandise, and the other property and proceeded to administer the trust. The Rock Island Plow Company was one of the creditors. It secured a judgment against Clausen, after Pogue had taken possession, for the sum of \$131. An execution issued on that judgment to the defendant in error, who is a constable, and by virtue of that execution a levy was made upon a portion of the merchandise in Pogue's possession. Thereupon Pogue sued out a writ of replevin from a justice's court, and regained possession of the goods. Upon a trial before the justice, there was a judgment in favor of the constable. Pogue appealed to the county court of De Kalb county. A jury was impaneled and the evidence taken, when by agreement of the parties the jury was discharged and the cause was submitted for determination by the court. Propositions of law were tendered by both parties and passed upon by the court. Judgment was entered in favor of the constable. The constitu-

tionality of the so-called "Bulk Sales Act" (Laws 1905, p. 284) was involved, and Pogue has sued out of this court a writ of error to review the judgment of the county court, and contends that the court erred in passing upon the propositions of law submitted. The only brief on file is that of plaintiff in error.

Forssen & Cochran (George W. Dunton, of counsel), for plaintiff in error.

SCOTT, J. (after stating the facts as above). When the property was transferred to Pogue, there was no attempt to comply with the so-called "Bulk Sales Act." Laws 1905, p. 284. The court held the transfer to Pogue to be void on account of this noncompliance. This view is erroneous. That act is unconstitutional. We have so held since this case was tried in the county court. *Off v. Morehead*, 235 Ill. 40, 85 N. E. 264.

The court also held that, irrespective of that statute, Pogue did not obtain by virtue of the assignment any title to the property which would enable him to maintain a suit in replevin against the constable. This, also, was erroneous. The court seems to have proceeded on the theory that a valid common-law assignment for the benefit of creditors cannot be made under the law of this state as it now exists. The national bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) suspended the statute of this state in reference to voluntary assignments for the benefit of creditors (*Harbaugh v. Costello*, 184 Ill. 110, 56 N. E. 363, 75 Am. St. Rep. 147), and the debtor may make a common-law assignment for the benefit of his creditors, which is valid so far as the statutes of this state are concerned. *Howe v. Warren*, 154 Ill. 227, 40 N. E. 472; *Thompson Co. v. Whitehead*, 185 Ill. 454, 56 N. E. 1106, 76 Am. St. Rep. 51. As the statute in reference to voluntary assignments is suspended, the common-law assignment is in no wise affected by that law. If the common-law assignment should be attacked by a proceeding under the bankruptcy law, a question not here presented would arise. The assignment passed the title of the property to Pogue, and he could maintain replevin for the same as against the constable levying execution thereon. *Kimball v. Mulhern*, 15 Ill. 205; *Nimmo v. Kuykendall*, 85 Ill. 476.

The court also erroneously held that Pogue could not maintain a replevin suit because he had failed to make demand upon the constable for the return of the property before instituting the suit. Pogue was in possession of the property, and had the legal title thereto and the goods were taken from him by an execution against Clausen. Under these circumstances Pogue could maintain replevin without making a demand. *Tuttle v. Robinson*, 78 Ill. 332. The transaction was not tainted with fraud. The conveyance to Pogue was

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

made in good faith for the benefit of the creditors of Clausen, and Pogue was actually in possession of the property long prior to the issuance of the execution.

The judgment of the county court will be reversed and the cause will be remanded to that court for further proceedings consistent with the views herein expressed.

Reversed and remanded.

(236 Ill. 160)

STIVERS et al. v. STIVERS et al.

(Supreme Court of Illinois. Oct. 26, 1908.)

**1. PARTITION (§ 109\*)—SALE—RIGHTS OF PURCHASER.**

The rights of a purchaser at a partition sale are not affected by a petition filed after the sale, on conveyance to petitioner of the interests of the other tenants in common, asking a dismissal of the bill for partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 396; Dec. Dig. § 109.\*]

**2. PARTITION (§ 106\*)—SALE—EVIDENCE—SUFFICIENCY—INADEQUACY OF PRICE.**

Evidence on objections to the confirmation of a partition sale held not to show that the price was grossly inadequate, or that the land could be resold at a substantial advance.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 106.\*]

**3. PARTITION (§ 106\*)—SALE—EVIDENCE—INTERFERENCE WITH BIDDERS.**

Evidence on objections to the confirmation of a partition sale held not to show that the purchaser interfered with other bidders, or prevented them from bidding.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 106.\*]

**4. INFANTS (§ 40\*)—SALE OF REAL PROPERTY—VALIDITY.**

Confirmation of the sale of a minor's realty will not be refused on the ground alone of inadequacy of price, unless it clearly appears that a resale will realize a sum substantially larger.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 40.\*]

**5. INFANTS (§ 40\*)—SALE OF PROPERTY—CONFIRMATION—REVIEW.**

Though the chancellor has a broad discretion in reference to approving a sale of a minor's realty, his discretion is not arbitrary but subject to review.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 40.\*]

Hand, Vickers, and Carter, JJ., dissenting.

Appeal from Circuit Court, Moultrie County; W. G. Cochran, Judge.

Bill by Etna H. Stivers and others against Ora L. Stivers and others for partition. The land having been sold to P. J. Harsh, both complainants and defendants joined in filing objections to the confirmation of the report of sale, and Harsh was permitted to file an answer. From a decree sustaining the objections and dismissing the bill, Harsh appeals. Reversed and remanded, with directions.

On September 11, 1907, Etna H. Stivers, Mary V. Stivers, and Carl M. Stivers by Mary M. Stivers, his next friend, filed their bill in

the circuit court of Moultrie county against Ora L. Stivers and others for partition of 83 acres of land in that county. The cause was referred to a master, and thereafter, in accordance with his recommendations, on October 17, 1907, a decree for partition and appointing commissioners was entered by the court. The commissioners fixed the value of the land at \$11,070, and reported that it was not susceptible of division without manifest prejudice to the parties in interest, and thereupon, on November 4, 1907, the court entered a decree of sale directing the master to sell said property at public sale, and the decree further directed that said master should execute and deliver to the purchaser or purchasers of said premises proper deeds of conveyance therefor upon the confirmation of the report of such sale. On March 13, 1908, the master reported that in pursuance of the decree of November 4, 1907, after having duly advertised said land according to law and the requirements of said decree, he did on March 7, 1908, sell the said land to P. J. Harsh at public sale for \$7,800, he being the highest and best bidder therefor, and that Harsh immediately complied with the terms of said sale. The complainants and defendants joined in filing objections to the confirmation of the report, setting up that the selling price was grossly inadequate; that the purchaser interfered with the sale of said premises by preventing other persons from bidding; that the master did not distinctly announce the sale, and that some of the persons who were present, and who were intending to bid a greater amount than the sale was made for, misunderstood the character of the sale and thought the title to the land was defective, and that if the premises were resold they would bring at least \$1,500 more than what they sold for.

By leave of court Harsh filed an answer to the objections, denying the charges made therein, and averring that he in no way attempted to or did prevent any competition, that he did not bargain with any one with reference to said sale or in any way prevent any one from bidding. He averred that this was the second sale of said premises within the past 90 days, and that at the first sale thereof, which was held on December 7, 1907, R. M. Peadro, who is the solicitor for complainants in the partition proceeding, became a bidder himself and the premises were sold and struck off to Peadro for \$10,085, but that he did not comply with the terms of said sale; that said Peadro ordered the master to again advertise the said land to be sold on March 7, 1908, and at said time at said sale there were several persons present who were large property owners and able to buy said premises; that the said Harsh became a bidder at said second sale and was the highest bidder, and that said land was sold and struck off to him after the said master

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

had made an open and distinct announcement of the sale of said land, that said sale was open and fair in every respect, and that he (Harsh) complied with the terms of said sale and is entitled to a deed to said premises. Thereafter, on March 24, 1908, Carl M. Stivers filed additional objections to the confirmation of the report and a petition seeking a dismissal of the bill for partition, setting out that he was a minor, and that the said premises at the time of the filing of the bill were owned by petitioner, Etna H. Stivers, Mary V. Stivers, and Ora L. Stivers as tenants in common; that J. E. Dazey, one of the defendants, had no interest in the premises except as mortgagee, and Emma Lee, another of the defendants, had no interest therein except as a judgment creditor, and that Dennis Landers, another of said defendants, had no interest except as a tenant under a lease which has since expired; that on March 19, 1908, petitioner became the sole owner of the said premises by virtue of deeds of conveyance from the said tenants in common; that he does not desire to part with the title to said land, and that it is not for his best interest that the title should be taken from him. Petitioner asks that the court refuse to confirm the said sale and the report of the master made thereof, and that the court set aside the decree for partition, all of the reports of the master and the report of the commissioners, and that the bill be dismissed without prejudice to the rights of J. E. Dazey and Emma Lee. On the same day the other complainants, by R. M. Peadro, their solicitor, filed their motion to dismiss the cause. Dazey and Emma Lee filed their consent to the dismissal of the suit. Upon the hearing on the objections and the petition for dismissal, evidence was offered by the objectors and Harsh in open court, and on March 30, 1908, a decree was entered by the court sustaining said objections and setting aside all the orders and decrees theretofore entered in the cause. By that decree the cause was dismissed and the master ordered to return to Harsh all the money which he had paid and the note which he had executed in payment for the land. From that decree Harsh has prosecuted an appeal to this court.

It appears from the record that the land was first offered for sale on December 7, 1907, and at that sale it was struck off and sold to R. M. Peadro for the sum of \$10,085, he being the highest bidder. Peadro apparently made no effort whatever to comply with the terms of that sale, and directed the master to readvertise the land, and sell it again on March 7, 1908, which the master did. It appears from the evidence taken upon the hearing on the objections to the confirmation of the sale that some of the persons who attended the second sale believed that the land was being bid in by Peadro, acting through Harsh. At that hearing witnesses testified fixing the value of

the land at various sums in excess of \$7,800. The sale was conducted in a proper manner by the master, and the only evidence tending to show that Harsh attempted to prevent competition appears from a conversation that he had with one Dennis Landers, who occupied the land as tenant during 1907. Landers and Harsh both testified that no agreement or understanding of any kind between them resulted. Landers was present at the second sale and made three bids on the land; his last bid being \$7,775. He testified that he thought his bid was \$8,000, and that he would have bid that amount for the land had he not been mistaken as to the amount of his bid. It is contended by Harsh that the court erred in not confirming the master's report of sale and in dismissing the bill.

E. J. Miller, for appellant. M. A. Mattox and J. B. Titus, for appellees. A. W. Lux, guardian ad litem.

SCOTT, J. (after stating the facts as above). Appellant, the purchaser at the sale, was heard upon the objections to the confirmation of the report of the sale, and was allowed an appeal. The contention of appellees that he could not rightfully appeal is without merit. The petition of Carl M. Stivers asking dismissal of the bill filed after the master's sale, upon the conveyance to him of the interests of the other tenants in common, did not affect the rights of the purchaser at the sale. The further discussion of the case may therefore be confined to the grounds upon which it was originally urged that the master's sale should not be confirmed. We find these, so far as now insisted upon, to be: (1) That the selling price as shown by the report is grossly inadequate; and (2) that the purchaser prevented other parties from bidding at the sale.

The property was sold for \$7,800. No money was brought into court with the objections to the confirmation of the master's report of sale, no guaranty of an advance was given, nor does the proof show that the premises would have sold for more had a resale been ordered. Several of the witnesses who testified on the part of those objecting to the confirmation of the report fixed the value of the land on the day of the sale at \$8,000 to \$8,300, which was but \$200 to \$500 above the price at which the land was sold. Others, however, stated the value to be some place from \$125 to \$150 per acre. The sale was properly advertised and fairly conducted. It was attended by several men who were farmers owning land in the vicinity of this land and who possessed the requisite financial ability to become purchasers, none of whom saw fit to raise the bid upon which the land was knocked off to the appellant. It is true the land sold for less than it had been purchased for by Mr. Peadro at the first sale, but it is entirely clear

from the testimony that the market value of the land was less at the second sale than at the first on account of the financial depression, which had continued during the interim and which resulted from the panic which occurred in the autumn of 1907. The inadequacy did not exceed \$500, and this, it is clear to us, resulted from the course pursued by Mr. Peadro, who had defaulted after purchasing the land at the first sale, and from a suspicion which seems to have prevailed to some extent that Harsh was at the second sale bidding for Mr. Peadro or acting in collusion with him, and was, in fact, a by-bidder. This suspicion finds no support in the proof, and it does not appear that Harsh was in any way responsible for its existence.

As regards the charge that the appellant interfered with other prospective bidders or prevented them from bidding, the evidence shows this: Shortly after Peadro defaulted, Harsh suggested to Landers, who had been the principal bidder against Peadro at the first sale, that he (Harsh) thought, if Landers would stay out, he (Harsh) might possibly get the land for \$10,000. Landers replied that he did not want it for that. This was before the land was advertised the second time, and Harsh says that at that time he thought he could buy up the claims which were secured by liens upon the interests of the adult tenants in common, and in this way perhaps acquire the land so that he could sell it to Landers for \$10,000. The amount of these incumbrances is such that they will more than consume the interests originally owned by the adult tenants in common at the price at which the land was sold, and would practically consume those interests if the land was sold for \$10,000. These incumbrances, however, do not affect the interest originally owned by the minor. Nothing came of the suggestion made by Harsh to Landers, and later Harsh told Landers that nothing could be done about the matter, as the land had been again advertised. After the second sale was advertised, Landers made an agreement with a neighbor by the name of Monroe to attend the sale and bid as high as \$8,000, if necessary, in order to get the land, and in the event of his purchasing it for \$8,000 or less he was to take one-half and Monroe was to take the other half. Landers was the only bidder against Harsh, and, when Harsh bid \$7,800, Landers quit bidding, and testifies that he quit under the impression that his last bid was \$8,000. It also appears that after the land had been knocked off to Harsh he offered to rent it to Landers, but the latter did not accept the offer. This proof entirely fails to establish any of the grounds upon which the objections to the sale were based. It is, of course, a misfortune that less has been realized from the land than the amount for which it was sold at the first sale, but upon this record we are driven to the conclu-

sion that the necessity for the second sale was the result of the course pursued by Mr. Peadro, and, if his acts were as they now appear to have been, the parties were not without remedy against him.

The sale was made in accordance with the law. It was properly advertised and regularly conducted. The price realized, considering all the evidence, was not grossly inadequate. The purchaser was not guilty of any improper conduct. To set aside a sale under such circumstances is calculated to discourage bidding at, and to destroy the faith of the business world in, judicial sales. In *Kiebel v. Leick*, 216 Ill. 474, 75 N. E. 187, it was said: "On an application to vacate a judicial sale the court should also take into consideration the fact, if shown, that the parties interested are under disabilities. Adults are able to bid for themselves or have others do so, and thus protect their rights and obtain the full value of their interests in premises sold; but not so as to infants. They are by their disability prevented from protecting themselves against loss. Courts of equity are the guardians of all infants within their jurisdiction, whose rights are under their special protection. Hence a sale of real estate should be set aside where the interests of infants are involved, if the court can see that to refuse to do so will result in substantial and irreparable loss to them. In other words, the policy of the law to give permanency to judicial sales should not be enforced contrary to the rights of infants or others under disability." To the same effect are *Jennings v. Dunphy*, 174 Ill. 86, 50 N. E. 1045, *Compton v. McCaffree*, 220 Ill. 137, 77 N. E. 129, and *Abbott v. Beebe*, 226 Ill. 417, 80 N. E. 991, 117 Am. St. Rep. 257. Confirmation of the sale of a minor's realty will not be refused, however, upon the motion of those representing the minor, on the ground alone that the price was inadequate, unless it is clearly made to appear to the chancellor that a resale will realize for the minor a sum substantially larger than that resulting from the sale attacked. No such showing is made here. No offer to bid more appears, no witness testifies that more would be offered at another sale, and such inadequacy as is shown by the proof is not sufficient to clearly establish the fact that the land would have sold for a substantial advance at a third sale. While the chancellor is vested with a broad discretion in reference to approving sales of this character, his discretion is not arbitrary, but is subject to review, and the following authorities warrant the conclusion that in the exercise of that discretion the chancellor should have confirmed this sale: *Ayers v. Baumgarten*, 15 Ill. 444; *Barling v. Peters*, 134 Ill. 606, 25 N. E. 765; *Connely v. Rue*, 148 Ill. 207, 35 N. E. 824; *Quigley v. Breckenridge*, 180 Ill. 627, 54 N. E. 580; *Quick v. Collins*, 197 Ill. 391, 64 N. E. 288.

The decree appealed from will be reversed and the cause will be remanded to the cir-

cult court, with directions to enter a decree confirming the report of the sale to Harsh, and the master will then convey the property to him. The fees of the guardian ad litem in this court will be taxed at \$50, and all of the costs of this court will be adjudged against the appellees.

Reversed and remanded, with directions.

HAND, J. (dissenting). I do not concur in the conclusion reached in the majority opinion filed in this case. The complaining party is a minor. The land was appraised at \$11,070, and it had sold at a former master's sale, in the same proceeding, for \$10,085, and the sale directed to be approved by the majority opinion was for \$7,800, only \$420 more than two-thirds of the appraised value of the land; and the chancellor who set aside the sale in the court below and ordered a resale was more familiar with the situation, from his knowledge of the case, than this court could possibly be from reading the record filed in this court. We have repeatedly held, in cases like this, that great weight should be given to the view of the chancellor, and that when the interest of a minor is involved the court should guard such interest with great care. *Kiebel v. Leick*, 216 Ill. 474, 75 N. E. 187; *Compton v. McCaffree*, 220 Ill. 137, 77 N. E. 129. Had the bid in question been \$420 less than it was, even though the parties were adults, the master would have been powerless to make the sale, or the court to approve the sale if made, as it would have been for a sum less than two-thirds of the amount at which the land was appraised; and in the case of a minor it would seem clear it was not error to set aside a sale of the minor's real estate for \$7,800, where the land had been appraised by sworn appraisers at \$11,070, and sold for \$3,270 less than its value was fixed by the appraisers, and \$2,285 less than the price at which it sold at a sale a short time before in the same proceeding.

In the case of a sale of a minor's real estate, a sale may be set aside and a resale ordered by the chancellor upon his own motion, and without security that the premises at a subsequent sale will bring more than at the sale sought to be set aside (*Jennings v. Dunphy*, 174 Ill. 86, 50 N. E. 1045; *McCallum v. Title & Trust Co.*, 203 Ill. 142, 67 N. E. 823; *Compton v. McCaffree*, supra; *Abbott v. Beebe*, 226 Ill. 417, 80 N. E. 991, 117 Am. St. Rep. 257); and the misconduct of the solicitor representing the adult parties in interest ought not to bar the chancellor from protecting the rights of the minor in the subject-matter of the sale, and the minor be required to surrender his interest in the land, and look to an uncertain remedy against such solicitor.

VICKERS, J. I concur in the dissenting opinion of Mr. Justice HAND. I think the

decree setting aside the sale should be affirmed.

CARTER, J. I agree with the views expressed in the dissenting opinion of Mr. Justice HAND.

(236 Ill. 169)

# LE SOURD v. EDWARDS et al.

(Supreme Court of Illinois. Oct. 26, 1908.)

## 1. QUIETING TITLE (§ 44\*)—PRESUMPTIONS—COLOR OF TITLE.

Every presumption will be made in favor of the holder of the legal title, and, as against him, no presumption will be indulged in favor of the holder of color of title only.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 44.\*]

## 2. QUIETING TITLE (§ 12) — "POSSESSION"—WHAT CONSTITUTES.

Any acts of dominion exercised over property by the party claiming to hold title thereto that clearly indicate to others an appropriation thereof to the purposes for which it may ordinarily be used are generally sufficient to constitute possession.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 44, 45; Dec. Dig. § 12.\*]

## 3. QUIETING TITLE (§ 44\*)—POSSESSION—EVIDENCE.

Land in controversy was overflowed, and valuable only for fishing and hunting. Immediately after defendant E. obtained a deed thereto, he sent men with fish traps to take possession. The men set out the traps, 19 of which were tied to trees with ropes below the water line, and each of the trees blazed. A stake was driven projecting above the water to which the twentieth trap was similarly attached. These traps were openly continued and used for fishing purposes, until after plaintiff, having acquired a tax title to the land, strung a wire around it. Held, that E. was then in actual possession of the land, and that it was not vacant or unoccupied.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 92; Dec. Dig. § 44.\*]

## 4. QUIETING TITLE (§ 13\*)—ACTS OF POSSESSION—LEGALITY.

Where defendant E. took possession of submerged land by setting out fish traps thereon, the fact that such traps were in violation of the state fish laws was immaterial in determining whether E. by so doing actually took possession of the land.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 13.\*]

Appeal from Circuit Court, Mason County; Guy R. Williams, Judge.

Suit by Russell Le Sourd against William C. Edwards and others. Judgment for defendants, and plaintiff appeals. Affirmed.

On June 17, 1907, Russell Le Sourd, the appellant, filed his bill in the circuit court of Mason county against William C. Edwards, Richard L. England, and others to quiet the title to the N. W. ¼ of the S. W. ¼ of section 17, in township 22 N., range 3 W., of the third principal meridian, in that county, of which appellant alleged by his bill he was in possession and the owner in fee simple. England answered the bill, denying, among other things, that appellant was the owner of and seised in fee simple of the east 15 acres

of said tract of land. The other defendants were defaulted. A replication to the answer was filed and the cause referred to a master to take the proofs and report the same to the court. The cause was heard by the chancellor upon the evidence reported by the master and the testimony of one witness taken in open court, and on April 20, 1907, the court entered a decree finding, among other things, that appellant was the owner in fee simple of the west 25 acres of said tract of land and entitled to the relief prayed for in his bill as to the said 25 acres, but as to the east 15 acres of said tract, which is the land here in dispute, the bill was dismissed for want of equity. From that decree Le Sourd has appealed to this court.

It appears from the record that on June 14, 1897, Le Sourd purchased the land described in his bill at a tax sale, and that on July 14, 1899, a tax deed was executed by the county clerk of Mason county conveying said land to appellant. In the year 1898, and thereafter during the months of January and February of each year up to and including the year 1907, the appellant paid the taxes on the said 40-acre tract of land. It also appears from the record that on May 28, 1907, one John H. Nash conveyed to appellee England the said 15-acre tract by a quitclaim deed for a consideration of \$150, which deed was recorded in the recorder's office of Mason county on the day of its execution. Tax receipts were offered in evidence by England showing that on February 17, 1906, and on April 17, 1907, Nash also paid the taxes on said 40-acre tract of land. Each of these two payments, however, was made after the payment for the same year had been made by Le Sourd. The evidence discloses that this land is what is known as swamp and overflow land, and subject to overflow from the Illinois river and Quiver creek. Since the Sanitary District of Chicago opened its canal, in January, 1900, the whole tract has been under water practically all of the time, and it had been vacant and unoccupied for a period of at least 40 years prior to 1907. On June 10, 1907, the land being entirely submerged, appellant ran a single barbed wire about it by attaching the wire to trees or to rails driven 50 or 60 feet apart. When the wire was so attached, appellant placed signs, bearing his name, on the land, in conspicuous places, notifying trespassers to keep off. Prior thereto, however, and on May 28, 1907, England, for the purpose of reducing the 15-acre tract to possession, took 20 fish baskets or traps and fastened them with ropes in the water on the land. These ropes were tied to trees, except one, which was tied to a stake, and, together with the baskets to which they were attached, were beneath the surface of the water. England blazed the trees to which the traps were attached when the traps were put in place. It appears that

these baskets were so located at the time appellant put up his wire. It is insisted by appellant that the court erred in denying the relief prayed for by him in his bill as to the said 15-acre tract.

Lyman Lacey, Jr., for appellant. Lyman Lacey, Sr., & Son, for appellees.

SCOTT, J. (after stating the facts as above). Appellant, relying upon his tax deed as color of title, claims the 15 acres in dispute under and by virtue of the provisions of section 8, c. 83, Hurd's Rev. St. 1905, and under and by virtue of his alleged possession. It is conceded by him that if England, who asserts a legal title, reduced the land to possession in May, 1907, and thereafter continued in possession up to the time when the appellant strung a strand of barbed wire around the land, the decree of the court below should be affirmed. Since January, 1900, the entire tract has been under water practically all the time. Appellant states that "its principal, and probably its only, value now is for hunting and fishing." The rule is that every presumption will be made in favor of the holder of the legal title, and as against him no presumption will be drawn in favor of the holder of color of title only. *White v. Harris*, 206 Ill. 584, 69 N. E. 519. It has frequently been said in reference to acts necessary to constitute possession that every case must rest upon its own facts, and that it is difficult to state any general rule as to what character of improvements or acts will be sufficient for this purpose, and that the acts necessary to constitute possession depend, to some extent, upon the nature and locality of the property, the use to which it may be applied and the situation of the parties; that a variety of circumstances necessarily have to be taken into consideration in determining the question. Any acts of dominion exercised over the property by the party claiming to hold title thereto that clearly indicate to others an appropriation thereof to the purposes for which it may ordinarily be used are generally regarded as sufficient. *Morrison v. Kelly*, 22 Ill. 609, 74 Am. Dec. 169; *McLean v. Farden*, 61 Ill. 106; *Truesdale v. Ford*, 37 Ill. 210; *Gage v. Hampton*, 127 Ill. 87, 20 N. E. 12, 2 L. R. A. 512; *White v. Harris*, supra. We find from the record that appellee England obtained his deed for this tract on May 28, 1907. Immediately thereafter, on the same day, he sent two men with 20 fish traps to take possession of the land. These men went to the land on that day and put the traps out on the land. Nineteen of them were put out by tying them to trees with ropes. The rope in each case was put around a tree below the water, and the trap was so weighted that it did not rise to the surface. Each of these trees was then blazed. A stake was then driven in the ground beneath the water, the upper end

projecting above the water, and to that stake the twentieth trap was in like manner attached. These traps all continued there in use for fishing purposes until after appellant strung his wire around the land on the 10th of June, 1907.

It is strenuously insisted on the part of appellant that inasmuch as these traps, and the ropes with which they were attached to the trees, were not visible above the water, England did not, in fact, take possession of the land. As the land was covered with water and grew nothing that seems to have been of any value, it is manifest that the owner could not be expected to assert his rights by the ordinary acts of an owner, such as erecting improvements or taking off the produce of the land. It is true that he might, as appellant did, have carried a wire about the property, the only purpose of which would have been to keep others from passing upon the property—a thing that would have been of very little moment, in view of the fact that the adjoining lands were also submerged, and that it was not a matter of substantial importance to the owner of this particular tract whether persons traveling by boat in this vicinity passed over this land or not. It is true that the traps and ropes were not visible after they had been put in position by England's employes, but the acts of those employes in placing them there, and in driving the stake, and in blazing the trees, indicate the assertion of such rights as would rest only in the owner. Where the proprietor of an unfenced tract uses it for grazing purposes and herds his stock thereon each year throughout the grazing season, no indicia of possession or ownership is left upon the land by which it can be determined, after the close of the grazing season, that any person is in actual possession or occupancy of that land, and yet it would scarcely be contended that such land was vacant or unoccupied. It is true that the acts of ownership here relied upon are slight, but in determining the significance thereof the character of the property must be taken into consideration. In view of the fact that this land could be used, at the season at which England placed his traps thereon, only for fishing, we are disposed to think that the acts constituted a visible appropriation thereof for the only purpose for which the land could be used. His men were in open view of passers as they blazed the trees, set out the stake and attached the traps, and, having so taken possession of the property, it was not necessary that England should keep some one on guard or post notices to advise passers-by that he had taken possession.

Appellant also contends that to fish with the traps put out by appellee England on this land was at the time they were placed

upon the land a violation of the fish laws of this state. Whether that was so is immaterial in determining whether England actually took possession of the land.

The decree of the circuit court will be affirmed.

Decree affirmed.

(236 Ill. 175)

#### RAGSDALE v. ILLINOIS CENT. R. CO.

(Supreme Court of Illinois. Oct. 26, 1908.)

##### 1. MASTER AND SERVANT (§ 285\*)—INJURIES TO SERVANT—CAUSE OF ACCIDENT—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a servant by the explosion of a steam boiler, whether the explosion was caused by a defective flange on the supply pipe connection, which could have been discovered by inspection, whether the boiler had been properly inspected, or whether it was rendered unsafe by the action of plaintiff's fellow servants in setting it up and starting the engine to which it was connected *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 285.\*]

##### 2. TRIAL (§ 260\*)—INSTRUCTIONS.

Where the charge considered as a whole correctly states the law, it was not error to refuse particular requests, the principles of which are contained in instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

##### 3. APPEAL AND ERROR (§ 197\*)—QUESTIONS NOT RAISED AT TRIAL—VARIANCE.

A question of variance cannot be first raised in the Appellate or Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 197;\* Pleading, Cent. Dig. § 1428.]

Appeal from Appellate Court, Fourth District, on Appeal from Circuit Court, Union County; W. W. Duncan, Judge.

Action by Calvin Ragsdale against the Illinois Central Railroad Company. Judgment for plaintiff affirmed by the Appellate Court, and defendant appeals. Affirmed.

W. W. Barr and R. J. Stephens (J. M. Dickinson, of counsel), for appellant. James Lingle, for appellee.

**HAND, J.** This was an action on the case commenced in the circuit court of Union county by the appellee against the appellant to recover damages for a personal injury alleged to have been sustained by the appellee while in the employ of the appellant through the negligence of the appellant. The jury returned a verdict in favor of the appellee for \$6,000, upon which the trial court rendered judgment, which judgment has been affirmed by the Appellate Court for the Fourth District, and a further appeal has been prosecuted to this court. The declaration contained three counts, and the general issue was filed.

It appeared from the evidence that on January 2, 1907, the foreman of the appellant's waterworks department sent William Harmon, in charge of a gang of men, from Car-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

bondale to Gale, a station on appellant's line, to take out a boiler used by appellant at that station, which was connected with a steam pump used to pump water into a tank, and to put another boiler in its place. The boiler house was a small building 14 by 18 feet, located near appellant's track. The old boiler was removed, and the new boiler, called an "emergency boiler," was set in its place. The steam was to be carried from the boiler to the pump through a cast iron pipe. The pipe extended straight up from the steam dome of the boiler some five or six inches, then turned, with an elbow, toward the pump, and when directly over the pump it turned down with another elbow and connected with the pump. The pipe was connected with the boiler by means of a cast-iron flange three-fourths of an inch thick, which was bolted to the head of the dome of the boiler. After the boiler was put in place, it was found the pipe leading down to the pump was some five inches too long. The workmen had no tools to remedy the defect, and they jacked the boiler up to the required height and placed it upon timbers, and then made the connection. After the connection was made, a fire was started and steam raised, but the pump would not start; the piston appearing to be "hung on center." Two workmen attempted to pry the piston off center with wood or iron pries placed against the arms of the rocker of the pump. After this was done steam was turned on, and immediately an explosion took place, which filled the boiler house with steam and hot water. The appellee was severely scalded about the head, body, and arms, and permanently crippled and disfigured. An examination of the flange of the boiler after the explosion showed that it was broken.

At the close of the evidence the appellant made a motion to take the case from the jury, and the denial of that motion is assigned as error. The evidence fairly tended to show that the flange on the boiler was defective, and that the boiler gave way at that point when steam was turned on. Whether the break in the flange was an old break or whether it was broken by prying upon the rocker of the pump after the connection was made is not clear from the evidence. We think, however, in either event, that the court did not err in declining to take the case from the jury.

It is urged, however, by the appellant that the boiler was properly inspected before it was placed in position at Gale and that the flange was found to be safe, and that, if the flange was broken after the connection was made, the break was caused by prying upon the rocker of the pump, and that, if it was thus broken, it was broken by the fellow servants of the appellee. The appellee was an inexperienced workman, and he and the other workmen were under the direction and

control of Harmon, who represented the appellant, and the questions whether the boiler was properly inspected, or whether it was rendered unsafe by the action of the fellow servants of the appellee, were questions of fact, and we think were properly left to the jury.

It is also contended that the trial court misdirected the jury as to the law and improperly refused certain instructions which were offered to the jury on behalf of appellant. We have carefully considered the instructions given to the jury, and when considered as a series we think they correctly state the law. We are also of the opinion that the principles contained in the refused instructions offered by appellant, so far as they were applicable to the case, were contained in instructions which were given to the jury.

It is also contended that there was a variance between the declaration and the proof. That question does not appear to have been raised in the trial court, and it cannot be raised in the Appellate Court or in this court for the first time.

From a careful examination of this record, we are of the opinion that it contains no reversible error. The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

(236 Ill. 179)

PEOPLE ex rel. KOELLING v. CANNON  
et al.

(Supreme Court of Illinois. Oct. 26, 1908.)

1. COURTS (§ 219\*)—JURISDICTION—APPELLATE JURISDICTION.

Where the circuit court in mandamus to compel the board of election commissioners of the city to submit to the voters the question whether dramshops should be closed on Sunday, as petitioned for under the public policy act (Hurd's Rev. St. 1905, c. 46, § 423), providing for the submission on petition of any question of public policy, awarded the writ because the Australian ballot law (section 297), relating to the finality of the determination by certain officers of objections to the nomination papers of candidates for office, was inapplicable, the validity of the act not being questioned, and because the question sought to be submitted was one of public policy, notwithstanding the dramshop act (chapter 38, § 259), requiring dramshops to be closed on Sunday, the Supreme Court has no jurisdiction of an appeal direct from the circuit court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 553; Dec. Dig. § 219.\*]

2. APPEAL AND ERROR (§ 503\*)—JURISDICTION—APPELLATE JURISDICTION.

To authorize the Supreme Court to take jurisdiction of an appeal direct from the circuit court, it must appear from the record, and not merely from the statement of counsel in briefs and argument, that some question was involved which authorized the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2310, 2311; Dec. Dig. § 503.\*]

Appeal from Circuit Court, Cook County; Charles M. Walker, Judge.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter-Indexes

Mandamus by the people, on the relation of John Koelling, against John C. Cannon and others, as board of election commissioners of the city of Chicago. From a judgment awarding the peremptory writ, defendants appeal. Appeal transferred to Appellate Court for the First District.

On the 7th day of February, 1908, a petition was presented to and filed with the board of election commissioners of the city of Chicago asking for submission to the voters of said city at the election to be held April 8th following, to be voted on by separate ballot, the question: "Shall all places where liquor is sold or given away in this city on Sunday be closed upon that day?" The petition was signed by more than 25 per cent. of the registered voters of the city of Chicago, and the right to have the question mentioned in the petition submitted to a vote, the petitioners claimed, was to be found in what is known as the "Public Policy act" of 1901. Hurd's Rev. St. 1905, p. 967, c. 46. Objections to the submission of the question were filed with the board of election commissioners. One of the objections was that the question proposed to be submitted was not one of public policy in contemplation of law. This objection was sustained and the prayer of the petition denied by the board. Thereupon the petitioners, or some of them, filed in the circuit court of Cook County a petition for a writ of mandamus commanding the board of election commissioners and its clerks to submit the question, to be voted on by separate ballot, at the April election. The defendants to the petition filed a demurrer, which was overruled, and judgment entered awarding the peremptory writ of mandamus. From that judgment the election commissioners have prosecuted an appeal direct to this court.

Walter L. Fisher and Frank D. Ayers, for appellants. Levy Mayer and Harry Rubens, for appellee.

FARMER, J. (after stating the facts as above). The first question that confronts us is: Has this court jurisdiction to entertain the appeal? Appellants contend that the elective franchise is involved; also, that the validity of the public policy act, and section 10 of the Australian ballot law (Hurd's Rev. St. 1905, p. 929, c. 46) and the provision of the dramshop act (page 724, c. 38, § 259) requiring dramshops to be closed on Sunday are involved.

Section 10 of the Australian ballot law provides that objections to the nomination papers of candidates for office shall be considered and determined by certain public officials named. In case the nomination papers of a candidate for a state office are objected to, the objection must be considered by the Secretary of State, Auditor, and Attorney General. If the nomination papers of a candidate to be voted for by the voters

of a division less than a state and greater than a county are objected to, the objection must be considered by the county judges of the counties embraced in such division; and, if the objection is to the nomination papers of a candidate for a county office, the objection must be considered by the county judge, county clerk, and state's attorney. In either case the decision of a majority of such officers is made final. A proviso to said section 10 reads: "Provided, that in cities, towns or villages having a board of election commissioners such questions shall be considered by such board and its decision shall be final." The only basis for claiming that the constitutionality or validity of this section of the statute is involved is that it is stated by appellants in their brief and argument that they insisted in the trial court that said section 10 was applicable to the case and made the decision of the election commissioners final, and that petitioners insisted there, as here, that said section was not applicable, and further insisted in the trial court that, if the court held said section applicable, they would insist that it was unconstitutional. It does not appear from this record that the court agreed with appellants' contention as to the applicability of section 10, but, on the contrary, we understand from appellants' brief and argument that the circuit court held said section not applicable. The applicability of the statute, and not its validity, was the only question involved in the decision of the case.

We find no basis in his record for the assumption that the elective franchise or the validity of any other statute or any question of constitutional construction is involved in the determination of the case. In no view that we can take of the case is any question involved that authorized the appeal direct to this court from the circuit court. The sole question involved is the construction of the public policy act of 1901. Section 1 of that act provides: "That on a written petition signed by twenty-five per cent. of the registered voters of any incorporated town, village, city, township, county or school district, \* \* \* It shall be the duty of the proper election officers in each case to submit any question of public policy so petitioned for, to the electors of the incorporated town, village, city, township, county, school district or state, \* \* \* at any general or special election named in the petition." Section 2 provides that the question submitted shall be printed upon a separate ballot, in the form required by law, the same as a constitutional amendment or other public measure proposed to be voted upon by the people. The validity of this act was not challenged by any of the objections filed before the board of election commissioners, and was not involved in the determination of the case in the circuit court. The sole question, as we understand this record, was whether the proposition proposed by the pe-

tion to be submitted to the voters was a question of public policy within the meaning of the statute. The election commissioners, as appears from a written opinion filed by them, which is made part of the petition, held that it was not; that the question proposed to be submitted, to come within the meaning of the law, must be for the purpose of obtaining an expression of the public sentiment upon the enactment of a new law by the proper authorities or the repeal or amendment of a law already upon the statute books. If the question presented by the petition was one of public policy within the meaning of the statute, the election commissioners had no discretion in the matter, and it became their duty to submit it to be voted upon at the election. If the question, however, was not one of public policy within the meaning of the law, then it was their duty to refuse to submit the question. The point of difference between the election commissioners and the circuit court was that, as the former construed the statute, the question proposed was not one of public policy, while as the circuit court construed the statute the question was one of public policy. In both cases the question depended upon the construction given the statute.

In order to authorize this court to take jurisdiction of an appeal direct from the circuit court, it must appear from the record, and not merely from the statement of counsel in their briefs and argument, that some question was involved which authorized the appeal. *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. McGrath*, 195 Ill. 104, 62 N. E. 782; *Foot v. Lake County*, 198 Ill. 638, 64 N. E. 1015; *St. Louis Transfer Co. v. Canty*, 103 Ill. 423; *City of Virden v. Allan*, 107 Ill. 505. No such question appears from this record to be involved in this case, and the appeal should have been prosecuted to the Appellate Court. The record will therefore be transferred to the Appellate Court for the First District.

Appeal transferred.

(236 Ill. 183)

GOODRUM et al. v. MITCHELL et al.

(Supreme Court of Illinois. Oct. 26, 1908.)

1. DESCENT AND DISTRIBUTION (§ 130\*)—CLAIMS—LIEN UPON LAND—DURATION.

There is no statute of limitations providing when a claim against a decedent's estate ceases to be a lien upon his land, but it must be enforced within a reasonable time after his death.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 486; Dec. Dig. § 130.\*]

2. DESCENT AND DISTRIBUTION (§ 130\*)—CLAIMS—LIEN UPON LAND—HOMESTEAD.

That decedent's widow occupied part of his land as a homestead would not excuse delay in enforcing a claim against the land, if its value exceeded \$1,000, or if decedent's personalty was ample to pay his debts, or if he left land other

than the homestead, out of which claims not satisfied from the personalty could be made.

[Ed. Note.—For other cases, see Descent and Distribution, Dec. Dig. § 130.\*]

3. DESCENT AND DISTRIBUTION (§ 130\*)—CLAIMS—LIENS AGAINST LAND—ENFORCEMENT—LACHES.

Defendants were barred by laches from charging their deceased parents' land with the amount of claims against the father's estate paid by them, where he died 32 years previously, leaving other property out of which the claims could have been satisfied, but defendants took no steps to enforce such claims.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 486; Dec. Dig. § 130.\*]

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, De Witt County; W. G. Cochran, Judge.

Partition suit by Aleta Goodrum and others against James H. Mitchell and another. From a judgment of the Appellate Court for the Third District, affirming a decree of the circuit court for plaintiffs, defendants appeal. Affirmed.

This was a bill in chancery, filed in the circuit court of De Witt county by the appellees, against the appellants, for the partition of certain real estate situated in the city of Clinton, in said county. It appears from the pleadings and proofs that John P. Mitchell died intestate in said county in the year 1874, seised in fee simple of the south half of the north half of outblock 16, in the original town (now city) of Clinton, in the county of De Witt and state of Illinois; that he left him surviving his widow, Elizabeth Mitchell, and James H. Mitchell, Lillian Stock, and William G. Mitchell, his children and sole heirs at law; that William G. Mitchell departed this life intestate in the year 1901, leaving him surviving his widow, Sarah E. Mitchell, and Aleta Goodrum, his daughter and sole heir at law; that Elizabeth Mitchell, the widow of John P. Mitchell, deceased, and Sarah E. Mitchell, the widow of William G. Mitchell, deceased, are both dead, and that said James H. Mitchell, Lillian Stock, and Aleta Goodrum are each seised in fee of the undivided one-third part of said premises; that John P. Mitchell was indebted, at the time of his death, in excess of the amount of his personal estate; that claims for a considerable amount were allowed against his estate; that the only real estate, the legal title of which was in said John P. Mitchell at the time of his death, was the premises sought to be partitioned, which premises were occupied by him as a homestead, and that his widow continued to occupy the same as her homestead until the time of her death, in the year 1903; that said real estate was of the value of about \$1,500; that to save any portion of said homestead from forced sale to pay debts of said John P. Mitchell, deceased, said James H. Mitchell and Lillian Stock paid the claims

against the estate of John P. Mitchell, deceased, not satisfied out of the personal estate, with their own funds, and said claims, which had been allowed by the county court, were assigned to them; that said claims remained unpaid at the time the bill for the partition of said premises was filed, and they sought, by their answer, to have said claims established as a lien against said premises. It further appeared that some years before his death John P. Mitchell conveyed to John Warner and C. H. Moore a large tract of farming land situated in said De Witt county; that while said lands were conveyed to Warner and Moore by absolute deed, they were conveyed to Moore and Warner in trust; that subsequent to the death of John P. Mitchell his widow and heirs filed a bill against Warner and Moore to enforce the said trust; that thereafter a compromise was effected between the parties, whereby Warner and Moore conveyed to the widow and heirs of John P. Mitchell, deceased, 240 acres of said lands, of the value of from \$35 to \$50 per acre, and paid \$5,000 in cash, in compromise of said litigation, which cash payment was retained by the solicitors of the widow and heirs as their compensation. The master held that the claims paid by James H. Mitchell and Lillian Stock, which had been allowed against the estate of John P. Mitchell, deceased, and assigned to them, should be established as a lien against the property owned by John P. Mitchell, deceased, situated in said outblock 16. The circuit court sustained exceptions to the master's report in that regard, and held that said claims were stale and barred by the laches of James H. Mitchell and Lillian Stock, and decreed that said real estate be divided equally among James H. Mitchell, Lillian Stock, and Aleta Goodrum, as the heirs at law of John P. Mitchell, deceased, free and clear of all liens. From that decree James H. Mitchell and Lillian Stock prosecuted an appeal to the Appellate Court for the Third District, where the decree of the circuit court was affirmed, and a further appeal has been prosecuted to this court, and it is assigned as error in this court that the Appellate Court erred in holding that the circuit court properly declined to establish a lien against the said premises in favor of the appellants for the respective amounts of the claims allowed against the estate of John P. Mitchell, deceased, which had been paid by them and assigned to them.

Edward J. Sweeney, John Fuller, and L. O. Williams, for appellants.

Lemon & Lemon, for appellees.

HAND, J. (after stating the facts as above). John P. Mitchell died in the year 1874, and this bill was filed in the year 1908. Thirty-two years had therefore elapsed between the death of John P. Mitchell and the time of the filing of this bill. It is therefore appar-

ent that unless some valid reason is shown why payment of the claims of James H. Mitchell and Lillian Stock against the estate of John P. Mitchell, deceased, had not been sooner enforced, said claims were barred by the laches of the claimants, and had ceased to be a lien upon the real estate of which said John P. Mitchell died seised, and the payment thereof could not legally be enforced in this proceeding. *Graham v. Brock*, 212 Ill. 579, 72 N. E. 825, 103 Am. St. Rep. 248. There is no statute of limitations in force in this state which provides when a claim against the estate of a deceased person ceases to be a lien upon the real estate of which such deceased person died seised. It is held, however, such claim must be enforced against the real estate of the decedent, if at all, within a reasonable time after his death, and by analogy the time has been established at seven years, unless some valid reason for a further extension is shown. In this case the delay was attempted to be excused on the ground that the premises, against which said claims are now sought to be enforced, were occupied by John P. Mitchell as a homestead at the time of his death, and subsequent to his death were so occupied by his widow until her death, which occurred in the year 1908. The fact that premises, which do not exceed in value \$1,000, were occupied by a widow as a homestead subsequent to her husband's death has been held to be a valid excuse for not seeking to enforce payment of the debts of the deceased husband against said premises during the life of the widow (*Hanna v. Palmer*, 194 Ill. 41, 61 N. E. 1051, 56 L. R. A. 93), but the fact that the widow occupied a part of her deceased husband's estate as a homestead would not be an excuse for a delay in enforcing a claim against the real estate of her deceased husband, if the same exceeded in value \$1,000, or if the personal property of the deceased was ample to pay his debts, or if he left real estate other than the homestead, out of which claims not satisfied from the personal property could be made. In this case John P. Mitchell died having a claim to real estate, the title of which was held by Warner and Moore, and as a result of litigation between his widow and heirs and Warner and Moore, the widow and heirs recovered said real estate, which far exceeded in value the amount of the claims now sought to be enforced against the property sought to be partitioned. We think it clear when the widow and heirs of John P. Mitchell, deceased, recovered the legal title to said lands, if not before, said lands were liable for the payment of the debts of John P. Mitchell, deceased, and as the appellants took no steps to enforce the claims which they had paid, individually, against their father's estate, against said lands, and treated said lands as the individual property of the widow and heirs of said John P. Mitchell, deceased, they thereby barred themselves

from claiming a lien at this late date upon the lands of the deceased, which their mother then occupied as a homestead. Our conclusion therefore is the circuit and Appellate Courts properly held that the payment of said claims could not be enforced in this proceeding against the premises sought to be partitioned.

The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

(236 Ill. 188)

GILLESPIE et al. v. FULTON OIL & GAS CO. et al.

(Supreme Court of Illinois. Oct. 26, 1908.)

1. LANDLORD AND TENANT (§ 28\*)—LEASE—FRAUD—BURDEN OF PROOF.

One alleging that a lease was procured by fraud has the burden of sustaining the charge by so cogent proof as to leave the mind well satisfied that the allegation is true.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 82; Dec. Dig. § 28.\*]

2. CANCELLATION OF INSTRUMENTS (§ 47\*)—EVIDENCE—SUFFICIENCY.

Equity will not set aside contracts made by parties on an equal footing, where the proof is such that to grant the relief is as liable to be wrong as right.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 102; Dec. Dig. § 47.\*]

3. EVIDENCE (§ 589\*)—WEIGHT OF TESTIMONY—INTEREST OF WITNESSES.

On the issue whether an oil and gas lease was procured by the fraud of the lessee, the unsupported statement of the lessor in answer to a leading question of his counsel is entitled to no more weight than the statement of the lessee who has assigned the lease, whose testimony cannot be rejected as that he is an interested party without invoking a rule that will apply with greater force to the lessor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 24, 38; Dec. Dig. § 589.\*]

4. EVIDENCE (§ 91\*)—PRESUMPTIONS—BURDEN OF PROOF.

The general presumption that all men act honestly must be overcome by the party alleging the contrary.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 113; Dec. Dig. § 91.\*]

5. MINES AND MINERALS (§ 58\*)—OIL LEASE—FRAUD—EVIDENCE—SUFFICIENCY.

Evidence held not to show that an oil lease was obtained by fraud.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 58.\*]

6. CONTRACTS (§ 94\*)—SETTING ASIDE—GROUNDS—FRAUD—ELEMENTS.

A misrepresentation which will warrant equity in setting aside a contract must be a statement of a fact, made to induce the other party to act, the statement must be untrue, the party making it must know or believe it to be untrue, the person to whom it is made must rely on its truth, and it must be material.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420-427; Dec. Dig. § 94.\*]

7. MINES AND MINERALS (§ 58\*)—OIL LEASE—FRAUD—EVIDENCE—SUFFICIENCY.

Where there was no proof that a lessor relied on the truth of a false statement made by

the lessee, equity could not cancel the lease on the ground of the fraud of the lessee.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 58.\*]

8. MINES AND MINERALS (§ 58\*)—OIL LEASE—FRAUD.

Where an oil and gas lease was executed by an owner with the object of having his land prospected for oil and gas, a false statement of the lessee made to induce the execution of the lease that he was a producer of oil was not a material misrepresentation, and the court could not cancel the lease on the ground of fraud.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 58.\*]

9. EVIDENCE (§ 432\*)—ADMISSIBILITY—CONSIDERATION.

Equity will not receive evidence contradicting the acknowledgment of the receipt of the consideration in a sealed instrument for the purpose of canceling it, though in actions for the consideration, and in bills for specific performance and the like, courts will inquire into the actual consideration and whether the same has been paid.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1981-1989; Dec. Dig. § 432.\*]

10. MINES AND MINERALS (§ 58\*)—LEASE—NONPAYMENT OF CONSIDERATION RECITED—EFFECT.

Where the real consideration for the execution of an oil and gas lease was the exploitation of the mineral resources of the farm of the lessor, and not the recited consideration of \$1, the receipt of which was acknowledged, the nonpayment of \$1 did not invalidate the lease.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 58.\*]

11. HOMESTEAD (§ 114\*)—LEASES—INTERESTS ACQUIRED.

A lease of unlimited duration giving the lessee the right to enter on land occupied as a homestead to prospect for and mine oil and gas, and erect necessary buildings and structures, is a conveyance of such an interest in the homestead as is void, unless the lease is executed and acknowledged as provided by Hurd's Rev. St. 1905, c. 52, § 4, defining how a homestead may be conveyed.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 114.\*]

12. HOMESTEAD (§ 213\*)—STATUTORY RIGHTS—PLEADING.

The rule that, where a statute gives a new right under specified conditions, the party claiming the right must bring himself within the statute by his pleading, applies to a pleading setting up the right of homestead.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 394; Dec. Dig. § 213.\*]

13. HOMESTEAD (§ 213\*)—EXISTENCE—PLEADING—SUFFICIENCY.

A pleading which seeks to avoid an oil and gas lease because the premises were the homestead of the lessor, which alleges that the premises are contiguous and are the homestead of the lessor and family; that in the execution of the lease the lessor's wife did not join, and the lease contains no waiver of the estate of homestead; and that the premises were at the time of the execution of the lease occupied by the lessor and his wife as a homestead, and that the premises were worth less than \$1,000—does not allege facts sufficient to show that the entire premises were at the time of the execution of the lease the homestead of the lessor.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 213.\*]

**14. HOMESTEAD (§ 57\*)—EXISTENCE—BURDEN OF PROOF.**

The burden of proving the existence of a homestead is on the one relying on it.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 84; Dec. Dig. § 57.\*]

**15. HOMESTEAD (§ 125\*)—CONVEYANCE—VALIDITY.**

A conveyance of a tract of land worth more than \$1,000 on which a homestead exists is valid without a release of homestead as to the excess over \$1,000 in value.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 223; Dec. Dig. § 125.\*]

**16. HOMESTEAD (§ 125\*)—CONVEYANCE—VALIDITY.**

Where the evidence did not show that land embraced in an oil and gas lease and constituting the lessor's homestead was worth \$1,000 or less, the lease could not be held invalid as to the excess because the homestead was not properly released.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 223; Dec. Dig. § 125.\*]

**17. HOMESTEAD (§ 1\*)—NATURE OF ESTATE—"FREEHOLD."**

A homestead estate is a freehold.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 2968-2969.]

**18. COURTS (§ 219\*)—QUESTIONS REVIEWABLE—WAIVER.**

On appeal to the Appellate Court as to questions of which it has no jurisdiction such questions are waived, and appellant cannot insist in the Supreme Court on an appeal from the Appellate Court that such questions shall be considered.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 219.\*]

**19. COURTS (§ 219\*)—QUESTIONS REVIEWABLE—WAIVER.**

Where appellee submitted the case in the Appellate Court for a hearing on the merits, he waived, for the purposes of an appeal to the Supreme Court from the Appellate Court, a defense involving a freehold estate, and not within the jurisdiction of the Appellate Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 558; Dec. Dig. § 219.\*]

**20. MINES AND MINERALS (§ 79\*)—LEASES—CONSTRUCTION.**

An oil and gas lease for five years, which required the lessee to drill a test well within 12 months, and which provided that, in case no well was completed within that time, he should pay a rental of a specified sum per acre "to be paid annually counting from the expiration of the said twelve months," did not require the lessee to pay any rent until the expiration of the first year, and at that time, if no test well was completed, the rent commenced to accrue, and, as the lease did not require the payment of the rent in advance, the lessee had all of the second year in which to pay rent.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 79.\*]

**21. TENDER (§ 16\*)—WAIVER.**

Where a lessor in an oil and gas lease, when notified that the money called for as rent had been left for him at a bank, refused to accept it on the ground that the lease was void, and he indicated his purpose not to receive any rent under the lease, he waived any duty resting on the lessee to make a legal tender of the rent.

[Ed. Note.—For other cases, see Tender, Cent. Dig. § 48; Dec. Dig. § 16.\*]

**22. CANCELLATION OF INSTRUMENTS (§ 37\*)—LEASES—TENDER OF RENT.**

Where a lessor in an oil and gas lease repudiated the lease by releasing the premises to another, and admitting the latter into possession before the expiration of the year in which the lessee in the first lease had the right to pay rent, and the lessee before the expiration of the year filed a bill to set aside the second lease, in which he tendered performance of all the conditions to be performed by him, and in which he averred that he was willing to perform his covenants, there was a sufficient tender in equity of the rent called for in the lease.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 37.\*]

**23. MINES AND MINERALS (§ 77\*)—LEASES—TENDER OF RENT—FORFEITURE.**

A lessee in an oil and gas lease executed June 15th, for five years, served notice on September 15th of the following year of his intention to carry out a provision in the lease requiring him to make a test well. The lease provided that, if no well was completed within the first year, the lessee should pay a rental of \$100, which he tendered. September 15th no work had been done under a subsequent lease executed by the lessor to others. On October 14th, following he went on the land to make a location for drilling a well, when he found a well in operation which had been drilled after his notice was served. *Held*, that the rights of the first lessee were not forfeited.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 77.\*]

**24. LANDLORD AND TENANT (§ 74\*)—LEASES—ASSIGNMENTS.**

At common law, and under Hurd's Rev. St. 1905, c. 80, § 32, providing that, when the lease is assigned, the landlord shall have the right to enforce his lien against the assignee, etc., leases are assignable.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 221; Dec. Dig. § 74.\*]

**25. MINES AND MINERALS (§ 81\*)—EJECTMENT—RIGHT OF ACTION—ASSIGNEE OF OIL AND GAS LEASE.**

An assignee of the lessee in a lease of oil and gas in premises described with the right to enter thereon to mine for oil and gas cannot maintain ejectment against the lessee in a subsequent lease.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 81.\*]

**26. MINES AND MINERALS (§ 81\*)—SUIT AGAINST ADVERSE LESSEE.**

Equity has jurisdiction to prevent waste and irreparable injury at the suit of an assignee in an oil and gas lease against a subsequent adverse lessee.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 81.\*]

Appeal from Appellate Court, Fourth District, on Appeal from Circuit Court, Crawford County; E. E. Newlin, Judge.

Suit by E. N. Gillespie, trustee, and others, against the Fulton Oil & Gas Company and others. From a judgment of the Appellate Court affirming a decree dismissing the bill for want of equity, plaintiffs appeal. Reversed and remanded.

E. N. Gillespie, trustee, filed a bill in the circuit court of Crawford county against the Fulton Oil & Gas Company, S. C. Bowman, T. N. Rogers, and Walter Hennig, praying

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

for an injunction, an accounting, the appointment of a receiver, and the cancellation of certain oil and gas leases executed by S. C. Bowman and wife to Rogers and by him assigned to Walter Hennig. All of the defendants below answered the bill, and, replications having been filed, the cause was heard by the court upon the bill, answers, replications, and proofs submitted in open court. The circuit court found the issues for the defendants, and dismissed the complainant's bill for want of equity. This is an appeal from a judgment of the Appellate Court for the Fourth District affirming the decree of the circuit court.

In his amended bill, upon which the cause was heard, appellant alleges that on the 17th day of May, 1905, appellee S. C. Bowman, then being the owner in fee of the west side of the N. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  and the N. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 11, township 8 N., of range 14 W., executed a lease in writing, commonly called an "oil and gas lease," to T. E. Pierce for said premises, for the purpose of being drilled and operated for oil and gas, for a term of five years from the date thereof, and as much longer as gas or oil should be found in paying quantities on said premises, and that such lease was duly assigned for a valuable consideration, in writing, on the 14th day of October, 1905, by T. E. Pierce to appellant, Gillespie, in trust, for the joint benefit of himself and others, and that said lease, together with the assignment thereof, was duly recorded in the recorder's office of Crawford county, state of Illinois, on the 15th day of June, 1906. The bill recites the several provisions of the lease according to their legal effect, and makes reference to a copy of the lease, which is attached to the bill and is as follows:

"In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, S. C. Bowman, party of the first part, hereby grant and lease unto T. E. Pierce, parties of the second part, all the oil and gas in and under the following described premises: All that lot of land situated in the township of \_\_\_\_\_ in \_\_\_\_\_ county, state of Illinois, described as follows, to-wit: West side of N. W. of N. E.  $\frac{1}{4}$  of Sec. 11, T. 8, R. 14, west; and N. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  of Sec. 11, T. 8, R. 14, west, all in Crawford county, Illinois, containing fifty acres, more or less, together with the right to enter thereon at all times for the purpose of drilling and operating for oil and gas, and to erect and maintain all buildings and structures and lay pipes necessary for the production and transportation of oil and gas. To have and to hold the above described premises for five years from the date hereof, and as much longer as oil or gas is found in paying quantities on said premises, on the following conditions:

"Second parties shall, within twelve months from the date hereof, drill a test well upon

said premises. If gas is found in sufficient quantities to transport, second parties agree to pay first parties the sum of \$100 per year for the gas produced from each well from which gas is transported, payable annually, when a market is found for the gas, and first parties to have gas, free of cost, to heat and light one dwelling house, to be transported at first party's cost. If oil is found in paying quantities the first party shall have one-eighth part of all oil produced and saved from said premises, to be delivered in the pipe line with which second parties shall connect their wells. The party of the first part grants the further privilege to the party of the second part of the right of way over and across said premises to the place of operating, together with the exclusive right to lay pipe lines to convey oil and gas, the right to remove any machinery and fixtures placed on said premises by them, doing the least possible damage to said premises; and the party of the first part reserves the right to use and enjoy said premises for the purpose of tillage and all purposes not inconsistent with the objects and purpose of this lease, except such part as may be necessary for the purpose above specified. The second parties to lay all pipes deep enough under the ground so as not to interfere with the cultivation of the soil. Second party hereby agrees to pay any damage done to growing crops by the laying pipes and to leave the tiling in as good order as the same is found. In case no well is completed on said premises within twelve months from this date, the parties of the second part shall pay the party of the first part a rental of twenty-five cents per acre per year, to be paid annually, counting from the expiration of said twelve months. It is further agreed that in case no paying well is completed on said premises within five years from the date hereof, this grant shall be null and void without further agreement of the parties hereto. No well shall be drilled within two hundred feet of any dwelling house without a written permit from the first party. The second party shall have the right to use sufficient gas and water to run all machinery for operating said wells and the right to remove all its property at any time, but without interference with first party's water supply. Upon the abandonment by second party of the premises, or upon the expiration of the rights and privileges of the second parties under the provisions hereof, the second party agrees to execute full release to party of first part. The parties of second part hereby agree to complete test well in \_\_\_\_\_ county, Illinois, on or before the \_\_\_\_\_ 190\_\_\_\_, or forfeit all rights under this lease. It is understood between the parties of this agreement that all conditions between the parties hereunto shall extend to their heirs, executors, administrators, successors and assigns.

"In witness whereof the parties hereun-

to have set their hands and seals this 17th day of May, 1905.

"S. C. Bowman. [Seal.]

"T. E. Pierce. [Seal.]"

"Witness: T. E. Pierce."

The following is a copy of the assignment of the lease as set out in the amended bill: "This agreement, made and entered into this 14th day of October, 1905, by and between T. E. Pierce, ———, Ill., first party, and E. N. Gillespie, of Freeport, Pa., of the second party, witnesseth: That the said party of the first part, for and in consideration of the sum of one dollar and other consideration to him in hand paid by the party of the second part, has sold, transferred and assigned and set over all his right, title, interest and claim on the within lease. In witness whereof the party of the first part has set his hand and seal the day and year above mentioned or written. T. E. Pierce." A certificate of acknowledgment of a notary public appears on this instrument.

After averring that appellant had kept and performed all of the covenants in said lease, and that he was able and willing to go on in good faith with the prompt performance of all of the covenants in said lease to be by him performed, the bill charges that on the 20th of August, 1906, without the consent or authority of appellant or any one interested with him in said lease, and in violation of appellant's rights under his lease, appellee S. C. Bowman pretended to lease said premises for oil and gas to T. N. Rogers, which said lease to Rogers was duly recorded in the recorder's office of Crawford county on August 31, 1906, which said pretended lease to T. N. Rogers the bill avers was taken with notice and knowledge of the prior lease given to T. E. Pierce and by him assigned to appellant. The bill alleges that on December 19, 1906, after the filing of the original bill herein, a second lease from said Bowman to said T. N. Rogers was filed for record; that said second lease was acknowledged September 8, 1906, and is in all respects similar to the first lease, except in the first lease there was an agreement that Bowman, the lessor, would stand between the said lessee and his assigns and Pierce and pay all costs of any litigation that might be instituted on account of appellant's lease; that the second lease made to appellee Rogers omitted this indemnity clause, but the same agreement was made by a separate writing; that the first lease made to Rogers was by him assigned to the Fulton Oil & Gas Company, and the second lease to Rogers was assigned to Walter Hennig. The amended bill charges that the said Walter Hennig, either on his own account or on behalf of the Fulton Oil & Gas Company, conspired with said Bowman to injure and defraud the said complainant by wrongfully taking possession of the premises, and boring and completing thereon a producing oil well of great value, from which large quantities of

oil have been taken, and that said appellees are about to drill other wells on the premises, and have done, and are doing, irreparable damage to the premises and to the estate of appellant and his associates by depriving them of the oil and gas on said premises, which appellant claims he is entitled to; that appellee Bowman refuses to permit the appellant and his associates to go upon the premises and to operate for oil and gas under said lease. The bill avers that appellant has no knowledge as to the quantity of oil that has been taken from the premises by the appellees, but avers that it will amount to several thousand dollars. The bills prays for an injunction, for an accounting, for a receiver, and the cancellation of the oil leases, and the record and assignment thereof executed by appellee Bowman to Rogers (now held either by Hennig or the Fulton Oil & Gas Company) as clouds upon the title of appellant and his associates. The answers of the appellees deny the execution of the Pierce lease, and charge that, if the same was executed, it was illegal and void for the following reasons: (1) That Pierce obtained his lease from Bowman through fraud, deceit, and falsehood in the manner of procuring Bowman's signature; (2) that Bowman never executed, completed, or delivered said lease; (3) that the premises described in the Pierce lease were the homestead of Bowman and family and the homestead rights were not waived in said lease, and Bowman's wife did not join in the execution of the same; (4) that complainant has a complete and adequate remedy at law; (5) that, even if the lease had been a valid lease from Bowman to Pierce, it has become forfeited and been allowed to lapse by non-performance of its terms by the lessee and his assignees; (6) that the said assignment is insufficient and invalid and conveyed no interest from the said Pierce to the said complainant, because this lease conveyed a part of the fee, and therefore could not be conveyed or transferred by simple assignment. The circuit court sustained, by special findings, all of the foregoing grounds of defense, and its decree has been affirmed by the Appellate Court for the Fourth District. The evidence is stated in the discussion of the points to which it relates, and a further reference to the answers of appellees, somewhat more in detail, is made in the opinion which follows this statement.

George B. Gillespie and A. M. Fitzgerald (Charles Gibbs Carter, Hamlin, Gillespie & Fitzgerald, and Callahan, Jones & Lowe, of counsel), for appellants. George W. Jones, for appellees.

VICKERS, J. (after stating the facts as above). First. The legality of appellant's lease is challenged on the ground, among others, that its execution was procured through fraud and false representations.

The evidence shows that appellant's lease was executed at Bowman's residence. The only persons who testify to the occurrences at the time the lease was executed are Pierce and Bowman. Pierce testifies that he was down in Bowman's neighborhood looking for leases, and that Bowman's father-in-law sent him over to see Bowman. Pierce's business was taking leases for the purpose of reselling them for a profit. He was not in the business of producing oil. Pierce stayed over night at the Bowman house, and the lease in question was executed next morning at the breakfast table, while Mrs. Bowman was clearing away the dishes. Pierce denies having made any representation or statement to Bowman except what is in the lease. He denies that Bowman said anything to him about the payment of the dollar mentioned as a consideration for the lease at that time. Bowman testifies that he signed the lease at the time and place mentioned by Pierce. He testifies, also, that no part of the consideration was paid in cash at that time, and that he demanded the dollar, and that Pierce refused to pay it. In his original account of what occurred at the time the lease was signed, he says nothing about any representations that Pierce made in regard to his business. Further on in his testimony, in response to a question by his counsel drawing his attention to what Pierce said about his business and whether or not he was in the business of oil development, Bowman testified that "Pierce represented himself as an oil producer, and said that they were operating in Clark county, about three or four miles from Martinsville. He told the place and told the farm, but I disremember the man's name." This is the only evidence in the record which has any tendency to sustain the allegation of fraud and misrepresentation. The burden of proof upon this issue was upon appellees. The allegation that the execution of the lease was procured by fraud having been made by appellees in their answers, it devolved upon them to sustain that charge by proof so clear and cogent as to leave the mind well satisfied that the allegation is true. *Shinn v. Shinn*, 91 Ill. 477; *English v. Lindley*, 194 Ill. 181, 62 N. E. 522.

While the jurisdiction of courts of equity to restore parties to rights of which they have been deprived through fraud is one of the most salutary which these courts exercise, still this jurisdiction is not to be called forth and solemn contracts made by parties upon an equal footing set aside where the state of the proof is such that to grant the relief is as liable to be wrong as right. If such were the practice, it might often happen that the remedy provided would be more oppressive than the evil sought to be cured. In the case at bar we see no reason why the unsupported statement of Bowman, made in answer to a leading and suggestive question of his counsel, should be entitled

to more weight than the statement of Pierce, the other party to the transaction. Pierce had assigned the lease, and, so far as appears, he has no interest now in the result of this litigation. His testimony cannot be rejected on the theory that he is an interested party, without invoking a rule that would apply with much greater force to Bowman. The general presumption that all men act honestly and fairly must be overcome by the party who alleges the contrary. Bowman's evidence on this question is materially impaired by the following circumstance: No well having been sunk on the Bowman farm within one year, appellant deposited \$12.50 in a bank nearest to Bowman's residence, and with which he had transacted some business, to pay one year's rent at 25 cents per acre, in accordance with the requirements of the lease. The bank at Annapolis with which the money had been left immediately notified Bowman that the money had been left for him, and in reply to this notice Bowman wrote the bank under date of May 27, 1906, saying that he would not accept the money on that lease because the lease was null and void, and assigned the following reasons: "First, it is not signed by the wife of S. C. Bowman, and the premises therein described being a homestead renders it absolutely void without she joins in the execution thereof; second, no well was commenced or completed thereon, as stipulated therein, within twelve months, nor no rental paid thereon within that period of time." The apt language employed in stating the reasons why the lease was void is proof that Bowman either possessed more legal knowledge than the ordinary layman, or he had procured legal advice before writing this letter. Whatever may be the fact in this regard, it is a matter of surprise that in stating the grounds with such particularity and legal precision which he relied on as rendering the lease void he entirely omits any reference to fraud and misrepresentation. His unexplained failure to mention fraud and misrepresentation in this letter tends to discredit his testimony on that subject given at the trial. In our opinion the evidence in this record is wholly insufficient to sustain the charge of fraud by that degree of proof required to establish such charge. There is, however, another reason why this defense cannot prevail. A misrepresentation which will warrant a court of equity in setting aside a contract must contain the following elements: First, its form must be a statement of fact; second, it must be made for the purpose of inducing the other party to act; third, it must be untrue; fourth, the party making the statement must know or believe it to be untrue; fifth, the person to whom it is made must believe in and rely upon the truth of the statement; sixth, the statement must be material. *Pomeroy's Eq. § 876*; *Prentice v. Crane*, 234 Ill. 302, 84 N. E. 916. When carefully analyzed, the

statement attributed to Pierce by Bowman will be found wanting in at least two of the essential elements of a misrepresentation against which a court of equity will grant relief: (a) There is no proof whatever that Bowman believed in and relied upon the truth of the statement. We have read Bowman's evidence in the abstract, in appellees' additional abstract, and in the record, and there is no statement in it anywhere to the effect that he believed or relied upon the statement attributed by him in his testimony to Pierce, to the effect that Pierce was an oil operator or producer and that he was then engaged in operating in Clark county. (b) The statement is also wanting in the essential element of materiality. The lease in question was not a contract for personal service to be rendered by Pierce to Bowman. It was a contract the execution of which would necessarily require the co-operation of several persons. Bowman's object no doubt was to have his land prospected for oil and gas. Whether this was done by Pierce personally, or by others whom he might employ or to whom he might assign the lease, could not make the slightest difference to the landowner. In this connection, it is also to be noted that Bowman does not testify that Pierce made any promise or representation to the effect that he would personally develop the Bowman land; the only statement being that he was a producer of oil and engaged in that business. Even if the statement was proven to have been made in that clear and convincing manner required by the law, and if the proof showed that Bowman believed in and relied upon such statement, it is clearly a matter outside the real consideration of the contract, and is not, for that reason, such a misrepresentation as will avoid the contract.

In connection with the charge of fraud set up in the answer, appellees point out the fact that the money consideration mentioned in the lease was not paid. This is admitted by Pierce, but he denies that Bowman made any request for payment until a subsequent interview, some time after the lease was executed. Courts of equity will not receive evidence contradicting the acknowledgment of the receipt of the consideration in a sealed instrument for the purpose of invalidating the writing. In actions brought to recover the consideration, and in bills for specific performance and the like, courts will inquire into the actual consideration and whether the same has been paid, notwithstanding the recital in the instrument acknowledging the receipt of a named consideration; but it is not proper to show that the consideration was not paid to defeat the operation of the instrument. Warvelle on Abstracts, p. 216; *Stannard v. Aurora, Elgin & Chicago Railway Co.*, 220 Ill. 469, 77 N. E. 254; *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46. In the *Ulrey Case*, above cited, which was a bill in chancery to cancel an oil lease substantially like the one involved in the case at bar, this

court, on page 63, said: "But, while the recital of the payment of the consideration in an instrument may be contradicted for such purposes, an acknowledgment of such payment cannot be contradicted by parol for the purpose of invalidating the instrument or impairing its legal effect as a conveyance. *Stannard v. Aurora, Elgin & Chicago Railway Co.*, 220 Ill. 469, 77 N. E. 254. The interest of the appellee Ulrey under the lease had been assigned to the appellee the Illinois Oil & Gas Company, with the exception of one-sixteenth, and the purpose of the allegation in the bill and evidence that the \$1 was not, in fact, paid, was to invalidate the lease, which could not be done." It is inconceivable that the money consideration mentioned in this lease was the real consideration upon which it rested. Undoubtedly the real consideration was the exploitation of the mineral resources of Bowman's farm. If the dollar was not paid, Pierce owes Bowman that sum and he has a legal remedy for the same, but the nonpayment of it affords no reason for annulling the contract.

Second. Appellees insist that appellant's lease is void because the demised premises were at the time the lease was executed the homestead of the lessor, and that there is no waiver or release of the homestead in accordance with the statute, and the lease is not signed and acknowledged by the wife of the lessor. Upon this question the answer of S. C. Bowman to the amended bill contains the following averment: "The said S. C. Bowman, further answering, states that all of said premises are contiguous and are the homestead of himself and family; that in the pretended execution of said paper to said T. E. Pierce, his wife, Mrs. Carrie Bowman, did not join therein, and said paper contained no release or waiver of the estate of homestead then owned therein by this defendant, and no release, waiver, or conveyance thereof was intended to be made thereof and none is contained within the body thereof or in the pretended acknowledgment thereof, and the possession thereof was never abandoned by this defendant or his said family pursuant thereto." The answer of Walter Hennig makes no reference to the homestead question. The amended answer of the Fulton Oil & Gas Company and T. N. Rogers contains the following averment on the subject of the homestead: "That the premises were occupied by Bowman and his wife as a homestead at the time of the execution of the Pierce lease, and that they were worth less than \$1,000."

The law is settled in this state by the cases of *Bruner v. Hicks*, 280 Ill. 536, 82 N. E. 888, 120 Am. St. Rep. 332, and *Poe v. Ulrey*, supra, that a lease of unlimited duration, giving the lessee the right to enter upon land occupied as a homestead for the purpose of prospecting for oil and gas, drilling, operating, and erecting the necessary buildings, pipe lines, and other structures, is a

conveyance of such an interest in the homestead as is void, unless such lease is executed and acknowledged in the manner provided by section 4, c. 52, Hurd's Rev. St. 1905. In neither of the above-cited cases was the question presented in the same manner that it is in the case at bar. In the Bruner Case an issue was made up and tried as to the value of the leased premises upon which a homestead was claimed, and a finding that the premises were worth less than \$1,000 at the time the lease was executed was approved by this court. In the later case of Poe v. Ulrey the homestead question was held to have been waived by taking the case to the Appellate Court, and not raising the question in that court. In the case at bar it will be seen, by reference to the portions of the answers above set out, that the defense that the premises were a homestead is not properly pleaded. Whether or not a homestead exists in the premises involved, so as to render the lease in question void, is a legal conclusion to be drawn from a consideration of the several elements which enter into the homestead, cited under section 1 of chapter 52 of the Revised Statutes. Hurd's Rev. St. 1905, p. 1043. The statute provides: "Every householder, having a family, shall be entitled to an estate of homestead, to the extent in value of \$1,000, in the farm or lot of land and buildings thereon, owned or rightly possessed, by lease or otherwise, and occupied by him or her as a residence; and such homestead, and all right and title therein, shall be exempt from attachment, judgment, levy or execution, sale for the payment of his debts, or other purposes, and from the laws of conveyance, descent and devise, except as hereinafter provided." It is a familiar and well-established rule of pleading that, when a statute gives a new right or privilege under certain circumstances, conditions, or qualifications, the party claiming such right must bring himself within the requirement of the statute by his pleading. He must show that he comes within the circumstances or possesses the conditions or qualifications named by the statute as requisite to the right or privilege claimed. This principle applies to a pleading which sets up the right of homestead. Thompson on Homesteads, § 702; Kitchell v. Burgwin, 21 Ill. 40; Symonds v. Lappin, 82 Ill. 213. In the case last above cited, which was a bill to foreclose a mortgage, to which the defendants answered setting up "that the said real estate in said bill described is the homestead upon which defendant and his family reside, that in and by said mortgage defendant does not waive his right under the homestead law, and that said mortgage debt is not for purchase money of said real estate," this court said: "To avail of the benefits of the homestead law, it was incumbent on them to allege in their answer such facts as certainly brought them within the protection of the law. We cannot indulge in presump-

tions not necessarily arising from the facts alleged to aid them in this regard." The answer was held not to properly bring the homestead question before the court and a decree granting a foreclosure was affirmed.

There are no averments in any of the answers filed in this cause of such facts as show that the premises in question were the homestead of S. C. Bowman at the time the lease in question was executed. But, even if there were proper allegations in the answers to support the finding of the court below that the premises in question were a homestead, there is no proof in the record to sustain such allegations. There is no finding in this case nor evidence upon which such finding could rest that the premises embraced in this lease were worth \$1,000 or less. The Appellate Court recognized that there was no proof on the question of the value of these premises, but seems to have been of the opinion that the burden of proof was upon appellant to prove that the premises were worth more than \$1,000 in order to sustain his lease as to the excess. In this the learned Appellate Court is in error. The burden of proving the existence of a homestead is upon the person relying upon it. Kales on Homestead Exemption Laws, § 135, and cases there cited. The law is well settled in this state that a conveyance of a tract of land worth more than \$1,000, upon which a homestead exists, is valid, without a release of homestead, as to the excess over \$1,000 in value. Watson v. Doyle, 130 Ill. 415, 22 N. E. 613; White v. Bates, 234 Ill. 276, 84 N. E. 906. So far as the evidence in this case shows, the 50 acres of land embraced within this lease may be worth a large amount in excess of the value of the homestead. If so, the lease cannot be held invalid as to such excess because the homestead was not properly released.

There is, however, still another reason why appellees can have no advantage in this court on this hearing of the defense that the premises were a homestead. The homestead estate is a freehold, and, if that question was relied on as a defense to the action, the appeal should have been brought directly to this court. Undoubtedly, where a party appeals a case to the Appellate Court which involves questions of which the Appellate Court has no jurisdiction, he thereby waives such question, and he cannot insist in this court, on an appeal from the Appellate Court, that this court shall consider a question which the Appellate Court had no jurisdiction to consider or decide. When this case was in the Appellate Court, appellees might have applied to that court for an order transferring the case to this court on the ground that a freehold was involved. Having failed to do this or otherwise question the jurisdiction of the Appellate Court, and having submitted the cause in that court for a hearing on its merits, they must, for the purposes of this appeal, be held to have

waived their defense of homestead. *Poe v. Ulrey*, *supra*.

. Third. It is insisted by appellees that, even if the lease was otherwise valid, it was forfeited by reason of the nonperformance of its terms by the lessee and his assignees. Under this point, it is contended that appellant was required to put down a well on the premises within 12 months, or, failing in that, he was required to pay 25 cents per acre rental on the land before the first year expired, and that no well was sunk and no rent paid during the first 12 months next after the lease was executed. This contention is based upon an erroneous construction of the lease itself. The lease provides that "the second parties shall, within twelve months from the date hereof, drill a test well upon said premises." By another clause in said lease it is provided: "In case no well is completed on said premises within twelve months from this date, the parties of the second part shall pay the party of the first part a rental of twenty-five cents per acre per year, to be paid annually, counting from the expiration of the said twelve months." Taking these two clauses together, and in connection with the clause providing that the lease was for five years from the date thereof, it is clear that the lessee was not required to pay any rent until the expiration of the first year. At that time, if no test well was completed, the rent commenced to accrue. The lease does not require the payment of the rent in advance. Appellant would therefore have all of the second year in which to pay his rental of 25 cents per acre. The evidence, however, shows that on the 16th day of May, 1906, which was one day before the first year expired, one full year's rent was paid by depositing for Bowman's use that amount to his credit in his bank. If it be said that this was not a payment to Bowman, it is a sufficient answer to such suggestion that Bowman, when notified that the money had been left for him at the bank, refused to accept the same, basing his refusal upon the ground that the lease was void. In his letter to the bank Bowman clearly waived any duty that appellant might have been under to make a legal tender to him of rent by indicating his purpose not to receive any rent under this lease. On August 20, 1906, Bowman repudiated appellant's lease by releasing the premises to others, and admitting them into the possession long before the expiration of the year in which appellant had the right to make his first payment on account of rentals. Even if there had been no payment or tender of payment by appellant prior to the filing of the bill in this case, the bill was filed in December, 1906, before the second year expired, and in his bill appellant tenders performance of all the conditions and covenants by him to be performed, and avers that he is ready and willing to go on in good faith and

perform all of his covenants. This is a sufficient tender in equity. *Webster v. French*, 11 Ill. 254; *Board of Supervisors v. Henneberry*, 41 Ill. 179. The good faith of appellant in his transactions in relation to this lease is shown by the fact that he served notice of his intention to carry out the lease on September 15th. This was before any work had been done under the Rogers leases. On October 14, 1906, appellant went upon the land to meet a contractor to make a location for drilling a well. On this occasion appellant found a well in operation which had been drilled after his notice was served. Appellant had contracted with M. J. Crotty, a contractor, to drill a well on the farm in question. The evidence shows that appellees had actual notice of appellant's lease before any work was done or money expended under the Rogers leases. In fact, the lessees who drilled the well recognized the existence of appellant's lease, and protected themselves against it by an indemnifying contract from Bowman. There is no warrant in the evidence in this case for holding that appellant has forfeited any of his rights or that he has been guilty of any conduct which in equity would estop him from now asserting them.

There is nothing in the contention of appellees that this lease was not assignable. Leases are assignable both by the common law (*Taylor on Landlord and Tenant*, § 426) and under our statute (*Hurd's Rev. St. 1905*, c. 80, § 32).

The contention that appellant has a complete remedy at law is untenable. Ejectment will not lie. *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 84 N. E. 53. Equity has jurisdiction to prevent waste and irreparable injury at the suit of an assignee of an oil and gas lease against an adverse lessee. *Indianapolis Natural Gas Co. v. Kibbey*, 135 Ind. 357, 35 N. E. 392; *Allegheny Oil Co. v. Snyder*, 106 Fed. 764, 45 C. C. A. 604; *Logan Natural Gas & Fuel Co. v. Great Southern Gas & Oil Co.*, 126 Fed. 623, 61 C. C. A. 359; *Allegheny Oil Co. v. Bradford Oil Co.*, 21 Hun (N. Y.) 32. Under the law as we understand it and the evidence in this record, the decree cannot be sustained on the ground that the execution of the lease was procured through fraud and misrepresentation, for the reasons already stated; nor because the premises were the homestead of the lessor, since there is neither pleading nor proof of such facts as are necessary to bring Bowman within the homestead statute. Appellees' contentions that the lease has been forfeited, that the same is not assignable, and that the remedy, if any exists is at law, are all wanting either in proof or legal support and are therefore insufficient to support the decree dismissing appellant's bill.

It follows from what has been said that the judgment of the Appellate Court and the decree of the circuit court must be reversed

and the cause remanded to the circuit court, with directions to enter a decree in accordance with the prayer of the bill.

Reversed and remanded, with directions.

(236 Ill. 207)

STULL et al. v. VEATCH et al.

(Supreme Court of Illinois, Oct. 26, 1908.)

**1. WILLS (§ 245\*)—FOREIGN WILLS—AUTHENTICATED COPIES—STATUTES.**

Under Statute of Wills (Hurd's Rev. St. 1905, c. 148) § 9, providing that all wills, proven according to the laws of any of the United States, and touching estates in Illinois, accompanied with a certificate that the will was proved according to the laws of the state in which it was executed, shall be recorded, and shall be good as wills made and executed in Illinois. An authenticated copy of a will proven in a sister state, after record in Illinois, is good and available as a will made and executed in Illinois, and cannot be collaterally attacked.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 245.\*]

**2. WILLS (§ 436\*)—CONSTRUCTION—WHAT LAWS GOVERN—APPLICABILITY OF RULES.**

The rule that the courts of Illinois are not bound by the judgment of the court of a sister state in construing wills, where the construction relates to lands in Illinois, is inapplicable, in a suit collaterally attacking the probate of a will in the courts of a sister state.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 950; Dec. Dig. § 436.\*]

**3. WILLS (§ 434\*)—PROBATE IN COURTS OF SISTER STATES—VALIDITY.**

A certified copy of a will, and the transcript of the order of its probate in a sister state, raise the presumption that all legal formalities at the probate were complied with, and is conclusive of the validity of the foreign probate, as against collateral attack, unless the transcript shows on its face that the will was not properly admitted to probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 940-944; Dec. Dig. § 434.\*]

**4. WILLS (§ 708\*)—FOREIGN WILL—PROBATE—RECORDING—EFFECT.**

A devisee cannot assert title to land devised to him until the will has been admitted to probate, but it then becomes good and available in law to support his title.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1687-1689; Dec. Dig. § 708.\*]

**5. WILLS (§ 245\*)—RIGHTS OF DEVISEE—ADMISSION OF WILL TO PROBATE—EFFECT.**

Under Statute of Wills (Hurd's Rev. St. 1905, c. 148) §§ 9, 10, providing that all wills, or authenticated copies thereof, proven according to the laws of any of the United States, and touching estates in Illinois, accompanied with a proper certificate of probate according to the laws of the state where executed, shall be recorded, and shall be good as wills executed in Illinois, and providing that all original wills, or copies thereof, or exemplifications from the records, in pursuance of the law of Congress relating to records in foreign states, may be recorded, and shall be good as wills proved in Illinois, a foreign will with proof of probate in a sister state, when recorded in Illinois, is as good and available as a will made and probated in Illinois, and it is not required that all foreign wills shall be probated in Illinois, though the testator owned lands therein.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 245.\*]

**6. WILLS (§ 434\*)—FOREIGN WILLS—PROBATE—EFFECT.**

A plea in a suit for partition among heirs, which alleges that the decedent owner died in Nebraska leaving a will, that the will was admitted to probate by the county court of Nebraska, a copy of which will, together with a certificate of probate, duly authenticated, was set out, and which avers that complainants were notified of the application for the probate, and that they contested it, etc., sufficiently shows the validity of the will and the probate, as against collateral attack, though there is no direct averment that the deceased owner resided in Nebraska at the time of his death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 940-945; Dec. Dig. § 434.\*]

Appeal from Circuit Court, McHenry County; A. H. Frost, Judge.

Suit by Louis Stull and others against Mary Veatch and others for partition. From a decree dismissing the bill, complainants appeal. Affirmed.

Shurtleff & Helzer (Botsford, Wayne & Botsford, of counsel), for appellants. D. T. Smiley, for appellees.

FARMER, J. Appellants filed their bill in the circuit court of McHenry county September 18, 1901, for a partition of certain lands therein described, alleged to have been owned by Lefler Stull at the time of his death. The bill alleged that Lefler Stull died April 7, 1896, at Auburn, Neb., leaving no widow, but leaving surviving him as his children and only heirs at law the complainants and defendants, and that by the death of their said father the lands described in the bill, which were situated in McHenry county, Ill. descended to and became the property of his said children, under and by virtue of the statute of descent of the state of Illinois. The bill further alleged that complainants were informed an attempt was being made, in some of the courts of the state of Nebraska, to probate a pretended will of said Lefler Stull; that the litigation arising therefrom was not concluded, and that the said pretended will was not the result of the intelligent, independent, and voluntary act of said Lefler Stull, deceased, and in no way affected the interest of his heirs in the land described in the bill; that no will or pretended will of said Lefler Stull had been presented for probate in McHenry county, or in any other court in Illinois, and that no copy thereof and certificate of probate had been filed in McHenry county, and that there was no record of such will and certificate of probate in the recorder's office of McHenry county, nor in any county of the state of Illinois. The bill prayed for a partition of the land therein described among the heirs of said Lefler Stull, deceased. To this bill John S. Stull, one of the defendants, interposed a plea in bar. The plea alleged that Lefler Stull died at Auburn, Neb., April 7, 1896, leaving a last will and testament; that said

will was duly admitted to probate by the county court of Nemaha county, Neb., a copy of which will, together with the certificate of probate thereof, duly authenticated, is set out in *hæc verba* in the plea. The plea further avers that complainants, and each of them, were notified of the application, to the county court of Nemaha county, Neb., to have the will of Lefler Stull admitted to probate; that each of them, in the contest that followed the application for the admission of the will to probate, gave his testimony in said cause, and that they should now be estopped from alleging in their said bill, or in making any attempt to prove, that Lefler Stull died intestate; that a copy of said will and its accompanying certificates of probate were duly filed for record in the office of the clerk of the probate court of McHenry county, Ill., and were by said clerk duly recorded, in a book kept by him for that purpose, as is by law directed. The sufficiency of this plea was set down for argument, and after hearing the argument, the court held it to be a good and sufficient plea, and entered a rule against complainants to reply to it. Complainants declining to reply, the court entered an order dismissing the bill for noncompliance with the rule, and complainants have appealed from that decree to this court.

Appellants contend that the plea was defective in form, in that it did not aver Lefler Stull was a resident of Nebraska at the time of his death, and did not contain sufficient averments to show that the probate court of Nebraska had jurisdiction to admit the will to probate. They also contend that the plea was defective in substance. Appellants' position is that a will, or copy of a will, made and probated in a foreign state, when properly certified and recorded in this state, is good and available only as notice or as an instrument of evidence; that a foreign will, to be effectual as to the title to real estate in this state, must be probated in this state. It is not denied by appellants that the will of Lefler Stull, and the probate thereof, were duly authenticated, but the controversy is as to the effect that should be given to it.

Section 2 of the chapter of our statutes on wills (Hurd's Rev. St. 1905, c. 148) provides the manner of proving wills for their admission to probate in this state, and the last clause of said section reads: "Every will, testament or codicil, when thus proven to the satisfaction of the court, shall, together with the probate thereof, be recorded by the clerk of said court, in a book to be provided by him for that purpose, and shall be good and available in law for the granting, conveying and assuring the lands, tenements and hereditaments, annuities, rents, goods and chattels therein and thereby devised, granted and bequeathed."

Sections 9 and 10 read as follows:

"Sec. 9. All wills, testaments and codicils, or authenticated copies thereof, proven according to the laws of any of the United

States, or the territories thereof, or of any country out of the limits of the United States, and touching or concerning estates within this state, accompanied with a certificate of the proper officer or officers that said will, testament, codicil or copy thereof was duly executed and proved, agreeably to the laws and usages of that state or country in which the same was executed, shall be recorded as aforesaid, and shall be good and available in law, in like manner as wills made and executed in this state.

"Sec. 10. All wills, testaments and codicils, which heretofore have been, or shall hereafter be made, executed and published out of this state, may be admitted to probate in any county in this state in which the testator may have been seised of lands, or other real estate, at the time of his death, in the same manner, and upon like proof as if the same had been made, executed and published in this state, whether such will, testament or codicil, has first been probated in the state, territory or country in which it was made and declared or not. And all original wills, or copies thereof, duly certified according to law, or exemplifications from the records in pursuance of the law of Congress in relation to records in foreign states, may be recorded as aforesaid, and shall be good and available in law, the same as wills proved in such county court."

Section 9 relates solely to the recording of authenticated copies of wills, proven according to the laws of a foreign state or territory; and such copies, after recording in this state, are made good and available in law, in like manner as wills made and executed in this state. We have held in a number of cases, among them *Harrison v. Weatherby*, 180 Ill. 418, 54 N. E. 237, *Bliss v. Seeley*, 191 Ill. 461, 61 N. E. 524, and *Catholic University v. Boyd*, 227 Ill. 281, 81 N. E. 363, that the record of copies of wills thus authenticated is notice to subsequent purchasers from the heirs of the testator. In *Shepherd v. Carriel*, 19 Ill. 313, *Gardner v. Ladue*, 47 Ill. 211, 95 Am. Dec. 487, and *Newman v. Willetts*, 52 Ill. 98, it was held that the copy of a will executed and probated in another state, duly authenticated according to the act of Congress, is admissible in evidence in the courts of this state, and entitled to be recorded, and in the latter case it was said such records import verity. It is not questioned by appellants that the copy of the will, together with the certificate of its probate in Nebraska, set out in the plea, authorized its being recorded in this state, but it is contended that the authenticated record of the probate in the state of Nebraska is not entitled to full faith and credit in this state, as provided by section 1 of article 4 of the Constitution of the United States. It is true, as contended by appellants, the courts of this state are not bound by the judgments of the courts of foreign states in construing wills, where the construction of

the will relates to lands in this state. "Where a testator by a single will devises lands lying in two or more states, the courts of such states will, respectively, construe it as to the lands situated in them, respectively, in the same manner as if they had been devised by separate wills." *McCartney v. Osburn*, 118 Ill. 403, 9 N. E. 210. That rule, however, is not applicable here, as the construction of the will is not involved. If the decision of this case depended alone upon whether the judgment of the Nebraska court is entitled to full faith and credit in this state, we would be disposed to hold that, as here presented, it is. Whatever might be the effect of a direct attack, it cannot be attacked collaterally, as is attempted in this case.

The case of *Clark v. Du Bois*, 148 Cal. 106, 82 Pac. 760, 1 L. R. A. (N. S.) 996, 113 Am. St. Rep. 197, cited by appellants, was an application for the admission of a will to probate of a testator who resided in the state of California, but whose will had been probated in the state of New Hampshire. The application was accompanied by an exemplification of the will and its probate in the state of New Hampshire. The evidence showed that the testator resided in the state of California at the time of his death, and the court held that the will was not entitled to probate in that state, upon the copies of the will and the record of its probate in New Hampshire. After reviewing certain cases decided in the same court, which counsel contended announced a different rule, the court said (page 116 of 148 Cal., page 763 of 82 Pac., page 1001 of 1 L. R. A. (N. S.) [113 Am. St. Rep. 197]): "This case, then, must be taken to decide, and to decide only, that upon collateral attack an order, admitting a will offered as a foreign will to probate, is not void for error either in the proof of authentication or in proof of residence, as in *Rogers v. King* (22 Cal. 72) and *Irwin v. Scriber* (18 Cal. 500). Question may be raised over the strict logic of that opinion, but no doubt can exist as to the strong necessity which called it forth. It must be taken, therefore, as settled in this state, upon the authority of the cases cited, that the probate of such wills is free from attack upon these questions in collateral proceedings, but that, upon the other hand, it is the duty of the court in probate to do as the court here did—refuse probate to a will offered as a foreign will if the court shall be satisfied from the evidence that the testator was, in fact, a resident of this state at the time of his death." "The certified copy of the will and the transcript of the order of probate in the foreign state raise a presumption that all necessary legal formalities at such probate were complied with, and such evidence is conclusive of the validity of the foreign probate, and is not subject to collateral attack, unless such transcript shows on its

face that the will was not properly admitted to probate, in which case it is held that the order of the foreign court is not conclusive." Page on Wills, § 357.

We are further of opinion that appellants' position is contrary to the proper construction of the meaning and intention of our statute. We do not think section 9 was intended to have given it the limited construction contended for by appellants. Copies of wills, and the proof thereof, exemplified in accordance with the provisions of that section, are made "good and available in law, in like manner as wills made and executed in this state." A devisee cannot assert title to land devised him by will until the will has been admitted to probate. It then becomes good and available in law to support the title of the devisee. Page on Wills, §§ 313, 314; *Pratt v. Hargreaves*, 76 Miss. 955, 25 South. 658, 71 Am. St. Rep. 551. Wills proven and admitted to probate in this state are good and available for the vesting of title in a devisee; and, if a foreign will, with proof of its probate, when recorded in any county in this state where the testator had lands, is as good and available as wills made in this state (which means made and probated in this state), it must be good and available to vest title. This view is further strengthened by the last half of section 10. The first half of said section relates to the probating in this state of wills executed in a foreign state, where the testator owned lands in this state. No reference is there made to probating a will upon an authenticated copy, or to the recording of authenticated copies. The last half of said section 10 provides that original wills, or copies thereof, certified according to law, or exemplifications from the records pursuant to the law of Congress in relation to the record of foreign wills, may be recorded, and shall be "good and available in law, the same as wills proved in such county court." This provision is not limited to the effect to be given foreign wills proven and admitted to probate in this state, but to foreign wills recorded in this state, and wills, or copies thereof, so recorded are to have the same effect as wills proven in this state. It is not required that all foreign wills shall be probated in this state, if the testator owned land in this state. The evils intended to be avoided by this legislation, must be manifest.

We are of opinion that the plea, while not a model by any means, is good in substance. There is no direct averment in the plea that *Lester Stull* resided in the state of Nebraska at the time of his death, but, under authorities above cited, the certified transcript of the record of the probate court in that state raises a presumption of the validity of the will, as against collateral attack. We are of the opinion the plea was sufficient to have required appellants to have replied to it if they desired to put in issue any question of

fact, and, as to questions of law presented by it, the court did not err in holding it good.

The decree of the circuit court is affirmed.  
Decree affirmed.

(236 Ill. 216)

ST. LOUIS & I. B. RY. v. GUSWELLE.  
(Supreme Court of Illinois. Oct. 26, 1908.)

1. EMINENT DOMAIN (§ 141\*)—RAILROADS—RIGHT OF WAY—COMPENSATION—DAMAGES—ELEMENTS—INSTRUCTIONS.

In railroad right of way condemnation proceedings, evidence as to damages from the discharge of cinders, ashes, and smoke on the premises, and the danger of fire from engines, must be confined to the effect on the market value of the land not taken.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 372; Dec. Dig. § 141.\*]

2. EMINENT DOMAIN (§ 150\*)—RAILROADS—RIGHT OF WAY—COMPENSATION—EXCESSIVE DAMAGES.

In proceedings by a railroad to condemn 5.72 acres for a right of way across a farm of 98 acres, witnesses for petitioner placed the value of the land taken at from \$60 to \$75 per acre, and that not taken from nothing to \$165, while those for the landowner fixed the value of the land taken at from \$125 to \$135 per acre, and the damages to that not taken from \$1,800 to \$2,200. The land was improved with the usual farm buildings, and would be cut into three pieces, permanently damaging the rest of the farm. *Held*, that a verdict fixing the value of the land taken at \$592, and damages to that not taken at \$1,362 was not excessive.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 402; Dec. Dig. § 150.\*]

3. EMINENT DOMAIN (§ 262\*)—RAILROADS—RIGHT OF WAY—DAMAGES—EVIDENCE.

While in condemnation proceedings actual sales of property in the vicinity, near the time, are competent evidence, the degree of similarity or the nearness of time and distance are matters within the discretion of the trial judge, and it was not reversible error to exclude, as too remote, evidence as to sales made in the neighborhood from three to six years before the filing of the petition.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 262.\*]

Scott, J., dissenting.

Appeal from Madison County Court; J. E. Hillskotter, Judge.

Condemnation proceedings by the St. Louis & Illinois Belt Railway against Frank Guswelle. From the judgment the railroad appeals. Affirmed.

Forman & Whitnel and Warnock, Williamson & Burroughs, for appellant. Springer & Buckley and C. H. Burton, for appellee.

CARTER, J. This is a proceeding in the county court of Madison county, brought by appellant to condemn a right of way across the farm of 98 acres owned by appellee. A cross-petition was filed, claiming damages to the land not taken. The strip sought to be condemned contained 5.72 acres. The jury by its verdict fixed the value of the land at \$592, or \$103.50 an acre, and damages to the

land not taken at \$1,362, or \$14.75 an acre. The main line sought to be condemned by appellant runs across the farm of appellee from north to south, leaving about 20 acres of the farm, mostly timber, on the west side of the proposed railroad. In addition to the main line appellant seeks to condemn a right of way for a connection between its main line and a railroad which already runs in a northeasterly direction across the farm. This connection with the main line runs northeast to the other railroad, thus cutting off from the rest of the farm, by the three lines of railroad, a triangular tract containing a little less than 3 acres. By stipulation appellant agreed to provide crossings for stock under the main track and the switch connection, in order to afford access between the farm buildings on the east side of the tracks and said triangular piece, and also the land west of the main line. The land on this farm is rolling, and in building the proposed line of railroad there are deep cuts and high fills to be made. The jury, under the direction of the court, viewed the premises. Witnesses for appellant placed the value of the land taken at from \$60 to \$75 per acre, and that not taken from nothing to \$165, while those for appellee fixed the value of the land taken at from \$125 to \$135 per acre, and the damages to that not taken from \$1,800 to \$2,200. The land is improved with the usual farm buildings.

The contention is made that the court erred in instructing the jury, in that instructions 6 and 8 permitted the jury to take into consideration the discharge of cinders, ashes and smoke upon the premises, and any real danger of fire from the engines, as elements of damage. Instruction 8 also omitted to state that such damages, if any, should only be allowed to the extent that they depreciated the fair cash market value of the land not taken. Instruction 6, as well as other instructions in the series, set forth this requirement. Complaint is also made of instruction 10. This told the jury that the railroad company was not required to fence its right of way until 60 days after the road was opened (this being under a stipulation), and any damage to the property of defendant on this account could be considered by the jury. The instruction did not limit that element of damage to its effect upon the market value of the farm. We have held that while the elements referred to may be taken into consideration by the jury in determining the damages, such elements of damage must be confined to their effect upon the market value of the land not taken, and that if they do not affect such market value, they cannot be properly considered by the jury. *Chicago & Alton Railway Co. v. Staley*, 221 Ill. 405, 77 N. E. 437; *Chicago Southern Railway Co. v. Nolln*, 221 Ill. 367, 77 N. E. 435. There was evidence in this record as to the effect

of smoke and cinders on the property immediately adjoining the proposed right of way; and, as instruction 6 properly limited the effect of this evidence to the market value, there was no error in giving it. Instructions 8 and 10, however, did not so limit the damages, and they are therefore in this particular erroneous. Instruction 8 in this cause appears to be identical in wording with the instruction that was criticised by this court in *St. Louis & Illinois Belt Railway v. Barnsback*, 234 Ill. 344, 84 N. E. 931. While we there stated that the instruction was wrong, we reversed that case because we were of the opinion that the damages were excessive, and that the instruction might have misled the jury. In *Chicago & Alton Railroad Co. v. Scott*, 225 Ill. 352, 80 N. E. 404, cited and relied on by appellant, it was also evident that the verdict was excessive. The jury in this case viewed the premises, and fixed the value of the land taken, and the damages to that not taken, well within the range of the testimony. From the situation of the farm and the manner in which it was cut up—the main line and the connecting switch cutting into three tracts what was previously only one—we do not consider the verdict excessive. Manifestly, from the situation of this land, if the main line and switch of this railroad cross it in the manner proposed, the remainder of the farm will be materially and permanently damaged. While instructions 8 and 10 were erroneous in the particulars suggested, we think that, when all of the instructions given are considered as a series, the failure to limit those elements of damage to the market value of the land did not mislead the jury. *Pardridge v. Cutler*, 168 Ill. 504, 48 N. E. 125; *Toluca, Marquette & Northern Railway Co. v. Haws*, 194 Ill. 92, 62 N. E. 312. Taking the series of instructions together, the jury were fully and fairly instructed on all the points. We cannot say that this verdict is the result of passion or prejudice.

Appellant also urges that the ruling of the court in refusing to admit certain evidence as to the value of the land was erroneous. When the defendant rested his case, appellant, in rebuttal, offered to prove the price at which lands had sold in the neighborhood some three years before the filing of the petition herein, and also offered testimony as to sales six years before. It is held in this state that "actual sales of property in the vicinity near the time are competent evidence, as far as they go," to establish the value of the land taken. *Culbertson & Blair Provision Co. v. City of Chicago*, 111 Ill. 651; *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, 21 L. R. A. 366, 36 Am. St. Rep. 401; *Peoria Gaslight & Coke Co. v. Peoria Terminal Railway Co.*, 146 Ill. 372, 34 N. E. 550, 21 L. R. A. 373. No positive rule can be laid down as to the degree of similarity or the

nearness of time and distance required to make such sales competent as evidence. These are matters that must rest largely within the discretion of the trial judge. 2 *Lewis on Eminent Domain* (2d Ed.) § 443. In *Green v. City of Fall River*, 113 Mass. 262, a sale made within one year of the taking, in the town of Fall River, Mass., was held properly rejected as too remote. We do not think the trial court committed reversible error in holding that the testimony in question was too remote, and refusing its admission.

The judgment of the county court will be affirmed.

Judgment affirmed.

SCOTT, J. (dissenting). I think this judgment should be reversed, upon the authority of *St. Louis & Illinois Belt Ry. Co. v. Barnsback*, 234 Ill. 344, 84 N. E. 931.

(236 Ill. 219.)

HENRY v. CLEVELAND, C., C. & ST. L. RY. CO.

(Supreme Court of Illinois. Oct. 26, 1908.)

1. RAILROADS (§ 307\*)—CROSSING ACCIDENT—NEGLIGENCE.

Where a railroad operated a passenger train over a city grade crossing, at the time intestate was struck and killed, at a prohibited rate of speed, and also failed to have a flagman at the crossing, as required by a city ordinance, or to give statutory signals, it was negligent.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 972-977; Dec. Dig. § 307.\*]

2. RAILROADS (§ 327\*)—CROSSING ACCIDENT—DEATH OF TRAVELER—CONTRIBUTORY NEGLIGENCE—LOOK AND LISTEN.

The omission of a person to look and listen as he approaches a railroad crossing will not bar a right of recovery in case of collision resulting in injury, if the circumstances are such as will excuse the person injured from a failure so to do.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.\*]

3. RAILROADS (§ 350\*)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—FAILURE TO LOOK AND LISTEN—QUESTION FOR JURY.

In an action for death of a traveler in a collision at a railroad crossing, whether decedent was negligent in failing to look and listen *held* for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1169-1176; Dec. Dig. § 350.\*]

4. RAILROADS (§ 330\*)—CROSSING ACCIDENT—RIGHTS OF TRAVELER.

A traveler approaching a railroad crossing may assume that the railroad company will obey the law and give warning of the approach of trains by proper signals or by the presence of a flagman.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1071-1073; Dec. Dig. § 330.\*]

5. TRIAL (§ 260\*)—INSTRUCTIONS—REFUSAL.

Where the instructions given, when considered as a series, fully and fairly stated the law, the court did not err in refusing defendant's request to charge.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, Coles County; M. W. Thompson, Judge.

Action by Sarah L. Henry, as administratrix of the estate of Thomas N. Henry, deceased, against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Affirmed.

George B. Gillespie (L. J. Hackney, Hamlin, Gillespie & Fitzgerald, and H. A. Neal, of counsel), for appellant. C. C. Lee and E. C. & J. W. Craig, Jr., for appellee.

**HAND, J.** This was an action on the case, commenced by the appellee, Sarah L. Henry, as administratrix of the estate of Thomas N. Henry, deceased, against appellant, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, in the circuit court of Coles county, to recover damages for the death of her intestate, alleged to have been caused in a street crossing collision at Sixth street, in the city of Charleston, through the negligence of the appellant. The declaration contained four counts. The first count charged negligence in general terms; the second, in a failure to ring a bell or sound a whistle; the third, in running at a high and prohibited rate of speed; and the fourth, in a failure to maintain a flagman at the street crossing where the accident occurred. The general issue was filed, and a trial resulted in a verdict and judgment in favor of appellee for the sum of \$1,999, which judgment has been affirmed by the Appellate Court for the Third District, and a further appeal has been prosecuted to this court.

The evidence fairly tended to establish the following facts: On the afternoon of June 13, 1906, Thomas N. Henry, who was an insurance solicitor and was of the age of 60 years, was driving north upon Sixth street, in the city of Charleston, in a buggy drawn by one horse. Sixth street runs north and south, and is intersected almost at right angles by the appellant's railroad tracks. Upon the east side of Sixth street, and adjoining appellant's right of way, is situated a building 104 feet deep, with a frontage of 84 feet upon Sixth street. Just before Henry reached appellant's right of way, a two-horse team driven by William Fleming passed him and drove across appellant's tracks on Sixth street. Henry apparently neither looked nor listened before driving upon said right of way. Just as he reached the main track he discovered, a few rods away, a passenger train approaching from the east at a rate of speed far in excess of the speed limit provided by the city ordinances of the city of Charleston. He then attempted to turn his horse to the left to avoid the approaching train, but was unable to get off the track with the horse and buggy in time to avoid the train. The horse was ruined,

the buggy was wrecked, and Henry was thrown out upon the ground or adjoining side tracks, and died that evening from the effect of injuries which he received at the time of the collision.

It is not denied by the appellant that it was running its train, at the time of the accident, at a prohibited rate of speed, or that it failed to have a flagman at the intersection of its right of way with Sixth street, in accordance with the ordinance of the city of Charleston, and the evidence was conflicting as to whether the statutory signals of ringing a bell or sounding a whistle were given. It cannot, therefore, be denied but the appellant was guilty of the negligence charged in the second, third, and fourth counts of the declaration. It is, however, urged that the appellee's intestate was guilty of such contributory negligence at the time he was injured as to bar a recovery. It is not the law of this state that the omission of a person to look and listen as he approaches a railroad crossing will bar a right of recovery in case of a collision resulting in injury, if the circumstances surrounding the accident are such as will excuse the person injured from a failure to look and listen (*Chicago & Alton Railroad Co. v. Pearson*, 184 Ill. 386, 56 N. E. 633); and the question whether the deceased in this case was guilty of negligence in failing to look and listen, we think, under the circumstances of this case, was a question of fact to be determined by the jury (*Chicago & Northwestern Railway Co. v. Hansen*, 106 Ill. 623, 46 N. E. 1071; *Chicago & Alton Railroad Co. v. Lewandowski*, 180 Ill. 301, 60 N. E. 497; *Chicago & Alton Railroad Co. v. Corson*, 198 Ill. 98, 64 N. E. 739; *Illinois Southern Railway Co. v. Hamill*, 226 Ill. 88, 80 N. E. 745).

The statute required the appellant to ring a bell or sound a whistle as it approached said crossing, and the ordinances of the city of Charleston required it not to run its trains in the city at a higher rate of speed than 10 miles per hour and to maintain a flagman at the intersection of its right of way with said Sixth street. The appellant violated all of said requirements for the safe operation of its road. The view of appellee's intestate as he approached the appellant's right of way was partially obstructed. A party with a two-horse team, who had just passed him, drove across the right of way of the appellant without apparent danger, and no warning was given said intestate of the approaching train. It cannot be said, we think, therefore, as a matter of law, that he was guilty of such contributory negligence in driving upon the appellant's track as to defeat a right of recovery, or that he acted, after he found himself upon the track, in such a negligent manner as to bar a right of recovery. In *Chicago & Northwestern Railway Co. v. Dunleavy*, 129 Ill. 132, on page 148, 22 N. E. 15, on page 19, this court said: "The question

then presents itself whether, if it be admitted that the deceased neither looked nor listened for the train, and also that if he had looked he could have seen it, and if he had listened with his attention concentrated in that direction he could have heard it in time to avoid the accident, such facts would constitute such conclusive proof of contributory negligence on the part of deceased as would have barred a recovery. Undoubtedly a failure to look or listen, especially where it affirmatively appears that looking or listening might have enabled the party exposed to injury to see the train and thus avoid being injured, is evidence tending to show negligence. But they are not conclusive evidence, so that a charge of negligence can be predicated upon them as a matter of law. There may be various modifying circumstances excusing the party from looking or listening; and, that being the case, a mere failure to look or listen cannot, as a legal conclusion, be pronounced negligence per se."

The appellee's decedent had the right to assume that the appellant would obey the law and give him warning of the approaching train by proper signals or by having a flagman at the crossing to notify him of its approach. In *Chicago City Railway Co. v. Fenimore*, 189 Ill. 9, on page 17, 64 N. E. 985, on page 987, it was said: "Anticipation of negligence in others is not a duty which the law imposes. On the contrary, it is a presumption of law that every person will perform the duty enjoined by law or imposed by contract. Where, for instance, the traveler knows that the law requires a railroad company to ring a bell or sound a whistle, he has a right to rely upon the performance of such duty by the company. 2 *Jaggard on Torts*, p. 970; *Shearman & Redfield on Negligence*, § 92; *Chicago, Burlington & Quincy Railroad Co. v. Gunderson*, 174 Ill. 495, 51 N. E. 708; *St. Louis, Vandalia & Terre Haute Railroad Co. v. Dunn*, 78 Ill. 197; *Thomas v. Railway Co.*, 8 Fed. 732." In view of all of these facts, and of the high rate of speed at which the train was approaching the crossing, we are of the opinion the trial court did not err in declining to take the case from the jury, upon the motion of appellant, at the close of all the evidence.

It is also contended that the court misdirected the jury as to the law on behalf of the appellee, and erred in refusing to give to the jury certain instructions offered upon behalf of the appellant. We have carefully examined the instructions given and refused. The issues were simple, and there was but little conflict in the evidence, and a number of instructions were given for each of the parties. The instructions given, when considered as a series, fully and fairly stated the law to the jury. We are of the opinion, therefore, the trial court committed no reversible error in instructing the jury.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(236 Ill. 224)

POTTER v. BARRINGER.

(Supreme Court of Illinois. Oct. 26, 1908.)

1. DEEDS (§ 194\*)—DELIVERY—EVIDENCE.

A deed duly executed being found in the hands of the grantee, there is a presumption of delivery, which can be overcome only by clear and convincing evidence.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 577; Dec. Dig. § 194.\*]

2. DEEDS (§ 207\*)—CANCELLATION—EVIDENCE.

The statement made by deceased that defendant had no papers signed by her can have no force to show a deed from her to defendant was not genuine, or was canceled, as against positive testimony as to the signing, acknowledging, and witnessing of the deed, and the fact that it remained, from that time till it was recorded, in defendant's possession.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 614, 615, 624; Dec. Dig. § 207.\*]

3. DEEDS (§ 178\*)—CANCELLATION.

A deed, being delivered, can be canceled only with the grantee's consent.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 550; Dec. Dig. § 178.\*]

4. DEEDS (§ 178\*)—CANCELLATION—EFFECT.

Cancellation, with the consent of the grantee, of a delivered deed gives the grantor merely an equitable title.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 550; Dec. Dig. § 178.\*]

5. WITNESSES (§ 196\*)—PRIVILEGE—SCRIVENER.

Testimony of one who is a mere scrivener of a deed is not privileged.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 744; Dec. Dig. § 196.\*]

6. DEEDS (§ 154\*)—DELIVERY—VERBAL UNDERSTANDING.

A deed being actually delivered to the grantee, a verbal understanding that it is to take effect only on certain conditions will not defeat the passing of title; as a delivery in escrow cannot be made to the grantee.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 487; Dec. Dig. § 154.\*]

7. EVIDENCE (§ 390\*)—PAROL EVIDENCE—DELIVERY AND EFFECT OF DEED.

Parol evidence, while competent to show that a deed, though in the grantee's hands, was never delivered, is not competent to control its effect, if delivered.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1719; Dec. Dig. § 390.\*]

8. EVIDENCE (§ 230\*)—DECLARATIONS—DELIVERY AND EFFECT OF DEED.

Declarations of the grantor, in the absence of the grantee, while competent to show intention of the grantor on the question of delivery of the deed, are incompetent to invalidate the deed, if delivered.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 840-851; Dec. Dig. § 230.\*]

9. DEEDS (§ 208\*)—DELIVERY—EVIDENCE.

The presumption of delivery of a deed from its possession by the grantee before and after the death of the grantor is not overcome by the grantor's statement that she did not intend to leave the grantee anything, and letters and conversation of the grantee and her husband that

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

they did not expect anything from the grantor, and the fact that the grantor retained possession of the property till her death, renewing a mortgage on it, and selling minerals underlying the soil.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 634; Dec. Dig. § 208.\*]

Appeal from Circuit Court, Montgomery County; S. L. Dwight, Judge.

Suit by Mary A. Potter against Mattie J. McDavid Barringer. Decree for defendant. Complainant appeals. Affirmed.

This is an appeal from a decree entered by the circuit court of Montgomery county, dismissing, for want of equity, a bill filed by appellant, Mary A. Potter, against appellee, Mattie J. McDavid Barringer, for the cancellation of a deed and to quiet title to certain land in that county. Mary A. McDavid was at one time the owner of the land in question. Her husband was James B. McDavid, and they had one son, William, who was evidently an able and likable young man, but was somewhat dissipated. William married the appellee, whose maiden name was Mattie Wilson, and who had inherited from her father some 600 acres of land. This property, the evidence shows, she had lost, before the time of the transactions now in question, by indorsing notes with her husband and his father. William McDavid, appellee's first husband, died in the spring of 1903, his father dying before that date. Mary McDavid and appellee for some time leased and ran a hotel at Hillsboro, the furnishings of the hotel being largely the property of the former. Appellee seems to have transacted most of the business in connection with running the hotel, Mary McDavid making her home there. The deed which is here sought to be set aside is dated November 2, 1903, and is a statutory warranty deed, without any conditions on its face, signed and acknowledged by Mary McDavid, conveying to Mattie J. McDavid the house and lots in Hillsboro and 120 acres of the farm land included in the deed of trust. The acknowledgment was taken November 2, 1903, by James B. Barringer, notary public, who was then, and had been for some 25 years, cashier of a bank at Hillsboro. In October, 1904, he married Mattie J. McDavid, but there is nothing in the record to show that this marriage was anticipated at the time the acknowledgment was taken.

The testimony in reference to the execution and delivery of this deed is substantially as follows: Judge Lane, who had practiced law in Hillsboro about 44 years, testified that on November 1, 1903, Mary McDavid came to his office and told him that Mattie was about to go to St. Louis as a housekeeper, and she (Mrs. McDavid) did not want her to do this; that Mattie had lost her fortune, and that she (Mary McDavid) wanted to make a straight deed to

Mattie to the house and lots and 120 acres of the farm land; that he made pencil notations of what she wanted, but as it was nearly evening the matter was put off until the next morning; that on the following morning, not wishing to write the deed with a pen, and there being no one then in the office who could operate the typewriter, he took the paper containing the description down to the bank, and Frank McDavid, at his request, wrote the deed on the typewriter; that he (the witness) then took the deed up to the hotel, and gave it to Mary McDavid, and asked her to take it to the bank and sign and acknowledge it before Mr. Barringer; that as she did not return for some time he went to look for her, and met her coming back with the paper in her hand, signed and acknowledged; that at her request he returned to the hotel, and they found Mrs. Mattie J. McDavid, and he said to her, in the presence of Mary McDavid: "Mattie, your mother-in-law wants to convey this deed to you. She wants to reserve a life interest in this land—the rents and profits, and all that kind of thing—and this deed is not to be put on record until she dies, and she wants you to stay here. Are you willing to accept this deed on that condition?" He stated that Mattie said she was, and he thereupon handed the deed to her and came out; that he gave it directly into her hands, under the direction and in the presence of Mary McDavid, who was standing by and approved all that was said, and who made the remark that she did not want to see Mattie working as a hired woman for anybody. Frank McDavid, assistant cashier of the bank, testified that he was a nephew of Mary McDavid, and at Judge Lane's request wrote the deed in question on the typewriter; that she came to the bank and signed and acknowledged it before Mr. Barringer, and that he (McDavid) signed as a witness; that he saw the deed a number of times after that, in the bank, among the papers of appellee. Joel McDavid, president of the bank, testified that he saw the deed in question several times in a small bundle of papers belonging to appellee which were deposited by her for safekeeping in the bank.

During the time Mary McDavid and her daughter-in-law were living together at the hotel, they were evidently on fairly good terms, with perhaps occasional disagreements. In July, 1904, they sold their interest in the hotel, and some time thereafter Mary McDavid went to live at the Barringer residence. In October, 1904, as has heretofore been stated, Mattie J. McDavid married Barringer. Mary McDavid was not pleased with this, and she and her daughter-in-law seem to have become much more estranged after the marriage than before. Shortly before the marriage Mary McDavid went to live at Shoemaker's, and remained there until March,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1905, when she moved to her own home, and appellant, Mary A. Potter, her niece, came there to live and remained with her until her death. Mary McDavid continued to treat the land as if she was the owner. In March, 1906, she renewed a mortgage on the farm for \$1,700, taking up one given in 1902, which had become due. In August, 1907, she sold a coal option for the underlying mineral on the farm for about \$1,200, James Barringer, the husband of appellee, assisting her in this transaction. June 8, 1907, she made her will. She was then 79 years old. The will contained some personal bequests, and some provisions for cemetery lots, amounting to about \$1,200. It also stated: "I give and bequeath to Mattie J. McDavid Barringer and James B. Barringer each the sum of one dollar, and nothing more." It also gave the daughter of her grandson her house and lots in Hillsboro, subject to the payment of the personal and cemetery bequests above mentioned. It also gave Mary A. Potter, appellant, in "consideration of her kind treatment and care" during the later years of testatrix's life, all of her household and kitchen furniture and personal property not otherwise bequeathed, and the 120 acres of land in question in this proceeding, on condition of her paying the mortgage indebtedness thereon and \$250 to a certain church. The will was filed for probate October 7, 1907, and on the same date the deed in question was filed. This bill was filed January 8, 1908.

L. V. Hill and Thomas M. Jett, for appellant. Amos Miller and George R. Cooper, for appellee.

CARTER, J. (after stating the facts as above). Appellant insists that the testimony of witness Lane was inadmissible as privileged communications given him as an attorney. Even if this testimony be not competent, we think other competent evidence in the record upholds the finding of the chancellor that the deed in question had actually been delivered. Where a deed duly executed is found in the hands of the grantee, there is a strong implication that it has been delivered, and only clear and convincing evidence can overcome this presumption. *Blake v. Ogden*, 223 Ill. 204, 79 N. E. 68; *Tunison v. Chambliss*, 88 Ill. 378. This deed was in the possession of the appellee previous to the death of Mary McDavid, as is shown clearly by the testimony of the two McDavids, and the proof shows, without controversy, that it was in appellee's possession after Mary McDavid's death. On this record there is no dispute as to the fact that the deed was duly signed and acknowledged by the grantor.

Appellant seemingly contends that the deed is not genuine, or if it is genuine, that it was canceled, because Mary McDavid made the statement that appellee did not have any papers signed by her. This statement can

have no force against the positive testimony of the signing, acknowledging, and witnessing of the deed, together with the fact that it remained in the possession of appellee from that time until it was recorded. The testimony tends to show that Mary McDavid changed her mind frequently, and that her memory was not the best. If, however, she actually delivered the deed, she could not cancel it without the consent of the grantee, and even then the grantor would only acquire an equitable, and not a legal, title to the property. *Fletcher v. Shepherd*, 174 Ill. 262, 51 N. E. 212; *Duncan v. Wickliffe*, 4 Scam. 452. There is no proof of any character that she tried to cancel this deed. The fact that the grantor retained possession of the property, renewed a mortgage thereon, sold a coal option for minerals under the land, controlled the property, and received the rents, issues, and profits during her lifetime, if the deed was actually delivered to appellee, could not reinvest her with the title. This court has held that, even though deeds were found in the grantor's possession after his death, and it was shown that he had retained possession and control of the property after making the deeds, those facts cannot overcome evidence of delivery, where the grantor understood that he was conveying the absolute title to the property as a voluntary settlement. *Ward v. Conklin*, 232 Ill. 553, 83 N. E. 1058. The delivery of a deed is an essential part of its complete execution, and is almost wholly a matter of intention. For the purpose of showing intention parol evidence is admissible; and, if by such evidence it is shown that a deed not delivered was not intended to operate presently, but only upon the grantor's death, it is uniformly held to be only a testamentary disposition. *Oswald v. Caldwell*, 225 Ill. 224, 80 N. E. 131. If such deed is not to take effect until the death of the grantor, it is void. *Wilson v. Wilson*, 158 Ill. 567, 41 N. E. 1007, 49 Am. St. Rep. 176; *Benner v. Bailey*, 234 Ill. 79, 84 N. E. 638. But where a deed has been actually delivered to the grantee in the lifetime of the grantor, even though it provides that it is not to take effect until the grantor's death, it will be sustained as a present grant of future interest. *Noble v. Fickes*, 230 Ill. 594, 82 N. E. 950, 13 L. R. A. (N. S.) 1203. In *Shackleton v. Sebree*, 86 Ill. 616, this court held that a deed, containing a provision that it is not to take effect "until after my decease—not to be recorded until after my decease," but which has been delivered to the grantee in the lifetime of the grantor, passed a vested remainder to the grantee in fee. To the same effect are *Harshbarger v. Carroll*, 163 Ill. 636, 45 N. E. 565; *Bowler v. Bowler*, 176 Ill. 541, 52 N. E. 437; *Venters v. Wickens*, 224 Ill. 569, 79 N. E. 946, and *White v. Willard*, 232 Ill. 464, 83 N. E. 954.

The deed now under consideration is absolute on its face. Appellant bases her ar-

gument that there was a condition attached to it on the testimony of Judge Lane, while contending, at the same time, that Lane's testimony is inadmissible. Lane stated that he was called in by Mary McDavid, not to advise with her as to what she wanted, but was directed by her to draw a straight deed to her daughter-in-law, she giving her reasons why she wanted this done; that after the deed was drawn, she asked him if she could still retain the possession and income of her property until her death, and he replied that it could be done. Appellant in this connection insists that Lane also testified that the understanding was that the deed was not to take effect until after the death of Mary McDavid. While on cross-examination he did say something that would furnish a basis for this contention, taking all of his evidence together, we think it is a fair conclusion that he did not intend to make such a statement, for he says on redirect examination, when his attention was directed to this point, "There was not a word said about when the deed was to take effect—not a word." If he was a mere scrivener in drawing this deed, as contended for by the appellee, then his testimony was not privileged. *Champion v. McCarthy*, 228 Ill. 87, 81 N. E. 808, 11 L. R. A. (N. S.) 1052, and cases there cited. We are inclined to think, under these authorities, the evidence was competent. That being so, there cannot be the slightest question as to the actual delivery of the deed. And even if it was accompanied by the verbal understanding contended for by appellant, still the title passed, upon the well-settled principle that a deed voluntarily placed in the hands of a grantee is never to be considered as an escrow. *Weber v. Christen*, 121 Ill. 91, 11 N. E. 898, 2 Am. St. Rep. 68. A deed cannot be delivered to the grantee in escrow. In such case it must be delivered to a stranger, otherwise the deed becomes absolute at law. *Baker v. Baker*, 159 Ill. 394, 42 N. E. 867. A verbal understanding that a deed is to take effect only on certain conditions will not defeat the passing of title from the grantor to the grantee if the deed is actually delivered. *Fletcher v. Shepherd*, supra; *Blake v. Ogden*, supra. While it is not competent to control the effect of a deed by parol evidence when it has taken effect and been delivered, it is competent to show that the deed, although in the grantee's hands, has never, in fact, been delivered. The declarations of a grantor in a deed when the grantee is not present cannot be admitted for the purpose of invalidating the deed. Parties making deeds cannot invalidate them by parol. *Francis v. Wilkinson*, 147 Ill. 370, 35 N. E. 150, and cases cited. Such declarations are only competent for the purpose of showing the intention of the grantor as

to the delivery of the deed. The only evidence in this record that the deed was not, in fact, delivered, was the statement of Mary McDavid that she did not intend to leave appellee anything, and letters and conversations of appellee and her husband, which it is claimed tend to show that they did not expect anything from Mary McDavid, together with the fact that she retained possession of the property and entered into certain transactions concerning it, as herein stated. We do not think this evidence is of such a character as to overcome the presumption that the deed, actually in the possession of the grantee before and after the death of Mary McDavid, had been delivered. *McCann v. Atherton*, 108 Ill. 31.

Our conclusion is, that the evidence in this record, with or without the testimony of witness Lane, justifies the conclusion that the deed in question was actually delivered by the grantor to the appellee herein. Considering the facts in this record, nothing is said in *Cline v. Jones*, 111 Ill. 563, *Brown v. Brown*, 167 Ill. 631, 47 N. E. 1046, *Bovee v. Hinde*, 135 Ill. 137, 25 N. E. 694, and other decisions of like nature, cited and relied on by the appellant, that in any way conflicts. Our conclusion is further strengthened by the fact that the chancellor, who heard the evidence in open court, saw the witnesses and their manner of testifying, and is thus better able to judge of the weight to be given such testimony, has reached the same conclusion. *Biggerstaff v. Biggerstaff*, 180 Ill. 407, 54 N. E. 333; *In re Estate of Kohley*, 200 Ill. 189, 65 N. E. 609.

The decree of the circuit court will be affirmed.

Decree affirmed.

(236 Ill. 232)

#### GARLICK et al. v. MUTUAL LOAN & BUILDING ASS'N.

(Supreme Court of Illinois. Oct. 26, 1908.)

##### 1. CANCELLATION OF INSTRUMENTS (§ 24\*)—RIGHT OF ACTION—CONDITIONS PRECEDENT—RESTORATION OF BENEFITS.

Even if instruments were obtained under misrepresentation or misunderstanding as to their character, they will be set aside only upon payment of the amount equitably due from the one executing them.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 33; Dec. Dig. § 24.\*]

##### 2. BUILDING AND LOAN ASSOCIATIONS (§ 33\*)—LOANS—USURY—EXEMPTION FROM USURY LAWS.

The exemption of building and loan associations from the operation of the interest law applies only to interest, fines, and premiums accruing under the act providing for their organization, and, where money is not offered for loan in open meeting to the highest bidder, but at an arbitrary premium fixed by the directors, the loan is not exempt from the usury laws.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. § 33.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

### 3. USURY (§ 113\*)—USURY AS A DEFENSE—BURDEN OF PROOF.

The burden of proving usury alleged as a defense is on the party alleging the usury.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 308; Dec. Dig. § 113.\*]

### 4. USURY (§ 117\*)—USURY AS A DEFENSE—SUFFICIENCY OF EVIDENCE.

In a suit to cancel mortgages to a building and loan association, the evidence held insufficient to show usury in making the loan.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 328-340; Dec. Dig. § 117.\*]

### 5. CANCELLATION OF INSTRUMENTS (§ 24\*)—CONDITIONS PRECEDENT—PAYMENT OF AMOUNT DUE AND INTEREST.

In a suit to cancel a mortgage and quitclaim deed to a loan association as security and for an accounting, the complainant, having voluntarily come into court, must pay the amount actually due defendant with interest; and whether the secretary of the association had authority to consolidate two mortgages into one or accept the quitclaim deed was immaterial.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 33, 36; Dec. Dig. § 24; \* Mortgages, Cent. Dig. § 195.]

### 6. CANCELLATION OF INSTRUMENTS (§ 25\*)—DEFENSES.

In a suit to cancel a mortgage and quitclaim deed to defendant building and loan association, complainant cannot object that the association cannot enforce its security in the action except upon the order of its board of directors, as the association may proceed to enforce its rights; complainant having brought it into court.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 25.\*]

### 7. APPEAL AND ERROR (§ 1033\*)—HARMLESS ERROR—ERROR FAVORABLE TO COMPLAINING PARTY—EVIDENCE.

In a suit to cancel a mortgage to a building and loan association, error, if any, in admitting the books of the association to show payments, was not prejudicial where the books showed payments on the loans which reduced the amount for which complainant would otherwise have been liable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4054; Dec. Dig. § 1033.\*]

### 8. USURY (§ 98\*)—REMEDIES OF PARTIES—AMOUNT DUE.

Where two loans were made for \$5,000 and \$10,000, respectively, the latter being usurious, it was proper to allow the balance due on the former loan and add it to the balance of the principal due on the usurious loan, and to compute interest on the sum of the two at 5 per cent.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 205-212; Dec. Dig. § 98.\*]

### 9. USURY (§ 67\*)—RENEWAL OF LOANS—EFFECT.

Where a loan included the balance due on a prior usurious loan, the last loan was also affected with usury, and only the legal rate of interest was properly allowed on it.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 140; Dec. Dig. § 67.\*]

### 10. ACKNOWLEDGMENT (§ 20\*)—AUTHORITY TO TAKE.

Where the officers certifying to the acknowledgment of mortgages and a quitclaim deed of the grantor's homestead were stockholders in the mortgage building and loan association, the conveyances were void prior to the curative act of May 15, 1903 (Hurd's Rev. St. 1903, c. 30, §§ 43a, 43b), legalizing acknowledgments of mortgages, etc., to a corporation taken before a notary public, etc., who was at the time a stock-

holder of the corporation, but the curative statute validated the conveyances so as to convey the homestead; the rights of third parties not intervening.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 109; Dec. Dig. § 20.\*]

Error to Appellate Court, Second District, on Error to Circuit Court, Will County; A. O. Marshall, Judge.

Action by Louis D. Garlick and others against the Mutual Loan & Building Association, in which defendant filed a cross-bill to foreclose a mortgage. A decree of foreclosure was affirmed by the Appellate Court (139 Ill. App. 448), and complainants bring error. Affirmed.

E. C. Hall, for plaintiffs in error. J. W. Downey, for defendant in error.

DUNN, J. The plaintiffs in error filed their bill for an accounting, to restrain the defendant in error from interfering with their control and enjoyment of certain real estate, to cancel a certain quitclaim deed, and to have released certain mortgages upon payment of the amount, if any, due from the plaintiffs in error to the defendant in error. The defendant in error answered and filed a cross-bill, alleging that the quitclaim deed was given as further security for an indebtedness of \$11,800, secured by a mortgage from the plaintiffs in error to defendant in error, and praying for a foreclosure. After several hearings in the circuit court and two in the Appellate Court (116 Ill. App. 311; 129 Ill. App. 402) a decree of foreclosure for \$10,125.53 has been affirmed by the Appellate Court, and is brought here by the original complainants by writ of error.

So far as the right of the plaintiffs in error to any relief on the ground of fraud or misrepresentation or misunderstanding of the character of the instruments executed by them is concerned, it is not sustained by the evidence; and this claim is not material, because, in any event, the conveyances will not be set aside except on payment of the amount equitably due, and this is the extent of the claim of the defendant in error.

The plaintiffs in error charge that the debt to the defendant in error was usurious, and that nothing is due on it. Defendant in error is a building and loan association, organized under the laws of Illinois in 1884. The plaintiff in error Louis D. Garlick became a stockholder in that year, and first became a borrower from the association in 1885. The loan then obtained was wholly paid, and does not concern this controversy. The mortgages here involved are one for \$5,000, dated August 7, 1889, one for \$10,000, dated May 11, 1893, and one for \$11,000, dated September 15, 1898. The last mortgage represents the same indebtedness as the other two, and on August 31, 1899, the plaintiffs in error executed the quitclaim deed in

controversy and the defendant in error gave back a contract of defeasance. The circuit court found that the \$10,000 loan was usurious, and that decision is not questioned. It found that the \$5,000 loan was not usurious, and the plaintiffs in error insist that such finding is erroneous. The plaintiff in error Louis D. Garlick denies bidding for the loan, and claims that \$1,000 being a premium of 20 per cent., was retained by the defendant in error and only \$4,000 paid to him on account of the \$5,000 loan. At that time the only method for making loans provided by the statute was by competitive bidding; the priority of loan being awarded to the stockholder bidding the highest premium therefor. We have held in such cases that the exemption from the operation of the interest law conferred upon such associations as the defendant in error applies only to interest, fines, and premiums accruing according to the provisions of the act providing for their organization, and that a loan made where the money was not offered for loan in open meeting to the highest bidder, but at an arbitrary rate of premium fixed by the board of directors, was not exempted from the operation of the usury laws. *Jamieson v. Jurgens*, 195 Ill. 86, 62 N. E. 917; *Borrowers' Building Ass'n v. Eklund*, 190 Ill. 257, 60 N. E. 521, 52 L. R. A. 637. Mr. Clare, who was a clerk of defendant in error, testified that Garlick was present at the meeting and bid for the money, and he is corroborated to some extent by the secretary and the minutes of the meeting. The secretary also testified to the amount of money paid on the loan as \$4,100, and is corroborated by his cash book. The complainants, having charged usury, have the burden of proving it, and they have failed to do so as to this loan.

Whether the secretary of defendant in error had authority to consolidate the two mortgages into the one for \$11,600, or to accept the quitclaim deed, is unimportant. In fact, Garlick made a written application for a loan of \$11,600, and he and his wife executed the mortgage and the deed. They have voluntarily come into a court of equity to have them canceled. The only terms imposed upon them are payment of the actual money they have received and lawful interest. They have brought the mortgagee into a court of equity for the purpose of having the account stated, and equity requires the allowance of legal interest in ascertaining the amount due.

Objection is made that the defendant in error cannot proceed to the enforcement of its security except upon the order of the board of directors. The plaintiffs in error are not in a position to raise this question. They are the actors. They have brought the defendant into court and it may proceed to enforce its rights.

Plaintiffs in error insist that it was error to admit in evidence the books of the association. If so, it was error in their favor. The entries introduced showed payments made on account of the loans which went to the reduction of the amount for which, without such evidence, the defendant in error would have been entitled to a decree.

The \$5,000 loan was not usurious, and the court properly ascertained the balance due on it according to the contract of September 15, 1896, to which was added the balance due on the usurious \$10,000 loan, treating it as of the principal amount of \$8,000 and allowing 5 per cent. interest thereon, the sum of the two constituting the correct principal of the loan of September 15, 1896, which was \$11,600 on its face. This latter loan having included in it the balance due on the usurious \$10,000 loan, was itself affected with usury, and the legal rate of 5 per cent. only was properly allowed as interest thereon.

It is insisted that the plaintiffs in error were not in default to the amount claimed, and that they should have received credit for a larger amount than was allowed them; but an examination of the evidence convinces us that they were credited with all payments shown by the evidence to which they were entitled.

The officers certifying to the acknowledgment of the mortgages and quitclaim deed in this case were stockholders of the defendant in error. The premises included in those conveyances constituted the homestead of the grantors, and the conveyances were therefore null and void prior to the curative act of May 15, 1903. *Hurd's Rev. St. 1905*, p. 472, c. 30, §§ 43a, 43b. That act, however, made valid the defective acknowledgments, so that, no rights of third parties having intervened, the conveyances became effectual to pass the homestead in accordance with the original intention. *Maxwell v. Lincoln Building Ass'n*, 216 Ill. 85, 74 N. E. 804.

We find no error in the record. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

FARMER and VICKERS, JJ., took no part in the decision of this case.

(236 Ill. 236)

#### CITY OF AMBOY v. ILLINOIS CENT. R. CO.

(Supreme Court of Illinois. Oct. 26, 1908.)

#### 1. MUNICIPAL CORPORATIONS (§ 111\*)—ORDINANCES—PAROL EVIDENCE—PURPOSE OF ORDINANCE.

On an issue as to the validity of a city ordinance vacating part of a street, parol evidence is inadmissible to show that the motive or purpose of the council in passing the ordinance was to serve a private interest.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 254; Dec. Dig. § 111.\*]

\*For other cases see same topic and section—NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

## 2. MUNICIPAL CORPORATIONS (§ 657\*)—ORDINANCES—VALIDITY—PRIVATE INTERESTS.

The rule that a city ordinance, vacating a portion of a street in order to serve a purely private interest, is void does not apply, where the subservience of such interest is only incidental, and the ordinance was passed after due consideration of the public benefits to result from the proposed improvement.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 722, 1429; Dec. Dig. § 657.\*]

## 3. EJECTMENT (§ 27\*)—DEFENSE—ESTOPPEL IN PARS.

Estoppel in pars is not an available defense in ejectment.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. § 114; Dec. Dig. § 27.\*]

Appeal from Circuit Court, Lee County; O. E. Heard, Judge.

Ejectment by the city of Amboy against the Illinois Central Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

P. M. James and J. W. Watts, for appellant. William Barge, for appellee.

**VICKERS, J.** The city of Amboy brought an action of ejectment against the Illinois Central Railroad Company to recover the possession of a strip of ground 100 feet wide, and extending westerly from the west line of East avenue across the Illinois Central railroad right of way a distance of 350 to 400 feet. Upon a trial of the issues before the circuit court of Lee county without a jury there was a finding and judgment for the defendant. The city of Amboy has appealed to this court, and assigns error upon the refusal of the court to hold certain propositions of law submitted by appellant, and upon the holding of the court on other propositions submitted by appellee.

There is no serious controversy as to the facts. The locus in quo was, prior to July 13, 1904, a part of Main street, in the city of Amboy. On that day the city council of said city passed an ordinance vacating that portion of Main street that is involved in this suit. After the ordinance was passed, appellee took possession of the strip of land, and put in more tracks and enlarged its roundhouse, with a view of making the city of Amboy a division terminal. Appellee inclosed the strip with an iron fence, and has, since the vacation ordinance was passed, been in the exclusive possession and control of the same, claiming to be the owner thereof. The evidence shows that the railroad company has spent \$60,000 on improvements in connection with its terminal at Amboy, which would not have been spent had the city not vacated the street in question. The evidence shows that the easement of the public in the land in question was acquired by prescription. The fee was never in appellant. The reversion in fee was in appellee. After the vacation appellee entered into pos-

session under deeds, claiming to be the owner in fee of the premises. The appellant bases its right to recover solely upon the ground that the ordinance of July 13, 1904, vacating the street is illegal and void, and that in consequence the possession of appellee is without color of right. There is no objection to the form of the ordinance, nor is it questioned that it was passed in strict accordance with the formal requirements of the statute. Appellant's contention is that the ordinance was passed for the benefit of appellee, and that the ordinance for that reason is ultra vires and void. The evidence upon which appellant bases the charge that the ordinance in question was passed for the exclusive benefit of the appellee amounts simply to this: That Mr. Daley, a division superintendent of the Illinois Central Railroad Company, submitted some plans and blue prints to the members of the city council, showing what improvements appellee desired to make in connection with its terminals in the city of Amboy. He explained that the crossing at Main street would have to be abandoned if appellee's plans were carried out. He explained that the crossing at Division street, one block north, would be improved, and that there would be little or no switching done at the crossing of Division street. The evidence shows that the proposition to vacate Main street was discussed informally, at a meeting held in an engine room, the day before the ordinance was passed. At this meeting a number of the members of the city council were present, as well as other city officials and a number of citizens of the city of Amboy. On the evening following this meeting the city council met, and after some discussion of the proposition to vacate Main street, which was participated in by Mr. Daley, the ordinance in question was passed. None of these facts, however, appear of record. There was no petition or contract or other matter of record, showing any reasons or motives for passing the ordinance.

It may well be doubted whether parol evidence can be received for the purpose of showing that the motive the city council had in passing the ordinance in question was to accommodate some private interest. In all the cases to which our attention has been called in which ordinances have been held void because they were passed for the purpose of enabling private persons or corporations to enjoy and appropriate a portion of a street, the evidence upon which such ordinances were declared void was found in the ordinances themselves. Thus, in *Smith v. McDowell*, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393, which is the only case that appellant relies upon to support the admissibility of parol evidence to show that the streets were vacated for the benefit of private persons, the ordinance recited that it was passed

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"to enable the owner of lot 9, in block 22, in the original town of Chatsworth, to erect and maintain a brick building on said lot 9, with an area and entranceway to the basement of such building in said Fourth street." This case gives no support to appellant's contention that parol evidence is receivable for the purpose of invalidating an ordinance by establishing a motive or purpose in the council to serve some private interest. In *Ligare v. City of Chicago*, 139 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179, the court considered two ordinances, passed at the same time and in relation to the same subject, as parts of a single and entire scheme, from which the conclusion was deduced that there had been an improper exercise of the power vested in the city council in relation to streets. No parol evidence was offered or heard in that case. In *Field v. Barling*, 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406, 41 Am. St. Rep. 311, the question arose as to the power of the city of Chicago to grant permission to construct a bridge or covered passageway connecting two buildings belonging to the same party, and it was held that such permission could not be granted. The evidence that the ordinance was designed to confer merely a private benefit was found in the ordinance itself. In the case of *De Land v. Dixon Power Co.*, 225 Ill. 212, 80 N. E. 125, the evidence that a street was vacated merely for the purpose of strengthening the title of a private person was found in the petition and record of the action of the city council. It is there said, on page 217 of 225 Ill., page 127 of 80 N. E.: "The action of the city council was merely an attempt to pervert the power of vacation to the sole purpose of enabling private parties to appropriate and enjoy a portion of a public street. This affirmatively appears on the face of the petition for the vacation, and in the order of vacation." In the case of *People v. Clean Street Co.*, 225 Ill. 470, 80 N. E. 298, 9 L. R. A. (N. S.) 455, 116 Am. St. Rep. 156, the evidence that the ordinance, which purported to grant exclusive right to a private party to maintain boxes, to be designated "city waste boxes," was intended to confer a mere private benefit was found in the ordinance and contract made in pursuance thereof. In none of these cases, and in no others to which our attention has been called, was the validity of the ordinance made to depend upon a question of fact depending upon parol testimony for its proof. In the late case of *People v. Wieboldt*, 233 Ill. 572, 84 N. E. 646, this court held that it is improper to receive evidence which merely goes to the motive by which the legislative body is actuated in passing an ordinance. We conclude that it would be a very unsafe rule to hold that an ordinance could be rendered invalid by parol evidence as to the reasons urged for its passage. Evidence of this character is held in-

admissible, because it goes merely to the motives which led to the legislative acts in question, which are immaterial and cannot be inquired into. *Cooley's Const. Lim.* (5th Ed.) 222; *Dillon on Mun. Corp.* 311; *Meyer v. Village of Teutopolis*, 131 Ill. 552, 23 N. E. 651; *People v. Cregler*, 138 Ill. 401, 28 N. E. 812; *People v. Grand Trunk Railway Co.*, 232 Ill. 292, 83 N. E. 839; *People v. Wieboldt*, supra.

Even if it were shown by competent evidence that the city council vacated this street after due consideration of the inconvenience to the public on the one hand, and the public benefits expected to result from the improvement proposed on the other, the mere fact that, as an incident to such action, appellee also derived benefits therefrom would not warrant us in declaring the ordinance void. If there was an honest exercise of judgment that the public interest would be subserved by the vacation, the incidental benefits received by appellee would not render the ordinance void. The decisions rendered wherein ordinances of this character have been held void, as we already pointed out, are cases in which the evidence that the power was exercised solely for the benefit of a private interest appeared in the ordinance, or otherwise in the official records of the municipality, and from which it was clearly shown that no consideration of public interests could have led to the enactment of the ordinance. The trial court properly held that an estoppel in pais could not be relied on as a defense in an action of ejectment. *Linnertz v. Dorway*, 175 Ill. 508, 51 N. E. 809, 67 Am. St. Rep. 232; *Grubbs v. Boon*, 201 Ill. 98, 66 N. E. 890; *Wakefield v. Van Tassel*, 202 Ill. 41, 66 N. E. 830, 65 L. R. A. 511, 95 Am. St. Rep. 207. The mandamus cases cited on this point, wherein this court has regarded matters of estoppel in pais in determining what action ought to be taken in the exercise of a sound legal discretion, cannot be regarded as authorizing the consideration of this equitable defense in other actions at law, in respect to which no discretion can be exercised.

The result reached by the trial court is the correct one, and its holdings on the propositions of law submitted are well supported by the decisions of this court.

The judgment is affirmed.

Judgment affirmed.

(236 Ill. 344)

WALKER v. MONTGOMERY et al.

(Supreme Court of Illinois. Oct. 26, 1908.)

1. FRAUDULENT CONVEYANCES (§ 295\*)—EVIDENCE.

Suits on notes had been pending for several terms prior to a conveyance of a farm attacked by a creditor's bill, and grantee was an attorney, and must have known of the pending litigation. The debtor owned a store and other property, a home and other town property, and the farm,

and disposed of all at about the same time, at any prices he could get to prevent collection of the notes. The consideration paid for the farm was \$2,000 cash, subject to a mortgage of \$4,500, and the taxes which were not yet due. The farm was worth \$9,600, and grantee sold it within 90 days for \$9,000. The \$2,000 was not paid to the debtor, but was paid, on his order, to another for no apparent reason, and such other testified that there was a tenant on the farm, and a crop of broom corn, and that the \$2,000 covered both the crop and the land. Grantee did not testify, and made no denial of his knowledge of the pending suits or any explanation of his participation in the fraud. *Held*, that the conveyance was fraudulent, and that grantee would be required to account to the judgment creditor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 295.\*]

## 2. EVIDENCE (§ 314\*)—HEARSAY.

Evidence on a creditor's bill, attacking a conveyance as fraudulent, that the money received by witness covered both a crop, on the land conveyed and the land was not hearsay, but what the parties to the transaction said to witness on the subject was.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 314.\*]

## 3. CREDITORS' SUIT (§ 25\*)—RIGHT TO MAINTAIN BILL.—ADMINISTRATOR.

Where judgments were recovered by one as administrator, and executions sued out in his name in that capacity, he had the right to prosecute a creditor's bill, as administrator, for the collection of the judgments, regardless of any question as to whom he should account to.

[Ed. Note.—For other cases, see *Creditors' Suit*, Dec. Dig. § 25.\*]

## 4. APPEAL AND ERROR (§ 1090\*) — CROSS-ERRORS—SCOPE.

A creditor's bill was filed against numerous persons, to whom sales and conveyances had been made by the debtor, but neither the transactions nor the persons had any connection whatever with each other. The circuit court dismissed the bill, but on appeal the Appellate Court found against one of the debtor's grantees and in favor of the other defendants, and such grantee appealed to the Supreme Court. *Held*, that his appeal brought nothing to the Supreme Court except the decision of the Appellate Court against him, with which no other defendant was concerned, and hence cross-errors as to the other defendants could not be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1090.\*]

## 5. APPEAL AND ERROR (§ 1033\*)—HARMLESS ERROR.

A grantee, as to whom a conveyance is set aside as fraudulent, on a creditor's bill cannot complain that he was not required to account for the difference between the consideration paid and the actual value of the farm and a crop thereon, rather than for the difference between such consideration and the amount for which he sold the farm, which was less than the farm's value.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4060, 4061; Dec. Dig. § 1033.\*]

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, Shelby County; S. L. Dwight, Judge.

Creditor's bill by Amos W. Walker, administrator of the estate of Joseph Walker, deceased, against T. F. Dove, Michael Montgomery, and others. From a judgment of the Appellate Court, affirming a decree for

defendants, except as to Dove, as to whom the decree was reversed, Dove appeals. Affirmed.

George B. Rhoads, for appellant. E. J. Miller and W. C. Kelley, for appellee.

CARTWRIGHT, O. J. On December 18, 1902, the appellee, Amos W. Walker, as administrator of the estate of Joseph Walker, deceased, recovered two judgments in the circuit court of Shelby county, one against Michael Montgomery for \$982.35 and costs, and the other against said Montgomery and G. A. Edwards for \$1,822.53 and costs. The judgments were based upon notes made in the spring of 1896, and suits against Montgomery upon them were pending in some form in said circuit court from 1899 until the judgments were rendered. The executions having been issued on the judgments, and returned no property found, the appellee filed his creditor's bill in this case against the appellant T. F. Dove, and many other persons, praying the court to set aside various sales and conveyances made by the judgment debtor, Michael Montgomery, on the ground that they were fraudulent and intended to prevent appellee from collecting said judgments. The defendant Michael Montgomery was defaulted, and other defendants, among whom was Dove, filed answers. The defendant Dove by his answer admitted that he purchased a farm of 160 acres near Windsor, in Shelby county, from Montgomery, on November 17, 1900, and afterwards sold and conveyed the same to Samuel M. Buoy, but he denied all charges of fraud contained in the bill. The issues made by the bill and answers respecting the various sales and conveyances were referred to a special master, who took the evidence, and returned the same with his conclusions and a recommendation that the bill be dismissed for want of equity. The circuit court heard the cause on exceptions to the report, and overruled them, and entered a decree dismissing the bill for want of equity, at the complainant's costs. From that decree an appeal was taken to the Appellate Court for the Third District, and that court affirmed the decree, except as to Dove. The decree was reversed as to him, with directions to the circuit court to enter a decree requiring him to account for the sum remaining, after deducting from the amount received by him upon the sale to Buoy the \$2,000 which he paid Montgomery, the amount due on a mortgage for \$4,500 at the time he received the deed, and the taxes unpaid on the land when such deed was made, so far as the same should be required to pay said judgments and costs. Dove appealed from the judgment of the Appellate Court.

The evidence established the following facts: The suits on the notes were pending

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in the circuit court of Shelby county for several terms before the conveyance of the farm, and the defendant Dove was an attorney in active practice in that court. There were regular printed bar dockets issued by the clerk and distributed to the attorneys, containing the numbers and titles of all cases pending in the court, including the suits in question, and Dove must have known of the pending litigation. Michael Montgomery, the debtor, was anxious and determined to defeat the collection of the notes, and for that purpose set about getting rid of all his property, real and personal, in November, 1900. He owned a drug store, and other personal property, a home, and other town property in the town of Windsor, and the farm of 160 acres. He disposed of all this property at about the same time at any prices that he could get, and for the fraudulent purpose of preventing the collection of the complainant's demands. All of this was done within a few days, and deeds or bills of sale were recorded at the same time, on November 23, 1900, two of which ran to the defendant Dove. One of the conveyances was a deed made by Montgomery to Dove for the farm, and the consideration paid was \$2,000 cash, subject to a mortgage of \$4,500 and the taxes of 1900, which were not due. The farm was worth \$9,600, and Dove sold it within 90 days to Samuel M. Buoy for \$9,000. The \$2,000 was not paid to Montgomery, but was paid on his order to a man named Voris for no apparent reason, and Voris delivered it to the purchaser of the drugstore, which sale was also attacked by the bill. Voris testified that there was a tenant on the place and a crop of broom corn, and that the \$2,000 covered both the broom corn and the land. It is urged that this testimony about the broom corn was hearsay, but there was nothing of that nature in the testimony that the \$2,000 which Voris received covered both the broom corn and the land, and the alleged hearsay was what the parties to the transaction said to Voris on the subject. That the conveyance by Montgomery was fraudulent so far as he was concerned, is beyond question, and the evidence was entirely sufficient to establish its fraudulent character as to Dove. Dove did not testify, and made no denial of his knowledge concerning the pending suits, or any explanation of his participation in the fraud. The decree of the circuit court as to him was clearly against the evidence, and the judgment of the Appellate Court is fully sustained by the record.

It is urged that there could be no decree in favor of the complainant, for the reason that he had been discharged by the county court as administrator of the estate. If the estate had not been settled, an order discharging him would be a nullity, but whether he had been so discharged we will not in-

quire. The judgments were rendered in favor of the complainant as administrator, and the executions were sued out in his name in that capacity. Dove was not deprived of any rights, and the judgments settled the question in what capacity the recoveries were had. The complainant had a right to prosecute the creditor's bill, as he did, for the collection of the judgments; regardless of any question as to whom he should account. *Atkinson v. Foster*, 134 Ill. 472, 25 N. E. 523.

The appellee has assigned cross-errors, questioning the correctness of the judgment of the Appellate Court as to sales and conveyances other than the sale to Dove. The bill was filed against numerous persons to whom sales and conveyances of property, real and personal, were made by Montgomery, but neither the transactions nor the persons to whom the sales and conveyances were made were connected in any manner. The decision as to one sale or conveyance would have no influence or bearing upon the decision as to any other, and in such a case, where the interests of the parties are separate, a decree amounts, in effect, to separate and distinct decrees, so that an appeal may be taken from either part without affecting the record as to the other part. While a judgment at law is a unit, a decree in equity may have the effect of several separate decrees. If the circuit court had found and decreed against Dove and in favor of the other defendants, an appeal by him would not have brought before the Appellate Court any question as to the other parties. The circuit court dismissed the bill, and the appeal from that decree brought the whole case to the Appellate Court, but the Appellate Court found only against Dove and in favor of the other defendants, and Dove appealed. His appeal brought nothing here, except the decision of the Appellate Court against him, with which no other defendant was concerned; and, while an appellee may assign cross-errors on matters brought before this court by an appellant, cross-errors cannot be assigned as to separate parts of a decree not brought before the court by appeal. *Cheney v. Teese*, 113 Ill. 444; *Walker v. Pritchard*, 121 Ill. 221, 12 N. E. 336. The cross-errors as to the other parties cannot be considered, and no cross-error is assigned as to the basis upon which relief was awarded against Dove. Of course he has no ground of complaint that he was not required to account for the difference between the consideration paid and the actual value of the farm and broom corn, rather than for the difference between such consideration and the amount for which he sold the farm.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(236 Ill. 249)

**HAMPTON v. CHICAGO & A. R. CO.**

(Supreme Court of Illinois. Oct. 26, 1908.)

**1. APPEAL AND ERROR (§ 1094\*)—REVIEW—DECISIONS OF INTERMEDIATE COURTS—QUESTIONS OF FACT.**

The Supreme Court, on appeal from a judgment of the Appellate Court, affirming a judgment rendered on a verdict on a controverted question of fact, cannot determine on which side of the question the greater weight of the evidence was.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322, 4324; Dec. Dig. § 1094.\*]

**2. MASTER AND SERVANT (§ 289\*)—RULES OF EMPLOYMENT—ABROGATION—QUESTION FOR JURY.**

Where, in an action for the death of a railway engineer, killed by an accident to his engine while running in violation of a rule fixing the maximum speed of engines running backward at 10 miles per hour, witnesses testified to the running of trains over the road where the accident occurred, for several months, at a speed greatly in excess of that rate, and it appeared that the engineer had previously made trips over the road, and over other parts of the company's lines, and that he had been in the company's employ as fireman and engineer for more than two years, the court could not say, as a matter of law, that there was no evidence to show that he had knowledge of the disregard of the rule.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 289.\*]

**3. MASTER AND SERVANT (§ 286\*)—INJURY TO SERVANT—QUESTIONS OF FACT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.**

In an action for the death of an engineer by the derailment of his engine, questions of the condition of the track, the rate of speed at which the engine was running, the proximate cause of its leaving the track, and the abrogation of a speed rule held, under the evidence, questions properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.\*]

**4. WITNESSES (§ 397\*)—CREDIBILITY—INCONSISTENT STATEMENTS ON CROSS-EXAMINATION.**

That witnesses, in an action for the death of an engineer caused by the derailment of his engine, testifying on direct examination to the defective condition of the track at the place of the accident, testified on cross-examination that the defects were not at the place where the engine left the track, but several feet from it, affected only the weight of their evidence, and not its competency.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1265; Dec. Dig. § 397.\*]

**5. MASTER AND SERVANT (§ 278\*)—RULES OF EMPLOYMENT—ABROGATION—EVIDENCE.**

Abrogation of a rule established by an employer may be shown by proof of its habitual violation, with the employer's knowledge, actual or constructive; and, where it has continued for such a length of time that the employer might reasonably have known of it, knowledge will be presumed.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.\*]

**6. MASTER AND SERVANT (§ 270\*)—INJURY TO SERVANT—RULES OF EMPLOYMENT—ABROGATION—EVIDENCE—ADMISSIBILITY.**

On the issue whether a railway company had abrogated a rule fixing the maximum speed of engines running backward, testimony of witnesses as to the running of trains at a speed

greater than that fixed by the rule was not objectionable, on the ground that the points of observation of the witnesses were at such places that it could not be inferred that the officers of the company would observe a violation of the rule.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 270.\*]

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, Sangamon County; James A. Creighton, Judge.

Action by Lucy N. Hampton, administratrix of William H. Hampton, against the Chicago & Alton Railroad Company. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant appeals. Affirmed.

Patton & Patton (F. S. Winston, of counsel), for appellant. Hardin W. Masters and Thomas D. Masters, for appellee.

FARMER, J. This is an appeal from a judgment of the Appellate Court, affirming a judgment of the circuit court in favor of appellee, against appellant, for \$5,500 damages, on account of the death of appellee's intestate, William H. Hampton, which it is alleged was caused by the negligence of appellant. The deceased, at the time of his death, was employed by appellant in the capacity of locomotive engineer. In October, 1906, the engine and tender deceased was in charge of left the track and the engine turned over. Appellee's intestate was caught under the engine and killed. The declaration charged that appellant negligently and carelessly permitted its railroad track to become and remain in an unsafe and dangerous condition; that the rails of said railroad track were loose and insecurely fastened to the cross-ties underneath them; that said cross-ties were decayed, rotten, and unsound, and the spikes were loose, so that said railroad track was rendered unsuitable and dangerous for the movement of trains upon it, and that on account of said defective condition of the railroad track the engine left the track, toppled over, and killed appellee's intestate. The evidence shows that appellant's railroad consists of a main line running from Chicago to East St. Louis, and a number of branch lines. One of its branches is known as the Chicago & Kansas City Division. This branch leaves the main line at Bloomington, and runs in a westerly direction to Kansas City. Another branch, known as the Peoria Branch, runs from Springfield north to Peoria and crosses the Kansas City Division at a station called San Jose. Trains going from Bloomington to Peoria, on reaching San Jose via the Kansas City Branch, pass from that track to the track of the Peoria Branch by means of a Y, and are obliged to run backwards from San Jose to Peoria. On the morning of the accident the crew of which appellee's intestate was engineer was ordered to take an engine, ten-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

der, and caboose from Bloomington to Peoria. The crew, besides the engineer, consisted of a fireman, conductor, and two brakemen. They proceeded "head-on" to San Jose, backed around the Y upon the Peoria Branch track, and then proceeded, running backwards, toward Peoria. After having gone about four miles, the engine and tender left the track, and after running upon the ties for from 50 to 100 feet, the engine turned over, killing the engineer. Deceased became an engineer on appellant's road in June before his death. Prior to that time he had been employed by appellant for about two years, in the capacity of fireman.

Appellee's evidence abundantly tended to prove the allegations of the declaration as to the condition of the track, and that these conditions caused the engine to leave the track. Appellant concedes that appellee's evidence, standing alone, made a prima facie case, and no motion was made at its conclusion to direct a verdict. Appellant offered in evidence a rule adopted by it for the management of trains, which reads as follows: "On branch lines, an engine running backwards must reduce speed to ten or less miles an hour, according to condition of track, the object being to obtain absolutely safe movement." It also offered testimony tending to show that deceased had been furnished with a copy of this rule in June before his death, and that at the time of the accident the engine was running backward over the Peoria Branch at a greater rate of speed than 10 miles an hour. It further offered testimony contradictory to that of the appellee as to the condition of the track, and tending to show that the high rate of speed at which the engine was running, and not the defective condition of the track, caused it to leave the rails. In rebuttal the appellee introduced testimony tending to show that the speed rule had never been in force or observed by trainmen, and that it had been the habit ever since its adoption, and for several months prior to the accident, to run engines and trains backward from San Jose to Peoria at a rate of speed greatly in excess of 10 miles per hour. At the conclusion of all the evidence appellant moved the court to direct a verdict in its favor. The grounds upon which appellant based its right to have a verdict directed in its favor were that the evidence did not show any habitual violation of the rule, and if there was such violation, the evidence failed to show knowledge of appellant, actual or constructive, and that the evidence also failed to show that if the speed rule was habitually disregarded, the deceased had knowledge of such habitual disregard.

The evidence is not clear as to how long the deceased had worked on or run trains over appellant's Peoria Branch. He had no regular run, but appears to have been engaged, the greater part of the time he was

engineer, in running construction trains between Bloomington and Springfield on the main line, and between Bloomington and San Jose on the Kansas City Division, and between San Jose and Springfield on the Peoria Branch. He also made a number of trips, how many the evidence does not show, on the Peoria Branch between Peoria and San Jose. The proof, as we have said, tends to show that the speed rule had been habitually disregarded in running trains backward between San Jose and Peoria, but appellant contends that there was no testimony tending to show that the deceased had actual knowledge of such habitual disregard of the rule, and that, on account of his not having been frequently over the road between San Jose and Peoria, it cannot be justifiably inferred from the evidence that he had such knowledge. In taking this position appellant assumes that the evidence shows that it was the violation of the speed rule that caused the accident. Whether this is true, or whether the defective condition of the track was the proximate cause, was a controverted question of fact, and on which side of the question was the greater weight of the evidence is not open to review here. Furthermore, if proof of knowledge of deceased of the violation of the speed rule were necessary, we do not think it can be said, as a matter of law, that there was no proof upon this subject. A number of witnesses for appellee testified to the running of trains over the road where the accident occurred, for a period of several months before it occurred, at a rate of speed greatly in excess of 10 miles per hour. Deceased had made some trips over this line before his death, and had made other trips over other parts of the appellant's lines to and from San Jose. He had been in appellant's employment as fireman and engineer for more than two years prior to his death. These were circumstances proper to be considered by the jury upon the question whether he might have known of the disregard of the speed rule. Their sufficiency to prove the fact cannot be inquired into by us.

The evidence also was conflicting as to the rate of speed the engine was running when the accident happened. Two witnesses testified for appellee that it was "not going very fast," one that it was going "pretty fast," and one that it was running 18 or 20 miles per hour. The conductor of the crew with Hampton at the time of the accident, and the two brakemen, testified the engine was running 20 miles per hour; the fireman, that it was running between 15 and 20 miles per hour. In rebuttal appellee introduced witnesses who testified that the fireman and one of the brakemen said, soon after the accident, that the engine was not running over 10 miles an hour. The condition of the track, the rate of speed at which the engine was running, the proximate cause of its leaving the track, and whether the speed

rule had been disregarded for such length of time that appellant must be deemed to have had knowledge of it, and acquiesced therein, so that it is to be considered abrogated, were all questions of fact properly submitted to the jury, and upon which the judgment of the Appellate Court is conclusive.

It is insisted by appellant that the cross-examination of certain witnesses of appellee who testified as to the defective condition of the track shows that the defects described by them were not at the place where the tender and engine left the track, but were several feet south of it, and for that reason the court erred in overruling a motion made by appellant to exclude the testimony of said witnesses. These witnesses testified in chief to the rotten ties, loose rails, and spikes at the place where the tender and engine left the rails. If on cross-examination they testified to a contradictory state of facts, as claimed by appellant, this affected only the weight of their testimony, and not its competency.

It is also argued that the court erred in admitting testimony of witnesses for appellee as to the running of trains between San Jose and Peoria backward at a rate of speed greater than 10 miles per hour. Abrogation of a rule may be shown by proof of its habitual violation, with knowledge of the employer. *Chicago & Western Indiana Railroad Co. v. Flynn*, 154 Ill. 448, 40 N. E. 332; 6 Thompson on Negligence, § 7773. Knowledge of the employer of the violation may be actual or constructive. If it is continued for such a length of time that the employer might reasonably have known of it, knowledge will be presumed. The basis of the objection to this testimony was that the points of observation of the witnesses were at such places that it could not be presumed or inferred that the officers or agents of appellant would observe the violation of the rules. The same duty, with reference to its track, and rules governing the operation of its trains, upon its line between Peoria and San Jose, rested upon the appellant that rested upon it with reference to its other lines. There was no error in the admission of the testimony upon this subject, and we think the law applicable to it was stated with substantial correctness, in appellee's fourth instruction, of which complaint is made by appellant.

Complaint is also made of the refusal of the court to give two of the 31 instructions asked by appellant. The twenty-nine instructions given cover 20 pages of the abstract, and elaborately cover every question appellant was entitled to have given to the jury in the instructions.

Upon the controverted questions of fact, the evidence justified the court in submitting the case to the jury, and we find no errors

of law in the record that would justify a reversal of the judgment of the Appellate Court. It is therefore affirmed.

Judgment affirmed.

(236 Ill. 333)

COOMBS et al. v. PHELPS et al.

(Supreme Court of Illinois. Oct. 26, 1908. Rehearing Denied Dec. 4, 1908.)

1. WILLS (§ 70\*)—CONSTRUCTION—WHAT LAW GOVERNS.

The disposition by will of real property in Illinois is governed by the laws of Illinois.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 185; Dec. Dig. § 70.\*]

2. EXECUTORS AND ADMINISTRATORS (§ 519\*)—COLLECTION OF ASSETS.

Under the rule preserving local assets for the satisfaction in the first instance of local claims, a provision in a will of a nonresident for the sale of his interest in real estate in Illinois for the payment of nonresident creditors is in conflict with the law of Illinois and cannot be made effective; but, on the will being probated in Illinois, the residue after the payment of creditors in Illinois may be removed from the state for the payment of nonresident creditors.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2310-2322; Dec. Dig. § 519.\*]

3. WILLS (§ 759\*) — CONSTRUCTION—ESTATES ACQUIRED.

Testator devised to two daughters and a son the residue of his property in Illinois after the payment of his debts, and directed that any funds advanced to the son should be deducted from his share. *Held*, that the amount of a claim allowed against the estate, based on an obligation which was primarily the obligation of the son, must be paid from the interest of the son.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1962; Dec. Dig. § 759.\*]

4. EXECUTORS AND ADMINISTRATORS (§ 519\*)—COLLECTION AND DISTRIBUTION OF ASSETS.

A testator residing in California, having children in California and Illinois, and owning property in both states, directed his executor to pay the expenses of his last sickness and all his debts and expenses of administration, gave bank stock, some of which was not fully paid for, to children in California, same to be free of liens and fully paid, devised real estate in Illinois and California to children named, gave the residue of his property in Illinois to three children after the payment of all "debts and obligations," and gave his residuary estate to designated children, and directed his executor to sell his interest in a building in Illinois to pay indebtedness on his real and personal property in California. *Held*, that the interest of the testator in the building must be sold and the proceeds applied first to the payment of creditors in Illinois, and next to the payment of debts and expenses of administration, in California, and the real estate in Illinois not specifically devised might be sold for expenses of administration in Illinois, after applying cash in a bank in Illinois for such purpose, and the residue applied to the payment of debts and obligations of testator in Illinois or elsewhere, but the property in Illinois specifically devised could only be resorted to for the payment of creditors, and not to pay any unpaid balance on bank stock specifically bequeathed, and any proceeds of the testator's interest in the building in Illinois remaining after the payment of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

debts might be applied to the payment of the unpaid balance on bank stock or other indebtedness as directed by the will.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2310-2322; Dec. Dig. § 519.\*]

Appeal from Circuit Court, Cook County; G. A. Carpenter, Judge.

Suit by Hiram Coombs, executor of John Carne, deceased, and others, against Emily Blanche Phelps and others for the construction of the will of the deceased. From a decree construing the will, defendants appeal. Reversed and remanded.

Jesse A. & Henry R. Baldwin, for appellants. Edwin White Moore and H. Vanderploeg, for appellees.

CARTWRIGHT, C. J. John Carne died on December 22, 1905, in Ventura county, Cal., leaving property in that state, and also in Cook county, in this state, and leaving a last will and testament, of which his son Edgar W. Carne, a resident of California, and the appellee Hiram Coombs, a resident of this state, were appointed executors. The will was probated in California on January 9, 1906, and letters testamentary were issued to the executors. It was probated in Cook county, in this state, on May 18, 1906, and letters testamentary were issued to said Hiram Coombs. The heirs of the testator are his eight children—Edgar W. Carne, Charles H. Carne, Caroline E. Blackstock, Marion L. Hendrickson, and Inez G. Carne, residents of California; and Elizabeth M. Borwell, Emily B. Phelps, and Reginald G. Carne, residents of this state. They are all named as beneficiaries under both specific and residuary devises, except Emily B. Phelps, who is to share in the residuary estate in Illinois only. The amended bill in this case was filed by Hiram Coombs, the executor in Cook county, and Reginald G. Carne, one of the devisees, for a construction of the will, and the devisees and parties interested, including the appellants Emily B. Phelps and Elizabeth M. Borwell, were made defendants.

The will was made in California, and contains 16 paragraphs, but the controversy in this case concerns the proper construction of the first, twelfth, and fourteenth paragraphs. The testator owned 250 shares of stock in the First National Bank of Ventura, Cal., which were free from liens or incumbrances and were fully paid up, and 125 shares of stock of the Home Savings Bank of Ventura, on which there remained unpaid \$6,250. By various paragraphs of the will he distributed among his children Edgar W. Carne, Charles H. Carne, Marion Louise Hendrickson, and Inez G. Carne, residing in California, these shares of bank stock, with the exception of 25 shares of capital stock of the First National Bank of Ventura, which

he gave to Catherine McGrath, giving to each a specified number of shares, and providing as to the capital stock of the First National Bank that it should be free and clear of all liens and incumbrances, and as to the capital stock of the Home Savings Bank that it should be free and clear of all liens and incumbrances and fully paid up. He also devised to each of said four children an undivided interest in his real property known as the "Bank Building" in San Buenaventura, Cal. He devised to his daughter Carolina Edith Blackstock certain real estate in California. By the ninth paragraph he devised to his son Reginald G. Carne an undivided one-half interest in his real estate situated at the northwest corner of Lincoln and Walnut streets, in Chicago, subject to all indebtedness thereon, and directed his executors to surrender and cancel any unpaid promissory notes he might hold against said son, and not to collect any rent due him at the time of his death. By the tenth paragraph he devised to his daughter Elizabeth M. Borwell the other undivided one-half interest in said real estate in Chicago, subject to all indebtedness thereon, and directed his executors to surrender and cancel and deliver to her husband all promissory notes or other evidences of debt which he might hold against said husband. The first, twelfth, thirteenth and fourteenth paragraphs are as follows:

"First—I direct that the executors of this will, as soon as they shall have sufficient funds in their hands, pay the expenses of my last sickness, my funeral charges, all my debts and the expenses of administration."

"Twelfth—I give and devise to my daughters Elizabeth Mary Borwell and Emily Blanche Phelps, and to my son Reginald G. Carne, share and share alike, all the remainder of my property, of whatever kind and nature, situate in the state of Illinois and not herein disposed of, after the payment and discharge of all my debts and obligations and the expenses of administration in that jurisdiction, but I direct that any money or funds I may have advanced, either in kind or by way of guarantee or endorsement, to my son Reginald G. Carne, or his late partner, G. W. Phelps, shall be charged separately against the respective interests or parts of said Reginald G. Carne and Emily Blanche Phelps and deducted from his or her share.

"Thirteenth—I give, devise and bequeath, share and share alike, to Edgar W. Carne, Charles H. Carne, Caroline Edith Blackstock, Marion Louise Hendrickson and Inez Gertrude Carne, my children hereinabove named, all the rest, residue and remainder of my estate, real and personal, and wherever situate.

"Fourteenth—I direct that if I die seized or possessed of an interest in the reversion in and to that certain real property situate

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

at 160 and 162 Washington street, in the city of Chicago, Illinois, being the east half of lot 3, in block 35, in the original town of Chicago, and upon which the Journal building now stands, that said interest be sold and disposed of by my executors hereinafter named, and that the proceeds from such disposition and sale, and rental due or to accrue thereon, be used for the purposes of complying with my directions in paragraph first hereof, and in liquidating and paying any and all indebtedness upon my real and personal property in the state of California, my stock in the First National Bank of Ventura and that of the Home Savings Bank of Ventura, if any such liens or encumbrances there be."

The question about which the parties disagree relates to the disposition to be made of the proceeds of the testator's interest in the Journal building, which the fourteenth paragraph directs shall be sold and the proceeds be used for the purpose of complying with the directions contained in the first paragraph, and in liquidating and paying the indebtedness upon the California property and liens or incumbrances on the bank stock. The theory set up by the bill and contended for by appellees is that the executor should cause the Journal building property to be sold and the proceeds applied upon the debts in California, while appellants contend that the proceeds were intended to be applied to the payment of testator's debts generally, both in this state and in California, and that under the law property in this state must be applied to the payment of creditors in this state. Counsel for appellees argue that the testator, in paragraphs 1 and 12, had in mind two sets of debts, with the attending expenses of administration, and intended by the fourteenth paragraph that the proceeds of the Journal building should be applied to the debts in California only, and that paragraph 12 shows that the Illinois debts are to be paid out of Illinois property other than the proceeds of the Journal building, which was devoted to the payment of California debts. They insist that the general scheme of the testator was to give the California property to the children in California free from debts, liens, or incumbrances, which should be paid with the proceeds of the Journal building in Illinois, and that the property in Illinois, should go to the three children who live in Illinois, charged with the debts provable here. The circuit court adopted the theory of appellees and decreed accordingly, and from the decree this appeal was taken.

We find no sufficient grounds to sustain the conclusion of the circuit court either in the language of the will or the circumstances surrounding the testator when it was made. The fourteenth paragraph directs that the interest of the testator in the Journal building shall be sold and the proceeds be used for the purpose of complying with the direc-

tions of the first paragraph, which are that the executors shall pay the expenses of the testator's last sickness, his funeral charges, all his debts, and the expenses of administration. The language used includes all debts, and not merely California debts, and the proceeds are to be further used in liquidating and paying indebtedness upon the testator's property in California and liens and incumbrances on his bank stock. The testator lived in California, and probably contemplated that the expenses of his last sickness and the funeral charges would accrue there, but that affords no sufficient reason for limiting the language of the first paragraph to a portion of his debts. It is clear that he expected there would be expenses of administration in two jurisdictions, and he charged the property in this state, by the twelfth paragraph, with the payment of the expenses of administration in this state, but in that paragraph he did not limit the debts and obligations to Illinois debts. The devise is of the remainder of the testator's property situate in this state and not disposed of by the will, after the payment and discharge of all his debts and obligations and the expenses of administration in this state. The words "in that jurisdiction" qualify and limit the expenses of administration, and not the debts and obligations of the testator. The disposition of the real property in this state must be governed by our laws, and, if the testator designed by the fourteenth paragraph to provide that his interest in the Journal building should be sold and the proceeds removed to California for the payment of California creditors, the provision would be in conflict with our laws and could not be made effective. The will was probated here, as the testator contemplated that it would be, and letters testamentary were issued to one of the executors who resides here, and, under the law, only the residue of the testator's property remaining after the payment of creditors in this state could be removed from the state for the payment of creditors in California. It is the universal policy of the law to preserve local assets for the satisfaction, in the first instance, of local claims. 18 Cyc. 1229. The testator intended that those to whom bank stock was given should receive it free from all liens and incumbrances and fully paid, but he also intended that his son Reginald G. Carne, and his daughter Elizabeth M. Borwell, should have the real estate situated at the northwest corner of Lincoln and Walnut streets, in Chicago, subject only to the indebtedness thereon; and we find no warrant for saying that he intended the proceeds of the Journal building to be applied only to the payment of California debts, with the possible effect of taking the property so devised to the son and daughter for the payment of Illinois debts. Testator had in mind the administering of his estate in two jurisdictions, and, by charging the residuary es-

tate in Illinois with the expenses of administration here, he created an exception to the general language of the first paragraph directing the payment of expenses of administration generally. But his language does not indicate a purpose to divide his debts into two classes. The language used in the first paragraph is, "all my debts," and in the twelfth, "all my debts and obligations," and we regard this language, which is clear and unambiguous, as a safer guide than a resort to uncertain conjecture. The testator gave his California property to his children residing in that state, and the Illinois property, except his interest in the Journal building, to his children residing here, which was most natural, and raises no inference that he had in mind two sets of beneficiaries, to be treated differently. A claim of \$15,800 against the estate was allowed by the probate court of Cook county, which is primarily the obligation of Reginald G. Carne, and the testator designed that obligation to be paid out of his son's share of the residuary estate situated here. If there is such property, that debt should be paid from the interest of Reginald G. Carne therein.

As we construe the will, the interest of the testator in the Journal building is to be sold and the proceeds to be applied first to the payment of creditors in this state, and next to the payment of debts and expenses of administration in California. The real estate of the testator in this state not specifically devised may be sold and devoted to paying the expenses of administration in this state after applying the cash in bank in Chicago to such purpose, and the residue be applied to the payment of debts and obligations of the testator in this state or elsewhere. The property in this state specifically devised can only be resorted to for the payment of creditors, and not for the purpose of paying any unpaid balance on bank stock specifically bequeathed by the will. Any proceeds of the testator's interest in the Journal building remaining after the payment of debts may be applied to the payment of the unpaid balance on bank stock or other indebtedness, as directed by the fourteenth paragraph. Any residue of the property in Illinois is devised to the testator's daughters Elizabeth M. Borwell and Emily B. Phelps and his son Reginald G. Carne, but the claim of \$15,800 arising by way of guaranty in favor of the Corn Exchange National Bank, which is primarily the indebtedness of said Reginald G. Carne, is to be deducted from his share.

We have construed the will only so far as property in this state is involved. This construction differs from that adopted by the circuit court, and the decree of that court is therefore reversed and the cause is remanded, with directions to enter a decree in accordance with the views herein expressed.

Reversed and remanded, with directions.

(236 Ill. 452)

**R. HAAS ELECTRIC & MFG. CO. et al. v. SPRINGFIELD AMUSEMENT PARK CO. et al.**

(Supreme Court of Illinois. Oct. 28, 1908.)  
Rehearing Denied Dec. 4, 1908.)

**1. MECHANICS' LIENS (§ 73\*)—IMPROVEMENTS BY LESSEE—AUTHORITY OR PERMISSION FROM OWNER.**

The owner of land authorizes or knowingly permits the improvement of the land within Mechanic's Lien Law, § 1, as amended in 1903 (Hurd's Rev. St. 1905, c. 82, § 15), making the interest of the owner subject to a lien for improvements made by a person under contract with one whom the owner has authorized or knowingly permitted to contract for the improvement, where the owner's written consent to subletting the premises recites that the sublessee shall have the right to make improvements on the premises, provided that all improvements shall remain on the premises at expiration of the lease; the consent necessarily permitting contracts for the improvements, and not limiting the extent or character of the improvements.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 101; Dec. Dig. § 73.\*]

**2. MECHANICS' LIENS (§ 48\*)—RIGHT TO LIEN—MATERIALS FURNISHED—FIXTURES—NECESSARY PROOF.**

Mechanic's Lien Law, § 1, as amended in 1903 (Hurd's Rev. St. 1905, c. 82, § 15), gives a lien to a person who shall, under recited conditions, "furnish materials, fixtures, apparatus or machinery for the purpose of, or in the building, altering, repairing or ornamenting any house \* \* \* or sidewalk." Section 7 (section 21) provides that no lien for material shall be defeated because of lack of proof that the material after its delivery actually entered into the construction of the building or improvement. Held that, whatever may be the necessity as to proof of "materials" actually entering into the improvement, "fixtures, apparatus, and machinery" must be shown to have been used in such a manner as to become attached to or form a part of the real estate.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 48.\*]

**3. MECHANICS' LIENS (§ 239\*)—PAYMENT—APPLICATION ON NONLIENABLE ITEMS.**

Within the rule that where a contractor has a claim for items, some only of which are lienable, a general payment will be applied on the nonlienable items, there is no payment, but merely a cancellation of the specific charge, where lienable articles are returned, and credit given therefor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 420-423; Dec. Dig. § 239.\*]

**4. APPEAL AND ERROR (§ 606\*)—CONSIDERING FACTS DEHOIRS THE RECORD.**

An Appellate Court cannot consider facts dehors the record that are brought to the court's attention only by statements in the briefs.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2861-2866; Dec. Dig. § 606.\*]

**5. APPEAL AND ERROR (§ 1031\*)—HARMLESS ERROR.**

It cannot be said that error in giving a lien for nonlienable items was harmless by reason of payments which may be applied on the nonlienable items, where from the record it is impossible to separate the lienable from the nonlienable items.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1031.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**6. APPEAL AND ERROR (§ 220\*)—RESERVATION OF GROUNDS—FINDINGS OF MASTER—NECESSITY OF EXCEPTIONS.**

Findings of the master in chancery, in the absence of exception thereto, are conclusive on the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1325-1332; Dec. Dig. § 220.\*]

**7. APPEAL AND ERROR (§ 170\*)—RESERVATION OF GROUNDS—CONSTITUTIONAL QUESTION NOT RAISED BELOW.**

Right to raise the question of the constitutionality of a statutory provision for allowance of a solicitor's fee is waived, no objection or exception to the allowance having been made below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1037; Dec. Dig. § 170.\*]

**8. COURTS (§ 219\*)—CONSTITUTIONAL QUESTIONS—WAIVER BY APPEAL TO APPELLATE COURT.**

Though a constitutional question be raised in the trial court, it is waived by taking the case to the Appellate Court, instead of bringing it directly to the Supreme Court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 219.\*]

Appeal from Appellate Court, Third District on Error to Circuit Court, Sangamon County; James A. Creighton, Judge.

Suit by the R. Haas Electric & Manufacturing Company against the Springfield Amusement Park Company. From a judgment of the Appellate Court, modifying and affirming the decree, the complainant and others appeal. Reversed in part, and remanded.

This is a bill in chancery filed by the R. Haas Electric & Manufacturing Company (which will hereinafter be designated as the electric company) against the Springfield Amusement Park Company (which for convenience is hereinafter called the park company), the Peter Vredenburg Lumber Company (hereinafter called the lumber company), Thomas D. Hogan, F. Reisch & Bros., and certain other parties, defendants, to enforce a mechanic's lien.

It appears from the bill that on the 2d day of March, 1906, the electric company entered into a contract with the park company by which the electric company contracted to furnish all labor and material for electric wiring, motors, accessories, plumbing, piping, etc., to be used in the Springfield Amusement Park Company's White City Park of Springfield, Ill., to be located at the east end of Capitol avenue, now known as Reisch's Park; that said materials and labor were to be furnished at the regular retail prices; that in consideration of this contract the electric company agreed to subscribe for \$1,000 of the capital stock of the park company, to be paid for in material and labor, provided that such subscription did not exceed 40 per cent. of the total amount of the materials and labor furnished by the electric company. The bill avers that in pursuance of such contract the electric company furnished all labor

and materials for electric wiring, motors, accessories, plumbing, piping, etc., used in the said park company's White City Park, and complied in all respects with the said contract, and that such material and work had been accepted and used by the park company. The bill alleges that there is due the electric company \$4,297.36, together with interest from July 5, 1906, at 5 per cent. To said bill the electric company attached a schedule marked "Exhibit A" and made the same a part of the bill, which purports to be an itemized bill, the aggregate of which is the amount above stated. The several corporations and individuals that are made defendants to the bill are alleged to have or claim some interest in the premises, the precise nature of which is alleged to be unknown to the electric company. It is charged that the interest or claim of the several defendants, if any, is subject to the lien of the electric company, and that all of said parties defendant knowingly permitted the park company to contract for and receive and obtain the materials, labor, and improvements furnished by the electric company.

The lumber company answered the bill, neither admitting nor denying any of the facts upon which the electric company predicated its right to a lien, and prayed that strict proof might be required as to all such facts. The lumber company by its answer set up a claim for lien in its behalf for lumber and building materials furnished by said lumber company to the park company under a verbal agreement of April 30, 1906. The lumber company also agreed to subscribe for \$1,000 of the capital stock of the park company, to be paid for in building material. To its answer the lumber company attached an itemized bill showing a balance due it of \$5,928.19, for which sum the lumber company also claims a lien upon the premises described in the bill. The park company also answered the bill, in which it denied all of the material averments in the bill. F. Reisch & Bros. answered the bill and disclaimed all knowledge of the alleged contract or the material furnished or work done thereunder, and demanded strict proof of the same. They set up in their answer that they have an interest in said premises as sublessors to the park company. Thomas D. Hogan filed an answer to the bill, in which he claims to be the owner in fee simple of the real estate described in the bill. He denies all the averments in the bill in so far as the same affect his interest. Replications to these several answers were filed, and the cause was referred to a master in chancery to take the proofs and report his findings.

In behalf of the electric company, Rudolph Haas, the president of the company, testified that under the contract offered in evidence the electric company furnished all motors, electric lights, wiring, and accessories, which

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

were properly installed by labor furnished and paid for by the electric company, at the White City grounds at the end of East Capitol avenue; that the materials were furnished and work done in various buildings, such as the theater, roller coaster, and other buildings; that more or less work was done on all the buildings in the park. This witness states that the electric company complied with the contract and paid all workmen, subcontractors, and materialmen who did work for it under said contract, and that the park company owed the electric company \$4,297.38, besides the interest, less the amount of stock subscribed for by the electric company.

Herman Armbruster, who superintended the electrical construction for the electric company, also testified on behalf of the complainant. This witness testifies that the work was done during June and July, 1906. In reference to the character of work done, this witness says: "We worked there on the entrance building—entrance gate—and put on the electrical sign 'White City.' That was put right in front of the entrance, on the woodwork there. We put the sign on two buildings, refreshment stands, pagodas, sign on the main stand, dancing pavilion, bridge, theater (interior and exterior), porch around the old building, additional lights in the kitchen and rear porch on the rear building, penny arcade, shooting gallery, bowling alley and pool, rough house, house of trouble, fun factory, cave of the winds, roller coaster, photograph gallery, Japanese bowling alley, three ice cream cone stands, throwing-the-ring stand, knock-the-baby-down stand, the outhouses, wiring for 14 arcs in and around the park, putting up buffet sign on porch around old building, theater sign on theater, signs on the penny arcades, shooting gallery, bowling alley, house of trouble, fun factory, etc. We also decorated an actual tree, called the 'Christmas Tree.' We wired that complete. We furnished three-light clusters at the entrance to the theater, and one five-light cluster at the band stand. The itemized statement attached to complainant's bill is complete. They were all delivered. I delivered most of them myself." This witness testifies also that during the time that this work was being installed Thomas D. Hogan, the owner of the land, was frequently out there and witnessed the work going on, but that the witness had no conversation with him.

In addition to the testimony of these two witnesses, the electric company introduced a lease dated October 29, 1903, between Thomas D. Hogan and F. Reisch & Bros. for the 38.44 acres described in the bill, which lease is for five years from November 1, 1903, with the privilege of renewing for five years additional. The lease provides that the premises are to be occupied for saloon and park purposes, and for no other purposes whatever. The lease provides that the lessees are to keep the premises in good condi-

tion and repair and pay a rental of \$75 per month. The lease provides that the lessee should not assign or sublet without the written consent of the lessor. Under date of April 1, 1906, there is a written consent, signed by Thomas D. Hogan, to the subletting of said premises to the said park company. The written consent to the subletting recites that the park company should have the right to make improvements on said premises, provided that all improvements, alterations, and additions made by the said company should remain on the premises at the expiration of the lease, for the benefit of the lessor. This was all the evidence offered by the electric company in support of its bill, except that proof of a solicitor's fee was made, and such fee allowed in the sum of \$160.

On behalf of the lumber company evidence was offered proving that the lumber company furnished the material for which it claims a lien. There is no serious dispute about the lumber company's claim. There is some question in regard to the interest allowed the lumber company. Evidence was also submitted in regard to the amount of a reasonable solicitor's fee for the lumber company, and \$125 was allowed as such fee.

Upon this evidence the master in chancery found that the electric company was entitled to a lien for \$4,297.38, and that the lumber company was entitled to a lien for \$4,111.73, after allowing credits about which there is no dispute. Numerous objections were filed before the master by Hogan, F. Reisch & Bros., and other defendants, all of which were overruled and allowed to stand, by agreement, as exceptions. The decree of the court sustained the master's report in all respects and established a lien in favor of the electric company and the lumber company for the amounts, respectively, found due them by the master. The court in its decree allowed interest on the amount found to be due the lumber company, which was added by the court to the amount found due by the master, making the decree in favor of the lumber company \$206.10 more than the amount found due by the master. To reverse this decree the park company, Thomas D. Hogan, and others sued out a writ of error from the Appellate Court for the Third District, where the decree of the circuit court was affirmed in all respects, except the Appellate Court modified the decree in regard to the interest allowed on the sum found due the lumber company by the master in chancery. The Springfield Amusement Park Company and others have appealed from the judgment of the Appellate Court to this court.

Albert Salzenstein and Graham & Graham, for appellants. Alonzo Hoff and Barber & Barber, for appellees.

VICKERS, J. (after stating the facts as above). First Appellants' first and most se-

rious contention is that the court erred in decreeing a lien against the interests of F. Relsch & Bros. and Thomas D. Hogan, appellants' contention being that only the interest of the park company should be subjected to a lien for these improvements.

Section 1 of the mechanic's lien law, as amended in 1903 (Hurd's Rev. St. 1906, p. 1317, c. 82, § 15), provides: "That any person who shall by any contract or contracts, expressed or implied, or partly expressed and partly implied, with the owner of a lot or tract of land, or with one whom such owner has authorized or knowingly permitted to contract for the improvement of, or to improve the same, furnish materials, fixtures, apparatus or machinery for the purpose of, or in the building, altering, repairing or ornamenting any house or other building, \* \* \* shall be known under this act as a contractor, and shall have a lien upon the whole of such lot or tract of land and upon the adjoining or adjacent lots or tracts of land of such owner constituting the same premises and occupied or used in connection with such lot or tract of land as a place of residence or business."

It will be noted that under the language of this statute the owner of a lot or tract of land may subject it to a lien by either making a contract himself or authorizing another to make such contract for him, or by knowingly permitting another to contract for the improvements upon his land. By reference to the evidence set out in the statement preceding this opinion it will be seen that Thomas D. Hogan, as owner, expressly consented that the park company should have the right to make improvements on the described premises on condition that all improvements, alterations, and additions made by the company should remain on the premises at the expiration of the lease, for the benefit of the lessor. It is true that the particular contracts relied on as the basis of the liens in this proceeding are not referred to in the consent agreement of April 1, 1906. Indeed, there is nothing said in the consent agreement about contracts that might be made by the park company in connection with any improvements, alterations, or additions that such company might undertake to make. The writing signed by the owner authorized the park company to "make improvements on said described premises," which necessarily carries with it a permission to the park company to make such contracts for labor and materials as were reasonably necessary in the making of the authorized improvements. The authority given by the owner to the sublessee to make improvements is not limited, either as to the extent or character, by any language found in the writing. The owner, no doubt, might have specified the character of improvements to be placed on his land and have limited the cost thereof, but in the case at bar the owner did not see proper to place any limita-

tions whatever upon the power of the park company in this regard, and he will therefore not be heard to complain that the cost is excessive or the character of the improvements undesirable. The first section of the mechanic's lien law of 1895 (Laws 1895, p. 226) made the interest of the owner of the land subject to a lien for improvements "knowingly permitted."

In the case of Carey-Lombard Lumber Co. v. Jones, 187 Ill. 203, 58 N. E. 347, this court held that a lessor who stipulates in the lease for the erection by the lessee of a building upon the demised premises, which is to become the property of the lessor upon the termination of the lease, by expiration or otherwise, subjects his title to mechanics' liens arising from the erection of the building, notwithstanding the lease provides, under a penalty of forfeiture, that the lessee shall permit no mechanics' liens to attach to the premises. In that case this court reviewed a number of decisions of this and other states, and the conclusion was there reached that one who agrees with another that he shall place buildings or other improvements upon certain property thereby authorizes or knowingly permits such other to improve the property, within the meaning of these terms as used in the mechanic's lien law then in force. It was also held in that case that the clause that the lessee "shall permit no mechanics' liens to attach to the premises" was merely a covenant on the part of the lessee that he would discharge such liens, and that such clause did not prevent the lien from attaching as between the owner and the party entitled thereto. This case has been reaffirmed in *Crandall v. Sorg*, 198 Ill. 48, 64 N. E. 769, and also in *Sorg v. Crandall*, 233 Ill. 79, 84 N. E. 181.

Under the rule laid down in the foregoing authorities, we are of the opinion that there was no error in holding that these improvements had been knowingly permitted by the owner of the fee.

Second. Appellants contend, under their second point, that many of the items in the respective bills were not for matters for which the law allows a lien. Apparently both the electric company and the lumber company proceeded in the court below upon the assumption that a prima facie case was made out by proving a contract and the delivery of the material upon the premises to be used in improvements to be made thereon. Section 7 of the lien law of 1903 provides, among other things: "No such lien shall be defeated to the proper amount thereof because of an error or overcharging on the part of any person claiming a lien therefor under this act, unless it shall be shown that such error or overcharge is made with intent to defraud; nor shall any such lien for material be defeated because of lack of proof that the material after the delivery thereof, actually entered into the construction of such building or improvement, although it be

shown that such material was not actually used in the construction of such building or improvement: Provided, it is shown that such material was delivered either to such owner or his agent for such building or improvement to be used in such building or improvement, or at the place where said building or improvement was being constructed, for the purpose of being used in construction."

By reference to section 1 it will be found that it is provided that a lien shall be allowed in favor of the person who shall, under the conditions therein provided, "furnish materials, fixtures, apparatus or machinery for the purpose of, or in the building, altering, repairing or ornamenting any house \* \* \* or sidewalk," etc. This section of the statute is more comprehensive than the language quoted above from section 7. The provision that it shall not be necessary to prove that material actually delivered to the owner or his agent, or at the place where such building or improvement was being constructed, was actually used in the construction or improvement, is limited to material, and does not extend to "fixtures, apparatus or machinery," for which a lien may be established under section 1. The words "fixtures, apparatus or machinery," are used in section 1 in addition to the word "materials," and are intended to designate things for which a lien may be established other than materials.

Even if it be conceded, which we do not decide, that under section 7 it is not necessary to prove that material delivered for the purpose of being used in the construction of a building or improvement actually entered into and was used in the building or improvement, can it be said that proof of the mere delivery of fixtures, apparatus, and machinery is sufficient to authorize a decree establishing a lien, without any proof that such fixtures, apparatus, and machinery were ever used in such a manner as to become attached to or form a part of the real estate? Commencing with the case of *Hunter v. Blanchard*, 18 Ill. 318, and coming down to *Compound Lumber Co. v. Murphy*, 169 Ill. 343, 48 N. E. 472, this court held that under the law which existed prior to the revision of 1895 the lien could only be established to the extent of materials actually used in the construction of the building. It was no doubt to meet the rule of law thus established that that portion of section 7 of the mechanic's lien law of 1903 which we have quoted was enacted. The principle underlying the cases which limit the lien to the extent of materials actually used in the construction of the building is that it is contrary to justice to burden real estate with liens to pay for chattels which in no sense could be supposed to enhance the value of the real estate; hence, where a lien was sought to be established for fixtures, apparatus, or machinery, it was necessary to allege and prove

that the things for which a lien was claimed were so attached to the building or improvement as to become a part of the real estate. A full discussion of the law, illustrated by many citations from various states of the Union, will be found in 27 Cyc. p. 38, where it is said in the text: "Whether or not machinery is within the lien laws usually depends upon whether it has become a fixture. If it is stationary and firmly attached to the realty, so as to become a part thereof, it is the subject of a lien; otherwise not." In *Drew v. Mason*, 81 Ill. 498, 25 Am. Rep. 238, it was held that furnishing material and labor in placing a lightning rod on a house is not furnishing materials and labor in building, altering, repairing, or ornamenting a house, in the sense those terms are used in the mechanic's lien law; while in *Dobschuetz v. Holliday*, 82 Ill. 371, it was held that a steam engine, machinery, and fixtures attached to the soil by a lessee thereof for the purpose of hoisting coal from mines situated thereon, including all boxes and all other necessary appliances connected therewith, become a part of the lessee's estate therein, and entitle the party furnishing such engine and fixtures to a mechanic's lien against the estate of the lessee on account thereof.

By reference to the electric company's bill of particulars filed with and made a part of its bill, it will be seen that a very large number of the items which enter into the aggregate amount of its claim are matters for which no lien should have been established without proof showing in what manner, if at all, they were connected with the real estate upon which it is sought to establish a lien. Thus, in the claim of the electric company there is included a charge of \$577.50 for two electric motors, for which a lien is claimed and allowed without any evidence whatever showing that these machines have been so installed as to become a part of the real estate. Included in the same bill are many other items for which no lien should have been allowed without proof that they were so attached to the real estate as to become permanent fixtures, or that they were used in connection with the proper installation of other lienable things. As illustrating the class of items now under consideration, the following may be mentioned: Sulphuric acid, carboys, Westinghouse knife switch, gasoline, fuse blocks, fuse plugs, fusible knife switch, plug cut-outs, lamp cord, lamps, clusters and reflectors, arc lamp pole tops, poles, and candelabra base lamps. These items, together with others of like character, constitute a very large portion of the claim of the electric company. By reference to the evidence of Herman Armbruster, who superintended the installation of all of this work, which is set out very fully in the statement preceding this opinion, it will be found that the work of installing these improvements was put upon buildings, refreshment stands, pagodas, signs, dan-

cine pavilion, bridge, theater, arcade, and various other places of amusement in the park. He says: "We decorated an actual tree, called the 'Christmas Tree'; we wired that complete;" that light clusters were installed at the entrance of the theater and on the band stand. It is utterly impossible to tell from his evidence what part of this work is for lienable matters and what is not, and there is no other evidence in the record bearing on that question. There is also included in the electric company's bill a number of items for street car tickets and meals for superintendent. We are unable to see how such items could possibly become the basis of a mechanic's lien under the contract relied upon. There is also an item for carboys which the bill shows were to be returned. This item was improperly included in the amount of the lien.

It is said by appellees that, even if nonlienable items were included in the electric company's claim, there have been payments made which the court ought to apply in discharge of such nonlienable items and affirm the decree, since the amount now due does not exceed the amount for which the electric company is clearly entitled to a lien. This view was adopted by the Appellate Court, and resulted in an affirmance by that court on the authority of *Monson v. Meyer*, 190 Ill. 105, 60 N. E. 63, and *Barbee v. Morris*, 221 Ill. 382, 77 N. E. 589. The first of the above cited cases announces the rule that equity requires the debtor to pay all of his obligations, and that the court will credit a payment so as to give the creditor the best security for the debt remaining unpaid. The case of *Barbee v. Morris* makes application of this equitable rule to a general payment made upon a building contract where the parties have not made any specific application thereof, and holds that a court of equity may properly credit the payment upon the contract so as to include an item for extra work for which the creditor would not, under the contract, be entitled to a lien, and thus give him the security of a mechanic's lien for the amount remaining unpaid. Without questioning the rule announced in these cases, we are of the opinion that it is erroneously applied to the facts in this case. The evidence shows that the only credit entered upon the bill of the electric company prior to the decree in the circuit court was an item of \$158.16 for material returned. The method of bookkeeping by the electric company was to charge all items that were furnished under the contract to the park company, and upon the return of any items a credit was entered, thus canceling the charge made for such item. If the return of these goods can be regarded as a payment at all, it would only be a payment of the amount charged for the specific articles returned, and could not in any view be regarded as a general payment, which a court of equity would apply to nonlienable items, within the equitable

rule announced in the foregoing cases. If the material returned was of a class for which a lien might be given upon proof of its mere delivery, such lien would be defeated by the voluntary removal of the material by the contractor from the premises. If the material returned was lumber, the lien which the statute gives upon proof of the delivery of such material at the place of the improvement could not be transferred by the removal of the lumber to other items for which the law gives no lien. The return of material to the amount of \$158.16 only had the effect of canceling the charge made for the items included in that amount.

There is a statement in appellees' brief to the effect that there have been payments made on this decree, aggregating about \$2,500, since the decree was rendered in the lower court, and the electric company seeks to avail itself of this fact in answer to the alleged error committed by including in the decree nonlienable items. To this contention it may be replied (1) that the case must be determined in a court of review upon the record made in the trial court, and we cannot take into consideration facts dehors the record that are only brought to our attention by the statement of counsel in their briefs; (2) the state of the record is such that it is impossible to separate the lienable from the nonlienable items, and until such items are separated we cannot tell what the amount of either is. There are no grounds here for the contention that the error of the trial court is cured by the application of payments to the items erroneously included in the decree.

Third. The master in chancery found the amount due the lumber company to be \$4,111.73. The lumber company filed no objections to this finding. The circuit court found the amount due the lumber company to be \$4,317.83, and rendered a decree for that amount. The court obtained the larger amount by the addition of \$206.10 interest. The Appellate Court struck out the item of interest and affirmed the decree in favor of the lumber company for \$4,111.73. In this we think the Appellate Court is clearly right. The finding of the master in chancery is conclusive upon the parties as to all questions wherein the finding is not excepted to. *Glos v. Hoban*, 212 Ill. 222, 72 N. E. 1.

Upon evidence heard, an attorney fee of \$125 was allowed the lumber company's solicitors. Since this case was heard in the Appellate Court, this court, in the case of *Manowsky v. Stephan*, 233 Ill. 409, 84 N. E. 365, has held that portion of the mechanic's lien act allowing attorney fees for the lienor's solicitors unconstitutional. No objection or exception to the allowance of attorney fees was made before the master or in the court below, nor was the constitutional question raised until the case reached this court. We are of the opinion that appellants have waived their right to raise this question by failing

to raise it in the court below, and if it had been so raised it would have been waived by taking the case to the Appellate Court instead of bringing it directly to this court.

The judgment of the Appellate Court will be affirmed in all respects in so far as the same relates to the decree in favor of the lumber company, and in so far as it relates to the electric company the decree of the circuit court and the judgment of the Appellate Court are reversed, and the cause remanded to the circuit court for further proceedings in accordance with the views herein expressed.

Reversed in part, and remanded.

(236 Ill. 495)

BRIMSON et al. v. ARNOLD et al.

(Supreme Court of Illinois. Oct. 26, 1908. Rehearing Denied Dec. 4, 1908.)

**1. TAXATION (§ 810\*)—TAX DEEDS—ACTION TO SET ASIDE—PLEADING AND PROOF.**

In an action to set aside a tax deed, plaintiffs offered in evidence a deed to themselves from their vendor, and two of plaintiffs testified without contradiction that they had been in possession of the premises described in the deed from the date thereof to the date of the trial. The descriptions in the deed and in the bill were the same. *Held* to establish the averments of their occupation of the premises described in the bill, and to be sufficient on which to base a decree.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 810.\*]

**2. TAXATION (§ 809\*)—TAX DEED—ACTION TO SET ASIDE—PLEADING—VARIANCE.**

Where, in an action to set aside a tax deed, plaintiffs claimed under a deed to them "not as tenants in common, but as joint tenants," and the bill averred that they were owners as "joint tenants," the omission of the words "not as tenants in common" was immaterial, since plaintiffs in any event were joint owners and in possession of the premises, and were entitled to notice of the tax sale and the time when the period of redemption would expire, whether they were tenants in common or joint tenants.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 809.\*]

**3. APPEAL AND ERROR (§ 187\*)—OBJECTIONS NOT MADE BELOW—PARTIES.**

One who, when sued as "J. G., trustee," answered and appealed as trustee, could not urge that he was sued individually.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1184; Dec. Dig. § 187.\*]

**4. PARTIES (§ 40\*)—INTERVENTION—ACTION TO SET ASIDE TAX DEED.**

Where, in an action against one G. and others to set aside a tax deed, the evidence showed that G. purchased at the tax sale; that G. paid taxes to protect the tax sale, and then assigned the certificate to defendant A., and that A. took out a tax deed under the sale in his name and then gave a trust deed to G. to secure A.'s note payable to himself and indorsed in blank—*held*, that the assignment of the certificate to A. by G. carried with it the right to the amount required to redeem therefrom, including the amount of taxes paid by G. to protect the tax sale; and that, if the deed were valid, the amount ordered paid into court as a condition precedent to canceling the tax deed and trust deed belonged to the holder of the

note secured by the trust deed, and not to G. individually, and hence the court did not err in declining to permit G. to intervene and answer the bill individually.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 40.\*]

**5. TAXATION (§ 810\*)—TAX DEED—ACTION TO SET ASIDE—EVIDENCE.**

Where, in an action against G., trustee, A., and others, to set aside a tax deed to A. and a trust deed from A. to G. to secure the payment of the note of A. payable to himself and indorsed in blank, G. individually and the other grantees in a quitclaim deed from A. to G. and others were not parties defendant by name but were included under the designation "unknown owners," and were in default, and hence were not in position to introduce evidence to show title in themselves from A., the exclusion of the quitclaim deed in evidence was proper.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 810.\*]

**6. TAXATION (§ 816\*)—TAX DEED—ACTION TO SET ASIDE DECREE—FORM.**

In an action against G., trustee, A., and others to set aside a tax deed to A. and a trust deed from A. to G. to secure the payment of the note of A. payable to himself and indorsed in blank, a decree directing the fund ordered paid to the clerk of court by plaintiffs as a condition precedent to the relief granted, to be *held* for the benefit of defendants as their interests might be subsequently ascertained by the court, was proper, as against the objection that the fund should have been distributed to those entitled thereto.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 816.\*]

Appeal from Superior Court, Cook County; Albert C. Barnes, Judge.

Bill by William G. Brimson and others against D. Arnold, Jacob Glos, trustee, and others. From the decree, said Glos appeals. Affirmed.

This was a bill in chancery filed by the appellees, in the superior court of Cook county, against D. Arnold, Jacob Glos, trustee, and others, to set aside as a cloud upon their title (which was alleged to be a fee) to the west 18 feet of lot 8 and the east 22 feet of lot 9, in block 8, in Clough & Barney's subdivision of lots 34 and 35, in school trustees' subdivision of section 16, township 38 north, range 14 east of the third principal meridian, in the city of Chicago, county of Cook and State of Illinois, a tax deed issued by the county clerk of Cook county to D. Arnold on August 1, 1906, and a trust deed made by D. Arnold to Jacob Glos, trustee, on January 18, 1907, to secure the payment of the promissory note of D. Arnold for \$50,000, payable to the order of himself and indorsed in blank. D. Arnold and the unknown owners of said promissory note and the unknown owners of the said premises were defaulted, and Jacob Glos, trustee, answered said bill as trustee. A hearing was had before the chancellor, and a decree was entered in accordance with the prayer of the bill after the appellees had deposited, under the direction of the court, with the clerk of the court, \$258.92 for the benefit of the defendants, \$3 of which

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

deposit the clerk was directed to pay to Jacob Glos, trustee, and \$255.92 of which he was directed to hold for the benefit of the defendants, as their interest might subsequently be ascertained by the court. Jacob Glos, trustee, has prosecuted an appeal to this court.

John R. O'Connor, for appellant. Julius A. Johnson and Enoch J. Price, for appellees.

HAND, J. (after stating the facts as above). The evidence clearly shows that the tax deed sought to be canceled was void for want of notice to the appellees of the tax sale and when the period of redemption would expire, and the decree should be affirmed unless the court committed reversible error in some one of the following particulars:

First. It is contended that the appellees did not establish that the premises described in the bill were the premises occupied by them. The appellees offered in evidence a deed to themselves from Fannie M. Gipson (of whom they purchased said premises) for the premises, bearing date October 3, 1895, and William G. Brimson testified that he and his family had been in the possession of the premises described in the deed, as their homestead, from the date of the deed to the date of the trial, and Mrs. Brimson testified to the same fact. The description contained in the deed from Mrs. Gipson and the description in the bill are the same. This testimony was uncontradicted, and clearly established the averments of the bill, and was sufficient upon which to base a decree.

Second. It is contended that there was a variance between the bill and the proofs. The bill averred that the appellees were the owners in fee simple, "as joint tenants," of the premises, and the deed from Mrs. Gipson to the appellees conveyed the premises to "William G. Brimson and Susan H. Brimson, his wife, not as tenants in common, but as joint tenants, to them and the survivor of them." The omission in the bill of the words, "not as tenants in common," was wholly immaterial, as the appellees, in any event, were the joint owners of and in possession of the premises, and were entitled to notice of the tax sale and the time when the period of redemption would expire, whether they were tenants in common or joint tenants.

Third. It is contended that Jacob Glos having been sued as "Jacob Glos, trustee," he was sued not "as trustee," but individually. Jacob Glos answered as trustee, and has prosecuted this appeal as trustee. He is not in a position, therefore, in this court to urge he was sued individually.

Fourth. The appellant, Glos, upon the trial asked leave to file an answer individually, with the view to have the court decree that the money ordered by the court to be deposited with its clerk as a condition precedent to the relief granted be paid to him

individually. The evidence showed that Jacob Glos was the purchaser at the tax sale; that, prior to the assignment of the tax certificate to D. Arnold, Jacob Glos had paid taxes aggregating the sum of \$146.97 on said premises to protect said tax sale; that he then assigned the tax certificate to D. Arnold; that D. Arnold took out a tax deed under said sale in his name, and then gave said trust deed to Jacob Glos. Clearly, the assignment of the tax certificate to D. Arnold by Jacob Glos carried with it the amount required to redeem thereunder, which included the amount of taxes paid by Jacob Glos to protect said tax sale, and, if said tax deed had any validity, the amount ordered paid into court as a condition precedent to canceling said tax deed and trust deed belonged to the holder of said \$50,000 promissory note, and not to Jacob Glos individually. We fail to see, therefore, upon this record, how Jacob Glos had any interest in said fund individually, and think the court did not err in declining to permit him to intervene and answer said bill individually.

Fifth. Jacob Glos on the trial offered in evidence a quitclaim deed from D. Arnold to himself and other grantees to said premises, which deed the court declined to admit in evidence, and it is urged by the appellant, Glos, the court committed reversible error in declining to admit said deed in evidence. Jacob Glos individually, and the other grantees in said deed, were not parties defendant by name, but they were included under the designation "unknown owners," and were in default, and were not in a position to introduce evidence upon the trial to show title in themselves from D. Arnold. The court did not, therefore, err in declining to admit in evidence said quitclaim deed.

Sixth. It is finally contended that the court erred in not disposing of the fund ordered paid to the clerk of the court by the appellees as a condition precedent to the relief granted, otherwise than by ordering it paid to the clerk of the court for the benefit of the defendants. The form of the decree adopted in this case was approved by this court in *Glos v. Hanford*, 212 Ill. 261, 72 N. E. 439, *Glos v. Ault*, 221 Ill. 532, 77 N. E. 939, and *Glos v. Cass*, 230 Ill. 641, 82 N. E. 327. If D. Arnold has conveyed his interest in said tax title to Jacob Glos and the other grantees named in said quitclaim deed, and Jacob Glos is the owner of the \$50,000 promissory note secured by said trust deed, upon a proper showing the court which controls said fund can readily adjust the equities of the parties in said fund, and under the decree from which this appeal is prosecuted protect the rights of Jacob Glos by directing the portion of the said fund found to belong to him to be paid to him.

Finding no reversible error in this record, the decree of the superior court will be affirmed.

Decree affirmed.

(286 Ill. 485)

**SHAUGHNESSY v. HOLT.**

(Supreme Court of Illinois. Oct. 28, 1908. Petition for Rehearing Stricken Dec. 3, 1908.)

**1. PLEADING (§ 54\*)—STRIKING OUT COUNT—EFFECT.**

Each of the first three counts of an original declaration, after stating the negligence, concluded, "by means whereof the plaintiff was then and thereby injured, as hereinafter set forth." The original fourth count, to which the quotation from the first three referred, was stricken out by order of the court, and a motion to file an amended fourth count denied. *Held* that, notwithstanding the fourth count had been stricken, it was still a part of the declaration for reference purposes, and furnished a sufficient basis for additional counts, merely alleging in a more accurate and legal manner the same damages.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 118; Dec. Dig. § 54.\*]

**2. EVIDENCE (§ 128\*)—DECLARATIONS TO PHYSICIANS—SELF-SERVING.**

Declarations of a person injured, when made as a part of the res gestæ, or to a physician during treatment, or on examination prior to, and without reference to, the bringing of an action for damages, are admissible; but declarations to a physician who has made an examination shortly before the trial, apparently for the purpose of testifying at it, are inadmissible, as based on self-serving statements of the person injured, notwithstanding such person testifies on the trial that the declarations made were true.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 383-387; Dec. Dig. § 128.\*]

**3. EVIDENCE (§ 128\*)—RES GESTÆ—DECLARATIONS TO PHYSICIAN.**

Declarations of a person injured, made during experiments many months after the accident as to her physical condition, were not admissible as a part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 383-387; Dec. Dig. § 128.\*]

**4. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

The admission, in a personal injury action, of incompetent, self-serving statements of the person injured to physicians was reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.\*]

**5. EVIDENCE (§ 526\*)—EXPERTS—OPINIONS—CAUSE OF INJURIES.**

A physician may testify as to his opinion whether the injuries of plaintiff were, or might have been, caused by the fall of an elevator.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2336; Dec. Dig. § 526.\*]

**6. EVIDENCE (§ 539\*)—EXPERTS—OPINION—MACHINERY.**

In an action for injuries due to the fall of an elevator, evidence of expert mechanics, who testified as elevator experts, was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2349; Dec. Dig. § 539.\*]

**7. EVIDENCE (§ 553\*)—EXPERT TESTIMONY—HYPOTHETICAL QUESTIONS—FORM.**

The proper practice in examining an expert is to state hypothetically the case which it is believed has been proved, and to ask a question based thereon, and not to ask a question in the form of a recitation of actual facts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2369-2374; Dec. Dig. § 553.\*]

**8. EVIDENCE (§ 558\*)—OPINION EVIDENCE—CROSS-EXAMINATION—EXPERTS—DISCRETION OF TRIAL COURT.**

The cross-examination, in a personal injury action, of a physician for defendant as to the amount he received for testifying as an expert is largely within the trial court's discretion.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 558.\*]

Appeal from Branch Appellate Court, First District, on Appeal from Superior Court, Cook County; Arthur H. Frost, Judge.

Action by Mary Shaughnessy against George H. Holt. From a judgment of the Appellate Court (140 Ill. App. 572) affirming a judgment of the superior court for plaintiff, defendant appeals. Reversed and remanded.

Appellee recovered a judgment of \$7,500 in the superior court of Cook county for personal injuries alleged to have been sustained by her while a passenger in appellant's elevator, October 9, 1902. This judgment, on appeal, was affirmed by the Appellate Court, and the case is now appealed to this court. Appellee was employed as a stenographer on the twelfth floor of the Manhattan building, in Chicago, owned by appellant. The evidence in her behalf tended to show that she entered one of the elevators in that building on the ground floor to go to the twelfth floor, and that, as it passed the tenth floor, some one signaled for the car to stop, and the elevator man attempted to return to the tenth floor, but the car would not stop and went on down to the main floor, where it struck with a thud and rebounded a short distance. Appellant's testimony tended to show that appellee entered the car on the twelfth floor, and that the elevator descended to between the second and third floors, when the elevator man, as was his custom, tried to pull the operating cable, in order to reduce the speed before the car came in contact with the automatic stopping device at the main floor; that he found it impossible to move the cable, and that the car continued its descent at full speed, striking the automatic device and rebounding about a foot. In the meantime the safety dogs were released, and the car, after rebounding, was held about a foot above the floor. In order to prevent the blistering of their hands, the operators were accustomed to use short pieces of common garden hose around the operating cable. One of these had apparently fallen from the car, and become wedged between the cable and a grooved wheel around which it ran at the bottom of the shaft, thus preventing the proper operation of the machinery.

John E. Kehoe, F. J. Canty, and R. J. Follonle, for appellant. Burth & Keefe and Francis J. Woolley, for appellee.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

CARTER, J. (after stating the facts as above). Appellant contends that there was no valid declaration upon which a recovery could be had. Each of the first three counts of the original declaration, after stating the negligence, concluded, "by means whereof the plaintiff was then and thereby injured, as hereinafter set forth." The original fourth count, to which the quotation from the first three counts above given referred, was stricken out by order of court March, 1905, and the motion of appellee for leave to file an amended fourth count denied. It is insisted that the three remaining counts contained no allegation that appellee suffered injury to her person. On February 4, 1906, the appellee filed additional counts to the declaration. Such counts stated no new cause of action, but each merely alleged, in a more accurate and legal manner, the same damages that were averred in the original fourth count. It is insisted by the appellant that, the fourth count having been stricken, it was out of the case for all purposes (*Slack v. Harris*, 200 Ill. 98, 65 N. E. 669), and could not be used as a basis for the additional counts, or be made a part of the three original counts by reference. Under the authority of *North Chicago Street Railroad Co. v. Aufmann*, 221 Ill. 614, 77 N. E. 1120, 112 Am. St. Rep. 207, this fourth count furnished sufficient basis for the additional counts filed. After the count was stricken out, while no longer, in legal contemplation, a pleading in the case, it still remained on file as a part of the record. *Abbott v. Douglass*, 28 Cal. 295. It is a mere figure of speech to say that the count is stricken out. Even when a section of the statute has been held to be unconstitutional, it may still be considered with the other sections for the purpose of construction. *Baird v. Hutchinson*, 179 Ill. 435, 53 N. E. 567. The original fourth count was still a part of the declaration for reference purposes.

The appellee claims that, by reason of the violence with which the elevator struck and rebounded, the head of the tibia—the large bone of the lower part of the leg—was split or broken, and that the nervous shock produced insomnia and trouble with her eyes, and inability to detect sensations on part of her left leg; that the shock of striking at the bottom of the shaft caused a displacement of her female organs. Three physicians, who testified for appellee, stated that they had made tests on her person by taking two test tubes, putting hot water in one and cold water in the other, and that they touched with the test tubes different parts of her skin, and she did not always answer correctly which tube was hot and which was cold; that there was a lack of sensitiveness in one leg; that such symptoms showed a deterioration of her nervous system, indicating nervous prostration or neurasthenia. All of these physicians made their tests very shortly before the case was called for hearing, ap-

86 N.E.—17

parently for the purpose of testifying at such hearing. It is insisted by appellant that this testimony was based on self-serving statements of appellee, and was therefore incompetent and inadmissible. It is the established rule in this state that the declarations of the injured party in a case like this, when made as a part of the *res gestæ*, or to a physician during treatment, or upon an examination prior to, and without reference to the bringing of, an action to recover damages for the injury complained of, may be introduced in evidence. As to testimony along the line of that now in question, the authorities in this and other jurisdictions are collected and discussed in *Greinke v. Chicago City Railway Co.*, 234 Ill. 564, 85 N. E. 327, and it was there held that a physician, when called as a witness, who has not treated the injured party, but has examined him solely as a basis upon which to give an opinion in a trial to recover damages for the injury, cannot testify to statements made by the injured party to him or in his presence during such an examination, or base an opinion upon the statements of the injured party.

Counsel for appellee attempt to distinguish this case from those cited in the opinion just referred to, on the ground that in this case appellee was first asked on the witness stand if the answers she had given the physicians during these tests were true, and she replied that they were; that in the cases where expert testimony based upon subjective symptoms were held improper, such opinions were based upon the unsworn statements as to such subjective symptoms. Counsel misapprehend the basis of such decisions. The law admits in evidence the declarations of the injured party as to the physical condition given to a physician during treatment because it is presumed that the injured person will not falsify in his statements made to the physician, when he expects and hopes to receive medical aid, but no such presumption arises when he is examined by an expert for the purpose of giving evidence in a case about to be tried. The reasons for this distinction are fully set forth in the *Greinke Case*, *supra*, and must control here.

Counsel also attempt to argue that these statements were admissible as a part of the *res gestæ*. The *res gestæ* referred to under this rule relates only to the main fact or transaction. 24 Am. & Eng. Ency. of Law (2d Ed.) p. 663; *Globe Accident Ins. Co. v. Gerisch*, 163 Ill. 625, 45 N. E. 563, 54 Am. St. Rep. 486. This main fact in this case was the accident itself, and not the experiments as to appellee's physical condition many months after. Appellee was allowed to enhance her damages by proof of her own incompetent, self-serving statements, to what extent it is impossible to judge. We think the admission of this testimony was reversible error. *Chicago & Eastern Illinois Railroad Co. v. Donworth*, 203 Ill. 192, 87 N. E. 797; *West Chicago Street Railroad Co. v.*

Carr, 170 Ill. 478, 48 N. E. 992; Chicago Union Traction Co. v. Glese, 229 Ill. 260, 82 N. E. 232; Consolidated Traction Co. v. Lambertson, 60 N. J. Law, 452, 38 Atl. 683.

Appellant also insists that the trial court erred in permitting physicians to express an opinion whether the injuries of appellee were or might have been caused by the fall of the elevator. Our views on these questions have been fully set forth in the recent decisions of City of Chicago v. Didler, 227 Ill. 571, 81 N. E. 698, City of Chicago v. McNally, 227 Ill. 14, 81 N. E. 23, City of Chicago v. Bork, 227 Ill. 60, 81 N. E. 27, Chicago Union Traction Co. v. Ertrachter, 228 Ill. 114, 81 N. E. 816, and Chicago Union Traction Co. v. Roberts, 229 Ill. 481, 82 N. E. 401. It would unnecessarily extend the length of this opinion to discuss here the contentions of counsel on this point. What we have said in those cases will serve as a sufficient guide in the further proceedings in this case.

We think the testimony of the expert mechanics who testified as elevator experts, as we understand this record, was admissible. Camp Point Manf. Co. v. Ballou, 71 Ill. 417; Slack v. Harris, supra; Lawson on Expert and Opinion Evidence (2d Ed.) 74.

The appellant also insists that reversible error was committed in permitting counsel for the appellee to ask experts questions in the form of a recitation of actual facts, and not by putting the questions in a hypothetical manner. Pyle v. Pyle, 158 Ill. 289, 41 N. E. 999. We think there is some basis for this contention. The proper practice is to state hypothetically the case which the attorney thinks has been proved and ask a question based upon such hypothetical case. Elgin, Aurora and Southern Traction Co. v. Wilson, 217 Ill. 47, 75 N. E. 436.

Appellant further insists that the court improperly allowed counsel for appellee to cross-examine one of appellant's physicians as to the amount he received for testifying as an expert. Such matters are largely within the sound discretion of the trial court. Kerfoot v. City of Chicago, 195 Ill. 229, 63 N. E. 101. We do not think this discretion was abused in this instance.

For the reasons indicated in permitting certain physicians to give answers based upon self-serving statements of appellee, the judgments of the Appellate and circuit courts will be reversed, and the cause remanded to the circuit court for further proceedings in harmony with the views herein expressed.

Reversed and remanded.

(236 Ill. 499)

**BURNETT et al. v. POTTS.**

(Supreme Court of Illinois. Oct. 26, 1908.  
Rehearing Denied Dec. 4, 1908.)

**1. BROKERS (§ 49\*)—COMPENSATION.**

An agreement authorizing a sale of real estate for a net amount to the owners, the per-

son making the sale to have, as compensation what he could get above that amount, entitled him to no compensation for making a sale, until the owners received the net amount stipulated, unless a failure to do so was due to their own fault.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 70; Dec. Dig. § 49.\*]

**2. VENDOR AND PURCHASER (§ 3\*)—SALE DISTINGUISHED FROM AGENCY.**

An agreement authorizing a sale of real estate for a net amount to the owners, the person making the sale to have, as compensation, what he could get above that amount, did not constitute the relation between the parties that of vendor and purchaser, but created the relation of principal and agent, and the broker had no right to retain an amount paid on the purchase price on subsequent default of the purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 3; Dec. Dig. § 3.\*]

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, Sangamon County; James A. Creighton, Judge.

Assumpsit by Sarah J. Burnett and others against Rufus M. Potts. From a judgment of the Appellate Court affirming a judgment of the circuit court for plaintiffs, defendant appeals. Affirmed.

Graham & Graham, for appellant. Albert Salzenstein and Jno. L. King, for appellees.

VICKERS, J. Sarah J. Burnett and others brought this action of assumpsit in the circuit court of Sangamon county against Rufus M. Potts to recover \$1,000, and the interest thereon, for money had and received by Potts to the use of plaintiffs. A jury was waived by agreement of the parties, and a trial had before the court, resulting in a finding and judgment in favor of the plaintiffs below for \$1,117.95. This judgment has been affirmed by the Appellate Court for the Third District, and Potts has brought the record to this court by his further appeal.

The case is this: Appellees were the owners of 417.72 acres of land in Christian county, which they authorized appellant to sell for \$35,000 net cash to appellees, appellant to have as compensation all that he could sell the land for over \$35,000. The agency contract was in writing, and contained the terms upon which a sale could be made. Appellant made a contract of sale of the premises with Thomas C. Bowman for \$37,500, \$1,000 of which was paid to appellant at the time the contract was executed, the balance to be paid at different times between the date of the contract and the 1st of March following. Appellees furnished an abstract showing a merchantable title, and executed a deed and deposited it in escrow with the First National Bank of Taylorville, to be delivered to the purchaser when the \$35,000 was paid to the bank for the use of appellees. Bowman made default under his contract, and never paid anything on it except the \$1,000. After the time had ex-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes

pired in which Bowman was to pay for the land, appellees withdrew their deed from the bank, and the contract was rescinded. This suit is brought against appellant to recover the \$1,000 paid to him by Bowman.

Appellant claims that he has a right to retain this \$1,000 as commission for making the sale and to reimburse him for expenses incurred in connection with his efforts to effect the sale. The money sued for was paid to appellant in his capacity as agent for the owner. The money at no time belonged to appellant, as between him and his principals. Appellant was not entitled to any compensation for making this sale until appellees received the \$35,000, unless their failure to so receive it was the result of their own fault. That it was not the fault of appellees is determined against appellant by the affirmation of this judgment by the Appellate Court.

Appellant contends that under the agreement between the parties the relation was in the nature of that of vendor and purchaser, and that appellant was part owner of the funds paid by Bowman, and should be allowed to retain his share of the \$1,000. We cannot agree with this contention. Appellant was not a part owner either in the land or the proceeds of a sale thereof, should one be made. Appellees were entitled to \$35,000 before appellant would have any right to compensation. Since his right to any compensation did not arise under the contract until appellees were paid \$35,000, it necessarily follows that the first \$35,000 paid on the contract would belong to appellees. Appellant would have no interest in this fund. If he sold for a sum exceeding \$35,000, the excess would belong to him. As to such excess appellant could make any terms he might see proper, and any contract he might make in regard to such excess he would make, not as agent, but for himself. The \$1,000 in question in this case must be regarded, as between the parties to this suit, as a part payment of the \$35,000 due to appellees, in which appellant had no interest.

Robinson v. Easton, 93 Cal. 80, 28 Pac. 796, 27 Am. St. Rep. 167, and Warvelle on Vendors, § 237, are cited by appellant in support of the proposition that a contract such as the one made by the parties to this suit creates the relation of vendor and vendee. The California case seems to sustain appellant's contention, but the case in this regard is not based upon any authority, and we do not regard it as sound upon principle. What is said by Warvelle on this subject is based entirely on this California case. Contracts such as the one in question have always been regarded by this court as creating the relation of principal and agent. Pierce v. Powell, 57 Ill. 223; Evans v. Hughey, 76 Ill. 115. Such contracts differ from the usual agency contract, where the compensa-

tion of the agent is a per cent. of the price at which the sale is made, only in that the compensation is contingent upon the agent's obtaining more for the land than the owner has agreed to accept. If appellant had sold this land for \$35,000, he would have been compelled to turn the entire proceeds over to his principals. We do not see upon what legal grounds he can be allowed to retain any part of the purchase money when only \$1,000 has been paid.

The rulings of the court below on the several propositions of law submitted by appellant were in accordance with the views that we have herein expressed.

There being no error in the record, the judgment of the Appellate Court is affirmed. Judgment affirmed.

(236 Ill. 255)

#### KIRBY et al. v. KIRBY et al.

(Supreme Court of Illinois. Oct. 26, 1908. Rehearing Denied Dec. 2, 1908.)

#### 1. DEEDS (§ 59\*)—VALIDITY—DELIVERY—EVIDENCE—RECORDING.

Though the recording of a deed by the grantor is prima facie evidence of delivery, this may be rebutted, and, where the grantees did not know that the deed was not recorded until some years thereafter, when he agreed to reconvey for the convenience of the grantor, and had never seen the deed or known of it, or had possession of the land, there was no delivery of the deed so as to pass any beneficial interest to him.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 138; Dec. Dig. § 59.\*]

#### 2. DEEDS (§ 8\*)—CONSTRUCTION—ESTATE CONVEYED.

A purported conveyance of a wife's land to another having conveyed no title, a reconveyance by the grantee to the husband after the wife's death conveyed no title to the husband.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 13, 408; Dec. Dig. § 8.\*]

#### 3. WITNESSES (§ 150\*)—COMPETENCY—PARTIES AGAINST WHOM TESTIMONY IS EXCLUDED—HEIRS.

In a suit by a widow claiming the fee in one-half of a tract conveyed by her husband to another, who reconveyed to her and her husband, she claiming under the reconveyance, the children of the husband by his second wife, who were defendants and claimed as heirs, were incompetent to testify against his children by his first wife and by plaintiff, they also claiming as heirs, as to statements made by the father during life to the effect that the land was their mother's, and they would get it.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 655; Dec. Dig. § 150.\*]

#### 4. WITNESSES (§ 148\*)—COMPETENCY—PARTIES AGAINST WHOM TESTIMONY IS EXCLUDED.

The children of the husband by his second wife were competent to testify against plaintiff, his widow; she not claiming as heir, but through a conveyance from a third party.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 148.\*]

#### 5. ADVERSE POSSESSION (§ 62\*)—HOSTILE CHARACTER—AGAINST HEIRS—POSSESSION BY THE FATHER.

Land owned by a wife was conveyed to another without the latter's knowledge and after

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the wife's death. The grantee thereafter reconveyed to the husband at his request, but, the original deed never having been delivered, the reconveyance passed no title to the husband, he having only his homestead and dower interest therein. Thereafter he continued to occupy the land, though dower was never assigned, received the rents, made improvements, paid the taxes, and placed several mortgages on it, and attempted to trade it, but the trade was abandoned. At his wife's death, their two children were mere babies, and did not reside with him until they were 15 years old. The daughter married thereafter, but the son continued to live with his father, farming the land on shares. The children had no knowledge during that time of the alleged conveyance by their mother, the reconveyance to their father, or of the mortgages or attempted trade, and there was some evidence of declarations by him that the children owned the land. No guardian was ever appointed for the children, and their relations to their father were always affectionate. *Held*, in view of the relation of the parties, that the father's continued possession of the land was not adverse to the children under a claim of ownership.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 62.\*]

**6. ADVERSE POSSESSION (§ 62\*)—CHARACTER OF POSSESSION—POSSESSION AGAINST HEIRS BY SURVIVING HUSBAND.**

Where a surviving husband occupied land under his right of homestead and dower, though his dower was never assigned, it would require acts of the most unequivocal character to render his possession adverse to his children who inherited the fee.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 329; Dec. Dig. § 62.\*]

**7. ADVERSE POSSESSION (§ 114\*)—EVIDENCE—SUFFICIENCY.**

One claiming by adverse possession must prove by clear and positive evidence that he claimed the exclusive possession of the land openly and adversely to the true owner.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682, 688; Dec. Dig. § 114.\*]

**8. ADVERSE POSSESSION (§ 60\*)—HOSTILE CHARACTER—CONSISTENT WITH THAT OF THE TRUE OWNER.**

Where a possession is consistent with, or in submission to, that of the true owner, only a clear, unequivocal, and notorious disclaimer and disavowal of the owner's title, of a character so manifest that knowledge will be presumed, will render such possession adverse, however long continued, unless there is actual notice of the adverse claim.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 288, 290; Dec. Dig. § 60.\*]

**9. ADVERSE POSSESSION (§ 112\*)—PLEADING—BURDEN OF PROOF.**

The burden of proving adverse possession is on the one alleging it.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 661; Dec. Dig. § 112.\*]

**10. EVIDENCE (§ 265\*)—ADMISSION—WEIGHT—EFFECT OF RELATIONSHIP OF PARTIES.**

Where one continued to occupy land after his wife's death under his homestead and dower right, though the evidence was slight as to statements by him that his possession was subordinate to that of his children, it is entitled to greater weight as evidence against his claim of adverse possession against the children than if the relation of the parties was otherwise.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1033; Dec. Dig. § 265.\*]

**11. EVIDENCE (§ 277\*)—DECLARATIONS AGAINST INTEREST—INTEREST AND SUBJECT-MATTER.**

Declarations made by one occupying land under his right of dower and homestead that he did not claim to own the land were admissible against his widow, who claimed the fee through him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1136; Dec. Dig. § 277.\*]

**12. ADVERSE POSSESSION (§ 45\*)—CONTINUITY OF POSSESSION—SUSPENSION OF LIMITATIONS.**

Declarations by one residing on land under his right of homestead and dower that he did not claim to own the land would prevent the running of the statute so as to bar his claim by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 45.\*]

**13. ADVERSE POSSESSION (§ 11\*)—HOSTILE POSSESSION—ACQUISITION OF RIGHTS—INTENTION.**

The intention with which possession is taken or held is material in determining whether it is adverse, and there must be an intention to claim title in derogation of the true owner.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 67-76; Dec. Dig. § 11.\*]

**14. ADVERSE POSSESSION (§ 12\*)—COLOR OF TITLE—CLAIM UNDER INSTRUMENTS—NECESSITY.**

Possession and claim of ownership under a muniment of title is not essential to title by adverse possession, but there must be a claim of ownership, and such acts, under possession, as to show a claim of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65, 66, 387-393; Dec. Dig. § 12.\*]

**15. ADVERSE POSSESSION (§ 84\*)—REQUISITES—TITLE IN GOOD FAITH.**

Statute of Limitations, § 6, requires possession for seven years under claim and color of title made in good faith; and, while it is not necessary that the holder of the title be ignorant of other claims under different titles, it is essential that his title was obtained in good faith.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 488; Dec. Dig. § 84.\*]

**16. ADVERSE POSSESSION (§ 85\*)—EVIDENCE—SUFFICIENCY—GOOD FAITH IN OBTAINING TITLE.**

In a suit by one claiming land through the adverse possession of her predecessor, the evidence *held* to show that the paper title under which the latter held was not obtained by him in good faith so as to support his title under the statute of limitations.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 85.\*]

Appeal from Circuit Court, Champaign County; Salon Philbrick, Judge.

Action by Frances S. Kirby and others, against Ellsworth Kirby and others, in which a part of defendants filed a cross-bill. From a decree for complainant dismissing the cross-bill, the cross-complainants appeal. Reversed and remanded, with directions.

This suit originated by Frances S. Kirby, widow of Joshua Kirby, deceased, filing a bill for the partition of certain real estate. The bill alleged Joshua Kirby died intestate, seized in fee simple of the undivided one-half of the N. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  and

the N.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  of section 18, town 20 N., range 10 E., of the Third principal meridian, in Champaign county, Ill. The bill alleged that complainant was the owner of the other undivided one-half, and prayed for partition and for the assignment of homestead and dower to the complainant in the undivided one-half alleged to have been owned by her deceased husband.

Joshua Kirby had been married three times. By the first wife he had one son, who survived him. By the second wife he had a son and daughter, Ellsworth Kirby and Dora Trickle, who survived him. By the third wife, complainant in the original bill, he had seven children, who survived him, one of whom was born after his death. All of these children were made defendants to the original bill, as were also John R. Trevett and the Mutual Benefit Life Insurance Company, as mortgagees.

Ellsworth Kirby and Dora Trickle, children of Joshua Kirby, deceased, by his second wife, Mary E. Kirby, filed their answer to the bill, denying that complainant in the original bill owned any interest in the lands in the said bill described, and denying also that their deceased father owned any interest in the fee of said lands, but alleged that said lands were owned in fee by their mother, Mary E. Kirby, at the time of her death, and that said lands descended to them, the said Ellsworth Kirby and Dora Trickle, from their mother in fee simple. The answer alleged that the only interest Joshua Kirby had in said lands was as surviving husband of Mary E. Kirby, deceased; that said interest ceased at his death; and that complainant was not entitled to either homestead or dower in said premises.

John R. Trevett answered the original bill and filed a cross-bill, alleging that Joshua Kirby and Frances S. Kirby owned the land in fee simple, and as such owners in October, 1902, executed to complainant in the cross-bill a trust deed on said lands to secure the payment of a note for the sum of \$2,000, payable to Wallace P. Spalding two years after date, and prayed for the foreclosure of the trust deed. The Mutual Benefit Life Insurance Company filed an answer to the original bill, and set up its interest in the lands, as mortgagee, of Joshua and Frances S. Kirby, to secure the payment of a note executed by them for the sum of \$8,000. Ellsworth Kirby and Dora Trickle filed a cross-bill in which they alleged that their mother, Mary E. Kirby, became the owner of the premises sought to be partitioned in 1876 by or from Peter Arie and wife, and that she owned the same at the time of her death, which the cross-bill alleges occurred August 15, 1879. The cross-complainants further alleged that on the 1st day of October, 1877, a deed was filed for record in the recorder's office in Champaign county purporting to have been executed by their mother and Joshua Kirby,

her husband, dated October 1, 1877, to John J. Kirby, a brother of Joshua; that said deed purported to convey to said John J. Kirby the N. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  and the N. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 18, part of the premises described in the original bill; that said deed was recorded in record book 41 of the deed records of said county; that afterwards, on the 15th of February, 1882, there was filed for record in said recorder's office a deed purporting to be executed by Mary E. Kirby and Joshua Kirby to John J. Kirby, bearing date October 1, 1877, purporting to convey to said John J. Kirby the N. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  of section 18, being all of the premises described in the original bill, and that this deed was also recorded in the deed records of the recorder's office; that these matters occurred during the infancy and without the knowledge of the cross-complainants. The cross-bill alleges that no deed from Mary E. Kirby conveying any portion of said premises to John J. Kirby was ever delivered to him; that he paid no consideration therefor, and had no knowledge that such deed had been made and recorded until after the death of Mary E. Kirby; that John J. Kirby never claimed any interest in said premises, and never accepted the deeds therefor and had nothing to do with their recording, and that said deeds are therefore invalid and of no effect, and are clouds upon the title of cross-complainants. The cross-bill further alleges that, two years after the death of Mary E. Kirby, John J. Kirby was informed by Joshua Kirby of the making and recording of the deed to him and requested to convey the premises to the said Joshua Kirby, which he did without any consideration whatever, and that said deed conveyed no title to Joshua Kirby, and is a cloud upon the title of the cross-complainants. Said cross-complainants further allege that they were infants of tender years, and had no knowledge of these things until after the death of their father. The cross-bill prays for partition of the premises between the cross-complainants, and that a decree be entered that Frances S. Kirby and her children and the son of Joshua Kirby by his first wife have no title to or interest in said premises.

Answers were filed by the defendants to the cross-bill, and the cause was referred to the master in chancery to take the testimony upon the original and cross-bills, with directions to report his conclusions of law and fact thereon. After hearing the testimony, the master reported recommending that a decree be entered according to the prayer of the original bill and the cross-bill of Ellsworth Kirby and Dora Trickle be dismissed for want of equity. Objections to the master's report were overruled by him, and were renewed as exceptions before the chancellor. Said exceptions were overruled, and a decree entered in accordance with the recommenda-

tions of the master in chancery, from which appellants Ellsworth Kirby and Dora Trickle have prosecuted this appeal.

Ray & Dobbins and Schneider & Schneider, for appellants. Frank H. Boggs (George W. Gere, A. D. Mulliken, and C. M. Matthews, of counsel), for appellees.

FARMER, J., (after stating the facts as above). The proof shows the conveyance by deeds of two of the tracts of land described to Joshua Kirby in March, 1874, and of the other one in February, 1875. December 23, 1876, Joshua Kirby and his wife, Mary E., conveyed the premises to Peter Arle, and on the same day Peter Arle and wife conveyed them back to Mary E. Kirby. The proof does not disclose any reason for those deeds having been executed. On the 1st day of October, 1877, the records of the recorder's office show a deed bearing that date from Joshua Kirby and wife, Mary E., to John J. Kirby, was filed and recorded. The record shows the land conveyed by this deed was the N. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  and the N. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ . The N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ , which is a part of the land in controversy, is not mentioned in said record. What is known as an "entry book" in the recorder's office contains a memorandum of the names of the grantor and the grantee, the date of the instrument, and of its filing October 1, 1877, and the property described as the N. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  and the N. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ , and that the deed was delivered to Joshua Kirby February 13, 1882. The book known as a "grantors' index" contains substantially the same memoranda as the entry book, except it does not show when and to whom the deed was delivered, and the land conveyed is described in that book the same as in the record and the entry book. The grantees' index is the same as the grantors' index, except that the names of the grantor and grantee are reversed in their order, and it described the land conveyed the same as the record, the entry book, and the grantors' index. There is a notation on the margin of the record of the deed, which reads as follows: "See 41 of deeds for re-recording to correct description.—Filed Feb. 15, 1882." On page 470 of the same record is the record of a deed dated October 1, 1877, signed by Mary E. Kirby and Joshua Kirby, purporting to convey to John J. Kirby the N. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$ . It will be seen this includes the 40 acres omitted from the description in the record and books previously mentioned. On the 13th of February, 1882, which is the same date the entry book shows the deed was delivered to Joshua Kirby, John J. Kirby executed a deed to Joshua Kirby purporting to convey to him the N. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$ . This deed was filed for record February 27, 1882. On January

29, 1902, Joshua Kirby and wife conveyed all of said premises to a man by the name of Larry, and August 5th of the same year Larry conveyed said premises to Joshua and Frances S. Kirby, his wife. It is by virtue of this conveyance that the widow claims to own the undivided one-half in fee.

Appellants contend that the deed from Mary E. Kirby and Joshua Kirby to John J. Kirby was never delivered; that it was made and left for record without the knowledge and consent of the grantee; and that said grantee was ignorant of the fact that it had been made and left for record until long after the death of Mary E. Kirby. John J. Kirby was a witness in the case, and testified that Mary E. Kirby never said anything to him about the deed, and that his brother, Joshua, never mentioned it to him until after the death of Mary E., when he told him the deed had been made and asked if he would convey it back to him; that he replied to his brother that he would do so, that it was nothing to him; that, when his brother brought a deed to him to sign, he signed and acknowledged it at his brother's request. He further testified he never saw the deed made by Mary E. and Joshua Kirby to him; that he never heard anything about any mistake in the description of the land or of the refilling or the re-recording of the deed. It is apparent that the conveyance to John J. Kirby was never intended to vest any beneficial interest to the land in him. The recording of a deed by the grantor has been held to be prima facie evidence of delivery. But this is subject to be rebutted, and this was done by the testimony of John J. Kirby. He was never in possession of the land under the conveyance, and never received any benefit from it. Mary E. Kirby and Joshua Kirby remained in control and possession of the land until the death of Mrs. Kirby, and Joshua continued in such possession until the conveyance to him from his brother, John J. In *Sullivan v. Eddy*, 154 Ill. 199, 208, 40 N. E. 482, 485, this court said: "When the deed is for his [the grantee's] benefit, under certain circumstances acceptance may be presumed, but not necessarily. Even in the cases which treat the act of recording as prima facie evidence of a delivery, it is held that such evidence is successfully rebutted by showing that the conveyance was intended to confer no benefit upon the grantee." In *Slattery v. Keefe*, 201 Ill. 483, 486, 66 N. E. 385, 386, we said: "The execution and recording of a deed by the grantor is only prima facie evidence of a delivery, and liable to be rebutted by showing, among other things, that the conveyance was intended to confer no benefit upon the grantee." Other cases will be found cited in the two cases referred to, which sustain the contention of the appellants that the deed to John J. Kirby vested no title or interest in him.

The appellees contend that, even if this be true, Joshua Kirby acquired title by limitation, and they rely both upon 20 years' adverse possession and also 7 years' possession under claim and color of title obtained in good faith. We are of opinion their title cannot be sustained upon either of these claims. It is not shown by the evidence what reasons Mary E. Kirby and Joshua Kirby had for making the deed to John J. Kirby nor the purposes sought to be accomplished by it. Whatever the motive may have been, under the facts as disclosed by the evidence in this record, the grantee in that deed acquired no interest in the land, but the equitable title remained in Mary E. Kirby, and the deed from John J. Kirby, after her death, to Joshua Kirby, invested in him no title to or interest in the land. As the surviving husband of Mary E. Kirby he was entitled to an estate of homestead and dower in said premises, and this was the extent of his interest in them. The proof shows he continued to occupy the lands and receive the rents and profits therefrom until his death, which occurred in 1906. During this time he made some repairs to the improvements on the land and paid the taxes thereon. There is no proof in the record that the appellants had any actual knowledge of the conveyance from their mother to John J. Kirby, nor of any of the conveyances made subsequent to that time. After their mother's death, they resided with their grandfather until they were about 15 years of age, when they went to reside with their father on the land in controversy. The daughter, a few years later, married a man named Trickle, and Ellsworth continued to reside with his father. For a number of years he farmed a part of the land; his father furnishing teams and implements and Ellsworth receiving one-fourth of the crops he raised. In addition to occupying the premises and making some repairs to the improvements thereon, Joshua Kirby placed a number of mortgages on the land during his lifetime. In 1902, when the conveyance was made by him and his wife, Frances S., to Larry, it appears that it was made in a trade with Larry for lands in Jefferson county, Ill. This trade afterwards was abandoned, and Larry conveyed the lands, as we have above stated, to Joshua and Frances S. Kirby. Before making this conveyance, and while he had the title to the land, Larry placed a mortgage on it for \$3,000, and, when he conveyed it back to the Kirbys, they mortgaged it for the same amount for money to pay off the mortgage Larry had made on the premises. The Kirbys made two mortgages—one for \$6,000 and one for \$2,000—and these are the mortgages held by Trevett and the Mutual Benefit Life Insurance Company. The acts of Joshua Kirby in retaining possession of the land, receiving the rents and profits therefrom, mortgaging the premises and proposing to

trade them for other lands are acts relied upon by appellees to establish their claim that he held the land adversely to appellants. There is no proof in the record that appellants had any actual knowledge of any of the mortgages or of the proposed trade with Larry.

The master permitted appellants, over the objections of appellees, to testify as witnesses in the case. So far as we can find, no ruling of the court was made upon their competency. They testified to a number of statements made by their father in his lifetime, to the effect that the land was their mother's and that they would get it eventually, and gave their reasons for not asserting their right during the lifetime of their father. They also testified of their ignorance of any claim of their father to be the owner of the land. In our opinion they were not competent witnesses against the children of their father by Frances S. Kirby and his first wife, but they were competent as against said Frances S. Kirby. She neither sued nor defended as heir. A Mr. Parsons and his wife testified that after the death of Mary E. Kirby Joshua Kirby told them she owned 40 acres of the land. Albert Kirby, a brother of Joshua, testified that he heard Joshua on Saturday before he died tell Ellsworth the farm was in his mother's name. Alex Funkhouser testified he had known Joshua Kirby since 1859 and knew his wife Mary E., and that he was in the office of Larry & Larry, who were in the real estate business in Champaign, and met Joshua Kirby there; that they were trying to make some kind of settlement about a land trade; that Joshua Kirby had tried to sell or trade his land to Larry & Larry, but there appeared to be some dissatisfaction and that Kirby could not make a deed; that Kirby said to the witness, "You know why I can't," and the witness replied, "Is that the trouble?" and that what the witness referred to was the fact that the deed had been made to Mary E. Kirby.

We do not think, under the circumstances of this case and the relation of the parties to each other, that appellees have established title in Joshua Kirby by 20 years' adverse possession. As the surviving husband of Mary E. Kirby, Joshua Kirby had an estate of homestead in the premises, and had a right to reside thereon. He was also entitled to dower in the residue of the land. While his dower was never assigned, yet the fact that he had a right of dower and homestead in the premises, and the further fact that the owners of the fee were his children, would require acts on his part of the most unequivocal character to render this possession adverse to his children. In *Zirngibl v. Calumet Dock Co.*, 157 Ill. 430, 42 N. E. 431, it was held that the adverse possession required to constitute a bar to the assertion of the legal title by the owner must be "hostile or adverse, actual, visible, notorious and exclu-

alive, continuous, and under a claim or color of title." The same rule was announced in *Downing v. Mayes*, 153 Ill. 330, 38 N. E. 620, 46 Am. St. Rep. 896, and many other cases to be found in our Reports. From the earliest decision in this state to the present time, it has been held that a party claiming title by adverse possession must prove his possession was adverse to the true owner by clear and positive evidence. This cannot be established by inference, but the proof must show clearly that the party in possession claimed the land as his own openly and exclusively. In *White v. Harris*, 206 Ill. 584, 592, 69 N. E. 519, 522, this court said: "A party claiming title by adverse possession always claims in derogation of the right of the real owner. He admits that the legal title is in another. He rests his claim, not upon a title in himself as the true owner, but upon holding adversely to the true owner for the period prescribed by the statute of limitations. Claiming a benefit from his own wrong, his acts are to be construed strictly." *Cornellus v. Giberson*, 25 N. J. Law, 81. 'Adverse possession cannot be made out by inference or implication, for the presumptions are all in favor of the true owner, and the proof to establish it must be strict, clear, positive and unequivocal.' *Zirngibl v. Calumet Dock Co.*, 157 Ill. 430, 42 N. E. 431. The rule is that every presumption will be made in favor of the holder of the legal title, and no presumption will be made in favor of the holder of color of title only."

In *Hunter v. Dennis*, 112 Ill. 568, George Dennis, owner of the land, had in his lifetime conveyed it by deed to Black to secure a loan. He died before paying the loan and securing to himself a conveyance of the land. After his death his widow paid the loan, and Black made her a deed conveying to her the premises. The widow had one child, a daughter, by George Dennis, who was a minor when her father died. The widow and daughter lived upon the premises until the daughter's marriage, and after the marriage the daughter and husband continued to live with the widow until the daughter's death, in 1880. She left five children surviving her. The deed from Black to the widow of George Dennis was made in 1854, and in 1882 the children of the daughter, as the legal heirs of George Dennis, deceased, filed a bill in chancery to have the deed from their grandfather to Black declared a mortgage, and for partition of the land, and for an accounting. The widow relied for her defense upon the statute of limitations. The trial court dismissed the bill filed by the heirs, and this decree was reversed, this court holding that, as the widow had a homestead and dower right in the premises, although her dower had not been assigned, her possession was not adverse. In *De Witt v. Shea*, 203 Ill. 393, 67 N. E. 761, 96 Am. St. Rep. 311, the widow of a deceased owner occupied and lived upon lands for more than

40 years after the death of her husband, and it was held this possession was not adverse. In *Musham v. Musham*, 87 Ill. 80, and *Riggs v. Girard*, 133 Ill. 819, 24 N. E. 1031, it was held that the occupation by a widow of lands of her deceased husband in which she had right of homestead and dower, however long continued, could not be regarded as adverse to the heirs. The statute under which the dower right accrued in these cases gave the widow the right to the possession of the dwelling house and the plantation thereto belonging until the assignment of her dower. This was called the widow's quarantine, and was abolished by the act of 1874. In *Reuter v. Stuckart*, 181 Ill. 529, 54 N. E. 1014, a bill was filed by a surviving husband for the assignment of homestead and dower in real estate alleged to have been owned by complainant's deceased wife at the time of her death. The deceased wife of complainant was a widow when he married her, and her former husband, by whom she had five children, was the owner of the premises, and at the time of his death, December 29, 1874, the family resided on the premises in controversy. The bill alleged that complainant's deceased wife had been in the adverse possession of the premises continuously since 1876 to her death, in 1897, and that during all that period the heirs of the former husband of complainant's wife had done nothing whatever to assert title to the land. The court said in that case (page 543 of 181 Ill., page 1018 of 54 N. E.): "We have held that the possession by the widow, under her statutory right, of the dwelling house and land, is not adverse to the title of the heirs, but is entirely consistent and in harmony with such title. [Citing cases.] It follows that in this case Mrs. Reuter acquired no title by an adverse possession of twenty years." See, also, 1 Cyc. 1051.

At the time of the death of Mary E. Kirby appellant Ellsworth Kirby was less than two years old and Dora Trickle less than one year old. They were taken by their grandparents and resided with them until after their father's marriage to the present widow, and when they were about 15 years of age they went to reside with their father. No guardian appears to have been appointed for them. There is nothing in this record to show that there ever existed any other than affectionate and filial relations between appellants and their father. Until they were of age, they could not have assigned dower to their father except by a proceeding in court by guardian or next friend. If during their minority, and also after becoming of age, they were willing their father should occupy and receive the income from the land rather than embarrass him or disturb the family relations existing by dispossessing him of part of the premises, this alone would not defeat their right to claim the land after their father's death. So far as this record shows, the failure of

appellants to assert their title before their father's death was on account of their relation to and their regard for him. The only thing the father ever did to indicate that he claimed to be the owner of the land was the procuring the deed from John J. Kirby to be made to himself and subsequently mortgaging the premises and endeavoring to trade them for other lands. As we have before stated, there is no evidence that appellants ever had any actual knowledge of these facts, and we do not think it can be held that they were bound to know of these acts of their father because the conveyances were recorded. All the verbal declarations proven to have been made by Joshua Kirby prior to his death tend to show that he recognized that his deceased wife, Mary E., was the owner of a part or all of the land, and his last declaration on this subject proven was made only a few days before his death. While the naked legal title of record appeared to be in Joshua Kirby, upon the strength of which he was able to procure credit by mortgaging the land, he was bound to know that the equitable title never passed out of Mary E. Kirby by the conveyance to John J. Kirby, and that after her death John J. Kirby could not convey the title to him. There was no proof that Joshua Kirby's possession was hostile in its inception, and nothing was done by him upon the death of his wife to indicate any change in the character of his possession. So far as shown, he continued in possession, neither doing nor saying anything, aside from the conveyances mentioned, to give any notice that he claimed the land adversely to his children, or that he claimed possession by any other right than that of surviving husband of his deceased wife. In the absence of clear and positive proof to the contrary, in view of the relations of the parties, his possession of that portion of the premises not included in the homestead would be presumed to be permissive and not adverse. 1 Am. & Eng. Ency. of Law (2d Ed.) 821. "And, where the possession had been consistent with or in submission to the title of the real owner, nothing but a clear, unequivocal, and notorious disclaimer and disavowal of the title of such owner will render the possession, however long continued, adverse." *Rigg v. Cook*, 4 Gilman, 336, 46 Am. Dec. 462. In such cases notice of the adverse claim would have to be actual or the hostile character of the possession so manifest and notorious that notice would be presumed, and the burden is on the party alleging the adverse possession to prove it. The proof further shows, as we have seen, that Joshua Kirby made declarations inconsistent with a claim of adverse possession. Most of such declarations proven, it is true, were made to and proven by appellants, whose testimony is only competent to be considered against the claim of Frances S. Kirby, but there was proof of declarations by Joshua

Kirby inconsistent with the claim of adverse possession, made by other witnesses. It may be admitted it was slight proof; but, as it tended to show that Joshua Kirby recognized the title of appellants and that his possession was subordinate thereto, it is entitled to greater weight than would be the case if the parties occupied different relations toward each other. As to the interest claimed by Frances S. Kirby, the proof is abundant and conclusive that Joshua Kirby made frequent declarations that he did not claim to own the land. Such declarations are competent evidence and prevent the running of the statute. *Beecher v. Parmele*, 9 Vt. 352; 31 Am. Dec. 633; *Deming v. Carrington*, 12 Conn. 1, 30 Am. Dec. 591. The intention with which possession is taken or held is a material factor in determining whether it is adverse. There must be an intention to claim title as owner, in derogation of the rights of the true owner. *McNamara v. Scaton*, 82 Ill. 498; *Ewing v. Burnett*, 11 Pet. 41, 9 L. Ed. 624; 1 Am. & Eng. Ency. of Law (2d Ed.) 798.

We think the proof warrants the conclusion that the deed from Mary E. and Joshua Kirby to John J. Kirby described only two of the tracts of land in controversy and that the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  was omitted from the description contained in said deed, and that the deed was altered after it was recorded, and after the death of Mary E. Kirby, so as to include the last-mentioned tract of land, and after being so altered was re-recorded. To acquire title by adverse possession, it is not necessary that the possession and claim of ownership be made under any muniment of title, but there must be a claim of ownership and such acts under possession as to show that the party in possession in fact claimed title to the land. It may be that the facts proven in this case would warrant the conclusion, as against anybody else than his children who claim the title, that his possession was adverse, but as against his children, who own the fee subject to his homestead and dower, his possession cannot be held to be adverse.

Neither can title in Joshua Kirby be sustained under section 6 of the statute of limitations. That section requires possession, under claim and color of title made in good faith, for seven successive years, and the payment of taxes on the premises during that period. It is an essential element of title under that section that it should have been acquired in good faith. The holder of the title need not be ignorant of the fact that some one else claims title to the premises through some other source, but it is necessary that his title, from whatever source derived, should be obtained in good faith. What we have already said conclusively shows that the paper title by virtue of which Joshua Kirby claimed to own the land was not obtained by him in good faith.

Appellants do not contest the right of the

mortgagees, made parties defendant to this proceeding, to have their mortgage liens preserved and satisfied out of the premises, but concede that said mortgagees are entitled to that relief.

The decree of the circuit court is therefore reversed and the cause remanded, with directions to that court to deny the relief prayed in the original bill, and to enter a decree in favor of the complainants in the cross-bill, in accordance with the views herein expressed.

Reversed and remanded, with directions.

(236 Ill. 349)

**VENNER v. CHICAGO CITY RY. CO. et al.**

(Supreme Court of Illinois. Oct. 26, 1908. Rehearing Denied Dec. 2, 1908.)

**1. STREET RAILROADS (§ 24\*)—CONTRACTS—FRANCHISES—ULTRA VIRES ACTS.**

Under Act Feb. 6, 1865 (Laws 1865, p. 597), amending Act Feb. 14, 1859 (Laws 1859, p. 530), confirming an ordinance of the city of Chicago granting the right to construct and operate a horse railroad in designated streets, and incorporating a street railway company, with power to construct and operate a street railway in the city as the council have authorized or shall authorize, by providing that the council may, with the written consent of other parties to any contract, amend, modify, or annul the same, an ordinance of the city, adopted February 11, 1907, constituting an agreement between the city and the railway company, whereby the company agrees to surrender to the city its rights, and to accept in lieu thereof the right to operate a street railway for 20 years on specified conditions, is not ultra vires; there being a controversy between the city and the company as to the rights of the company, and the company operating a part of its railway without authority.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 24.\*]

**2. CORPORATIONS (§ 374\*)—POWERS—INCIDENTAL POWERS.**

The power to make all such contracts as are necessary and usual in the course of business, or are reasonably incident to the objects for which a private corporation is created, is implied, where there is no positive restriction in the charter.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1517, 1518; Dec. Dig. § 374.\*]

**3. STREET RAILROADS (§ 16\*)—FRANCHISES—ACCEPTANCE.**

Where the charter of a street railway company provides that all the corporate powers shall be exercised by a board of directors, an acceptance of a franchise by the board of directors is binding on the stockholders.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 16.\*]

**4. STREET RAILROADS (§ 26\*)—FRANCHISES—VALIDITY.**

Under Act 1903 (Laws 1903, p. 285), authorizing a city to grant the use of its streets for street railway purposes without the petition or consent of abutting owners, an ordinance granting a street railway franchise is not invalid because the abutting landowners are not required to consent to the ordinance or to a continuation of the tracks in the street, notwithstanding City and Village Act (Hurd's Rev.

St. 1905, c. 24) § 62, cl. 90, since the act of 1903 controls.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 26.\*]

**5. STREET RAILROADS (§ 24\*)—FRANCHISES—COMPENSATION.**

The city of Chicago has the right to exact compensation from street railway companies for the privilege of occupying its streets with their railroads.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 43; Dec. Dig. § 24.\*]

**6. STREET RAILROADS (§ 24\*)—FRANCHISES—VALIDITY.**

An ordinance granting to a street railway company the right to occupy the streets of the city for railway purposes, and requiring the company to pay to the city 55 per cent. of the net earnings of the company during its occupation of the streets, is not invalid as making the city and the company partners in the operation of the street railway system.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 24.\*]

**7. STREET RAILROADS (§ 24\*)—FRANCHISES—VALIDITY.**

An ordinance granting a street railway franchise provided for an appraisalment of the property of the street railway company, and declared that there should be added to it the costs of the re-equipment of the system, and that after payment of fixed charges, the net earnings of the company should be divided between the city and the company, and created a board of supervising engineers to supervise the re-equipment and operation of the roads of the company, so far as necessary to reach a conclusion of what the net earnings would be. Held, that the ordinance was not invalid as taking the control of the street railway system from the directors of the company, and delegating such control to the board of supervising engineers.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 24.\*]

**8. STREET RAILROADS (§ 24\*)—FRANCHISES—ACCEPTANCE.**

A charter of a street railway company, which provides that contracts under which it shall operate in the streets of a city may be amended, modified, or annulled by the city with the consent of the company, and that the conditions under which the company shall operate shall be such as shall by contract with the company be prescribed, confers on the company the power, by accepting an ordinance granting a franchise, to enter into a contract fixing the terms on which the street railway system shall be operated, as against the objection of a minority stockholder of the company.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 24.\*]

**9. CORPORATIONS (§ 180\*)—MAJORITY STOCKHOLDERS—CONTROL OF CORPORATIONS.**

In the absence of any provision to the contrary in the charter, a majority of the stockholders control in deciding corporate questions requiring their action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 667; Dec. Dig. § 180.\*]

**10. CORPORATIONS (§ 180\*)—MAJORITY STOCKHOLDERS—CONTROL OF CORPORATIONS.**

Where the registered owners of more than nine-tenths of the stock of a street railway company affirmatively approved of the acceptance by the company of a municipal franchise, a minority stockholder could not maintain a bill to set aside such acceptance.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 668; Dec. Dig. § 180.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

# 11. CORPORATIONS (§ 320\*) — ACTIONS BY STOCKHOLDERS AGAINST OFFICERS—LACHES.

An ordinance granting a franchise to a street railway company was passed February 11, 1907, and was accepted by the company April 15th following, after the ordinance had been ratified by a vote of the people. On July 1st following, the company executed its trust deed and bonds for the re-equipment of the railway property covered by the ordinance. On July 25th, a minority stockholder protested to the directors of the company, and claimed that the ordinance was void. He took no action in court until October 21st. He became a stockholder in 1905, when the street car controversy between the city and the company was at its height. The company had sold its bonds, and was proceeding to expend the proceeds in re-equipping the system. *Held*, that the minority stockholder was barred by laches from attacking the validity of the ordinance.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 320.\*]

# 12. EQUITY (§ 67\*)—"LACHES."

"Laches" is not like limitations, but is a question of the inequity of permitting a claim to be enforced, and it depends on whether, under all the circumstances, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 191, 192; Dec. Dig. § 67.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 3969-3972; vol. 8, p. 7700.]

# 13. EQUITY (§ 148\*)—PLEADING—BILL—MULTIFARIOUSNESS.

A bill by a minority stockholder of a street railway company against the company, its president, and secretary and directors; the majority stockholders; the trustee under a first mortgage by the company to secure bonds, and the unknown owners of the bonds; the sales agent of the bonds in behalf of the company; the city which had granted a franchise to the company; its mayor; and the board of supervising engineers appointed under the ordinance—which prays that the ordinance be declared ultra vires the city and the company, and that the city refund to the company sums received by virtue of the ordinance, etc., is multifarious, because it seeks relief on grounds other than that the ordinance is ultra vires and void, and against parties in no way connected with the city.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 148.\*]

# 14. EQUITY (§ 293\*) — PLEADING — AMENDMENTS.

The refusal to permit the filing of an amendment to a bill, on sustaining a demurrer thereto, and the filing of a supplemental bill, was not an abuse of the court's discretion, where the amendment and the supplemental bill were not sworn to.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 551; Dec. Dig. § 293.\*]

Appeal from Superior Court, Cook County; Farlin Q. Ball, Judge.

Suit by Clarence H. Venner against the Chicago City Railway Company and others. From a decree dismissing the bill, complainant appeals. Affirmed.

This was a bill in chancery, filed in the superior court of Cook county by Clarence H. Venner, appellant, against the Chicago City Railway Company, its president and secretary and board of directors; J. P. Morgan & Co. and others, the majority stockholders of the Chicago City Railway Company;

the First Trust & Savings Bank, trustee under a first mortgage executed to said trustee by the Chicago City Railway Company, dated July 1, 1907, given to secure an issue of bonds by the Chicago City Railway Company to the amount of \$10,000,000, and the unknown owners of said bonds; the Harris Trust & Savings Bank, sales agent of said bonds on behalf of the Chicago City Railway Company; the city of Chicago; Fred A. Busse, mayor of the city of Chicago; Blon J. Arnold, A. B. Fleming and C. V. Weston, the board of supervising engineers created and appointed, under the provisions of the ordinance of the city of Chicago, hereinafter referred to as the ordinance of February 11, 1907—appellees. The bill was filed by the complainant, as a stockholder of the Chicago City Railway Company, on his own behalf, and on behalf of all other stockholders similarly situated who desired to join in the suit, and its objects were to set aside an ordinance of the city of Chicago, which was passed by the city council of said city on February 11, 1907, entitled "An ordinance authorizing the Chicago City Railway Company to construct, maintain and operate a system of street railways in streets and public ways of the city of Chicago"; to cancel a mortgage to the First Trust & Savings Bank, trustee, and \$10,000,000 in bonds, executed by the Chicago City Railway Company, bearing date July 1, 1907, for the purpose of obtaining funds to carry into effect the provisions of said ordinance of February 11, 1907; for an accounting, and for an injunction; for the appointment of a receiver; and for other relief. The defendants to the bill who appeared filed general and special demurrers, the ground of the special demurrer being that the bill was multifarious, which demurrers were sustained to the bill. Thereupon the complainant asked leave to amend his bill, and to file a supplemental bill; and, leave having been denied to file such amendment and supplemental bill, the bill was dismissed for want of equity, and the complainant has prosecuted an appeal to this court.

The bill alleges the Chicago City Railway Company is a corporation; that its capital stock consists of 180,000 shares of stock, of the par value of \$100 per share; that the complainant is the owner of 200 shares of the capital stock of said Chicago City Railway Company, which he acquired in the year 1905; that on August 15, 1858, the city council of the city of Chicago passed an ordinance granting to Henry Fuller, Franklin Parmalee, and Liberty Bigelow authority to construct and operate a horse railway, with single or double tracks, and all necessary and convenient tracks for turn-outs, side tracks, and switches, in and along certain streets in the city of Chicago, which grant was for 25 years, and until the city of Chicago should

elect to purchase said tracks and property from the Chicago City Railway Company; that on February 14, 1859, the General Assembly of the state of Illinois passed an act confirming said ordinance, and incorporating the Chicago City Railway Company (Laws 1859, p. 530), which act was entitled "An act to promote the construction of horse railways in the city of Chicago"; that on May 23, 1859, the city council of the city of Chicago passed an ordinance authorizing the Chicago City Railway Company to extend its tracks upon certain streets in the city of Chicago, which ordinance was accepted by the Chicago City Railway Company; that all rights and privileges theretofore granted by the city to Parmalee and his associates were by said ordinance confirmed in the Chicago City Railway Company; that on February 6, 1865, the General Assembly of the state of Illinois passed a statute (Laws 1865, p. 597) amending the act of February 14, 1859, hereinbefore referred to, whereby the corporate life of the Chicago City Railway Company was extended for the term of 99 years from February 14, 1859. The bill then sets out, by averment and as exhibits, some 90 ordinances passed by the corporate authorities of the city of Chicago, or the corporate authorities of the village of Hyde Park, or the corporate authorities of the town of Lake, prior to the annexation to the city of Chicago of said village of Hyde Park and the town of Lake, whereby the rights of the Chicago City Railway Company to construct and operate street railroads in the portions of the city covered by the provisions of the ordinance of February 11, 1907, were claimed to be either directly or remotely affected. It was averred in said bill that on February 11, 1907, and at the date of the passage of the ordinance sought to be annulled, by virtue of said ordinance said Chicago City Railway Company had certain vested rights in the streets of the city of Chicago upon the south side of the said city, which could not be impaired, extinguished, or acquired by the city of Chicago otherwise than under the provisions of the ordinance of August 15, 1858, hereinbefore referred to, which provided that the Chicago City Railway Company should have the right to use and occupy the streets mentioned in said ordinance, for street railway purposes, for 25 years, and until the city of Chicago should acquire the rights of said Chicago City Railway Company, by purchase, in and to its railroads located in said streets, and averred that the ordinance of February 11, 1907, which is by averment and as an exhibit made a part of said bill, impaired the obligations of the contract created between the city of Chicago and the Chicago City Railway Company and the complainant, as one of the stockholders of the Chicago City Railway Company, by the ordinance of August 15, 1858, and that said ordinance of February 11, 1907, was therefore ultra vires and void.

The ordinance of February 11, 1907, covers over 100 pages of the printed abstract, and it is not therefore practicable, within the scope of this opinion, to set its provisions out in hæc verba, or to incorporate therein an analysis of its several sections. Suffice it to say that the general scope and object of said ordinance may briefly be expressed as an agreement between the city of Chicago and the Chicago City Railway Company, whereby the Chicago City Railway Company agrees to surrender to the city of Chicago all its rights, whatever they may be, in the streets of said city, and in lieu thereof to accept from the city said ordinance, which grants it the right to operate its street railways in said streets of the city for the period of 20 years, with an agreement, on the part of the Chicago City Railway Company, to reconstruct and rehabilitate its street car system as operated upon the south side of the city of Chicago, under the direction of the board of supervising engineers created by said ordinance, which is to consist of three members, one to be selected by the city of Chicago, one by the Chicago City Railway Company, and Blon J. Arnold, who was named in the ordinance. The property of the Chicago City Railway Company was appraised, and its value was fixed in the ordinance at \$21,000,000 to which amount the ordinance provides the cost of certain betterments were to be added; that the net profits arising from the operation of said street railway system, after certain fixed charges and a dividend of 5 per cent. upon the capital invested had been paid to the Chicago City Railway Company, should be divided between the city of Chicago and the Chicago City Railway Company—that is, 55 per cent. of such net earnings should go to the city of Chicago, and 45 per cent. thereof to the Chicago City Railway Company—and the city reserved the right to take over the property of the Chicago City Railway Company any time during said term of 20 years, and in case it did take over said property itself, or the same should be transferred to another street railway company under the terms of said ordinance, the price at which said property should be taken over by the city or transferred to another corporation by the Chicago City Railway Company was fixed and determined by the said ordinance. The ordinance of February 11, 1907, contains a referendum clause, and upon submission to the electors of the city said ordinance was adopted, and on April 15, 1907, it was accepted by the board of directors of the Chicago City Railway Company, and on July 1, 1907, the Chicago City Railway Company executed its bonds in the sum of \$10,000,000, and secured the payment thereof by a mortgage upon all its property to the First Trust & Savings Bank, trustee. The bill further avers that on July 25, 1907, the complainant notified the Chicago City Railway Company, its officers, and directors that he protested against the expenditure of any of the moneys of the Chicago

City Railway Company, under the ordinance of February 11, 1907, and that he claimed the said ordinance was void. It was also averred, on information and belief, that large sums of money had been wrongfully paid out by the officers and directors of the Chicago City Railway Company, to persons in the city of Chicago, to procure the passage of said ordinance of February 11, 1907, and that large sums of money had been paid out by the Chicago City Railway Company, its officers, and directors in commissions for selling said bonds. It was also averred, upon information and belief, that the officers and directors of said Chicago City Railway Company were interested in the north and west side street car lines in the city of Chicago, and that by reason of such interest they sacrificed the rights of the Chicago City Railway Company in the streets of the city of Chicago by accepting said ordinance of February 11, 1907, to further their interests in the north and west side street car lines of the city of Chicago.

The bill prays that the ordinance of February 11, 1907, be declared ultra vires the city of Chicago and the Chicago City Railway Company, and that said ordinance be canceled, set aside, and held for naught; that the city of Chicago be ordered to refund to the Chicago City Railway Company any sum or sums of money which it has received from said Chicago City Railway Company by virtue of the provisions of said ordinance, and that it be required to place said Chicago City Railway Company in statu quo as to all of its rights in the streets of the city of Chicago, as they existed at the time of the passage of the ordinance of February 11, 1907; that the city of Chicago be required to pay to the Chicago City Railway Company all damages which the Chicago City Railway Company has sustained by reason of the passage and enforcement of said ordinance of February 11, 1907, and that the further payment of any money by the city of Chicago or the Chicago City Railway Company by virtue of said ordinance of February 11, 1907, be enjoined and restrained; that the officers and directors of the Chicago City Railway Company may be directed to repay to the treasurer of the Chicago City Railway Company all moneys which they have paid out, or caused to be paid out, by virtue of the provisions of said ordinance of February 11, 1907; that the defendants Blon J. Arnold, A. B. Fleming, and C. V. Weston, who constitute the board of supervising engineers created by said ordinance of February 11, 1907, be ordered and directed to repay to, and turn over to, the treasurer of the Chicago City Railway Company all moneys paid to them, or either of them, as salaries under the provisions of the ordinance of February 11, 1907; that all persons who are now, or who may hereafter be, made defendants to said bill be required to account for and pay over to the treasurer of said Chicago

City Railway Company all moneys of said Chicago City Railway Company paid out or received to secure the passage of said ordinance of February 11, 1907; that said mortgage given to secure the payment of said bonds of the Chicago City Railway Company, and said bonds, be canceled, set aside, and held for naught, and the Chicago City Railway Company be enjoined from paying any interest on said bonds; that said J. P. Morgan & Co., the Harris Trust & Savings Bank, the First Trust & Savings Bank, trustee, and all persons who are now defendants, or may hereafter be made defendants, to this bill be required to pay to the treasurer of said Chicago City Railway Company all moneys which they have received as commissions in negotiating or selling said bonds, and that a receiver be appointed of the property and assets of the Chicago City Railway Company.

Elijah N. Zohne, for appellant. John P. Wilson and Walter T. Fisher (Edward J. Brundage, Corp. Counsel, of counsel), for appellees.

HAND, J. (after stating the facts as above). It is first contended that the ordinance of February 11, 1907, impairs the charter rights of the Chicago City Railway Company as they existed at the time of the passage of said ordinance, and that said ordinance is therefore ultra vires the city of Chicago and the Chicago City Railway Company, and void. To sustain this proposition the appellant sets out in his bill the ordinance of August 15, 1858, the Acts of 1859 (Laws 1859, p. 530) and 1865 (Laws 1865, p. 597), and the ordinances passed by the city of Chicago, the village of Hyde Park, and the town of Lake from 1858 to 1906, so far as they apply to the Chicago City Railway Company, and then insists that, under those several ordinances and statutes, the Chicago City Railway Company had the right, on February 11, 1907, to continue to operate its entire system of street railroads in the streets of the city of Chicago upon the south side until such time as the city, under the ordinances of 1858, should purchase from the Chicago City Railway Company its entire system of street railroads. It is urged, however, by the appellees that from an examination of said ordinances and the acts of the Legislature it will be found that the contention of the appellant is not true as a matter of law or as a matter of fact. It was held in *Blair v. City of Chicago*, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801, that the act of 1865 did not have the effect to extend the right of the Chicago City Railway Company to occupy the streets of the city of Chicago, but that the right to occupy said streets could only be acquired from the city of Chicago, and that the only effect of the act of 1865, in the particular now under consideration, was to ex-

tend the corporate life of the Chicago City Railway Company 99 years from February 14, 1859. In *People v. Chicago Telephone Co.*, 220 Ill. 238, 77 N. E. 245, it was held that, where the corporate authorities of towns or villages had granted rights to public service corporations to occupy their streets, and no time was fixed when such rights should cease, such rights did not exist in perpetuity, but that they would cease to exist when the municipalities granting such rights ceased to exist, as the village of Hyde Park and the town of Lake ceased to exist by annexation to the city of Chicago.

It will be found that in some of the ordinances of the city of Chicago passed prior to 1875, when the city adopted the city and village act, the right of the Chicago City Railway Company to occupy the streets of the city was limited to a time certain, and not until the city should purchase said street railroads, and that in a number of the ordinances passed by the corporate authorities of the village of Hyde Park and the town of Lake prior to 1878, the date of annexation, there was no time limit when the right to occupy the streets of said village or town conferred upon the Chicago City Railway Company should expire. It will also appear that several of said ordinances were passed by the city of Chicago subsequent to the time of the adoption of the city and village act, which act expressly limited the power of the city to grant the right to occupy the streets of the city with street railroads to the period of 20 years. In those cases, therefore, where the ordinances of the city fixed a time when the right to occupy the streets of the city should expire, and that time had expired prior to February 11, 1907, and in those cases where the Chicago City Railway Company was operating its railroad in streets formerly located in the village of Hyde Park or the town of Lake, under ordinances passed by said village or town, fixing no time when such right should expire, the Chicago City Railway Company was operating its railroads in such streets without authority of law. And the same would be true where the Chicago City Railway Company was operating under ordinances passed by the city subsequent to 1875, when it had been operating under said ordinances more than 20 years. The ordinance of 1858 provided that the cars in the streets covered by that ordinance should be operated by animal power. By ordinances passed by the city of Chicago the city had authorized the Chicago City Railway Company to operate its cars by electricity. The right to so operate was, however, limited to 10 years in one instance, and in another to 8 years. The city had, as early as 1883, denied the power of the Chicago City Railway Company to operate its railroads in the streets of the city for 99 years, under the act of 1865; and, when an ordinance was passed in that year by the city, extending the Chicago City Railway

Company's right to operate its railroads in the streets of the city for 20 years, it was expressly provided that no new rights, for a longer period than 20 years, should be conferred upon the Chicago City Railway Company to operate its railroads in the streets of the city by said ordinance, and when the act of 1883 expired, in 1903, the city, with like limitations, extended the rights of the Chicago City Railway Company to occupy the streets of the city with its railroads for short periods. At the time the ordinance of 1907 was passed, not only was there pending a bitter controversy between the city of Chicago and the Chicago City Railway Company over the right of the Chicago City Railway Company to occupy the streets of the city with its railroads, but in many instances the Chicago City Railway Company was operating in the streets of the city without any authority, and in open disregard of the law. The act of 1903 provided for the taking over of the street railroads by the municipalities of the state in which they were located (*Lobdell v. City of Chicago*, 227 Ill. 218, 81 N. E. 354), and the time was ripe in 1907 for some adjustment of the differences between the city of Chicago and the Chicago City Railway Company, the result of which was the passage of the ordinance of February 11, 1907, by the city of Chicago, and the acceptance of such ordinance by the Chicago City Railway Company, and the question is, had the city the power to pass said ordinance, and the Chicago City Railway Company the power to accept the same?

By the act of 1865 it was provided "that it shall be competent for the said common council, with the written consent or concurrence of the other party or parties, or their assigns, to any of said contracts, stipulations, licenses or undertakings, to amend, modify or annul the same." In the *Blair Case*, supra, the Supreme Court of the United States held that the above provision was amply sufficient to allow the city of Chicago and the Chicago City Railway Company, by agreement, to change the power by which the Chicago City Railway Company should operate its cars from animal power to electricity, and we think said language sufficiently broad to allow the city of Chicago and the Chicago City Railway Company to abrogate the rights of the city and the Chicago City Railway Company created by the ordinances of 1858, and those subsequently passed, under which the Chicago City Railway Company had the right to operate in the streets of the city a fragmentary system of street railroads, and to adopt in place thereof the ordinance of 1907, which would give to the city of Chicago and the Chicago City Railway Company a complete system of street railroads in the south section of the city. The corporate powers of the Chicago City Railway Company are, as defined by the act of 1859, "to construct, maintain and

operate a single or double track railway, with all necessary and convenient tracks for turn-outs, side tracks and appendages in the city of Chicago, and in, on, over and along such street or streets, highway or highways, bridge or bridges, river or rivers, within the present or future limits of the south or west division of the city of Chicago, as the common council of said city have authorized said corporators, or any of them, or shall authorize said corporation so to do, in such manner and upon such terms and conditions, and with such rights and privileges, as the said common council has or may have contracted with said parties, or any or either of them, prescribed." In *Morville v. American Tract Society*, 123 Mass. 129, on page 136 (25 Am. Rep. 40), the court said: "The power to make all such contracts as are necessary and usual in the course of business, or are reasonably incident to the objects for which a private corporation is created, is always implied, where there is no positive restriction in the charter." We therefore conclude that the ordinance of February 11, 1907, was not ultra vires the city of Chicago or the Chicago City Railway Company, and void.

It is next contended that, even though it be conceded that the city of Chicago had the power to pass the ordinance of February 11, 1907, the board of directors of the Chicago City Railway Company could not accept said ordinance, and that, before said ordinance would be binding upon the city of Chicago and the Chicago City Railway Company, it must be unanimously accepted by the stockholders of the Chicago City Railway Company. Section 4 of the act of 1859 provides that "all the corporate powers of said corporation shall be vested in and exercised by a board of directors and such officers and agents as said board shall appoint." As we have seen, it was within the corporate powers of the city of Chicago to pass, and of the Chicago City Railway Company to accept, the ordinance of February 11, 1907. That being true, we think it necessarily follows that the acceptance of the ordinance could be consummated for and on behalf of the Chicago City Railway Company by its board of directors, and that their acceptance would be binding upon the stockholders of the corporation. In the *American and English Encyclopedia of Law* (volume 21 [2d Ed.] p. 863) it is said: "The general power to administer the affairs of a corporation is usually vested in a board of directors or trustees elected by the stockholders. The authority of directors is very extensive, and includes, generally, the power to do any act or make any contract, in the conduct of the company's affairs or business, which is within the limits of the powers conferred upon the corporation by its charter, and which is necessary or proper to enable the corporation to accomplish the purposes of its creation. And contracts so made, in the absence of any express

restriction, will bind the corporation, although not assented to or ratified by the stockholders." This text is well supported by the adjudicated cases. *Dickinson v. Consolidated Traction Co.* (C. C.) 114 Fed. 232; *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456; *Beveridge v. New York Elevated Railroad Co.*, 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648. The cases relied upon by appellant, notably that of *Chicago City Railway Co. v. Allerton*, 85 U. S. 233, 21 L. Ed. 902, involved the exercise of powers by the board of directors other than corporate powers, and those cases are not in point. In *Dickinson v. Consolidated Traction Co.*, supra, on page 254 of 114 Fed., it was said: "It is unreasonable to suppose that a power conferred by the creative act should, in the absence of any other mode prescribed for its exercise, be made to depend upon the unanimous consent of the stockholders. Corporate existence might be so imperiled and corporate ends defeated." In *Beveridge v. New York Elevated Railroad Co.*, supra, it was said: "What business a corporation can do within its chartered limits, and in or about that business by statutory authority, its directors hold a delegated power from the Legislature to do for it."

It is also urged that the ordinance of February 11, 1907, is invalid, by reason of the fact that the property owners of the land abutting upon the several lines of the Chicago City Railway Company's railroad in the streets of the city are not required to consent to the adoption of said ordinance, or to the continuation of said railroads in said streets, as it is claimed is provided by clause 90, § 62, City and Village Act (Hurd's Rev. St. 1905, c. 24). The act of 1908 (Laws 1903, p. 285) provides that the city shall have the power to grant the use of its streets for street railway purposes without the petition or consent of any of the owners of the land abutting or fronting upon any street or public way, or portion thereof, in which street railway tracks are already located at the time of making such grant. It is apparent, therefore, that the act of 1903, and not clause 90 of section 62, controls in this case, and that the consent of the owners of property abutting upon the several lines of railroad of the Chicago City Railway Company, laid in the streets of the city of Chicago, was not necessary to the passage of said ordinance of February 11, 1907.

It is also said that by the ordinance of February 11, 1907, a partnership is created between the city of Chicago and the Chicago City Railway Company, for the purpose of operating the street railroads of the Chicago City Railway Company in the city of Chicago. The law is clear that the city of Chicago has the right to exact compensation from street railway companies occupying its streets with their railroads for the privilege of so doing (*Lobdell v. City of Chicago*, supra), and the fact that the city is to receive 55 per cent.

of the net earnings of said Chicago City Railway Company during the term that it shall occupy the streets of the city of Chicago with its tracks, under the ordinance of February 11, 1907, does not make the city of Chicago and the Chicago City Railway Company partners in the operation of said street railway system.

It is also urged that the Chicago City Railway Company, by the acceptance of said ordinance, has taken the control of its street railway system from its board of directors, and delegated such control to the board of supervising engineers created by said ordinance. The ordinance of February 11, 1907, provides for an appraisal of the property of the Chicago City Railway Company; that to the amount of the appraisal, which is fixed by the ordinance at \$21,000,000, there shall be added the cost of the re-equipment of said street railway system. It also provides for the payment of certain fixed charges, and then provides that thereafter the net earnings of the Chicago City Railway Company shall be divided between the city of Chicago and the Chicago City Railway Company. It is apparent that it was necessary to provide, by ordinance, for some method whereby the net earnings of the Chicago City Railway Company might be determined, and the board of supervising engineers created by the ordinance was created to supervise the rebuilding and re-equipment of the roads of the Chicago City Railway Company, and the operation of said roads so far as might be necessary to reach a correct conclusion of what the net earnings of the railroad would be when it was in operation. The city must necessarily be represented by some officer or some board in the determination of the amount which it is to receive from the Chicago City Railway Company for the use of its streets for street railway purposes, and we see no legal objection to the creation of said board of supervising engineers, or to the powers conferred upon such board, or the duties imposed upon it, by the ordinance of February 11, 1907. The board of supervising engineers occupies a relation to the street car system operated upon the south side of the city somewhat analogous to that which the board of local improvements occupies to public improvements which are to be made in the city, and we are unable to see, and the appellant has not pointed out, how the creation of said board of supervising engineers works any injustice to the city of Chicago, the Chicago City Railway Company, or to him.

We have given every contention of the appellant, made in a brief containing 324 pages and a reply brief containing 52 pages, the most careful consideration, and are of the opinion that the ordinance of February 11, 1907, is a valid ordinance, and binding upon the city of Chicago, the Chicago City Railway Company, and the appellant, as a stockholder of said Chicago City Railway Com-

pany. To hold otherwise would be to hold that the Chicago City Railway Company has the right, under the ordinance of August 15, 1858, to occupy all the streets upon the south side of the city until such time as the city should, under the terms of that ordinance, purchase the street railway system of the Chicago City Railway Company, and that, as the city is now indebted to substantially the constitutional limit, the city could never purchase, for want of funds, from the Chicago City Railway Company, said street railway system, which would, in effect, confer upon the Chicago City Railway Company the right to perpetually occupy the streets of the city upon the south side for street railway purposes. It would also require a holding to the effect that, if the appellant, or any other single stockholder owning one share of stock in the Chicago City Railway Company, should object and refuse to give his consent to an ordinance which was satisfactory to the city of Chicago and the people of the city of Chicago, and to every other stockholder in the Chicago City Railway Company, whereby the worn-out street railway system of the south side should be re-organized, rehabilitated, and rejuvenated, he could prevent the acceptance of such ordinance, and the modernizing of said street railway system, practically for all time. We cannot, therefore, give our assent to the view of the appellant.

There are a number of other grounds which we will briefly advert to, which we are of the opinion clearly show the circuit court properly sustained demurrers to said bill.

First. It is clear, we think, that the appellant, as a single stockholder—and no other stockholder has joined him in this suit—cannot maintain this bill. Under the ordinance of February 11, 1907, the Chicago City Railway Company only agreed to construct and operate a system of street railways in the streets of the city of Chicago, which was clearly within the chartered powers of the company. The charter provides, in express terms, that the contracts under which the street railway company shall operate in the streets of Chicago may be “amended, modified, or annulled” by the city council with the written consent of the company, and that the terms and conditions upon which the company shall operate its railways in the streets shall be such as the city council shall, by contract with the company, prescribe. It was therefore clearly within its chartered power for the Chicago City Railway Company, by the acceptance of said ordinance, to enter into a contract by which the terms and conditions upon which its street railway should be operated should be prescribed; and it is elementary that, in the absence of any provision to the contrary in the charter, a majority of the stockholders control in deciding corporate questions requiring their action. In Clark

& Marshall on Private Corporations, on page 1688, it is said: "A stockholder cannot maintain a bill in equity to set aside an act or transaction which was done irregularly or illegally, but which a majority of the stockholders are entitled to do regularly or legally. Nor can a stockholder sue to set aside a transaction on the part of the directors, on the ground that it was fraudulent, irregular, illegal, or in excess of the powers conferred upon the directors, where the transaction is within the powers of the corporation, and such, therefore, as a majority of the stockholders may ratify, unless, as may sometimes be the case, it is impossible to procure a meeting of the stockholders to pass upon the transaction." And in Purdy's Beach on Private Corporations (volume 2, p. 998, § 681) it is said: "If the thing complained of is a thing which, in substance, the majority of the members are entitled to do, or if something has been done irregularly which the majority are entitled to do regularly, or if something has been done illegally which the majority are entitled to do legally, there can be no use in having a litigation about it, the end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes. If it is a matter of that nature it only comes to this: That the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly."

It is expressly stated in the bill that over 169,000 shares of the total capital stock of 180,000 shares of the company are registered in the names of J. P. Morgan & Co. and Walter B. Horn and Thomas W. Joyce, and "that the defendants J. P. Morgan & Co., the said directors, and said Horn and Joyce last named have conspired together, and agreed to act together, for the purpose of accepting and executing the said illegal ordinance of February 11, 1907." It is also alleged that in accepting the ordinance the said directors were acting upon the direction of the defendants J. P. Morgan & Co., who are claimed to control a large majority of the stock of the company. It therefore affirmatively appears from the allegations of the bill that the registered owners of more than nine-tenths of the capital stock of the Chicago City Railway Company affirmatively approved of the acceptance of the ordinance by the board of directors at the date of such acceptance.

Second. We are also of the opinion that the appellant was barred of the right to attack the ordinance of February 11, 1907, by his laches. The ordinance was passed on February 11, 1907, and, after having been ratified by the electors of the city of Chicago, was accepted by the Chicago City Railway Company on April 15, 1907, and on July 1, 1907, the Chicago City Railway Company executed its trust deed and bonds to the amount of \$10,000,000, which bonds

it sold, and was proceeding to expend the proceeds thereof in the re-equipment of its street railway property covered by said ordinance. On the 25th day of July, 1907, the appellant protested to the officers and directors of the Chicago City Railway Company that the ordinance was void, and demanded that no money be expended under the ordinance. He, however, took no action in court, by filing his bill, until the 21st day of October, 1907, six months after the passage of the ordinance and three months subsequent to his protest. If he desired to act in the premises, he should have acted with sufficient promptness to have enabled the court to do justice to him without doing injustice to others. In *Gallihier v. Cadwell*, 145 U. S. 373, 12 Sup. Ct. 875, 36 L. Ed. 738, the court said: "Laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties." And in *Townsend v. Vanderwerker*, 160 U. S. 171, 186, 16 Sup. Ct. 258, 262 (40 L. Ed. 383) the court said that laches depends on "whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did." And in *Morse v. Seibold*, 147 Ill. 318, 325, 35 N. E. 369, 371, this court said: "Laches has been defined to be such neglect or omission to assert a right as, taken in conjunction with lapse of time more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity." In *Coolidge v. Rhodes*, 169 Ill. 24, 32, 64 N. E. 1074, 1076, this court said: "The more important question in the case is whether complainants are barred by laches. Where this defense appears upon the face of the bill, it may be taken advantage of by demurrer, either special or general." The appellant became a stockholder in 1905, and after the street car controversy between the city of Chicago and the Chicago City Railway Company was at its height, and he having injected himself into the controversy by becoming a stockholder in the Chicago City Railway Company at that time, if he desired to prevent the consummation of the settlement of that controversy by the acceptance of the ordinance of February 11, 1907, by the railway company, he should have acted at once upon its passage by the city council, and not have waited until October 21, 1907, when the city of Chicago, the Chicago City Railway Company, and the bondholders of the railway company could not be placed in statu quo without great loss to them.

Third. The bill sought relief on grounds other than that the ordinance of February 11, 1907, was ultra vires and void, and against parties in no way connected with the city of Chicago, and we therefore think it multifarious. In *Swift v. Eckford*, 6

Paige's Ch. (N. Y.) 22, the court said: "If a joint claim against two or more defendants is improperly joined in the same bill, with a separate claim against one of those defendants only, in which the other defendants have no interest, and which is wholly unconnected with the claim against them, all or either of the defendants may demur to the whole bill for multifariousness."

The amendment to the bill and the supplemental bill were not sworn to, and the court did not abuse its discretion in refusing to permit the amendment to be made or the supplemental bill to be filed.

Finding no reversible error in this record, the decree of the superior court will be affirmed.

Decree affirmed.

(236 Ill. 375.)

**HENNING v. SAMPSELL et al.**

(Supreme Court of Illinois. Oct. 26, 1908. Rehearing Denied Dec. 4, 1908.)

**1. JUDGMENT (§ 263\*)—ARREST—DEFECT IN DECLARATION—FAILURE TO STATE CAUSE OF ACTION AGAINST ALL DEFENDANTS.**

If a declaration against several defendants fails to state a cause of action against all of them a judgment against all of them as a unit should be arrested on motion of any defendant against whom a cause of action was not stated.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 471; Dec. Dig. § 263.\*]

**2. APPEAL AND ERROR (§ 882\*)—REVIEW—FAILURE TO REMAND UPON REVERSAL—RIGHT TO COMPLAIN.**

Where, on reversal of a judgment for plaintiff and the remand of the case, the remanding order was vacated by the appellate court on plaintiff's motion, he could not, on appeal to the Supreme Court, complain that the case was not remanded.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 882.\*]

**3. APPEAL AND ERROR (§ 1177\*)—DETERMINATION OF CASE—REVERSAL WITHOUT REMANDMENT.**

If a declaration states no cause of action against one or more of several defendants, a reversal of a judgment against all of them as a unit without remanding the case by the Appellate Court is proper.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1177.\*]

**4. STREET RAILROADS (§ 78\*)—NATURE OF POSSESSION—LIABILITY OF OWNER FOR RECEIVERS' ACTS.**

While the grant of a street railway franchise carries with it a duty to use the property so as not to do unnecessary damage to others, and if the owner of the franchise permits a lessee to use the property the owner as well as the lessee will be liable for injuries, the possession of a receiver is not the possession of the owner, but is antagonistic to it, and the owner cannot control him, and is not liable for injuries inflicted by him or his employees.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 78.\*]

**5. STREET RAILROADS (§ 78\*)—INJURY BY COLLISION WITH TEAM—PERSONS LIABLE—RECEIVERS—DECLARATION—SUFFICIENCY.**

A declaration in an action against a lessor street railway company and the receivers of a

lessee and of a sublessee of the company, for injuries caused by a grip car, alleged that the sublessee, who was not a party, by its servants was possessed of and operating the grip car and was guilty of the negligence causing the injury, but there was no allegation that either set of receivers had anything to do with the possession or operation of the grip car, but it was alleged that the sublessee was in possession of and operating the car by its receivers. *Held*, that no cause of action was stated against either set of receivers.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 78.\*]

**6. STREET RAILROADS (§ 78\*)—DECLARATION—SUFFICIENCY OF ALLEGATIONS.**

As the possession of the receivers was not the possession of the lessor nor of the lessee or sublessee, it was impossible as a matter of law for the lessor railway, the sublessee who was not a party, and the receivers of the lessee and sublessee to be possessed of and operating the railway at the same time, and, on the theory that the injury was caused by the receivers' negligence, the lessee would not be liable, and hence the lessor, who was a party, would not.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 78.\*]

**7. STREET RAILROADS (§ 78\*)—DECLARATION—SUFFICIENCY OF ALLEGATIONS.**

Even if the receivers of the sublessee had been alleged negligent, neither the lessee nor its receivers would be liable for the negligence.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 78.\*]

**8. JUDGMENT (§ 263\*)—ARREST—DECLARATION INSUFFICIENT TO SUSTAIN.**

If a declaration is so defective that it will not sustain a judgment, its insufficiency may be taken advantage of on motion in arrest or on error.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 471; Dec. Dig. § 263.\*]

**9. JUDGMENT (§ 266\*)—ARREST—BASIS OF MOTION.**

A motion in arrest of judgment is based on the record proper alone, and the evidence will not be considered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 467; Dec. Dig. § 266.\*]

**10. APPEAL AND ERROR (§ 934\*)—REVIEW—PRESUMPTIONS—GROUNDS FOR ARREST OF JUDGMENT.**

It will be presumed on appeal that every proper reason for arresting judgment was presented to the court upon its consideration of the motion.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 934.\*]

**11. PLEADING (§ 406\*)—WAIVER OF RIGHT TO QUESTION SUFFICIENCY OF DECLARATION.**

In an action against a lessor of a street railway franchise and the receivers of the lessee and sublessee, an admission by defendant's counsel that the lessor had a license from the city which had been transferred to the lessee, which had leased to the sublessee its right to operate the road, and that receivers had been appointed for lessee and sublessee, was only an admission of facts which might have been proved, and not of a legal conclusion, and was not therefore a waiver of any right to question the sufficiency of the declaration by motion in arrest of judgment.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 406.\*]

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; A. H. Chetlain, Judge.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Personal injury action by Jacob Henning against Marshall E. Sampsell and others. The Appellate Court reversed a judgment for plaintiff and remanded the case, but, on motion of plaintiff, vacated the remanding order and allowed him to appeal to the Supreme Court. Affirmed.

Bowles & Bowles, for appellant. John A. Rose and Frank L. Kriete (W. W. Gurley, of counsel), for appellees.

CARTWRIGHT, C. J. Jacob Henning, the appellant, recovered a judgment on the verdict of a jury in the superior court of Cook county against the Chicago West Division Railway Company, John C. Fetzer, Marshall E. Sampsell, and James Eckels, receivers of the Chicago Union Traction Company, and John C. Fetzer, Henry A. Blair, and Marshall E. Sampsell, receivers of the West Chicago Street Railway Company, appellees, for the sum of \$5,000, which the judgment directed to be paid in due course of administration. From that judgment an appeal was taken by the appellees to the Appellate Court for the First District, and that court concluded that the declaration did not state a cause of action and therefore did not warrant the judgment, and that the trial court erred in overruling a motion in arrest of judgment and entering judgment on the verdict. The court reversed the judgment, and remanded the cause to the superior court of Cook county. The appellant, Jacob Henning, moved the Appellate Court to strike out the remanding order and to grant him an appeal to this court. His motion was allowed, and, the remanding order being vacated, an appeal to this court was allowed and perfected.

The summons was issued in an action of trespass on the case against the above-named parties, the Chicago West Division Railway Company, John C. Fetzer, Marshall E. Sampsell, and James H. Eckels, receivers of the Chicago Union Traction Company, and John C. Fetzer, Henry A. Blair, and Marshall E. Sampsell, receivers of the West Chicago Street Railway Company, and they were all served. The original declaration contained two counts, and a third or additional count was afterward added. Separate pleas of the general issue were filed by the several defendants, the Chicago West Division Railway Company, the receivers of the Chicago Union Traction Company, and the receivers of the West Chicago Street Railway Company. On the trial, at the close of the evidence, each defendant moved the court to direct a verdict of not guilty as to such defendant, and tendered an instruction for that purpose, but the motions were denied and the instructions refused. After verdict each of the defendants made a motion for a new trial, and the motions were denied, whereupon they each moved the court to arrest judgment on the verdict. The court denied the motions, and the defendants severally excepted.

The first count of the declaration alleged that defendants were possessed of a street railroad system in Chicago, and were street railroad corporations; that the Chicago Union Traction Company, by its receivers, was possessed of and operating a street railroad on West Madison street under a lease from the West Chicago Street Railway Company, which came into possession by virtue of a lease from the Chicago West Division Railway Company; that said defendants were possessed of a grip car, with trailers attached thereto, running on said street, which were under the care and management of divers then servants of the defendant the Chicago Union Traction Company, and while the plaintiff with all due care and diligence was driving a horse hitched to a cart or wagon in which he was riding on and along said street, and while crossing the track of the defendants' car line, the defendant the Chicago Union Traction Company, by its servants, so carelessly and improperly managed and drove its said grip car and train of cars that, by and through the negligence and improper conduct of the defendant the Chicago Union Traction Company, by its servants in that behalf, the said grip car and train of cars ran and struck upon and against the wagon, throwing the plaintiff out and causing injuries for which the suit was brought.

The second count alleged that defendants were street railroad corporations, and as such the Chicago Union Traction Company was possessed of, operating, and using the street railroad under a lease from the West Chicago Street Railway Company, which came into possession of the street railway under a lease from the Chicago West Division Railway Company; that the defendants were possessed of a grip car, with trailers attached, running on and along West Madison street, which grip car and trailers were then and there under the care and management of divers then servants of the defendant the Chicago Union Traction Company, and, while the plaintiff with due care was driving on the street and in the act of turning north and crossing the east-bound track, the defendant the Chicago Union Traction Company, by its servants, so carelessly and improperly managed and drove its said grip car and train of cars to and upon the plaintiff without ringing any gong or sounding any warning of the approach of said cable car, that by and through the negligence and improper conduct of the defendant the Chicago Union Traction Company, by its servants in that behalf, the said grip car or train of cars struck the wagon, throwing plaintiff out and injuring him.

The third or additional count alleged that the defendants were possessed of a railway system in the city of Chicago; that they were street railroad corporations, and as such the Chicago Union Traction Company, by its receivers, was possessed of, using, and operating a street railroad on West Madison street by virtue of a lease from the West

Chicago Street Railway Company, which came into possession of the tracks by virtue of a lease from the Chicago West Division Railway Company; that defendants were possessed of a certain cable or grip car, with trailers attached thereto, running on West Madison street, which said grip car and trailers were then and there under the care and management of divers then servants of the defendant the Chicago Union Traction Company, who were then and there driving the same upon and along the tracks of defendants on West Madison street, and, while the plaintiff was driving along the street and in the act of crossing defendants' car line, the defendant the Chicago Union Traction Company, by its servants, then and there so carelessly and improperly drove and managed its grip car and train of cars that, by and through the negligence and improper conduct of the defendant the Chicago Union Traction Company, by its servants in that behalf, said grip car or train of cars struck the wagon of plaintiff, throwing him out and causing injuries.

If the declaration did not state a cause of action against all of the defendants, the trial court erred in not sustaining the motion in arrest of judgment made by any defendant against whom a cause of action was not stated, and the Appellate Court did not err in reversing the judgment, which was a unit. *West Chicago Street Railroad Co. v. Morrison*, 160 Ill. 288, 43 N. E. 393; *South Side Elevated Railroad Co. v. Nesvig*, 214 Ill. 463, 73 N. E. 749. Inasmuch as the remanding order was struck out on the motion of the plaintiff in the suit, no complaint is or can be made that the cause was not remanded for any further proceedings. If the declaration did not state a cause of action against any of the defendants, the final judgment of the Appellate Court was right, regardless of the motion by which the remanding order was vacated. It will be at once noticed that the declaration made no charge, in any count, of negligence on the part of either set of receivers. There was no allegation that the receivers of the West Chicago Street Railway Company ever did anything or had any possession or control of the car or train or had anything to do with the accident. There was a general averment in each count that the defendants were street railroad corporations, which was a legal absurdity as applied to the receivers, who were natural persons. If it were possible to construe the averment as applying to the railway company which was a defendant, and the companies for which the other defendants were receivers, and as alleging that such corporations were possessed of the railway system, then it would follow, as a matter of law, that the receivers would not be liable for the acts of such corporations. That construction is not possible, however, since but one corporation was a defendant.

There were charges in the first and third counts that the defendant the Chicago Union Traction Company, which was not a defendant, was possessed, by its receivers, of the street railroad and operating the same; and that also was legally impossible, since a corporation, after the appointment of receivers, has no possession or control over its property and no voice in the selection of the servants or power to direct their acts. After the averments that the defendants were railroad corporations and possessed of the street railway system, there were averments of the leases from one corporation to another, and finally that the sublessee, the Chicago Union Traction Company, by its servants, was possessed of and operating the grip car and train in question, and that it was guilty of all the negligence charged. There was no allegation that either of the sets of receivers had possession of or operated the grip car and trailers in question, or had anything to do with them. The Chicago West Division Railway Company, the original owner and lessor, was a defendant, and it might be liable for the negligence of its lessee or sublessee, but it would not be liable for the negligence of the receivers or either of them. The grant of a franchise by the state to build, own, or operate a street railway carries with it a duty to use the property and manage and control it so as not to do any unnecessary damage to the persons or property of others, and, if the owner of the franchise authorizes or permits a lessee to use its tracks, the company owning the railway, and to which the franchise was granted, will be liable. *Pennsylvania Co. v. Ellett*, 132 Ill. 654, 24 N. E. 559. The injured party may look for indemnity to the corporation to which the franchise was granted as well as the company which has been permitted to use the tracks, and the servants of the latter will be regarded as servants of the owner. But the possession of a receiver is not the possession of the corporation owning the franchise and tracks, but is antagonistic to it. The owner cannot control the receiver or his employés and is not liable for injuries inflicted by him or them. *High on Receivers*, § 396; *McNulta v. Lockridge*, 137 Ill. 270, 27 N. E. 452, 81 Am. St. Rep. 362. It was therefore impossible, as a matter of law, that the Chicago West Division Railway Company and the receivers of the two corporations who were defendants, and the Chicago Union Traction Company, which was not defendant, were possessed of and operating the road at the same time. If, as contended by counsel, the declaration was intended to charge the receivers with negligence, the lessee, the Chicago Union Traction Company, would not be liable for such negligence, and, if the lessee was not liable, the lessor, which was a party to the suit, was not. Even if the receivers of the Chicago Union Traction Company had been alleged to be guilty of negligence, neith-

er the West Chicago Street Railway Company nor its receivers could be held liable on account of such negligence. In no possible view of the declaration was there any cause of action stated against either set of receivers, and upon the theory by which the action of the trial court is sought to be sustained no cause of action was stated against the railway company which was a defendant. With all the intendments in its favor after verdict, there is no consistent theory upon which it states a liability of any defendant.

If a declaration is so defective that it will not sustain a judgment, its insufficiency may be taken advantage of on a motion in arrest of judgment or on error. *Wilson v. Myrick*, 26 Ill. 34; *Schofield v. Settley*, 31 Ill. 515; *Kipp v. Lichtenstein*, 79 Ill. 858; *Joliet Steel Co. v. Shields*, 134 Ill. 209, 25 N. E. 569; *Chicago & Alton Railroad Co. v. Clausen*, 173 Ill. 100, 50 N. E. 690. A motion in arrest of judgment is based on the record proper, and in considering such a motion the court does not look into the evidence. *Danley v. Hibbard*, 222 Ill. 88, 78 N. E. 39. In this case motions in arrest of judgment were made and overruled, and the rulings were excepted to. The motions were made verbally, and the reasons were not specified. It is contended that the motions were insufficient to preserve the question of the sufficiency of the declaration, because the record does not show that the particular reasons were pointed out. There was no requirement by the court that the motions should be put in writing or specific grounds stated, and it will be presumed that every proper reason for arresting judgment was presented to the court.

It is further contended that the defendants waived the questions raised on the record in this way: At the close of the plaintiff's evidence the attorney for the defendants admitted that the Chicago West Division Railway Company had a license from the city of Chicago; that it was transferred to the West Chicago Street Railroad Company, which leased to the Chicago Union Traction Company its rights to operate the road from June 1, 1899; and that receivers were appointed by the United States District Court for the Chicago Union Traction Company and the West Chicago Street Railway Company. That admission had no more effect than if the facts admitted had been proved, and could not operate as a waiver of any right to question the sufficiency of the declaration by motion in arrest of judgment. There was no admission of any legal conclusion as there was in *Eckels v. Mutttschall*, 230 Ill. 462, 82 N. E. 872. There was only an admission of matters of fact which might have been proved.

The trial court erred in ruling on the motions in arrest of judgment, and the Appel-

late Court did not err in so holding and reversing the judgment. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(236 Ill. 507.)

# ATTON v. SOUTH CHICAGO CITY R. CO.

(Supreme Court of Illinois. Oct. 23, 1908.

Rehearing Denied Dec. 2, 1908.)

## 1. STATUTES (§ 225½\*)—RE-ENACTMENT—PRESUMPTIONS.

Generally substantial re-enactments are presumed to have been made in view of judicial constructions given the former law, in the absence of language in the new act indicating a different intent, when construed in the light of the context.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 806; Dec. Dig. § 225½.\*]

## 2. COURTS (§ 219\*)—RIGHT TO APPEAL—INTERMEDIATE COURTS.

Under New Practice Act (Laws 1907, p. 468) § 121, authorizing appeals from the Appellate Court to the Supreme Court, where the amount in controversy "exceeds" \$1,000, an appeal from a judgment for \$1,000 lies only upon a certificate of importance, as authorized by section 119 (page 467).

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 219.\*]

## 3. COURTS (§ 219\*)—REPEAL—LEGISLATIVE INTENT.

New Practice Act (Laws 1907, p. 461) § 91, allowing appeals, etc., to the Appellate or Supreme Court, etc., "subject to the limitations of this act," shows a legislative intent that the act should supersede all other legislation respecting appeals.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 219.\*]

## 4. COURTS (§ 219\*)—APPELLATE JURISDICTION—STATUTE APPEALABLE.

New Practice Act, § 121 (Laws 1907, p. 468), authorizing appeals from the Appellate Court to the Supreme Court where the amount in controversy exceeds \$1,000, controls where the right to appeal from the Appellate Court depends on the amount of the judgment appealed from.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 219.\*]

Appeal from Branch Appellate Court, First District, on Error to Municipal Court of Chicago; William N. Gemmill, Judge.

Action by William H. Atton against the South Chicago City Railroad Company. From a judgment of the Appellate Court for the First District, affirming a judgment for plaintiff, defendant appeals, and plaintiff moves to dismiss the appeal. Appeal dismissed.

Morrison & Brown, for appellant. James L. Bynum and Charles C. Spencer, for appellee.

VICKERS, J. William H. Atton brought an action of case against the South Chicago Street Railway Company, in the municipal court of Chicago, to recover damages for personal injuries, alleged to have been sustain-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed by him as a result of appellant's negligence. A judgment was rendered in the municipal court in favor of the plaintiff below for \$1,000, and that judgment has been affirmed by the Appellate Court for the First District, and the defendant below has prosecuted a further appeal to this court. Appellee has entered his motion to dismiss the appeal in this court on the ground that the amount in controversy does not exceed \$1,000, exclusive of costs. This motion has been taken with the case.

Section 8 of the Appellate Court act (Hurd's Rev. St. 1905, c. 37, § 25) and section 90 of the old practice act (Hurd's Rev. St. 1905, c. 110, § 91), being construed together, it has heretofore been the accepted construction of the two acts that appeals would lie from the Appellate Court to this court where the amount of the judgment, exclusive of costs, was just \$1,000. Section 121 of the new practice act (Laws 1907, p. 468) is identical in language with section 90 of the old practice act. It is contended that section 121 must receive the same construction given to section 90 of the old practice act. The general rule, no doubt, is that, where the Legislature enacts a provision of the law in almost the same words as a previous law which has been judicially construed, it will be presumed that such provision was re-enacted in view of such former construction. *Kirby v. Runals*, 140 Ill. 289, 29 N. E. 697; *Kelley v. Northern Trust Co.*, 190 Ill. 401, 60 N. E. 585; *McGann v. People*, 194 Ill. 526, 62 N. E. 941; *Endlich on Interpretation of Statutes*, p. 515. The rule established by these cases has no application where the language of the new act, when construed in the light of the context, indicates a different legislative intention. In *Sutherland on Statutory Construction*, § 395, it is said: "And if the Legislature uses words which have received a judicial interpretation, they are presumed to be used in that sense, unless the contrary intent can be gathered from the statute." Again, in section 403, the same author says: "Where a statute is amended, and re-enacted as amended, the words and provisions re-enacted without change do not necessarily have the same meaning which was before placed upon them by the courts. The amendments made may require a modification of such construction." In our opinion the construction heretofore placed on section 90 of the old practice act cannot be applied to section 121 of the new practice act, for the reason that language found in the new practice act indicates a contrary intention. It cannot be denied that section 121 of the new practice act is plain and unambiguous. It clearly provides for appeals from the Appellate Court to the Supreme Court where the sum or value in controversy "exceeds \$1,000." Of course it cannot be contended that \$1,000 is a sum exceeding \$1,000. By reference to section 119 of the new practice act it will be found that there is a provision there made for cases be-

ing appealed from the Appellate to the Supreme Court by a certificate of importance. The class of cases in which a certificate of importance is necessary are cases in which an appeal is "not allowed by this act." Appeals are only allowed, by section 121, to this court where the amount in controversy exceeds \$1,000. If appeals are only allowed by the new practice act in cases where the amount in controversy exceeds \$1,000, and if a certificate of importance must be obtained in all cases except in appeals provided for by this act, it follows that a case where the judgment is an even \$1,000 is one wherein an appeal is not provided for by the new practice act, hence it can only come to this court upon a certificate of importance, in accordance with section 119 of the new practice act.

We are also of the opinion that the view herein expressed is further strengthened by section 91 of the new practice act, which provides as follows: "Appeals shall lie to, and writs of error from, the Appellate and Supreme Courts, as may be allowed by law, to review the final judgments, orders or decrees of any of the circuit courts, the superior court of Cook county, the county courts or the city courts and other courts from which appeals and to which writs of error may be allowed by law, in any suit or proceedings at law or in chancery. Appeals or writs of error in this section allowed shall be subject to the limitations of this act provided and to the conditions imposed by law." This section is an express legislative declaration that all appeals or writs of error therein allowed shall be subject to "the limitations of this act"; that is, subject to the limitations of the new practice act. While the Appellate Court is not mentioned in the enumeration of the courts from which appeals may be prosecuted, yet it is clearly embraced within the language "other courts from which appeals and to which writs of error may be allowed by law." Section 90 of the old practice act, standing alone, never could have been construed as authorizing an appeal from the Appellate Court to this court in a case where the judgment was an even thousand dollars. It was only by construing that section in connection with section 8 of the Appellate Court act that such result was reached. We are of the opinion that, as to that class of cases in which the right to an appeal from the Appellate Court to this court depends on the amount of the judgment appealed from, section 121 of the new practice act must control. Under that section, as we have seen, the judgment must exceed \$1,000 to justify an appeal or writ of error without a certificate of importance. Appeals and writs of error in other cases provided for in section 8 of the Appellate Court act are unaffected by the new practice act.

This court has no jurisdiction of this appeal. The motion to dismiss will therefore be sustained.

Appeal dismissed.

(236 III. 341)

## DONNAN v. DONNAN et al.

(Supreme Court of Illinois. Oct. 26, 1908.  
Rehearing Denied Dec. 2, 1908.)

## 1. WITNESSES (§ 107\*)—COMPETENCY—TESTIMONY AGAINST INTEREST.

In a will contest by testator's son, testimony by testator's widow, who was a defendant devisee, as to the mental and physical condition of testator when he executed the will, and as to conversations between him and another son wherein the latter requested testator not to give anything to complainant, was adverse to her interest, within sections 1 and 2 of the statute on evidence and deposition (Hurd's Rev. St. 1905, c. 51), relating to the incompetency of witnesses because of interest in the proceedings.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 285; Dec. Dig. § 107.\*]

## 2. WITNESSES (§ 52\*)—COMPETENCY—HUSBAND AND WIFE—AT COMMON LAW—FOUNDATION OF DOCTRINE.

The incompetency of the wife at common law to testify to communications with her husband, or between him and third persons, whether the evidence was offered during or after coverture, was based upon grounds of public policy.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 124; Dec. Dig. § 52.\*]

## 3. WITNESSES (§ 140\*)—COMPETENCY—HUSBAND AND WIFE—CONVERSATIONS WITH THIRD PERSONS.

Laws 1867, p. 183, § 1, of the statute on evidence and depositions (Hurd's Rev. St. 1905, c. 51), removed the common-law incompetency of witnesses resulting from interest, and section 5 (page 184) re-enacted in 1872 (Laws 1872, p. 407), provided that section 1 did not render the husband or wife competent to testify, during coverture or thereafter for or against the other as to any conversation during the marriage, except in certain cases. In 1874 (Laws 1874, p. 98), the proviso was added that the section should not be construed to permit a husband or wife to testify to conversations of the other, whether between themselves or with third persons, except in suits between themselves. *Held* that, the statute being a re-enactment of the common law, a wife cannot, either during or after the coverture, testify to conversations between herself and husband, or between him and third persons, or to admissions made by him to her, and hence in a will contest by heirs testator's widow could not testify as to conversations between him and a devisee as to undue influence exercised by such devisee.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 608; Dec. Dig. § 140.\*]

## 4. WITNESSES (§ 140\*)—COMPETENCY—HUSBAND AND WIFE—CONVERSATIONS WITH THIRD PERSONS.

Testimony of testator's widow that testator was not capable of transacting ordinary affairs, being based largely on conversations between them, or between testator and others, was inadmissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 608; Dec. Dig. § 140.\*]

## 5. WILLS (§ 53\*)—TESTAMENTARY CAPACITY—SANITY—EVIDENCE—UNJUST DISPOSITION.

Inequality in the distribution of property by will may be considered in connection with other circumstances in determining testator's sanity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 129; Dec. Dig. § 53.\*]

## 6. WILLS (§ 164\*)—VALIDITY—UNDUE INFLUENCE—EVIDENCE—UNJUST DISPOSITION.

Inequality in the distribution of property by will may be considered, in connection with the other circumstances, in determining whether there was undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 406; Dec. Dig. § 104.\*]

## 7. WILLS (§ 166\*)—VALIDITY—UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE—UNJUST DISPOSITION.

Inequality in the distribution of property by will, though it may be considered in connection with other circumstances in determining whether there was undue influence, is not sufficient by itself to prove undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 429; Dec. Dig. § 166.\*]

## 8. WILLS (§ 55\*)—TESTAMENTARY CAPACITY—SUFFICIENCY OF EVIDENCE—UNJUST DISPOSITION.

Inequality in the distribution of property by will, though it may be considered with the other circumstances in determining testator's sanity, is not sufficient by itself to prove mental incapacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 153; Dec. Dig. § 55.\*]

## 9. WILLS (§ 1\*)—TESTAMENTARY POWER.

The owner of property may dispose of it by will in any way he wishes, and the justice or propriety of his disposition cannot be considered by the courts.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1; Dec. Dig. § 1.\*]

## 10. WILLS (§ 330\*)—TESTAMENTARY CAPACITY—EVIDENCE—INEQUALITY IN DISPOSITION—INSTRUCTION.

In a suit to set aside a will because of insanity and undue influence, an instruction that inequality and unreasonableness in the disposition of the property, though not in itself conclusive of mental incapacity or undue influence, may be considered as tending to show such facts, in connection with the other circumstances proved, and that the jury might consider the evidence, if any, in the will itself, of undue influence, etc., taking into consideration testator's property, his relatives, and their claims upon his bounty, in determining the questions of insanity and undue influence, was erroneous and misleading as unduly emphasizing the effect of inequality and unreasonableness of the disposition, and as tending to permit the jury to consider those facts alone as evidence of incapacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 781; Dec. Dig. § 330.\*]

## 11. WILLS (§ 82\*)—ANNULEMENT—GROUNDS.

A child has no legal or natural right to his father's estate, and, in the absence of testamentary incapacity or undue influence, a parent may give his property to any person he chooses, and that a child received less property under a will than the other children, because of the unreasonable dislike or prejudice of his parent, is no ground for setting aside the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 203; Dec. Dig. § 82.\*]

Appeal from Circuit Court, Logan County; T. M. Harris, Judge.

Action by William S. Donnan against Charles L. Donnan and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Robert Humphrey (W. R. Baldwin, guardian ad litem), for appellants. F. L. Tomlinson and Beach, Hodnett & Trapp, for appellee.

**PER CURIAM.** This bill was filed by appellee to contest the will of his father, Alexander Donnan. The will was executed May 5, 1904, and the testator died February 20, 1906. He was between 70 and 80 years of age at the time he executed the will. He left surviving him a widow, Sarah A. Donnan, and appellee, William S. Donnan, and appellants, Charles L. and Edward Donnan, as his only children and heirs at law. The testator was the owner of 360 acres of land in Logan county, Ill., worth, according to the proof, from \$50,000 to \$60,000. It was subject to a mortgage of \$10,000. By his will he gave to his widow 120 acres of land during her life, with remainder in fee to his sons Charles and Edward. Another 40 acres was directed to be sold and the proceeds applied to the payment of the testator's debts, and the remainder of his land he gave to his sons Charles and Edward during their lives, with remainder in fee to the heirs of their bodies. He gave his son William \$50, and stated in the will as a reason for giving him no more of his estate that he had theretofore made gifts to said son that would amount, in the aggregate, to a sum equal in value to the portion given each of the other sons. Appellee was the oldest son, was unmarried, and lived with his father 24 years after attaining his majority. The other two sons, on attaining their majority, married and established homes for themselves. In 1902 Alexander Donnan married a second wife, and about this time the appellee left his father's house and went to reside with George Gibson, whose wife, Molly, had been raised by Alexander Donnan from infancy. After leaving home the appellee asked that his father compensate him for his labors during the time he resided with and worked for his father after attaining his majority. The father and son chose arbitrators to determine what was the proper amount appellee should be paid by his father. They agreed upon the sum of \$4,800, being at the rate of \$200 per year for the 24 years appellee lived with and worked for his father after becoming of age. Subsequently this was paid before the will was executed. The bill charged that Alexander Donnan was mentally incapable of making a will, and that Charles L. Donnan and others to complainant unknown, by falsehoods and misrepresentation and fraudulent practices, unduly influenced the testator to make the will and deprive appellee of any part or share in his estate. The cause was tried by a jury and a verdict returned finding that the will was not the will of Alexander Donnan, and a decree was entered in accordance with the finding of the jury, from which decree this appeal is prosecuted.

The errors relied on are: That the verdict

of the jury and the decree of the court are contrary to the weight of the evidence; that the court improperly permitted Sarah A. Donnan, the widow of the testator, called as a witness by the appellee (complainant below), to testify on the trial; and that the court erred in giving instruction No. 14 on behalf of appellee and refusing instructions 2 and 5 asked for by the appellants.

Having reached the conclusion that the decree must be reversed for errors committed in giving and refusing instructions and in admitting testimony, we shall not discuss the merits of the case or the weight of the evidence. Testator's widow was a party defendant to the bill and was called as a witness by complainant, appellee here. Appellants objected to her being permitted to testify on the ground that she was not a competent witness, but their objection was overruled, and the witness was permitted to testify. The substance of the material testimony given by Mrs. Donnan related to the mental and physical condition of the testator at the time of the execution of the will and to the frequent visits made to him by Charles L. Donnan prior to the making of the will. She testified that Charles L., during the fall of 1903 and the spring of 1904, visited the testator often. Part of the time he visited him several times a week, and some of the time twice a day. Sometimes there would be a week between his visits. The witness testified that some of the conversations between the testator and his son Charles occurred in the testator's bedroom, while the parties were alone, and were not heard by her. On one occasion she says: Charles told her he wanted to see his father privately, and closed the door between the room they were in and the one occupied by the witness; that she heard Charles speaking to his father in the fall of 1902 and 1903 about making a will, and in January and February, 1903, she heard Charles tell his father to make a will and not give appellee any real estate; that appellee had received all that belonged to him; that his wages were all that he was entitled to; that Charles also told his father not to mention Molly Gibson in his will; that she heard Charles say these things to his father three times. The witness further testified that on the morning of the day the will was made Charles Donnan came to the testator's house in his own conveyance and asked testator to go with him, which he did. The proof shows that they drove to Lincoln, 15 miles from the testator's home, where the will was drawn by a lawyer and executed by Alexander Donnan.

We are satisfied that Mrs. Donnan was not competent to testify pertaining to the matters in reference to which she gave evidence. Section 1 of the statute on evidence and depositions (Hurd's Rev. St. 1905, c. 51) removes the common-law incompetency resulting from any interest which a witness has in the proceeding. The succeeding section creates cer-

tain exceptions to the first section. Mrs. Donnan's testimony, as appears from this record, was adverse to her own interest. Irrespective of the question of interest, however, the incompetency of the wife, under the common law, to testify to communications and conversations with her husband or between him and third persons, whether the evidence was offered either during or after the coverture, was based on grounds of public policy. This was recognized by section 5 of the act on evidence and depositions, which provided that no husband or wife should, by virtue of section 1 of the act, be rendered competent to testify for or against the other as to any conversation of the other occurring during the marriage, whether called as a witness during the existence of the marriage or after its dissolution, except in certain cases. The portion of section 5 which precedes the proviso, as it now appears, was originally enacted in 1867 (Laws 1867, p. 184), and re-enacted in 1872 (Laws 1872, p. 407). In 1874 (Laws 1874, p. 98), the proviso was added, and that proviso reads as follows: "Provided, that nothing in this section contained shall be construed to authorize or permit any such husband or wife to testify to any admissions or conversations of the other, whether made by him to her or by her to him, or by either to third persons, except in suits or causes between such husband and wife." In *Goelz v. Goelz*, 157 Ill. 33, 41 N. E. 756, it was said of the proviso that it was a recognition and a re-enactment of the rule of the common law based on public policy but confining its operations to cases other than suits between husband and wife. If this proviso be a recognition of the common law and a re-enactment thereof, it is apparent from the entire section that the wife is not competent, either during or after coverture, to testify to any conversation between herself and her husband or to any admission made by him to her or to any conversation between him and a third person, or to any admission made by him to a third person, except in suits or causes between the husband and wife. The only cases in this state to which our attention has been called that seem inconsistent with this conclusion are *Deniston v. Hoagland*, 67 Ill. 265, and *Galbraith v. McLain*, 84 Ill. 379, and they lack controlling force for the reasons stated in the *Goelz* Case. This witness' statement that in her judgment the testator was not capable of transacting ordinary business was based largely on conversations between herself and the testator or between the testator and others, and was incompetent. Our conclusion is that the court should not have admitted the testimony of Sarah A. Donnan in reference to what was said when Charles was talking with his father, and should not have admitted her testimony in reference to the mental condition of the testator. In other respects the testimony, so far as the same has been called to our attention, was properly admitted.

At appellee's request the court gave the jury the following instruction: "The court instructs the jury that inequality and unreasonableness in a testamentary disposition of property, though not, in itself, conclusive evidence of unsoundness of mind or of undue influence, may be considered as a circumstance tending to show unsoundness of mind or undue influence in connection with all the other facts and circumstances proven in the case; and the jury have a right to consider the evidence, if any, of unsoundness of mind and undue influence appearing in the will itself, taking into consideration the state of the testator's property, his relatives, and the claims of the particular individuals thereof upon his bounty, in determining whether or not, at the time of the signing of the supposed will in question, the testator was of sound mind and memory and free from undue influence." This instruction, standing alone, was calculated to make the impression on the jury that, where it appears from the will that the testator has made an unequal distribution of his property among his children, this fact, alone, is to be considered as evidence tending to show unsoundness of mind or undue influence. We have repeatedly held that inequality in the distribution of property may, in connection with other facts and circumstances proven, be considered upon the question of the soundness of mind of the testator or whether he was unduly influenced to make the will; but it has never been held, we believe, that the unequal distribution of property by a testator was primarily or of itself alone to be considered as evidence tending to prove unsoundness of mind or undue influence. Where other facts and circumstances are proven tending to show such condition of mind at the time the will was made, then inequality may be considered also, in connection with such facts and circumstances proven. No presumption is raised against the validity of a will because of inequality in the distribution of property, nor, standing alone, is it to be considered as a circumstance against the validity of the will. The law is too well settled to require the citation of authority that the owner of property may dispose of it by will in any manner he sees fit, to the exclusion of some or all of his children, and the justice or propriety of the disposition made of the property is not a question for courts and juries to pass upon; but, as we have said, it is only when other facts and circumstances are proven tending to show lack of mental capacity or undue influence that inequality in the provisions of the will becomes a circumstance to be considered. The instruction here complained of was calculated to give the jury to understand that, while "inequality and unreasonableness in a testamentary disposition of property" is not conclusive, it is evidence of unsoundness of mind or undue influence to be considered by the jury. The vice of the instruction is that it conveys the impression

to a jury that it should consider "inequality and unreasonableness in a testamentary disposition of property" primarily as evidence of unsound mind or undue influence. It unduly emphasized "inequality and unreasonableness" as elements to be considered in determining the validity of the will, and was calculated to encourage the natural tendency to correct inequalities where they were believed to exist. In this respect it was entirely different from the instruction approved in *England v. Fawbush*, 204 Ill. 384, 68 N. E. 526. That instruction told the jury, among other things, that inequality in the distribution of property by will among those who would inherit if no will had been made was not, of itself, evidence of undue influence or unsoundness of mind.

The court refused two instructions asked by appellants. One was, in substance, that a child had no legal or natural right to his father's estate as against the provisions of a valid will, and that a parent free from undue influence and of sufficient mental capacity might give his property to any person he chose. The other was that even if it appeared that William Donnan received less property by the will than the other children, and that this resulted from an unreasonable dislike or prejudice on the part of the testator toward his son William Donnan, that would afford no ground for setting aside the will, if the testator was of sound mind and memory and not unduly influenced when he executed it. These instructions stated correct principles of law, which appellants were entitled to have given to the jury. Appellee insists they were, in substance, embraced in instruction No. 2 given for appellants. We cannot agree with this contention. The refusal of the instructions referred to left nothing to supplement instruction No. 14 given on behalf of appellant.

For the error in giving said instruction for appellee, while refusing the two instructions above referred to which were asked by appellants, and for the error in admitting incompetent testimony, the decree is reversed, and the cause remanded.

Reversed and remanded.

(236 Ill. 178)

JONES et al. v. GLOS et al.

(Supreme Court of Illinois. Oct. 26, 1908.)

Error to Appellate Court, First District, on Appeal from Superior Court, Cook County; W. M. McEwen, Judge.

Action by William M. Jones and others against Jacob Glos and others. Judgment for plaintiffs was affirmed by the Appellate Court, and defendants bring error. Reversed and remanded.

David G. Robertson, for plaintiffs in error. John R. O'Connor, for defendants in error.

PER CURIAM. The questions raised upon the record in this case are the same as the questions raised in the case of *Larson v. Glos* (Ill.) 85 N. E. 926; and for the reasons given in the opinion filed in that case the decree of the su-

perior court and the judgment of the Appellate Court will be reversed, and the cause remanded to the superior court.

Reversed and remanded.

(200 Mass. 242)

YOUNG v. SNELL.

(Supreme Judicial Court of Massachusetts. Bristol. Nov. 24, 1908.)

1. EVIDENCE (§ 594\*)—UNCONTRADICTED EVIDENCE.

Testimony of plaintiff and his witnesses, though uncontradicted, may be disbelieved in toto by the jury.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2431; Dec. Dig. § 594.\*]

2. MASTER AND SERVANT (§ 278\*)—INJURY TO SERVANT—NEGLIGENCE.

A nail standing up above the floor from an inch to an inch and three quarters, covered with shavings, bent over so that it would make one hitting his foot against it stumble, and so located with reference to a buzzsaw as to make it a source of great danger, is such a defect as to authorize a finding of negligence of the master, where a servant fell over it onto the saw.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 958, 961, 967, 968; Dec. Dig. § 278.\*]

3. MASTER AND SERVANT (§ 278\*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

Evidence as to condition of a nail found in the floor in front of a buzzsaw a week after a servant stumbled over something onto the saw held to warrant a finding that it was there before the accident, and was the cause of it, and that on proper inspection by the master it would have been found.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 956, 963; Dec. Dig. § 278.\*]

4. MASTER AND SERVANT (§ 208\*)—INJURY TO SERVANT—TRANSITORY RISK.

It is not a case of transitory risk, for which the master is not liable, where a servant authorized to work at a buzzsaw stumbled onto it over a long projecting nail in the floor, covered with shavings, which were removed but once a week, the condition of the nail showing it had been there a long time.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 551-558; Dec. Dig. § 208.\*]

5. MASTER AND SERVANT (§ 279\*)—NEGLIGENCE OF FELLOW SERVANT—EVIDENCE.

Injury to a servant in stumbling onto a buzzsaw over a nail projecting from the floor and covered with shavings is not shown to have been caused by the negligence of a fellow servant in not sweeping up the shavings; the evidence showing they were to be swept up only on Saturdays, the accident happening on Monday, and it not appearing that the floor was not swept on the previous Saturday.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 279.\*]

6. MASTER AND SERVANT (§ 289\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

A servant is not as matter of law guilty of negligence in walking to a buzzsaw over a floor covered with shavings without sweeping them away, and examining the condition of the floor as to projecting nails.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1110-1115; Dec. Dig. § 289.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**7. MASTER AND SERVANT (§ 219\*) — ASSUMPTION OF RISK—OBVIOUS RISK.**

The floor in front of a buzzsaw, onto which a servant fell over a nail projecting from the floor, being habitually covered with shavings, the risk from the nail was not an obvious one, and therefore was not assumed by him as an incident to the employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-614; Dec. Dig. § 219.\*]

Report from Superior Court, Bristol County; Robert F. Raymond, Judge.

Action by Horace V. Young against George H. Snell. The case is reported. Judgment for plaintiff.

Frederick S. Hall, for plaintiff. D. F. Slade, for defendant.

LORING, J. The plaintiff was hired by the defendant to put up an addition to his planing mill about six weeks before the accident here complained of. He testified that he was invited by the defendant to use the machinery in the mill whenever he had work to be done which could be done more quickly on one of the machines. On the day in question he had occasion to square up a piece of quarter round board and undertook to use the defendant's buzz planer in doing that work. His story was that he found that he did not have the right gauge on; that he went and set the gauge; that he then "went to pick up" the board in question, when something caught his foot and "caused him to stumble" onto the buzz planer which was exposed, and parts of two of his fingers were cut off by the machine. He was alone in the room at the time, and he testified that "it was not light around the machine and you could not see the floor around the machine; that there were a good many shavings on the floor; that these were directly under his feet and all around the planer." The accident was on a Monday.

He further testified that a week later he went to the place with another carpenter who never had worked for the defendant, and found a nail sticking up "about one inch or more" above the floor, and about 18 inches from the bottom of the planer; "that it was where it came directly in the way of his right foot." He described the nail as "hooked over, the head of it," and "that the head of it was towards him as he stood there working on the machine"; that he saw an "impression in the floor" which indicated that the nail had been in the board; "that the depression looked old" and "the nail looked old"; it had been worn slightly; the nail was not there in the depression but was sticking up from it; the depression was about the same length as the part of the nail which stuck up from the floor, and the nail seemed to fit it. When he went there a week after the accident and found the nail, "he took a stick and brushed the shav-

ings away and found the nail." The depression showed where the head of the nail had been driven into the wood.

The story of finding the nail was corroborated by the testimony of the carpenter who went with the plaintiff when he went a week after the accident. He (the carpenter) testified to the shavings, to brushing them aside, and finding the nail. He saw that the nail "was sticking up an inch to an inch and three-quarters." He also corroborated the plaintiff's story as to the place where the nail was found, adding "it was sort of a bad place for it," and, as to the nail being bent over he testified that it "looked as if the nail had been stamped on"; that it looked to him as if the nail had been tramped on some around there"; that the nail head was bent over; that "the nail was loose in the floor, in the hole in the floor, from being tramped on; that there was a depression under the head of the nail"; "that the nail did not look very new."

The plaintiff's story as to what the nail looked like was further corroborated by one Fitch, who was an employé of the defendant. His testimony confirmed the story told by the plaintiff as to where the nail was, as to its sticking up from the floor, as to its being bent over, and as to the depression in the floor. He also testified "that it appeared to be a nail that had worked itself out of the floor or had been driven in the floor and tipped over by working around by the tramping on it; that it looked like a nail after it was scraped some on the side by the feet of anyone there and loosened out of the wood which kind of bent over the head of it; that it looked as if it had been tramped down on the floor"; and "that the floor was all worn there; that it was worn up under the edge of the planer."

One of the defendant's employés called by the defendant testified that his attention was called to the nail by the plaintiff. He said that the nail was  $2\frac{1}{2}$  inches long, and "that about half an inch or three-quarters of an inch" of it only "was in the floor." His testimony corroborated that of the plaintiff as to where the nail was, as to the nail being bent over, as to its being "worn some" and "shiny," "that it showed shiny in a part of it where it had been struck by the feet," and "that it was not a new nail." He also testified that between the time of the accident and the time the plaintiff found the nail he did not do any cleaning "as far as he could remember."

There was evidence that the floor about the buzz planer was habitually covered with shavings, and that these shavings were usually cleaned up once a week on Saturday night, and that it was the duty of the last witness to clean up the shavings at that time.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

There was some evidence which tended to contradict what might be inferred from the testimony of the plaintiff and his witnesses. It is not necessary to state what it was, for even if not contradicted, the jury could disbelieve it in toto. *Lindenbaum v. New York, New Haven & Hartford Railroad*, 197 Mass. 814, 84 N. E. 129.

The case does not come within *Jennings v. Tompkins*, 180 Mass. 302, 62 N. E. 265. The nail in the case at bar (if the plaintiff's story was believed) was bent over so as to make a person stumble, and was in such a position with reference to the buzz planer as to make its existence a source of great danger. In addition, the jury were warranted in finding that it stood up above the floor from an inch to an inch and three-quarters, in place of three-sixteenths of an inch, as in *Jennings v. Tompkins*.

It is not an infrequent occurrence that the condition in which the locus is found after an accident is of itself alone sufficient evidence of its having been in the same condition before the accident. In *Comerford v. Boston*, 187 Mass. 564, 73 N. E. 661, the plaintiff was injured by the sidewalk having settled down about two inches below the curbing. There was evidence that after the accident the facing of the inside of the curbing was "pretty nigh black." This was held sufficient evidence that the sidewalk had been in this condition such a length of time before the accident that the city, by the exercise of reasonable diligence, might have known of it in season to have it remedied within Pub. St. 1882, c. 52, § 18 (Rev. Laws c. 51, § 18).

In *Gould v. Boston Elevated Railway*, 191 Mass. 396, 77 N. E. 712, a seat in an open car fell on the plaintiff by the breaking of the metallic armature. Evidence that after the accident half of the break of the armature was rusty, black, and corroded was held to be evidence that the crack was an old one, and would have been seen on inspection if due care had been used by the defendant.

*Hannan v. American Steel & Wire Co.*, 193 Mass. 127, 78 N. E. 749, is another case of the same kind. There an injury was caused by the breaking of an iron bolt, and, after the accident, it was found that part of the break was fresh and the other part rusty. It was held that the condition in which the bolt was found to be after the accident warranted a finding that it was an old break and could have been found had proper inspection been made by the defendant, in the exercise of due care.

In our opinion the case at bar comes within these decisions, and the evidence here warranted the jury in finding that the nail found by the plaintiff a week after the accident was there before it and was the cause of it; and that on proper inspection it would

have been found by the defendant. Further, in our opinion this is not the case of a transitory risk, as in *Donovan v. American Linen Co.*, 180 Mass. 127, 61 N. E. 808, and *McCann v. Kennedy*, 167 Mass. 23, 44 N. E. 1055.

Neither was the accident caused by the neglect of a fellow servant in not sweeping up the shavings. On the uncontradicted testimony the shavings were to be swept up but once a week. There is no evidence that they were not swept up on the Saturday night preceding the Monday on which the accident occurred. The shavings around the planer at the time of the accident might well have been made on that Monday morning. The case therefore does not come within *McRea v. Hood Rubber Co.*, 187 Mass. 326, 72 N. E. 1015.

We are also of opinion that the jury were warranted in finding that the accident was not caused by contributory negligence on the part of the plaintiff. They were warranted in finding that the nail was hidden by shavings at the time of the accident. In our opinion a workman cannot be said as matter of law to be guilty of negligence if he walks to a buzz planer over a floor covered by shavings, without sweeping them away and examining the condition of the floor.

Since the floor was habitually covered with shavings, the risk from this nail was not an obvious one, and for that reason was not one assumed by the plaintiff as an incident to the employment which he chose to accept.

In accordance with the terms of the report the entry must be

Judgment for the plaintiff in the sum of \$1,000.

(200 Mass. 272)

#### CASHMAN et al v. PROCTOR.

(Supreme Judicial Court of Massachusetts. Essex. Nov. 25, 1908.)

#### 1. CONTRACTS (§ 282\*)—PERFORMANCE—SATISFACTION OF PARTY.

A contract to furnish a manufacturing plant "to the acceptance" of a party is performed if the plant in such that a reasonable man, in view of the specifications, ought to be satisfied with it as conforming to the contract, and he cannot refuse to accept it merely because its capacity is insufficient to do all the work that he desires.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1234-1239; Dec. Dig. § 282.\*]

#### 2. CONTRACTS (§ 280\*)—PERFORMANCE.

An agreement to furnish a plant constructed from described machinery which shall work successfully and perfectly is performed if the plant works successfully and perfectly when required to do the work which such machinery ought to accomplish; the contract creating a warranty as to capacity to this extent only.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1249-1252; Dec. Dig. § 280.\*]

**3. TRIAL (§ 228\*)—INSTRUCTIONS.**

An instruction treating a provision in a contract as creating a warranty is not erroneous because the word "warranty" was not used.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 228.\*]

**4. TRIAL (§ 256\*)—INSTRUCTIONS.**

A party who desires more specific instructions on an issue should ask for them.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.\*]

Exceptions from Superior Court, Essex County; Lloyd E. White, Judge.

Action by Michael Cashman and others against John H. Proctor. Verdict for defendant, and plaintiffs except. Exceptions overruled.

N. N. Jones and Wm. Frye White, for plaintiffs. Allen & Smith, for defendant.

**SHELDON, J.** The plaintiffs' second request was properly refused. The provision in the contract that the plant should be constructed "to the acceptance" of the plaintiffs meant under the circumstances here existing only that the materials and the construction should be such that a reasonable man, in view of the specifications incorporated into the contract, ought to be satisfied with the completed work as conforming to the requirements of the contract and specifications. *Lockwood Mfg. Co. v. Mason Regulator Co.*, 183 Mass. 25, 66 N. E. 420; *Noyes v. Eastern Accident Ass'n*, 190 Mass. 171, 182, 76 N. E. 665; *C. W. Hunt Co. v. Boston Elevated Ry.*, 199 Mass. 220, 85 N. E. 446. A reasonable man would not have refused to accept this work, if it complied with all the terms and stipulations of the contract and specifications, merely because its capacity was not sufficient to do all the work that he desired. Under the contentions made by the parties in this case, that was the actual effect of the modification of this request made by the Judge.

The third, fourth, fifth, and sixth requests were given in substance, but subject to a modification similar to that already stated; i. e., that what the defendant was required to do was to "put in just the mechanical appliances which he agreed to put in, and put them in mechanically correctly," and that, "if the defendant furnished a plant in accordance with the plans and specifications and it worked perfectly, mechanically, it [was] immaterial whether or not it was of sufficient capacity to do the work required of it by the plaintiff." This was correct. *Brummett v. Nemo Heater Co.*, 177 Mass. 480, 59 N. E. 58; *Morse, Williams & Co. v. Puffer*, 182 Mass. 423, 65 N. E. 804. The agreement was not to furnish a plant which should be of sufficient capacity to do all the work that the plaintiff might desire, but to furnish certain carefully described appliances and machinery, and that the plant constructed from

them should work successfully and perfectly; which must mean only that the working shall be successful and perfect when called upon to do the work of which such appliances and machinery ought to be capable. These words cannot be extended to include the successful and perfect accomplishment of work beyond the capacity of such a plant. To the extent that we have stated, these words were treated as creating a warranty; and it is immaterial that this word was not used by the judge. *Parker v. Springfield*, 147 Mass. 391, 18 N. E. 70.

The seventh request was given in substance with the modification already stated; and for the reasons mentioned above we are of opinion that the modification was correct.

The eighth request is not now insisted upon.

The ninth, tenth, eleventh, and twelfth prayers no doubt state correct rules of law. *Garfield & Proctor Coal Co. v. Pennsylvania Coal & Coke Co.*, 199 Mass. 22, 84 N. E. 1020. That is, the matters spoken of in these requests were not conclusive against the plaintiffs as matter of law. It was their right to have this issue submitted to the jury. But this was done. In substance, accordingly, these requests were given. And we cannot say that this exception is open to the plaintiffs. The judge evidently considered that he had given these requests; for he said to the plaintiffs' counsel at the end of his charge, that he had given substantially their requests numbered from two to twelve, with the modification which has been stated; and the plaintiffs' counsel, apparently consenting to this, desired only to except to that modification and to another specific part of the charge, which has been already considered.

For the same reason the plaintiffs' claim made before us in argument that the judge should have ruled in terms upon the question whether there was an express or implied warranty that the plant would do the work for which it was constructed is not open upon these exceptions. Apart from the fact that this question was in substance submitted to the jury, if the plaintiffs desired more specific instructions upon it, they should have asked for them.

Exceptions overruled.

(200 Mass. 175)

**COMMONWEALTH v. BYARD.**

(Supreme Judicial Court of Massachusetts.  
Bristol. Nov. 24, 1908.)

**1. MUNICIPAL CORPORATIONS (§ 703\*)—STREETS—MOVING BUILDINGS—PERMITS.**

Under Rev. Laws, c. 52, § 13, forbidding the moving of a building through a town way without written permit from the town authorities, to be granted on such terms as they deem necessary for the public safety, and chapter 26, § 2, making laws as to towns apply to cities, a permit to move a building of described dimensions

through a city street does not justify the moving of a larger building.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 703.\*]

**2. MUNICIPAL CORPORATIONS (§ 678\*)—TREES—ABUTTING STREETS—WARDEN'S AUTHORITY TO CUT.**

Rev. Laws, c. 51, § 10, providing that the officer having charge of trees belonging to a municipality may, and if required by the surveyors or road commissioners shall, trim trees, except public shade trees in towns and bushes standing in ways, etc., does not authorize a tree warden to cut down trees on private lands nor to cut off parts of such trees extending over the street.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 678.\*]

**3. MALICIOUS MISCHIEF (§ 1\*)—TREES—UNLAWFUL INJURY—MALICE.**

Under an indictment charging that accused willfully, maliciously, and wantonly injured a tree, in violation of Rev. Laws, c. 208, § 100, it was unnecessary to show that he acted maliciously.

[Ed. Note.—For other cases, see *Malicious Mischief*, Cent. Dig. § 2; Dec. Dig. § 1.\*]

**4. MALICIOUS MISCHIEF (§ 1\*)—TREES—"WANTONLY."**

A manifestly injurious act done willfully in reckless disregard of the rights of others is done "wantonly" within Rev. Laws, c. 208, § 100, as amended by St. 1902, p. 483, c. 544, § 30, providing punishment for willfully and maliciously cutting trees; and a tree warden wantonly cut a tree on private land where he did not try to ascertain what his rights and duties were.

[Ed. Note.—For other cases, see *Malicious Mischief*, Cent. Dig. §§ 1-4; Dec. Dig. § 1.\*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7385, 7386, 7832.]

**5. MALICIOUS MISCHIEF (§ 9\*)—TREES—WANTON INJURY—EVIDENCE—SUFFICIENCY.**

Evidence held to sustain a conviction of a tree warden for willfully, etc., injuring a tree, in violation of Rev. Laws, c. 208, § 100.

[Ed. Note.—For other cases, see *Malicious Mischief*, Cent. Dig. § 15; Dec. Dig. § 9.\*]

Exceptions from Superior Court, Bristol County.

William H. Byard was convicted of willfully, etc., injuring a tree, and he brings exceptions. Exceptions overruled.

James M. Swift and Frank B. Fox, for plaintiff. Benjamin Cook, Jr., for defendant.

**KNOWLTON, C. J.** The defendant was found guilty upon an indictment framed under Rev. Laws, c. 208, § 100, as amended by St. 1902, p. 485, c. 544, § 30, alleging that he "willfully and maliciously and wantonly did injure a tree standing for a useful purpose, of the property of Minnie M. Glendon." This was a large cherry tree standing near the line of the street, within its owner's inclosure, and it had large branches extending over the street. One part of the trunk, about 14 inches in diameter, extended over the line of the street about 9 feet above the ground. One Nickerson obtained from the proper authorities a permit to move a building through the street, around the corner,

into another street. Mrs. Glendon's lot at and near the corner abutted on both streets. The building was five feet longer and about a foot and a half wider than that described in the permit, and therefore the authority given did not justify the removal of this larger building through the street. Under Rev. Laws, c. 52, § 13, which applies to cities as well as towns (Rev. Laws, c. 28, § 2), its removal in that place was unlawful.

Its length and width were such that it was necessary to carry it over a part of Mrs. Glendon's land near the corner of the street, and to cut down a small tree in her yard, and Mrs. Glendon agreed with Nickerson that this might be done. Its width was so great, and houses upon the other side were so located, that it could not be taken through the street without cutting off branches and a part of the trunk of the cherry tree. The owner of the tree refused to permit this to be done, and the defendant, assuming to act under his authority as a tree warden, did it against her protest.

The first question that arises is: What is the authority of a tree warden under Rev. Laws, c. 51, § 10? Does it include a right to cut down trees, or to cut off parts of trees, standing on private land outside of the boundary lines of the street? We are of opinion that it does not. The surveyors and road commissioners, under the last clause of this section, should cause parts of such trees to be removed if they obstruct the way, or endanger, hinder, or incommode persons traveling thereon. In the early part of the section an exception is made of "public shade trees in towns"; but trees and bushes standing in ways may be trimmed or lopped off, or, in pursuance of a vote of the mayor and aldermen, selectmen or road commissioners, passed after public notice and a hearing, may be cut down and removed by the officer who has the care of trees belonging to a city or town. But this part of the section has reference only to trees and bushes "standing in ways." The defendant had no legal right to cut off the branches of the tree, and the ruling on this part of the case was correct.

The defendant's counsel presented 17 requests for rulings, some of which are covered by what we have said, and many of which relate to the meaning of the word "wantonly" used in the indictment. Under this indictment it was not necessary to prove that the defendant acted maliciously. Indeed, the commonwealth did not contend that the charge of malicious action was sustained, and the judge instructed the jury that it was not sustained. The case was left to stand upon the allegation that the defendant acted wantonly.

The judge instructed the jury that "an act done heedlessly, without regard to the propriety demanded by the circumstances of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the case, and in reckless disregard of the rights of others, with a total absence of care, amounting in this case to gross negligence by the defendant in the discharge of his duties as tree warden, would be an act done wantonly." We are of opinion that a manifestly injurious act, done willfully in reckless disregard of the rights of others, is done wantonly within the meaning of this statute. *National Folding Box Company v. Robinson's Estate* (C. C.) 125 Fed. 525; *Werner v. State*, 93 Wis. 266, 67 N. W. 417; 30 Am. & Eng. Encl. of Law (2d Ed.) 2-4. The jury were further instructed that if the defendant, acting as a reasonable man, was justified in believing and honestly believed that he had the authority that he exercised, he was not guilty; but if they found that if he had taken any proper precaution to learn of his rights and duties as tree warden he would not have acted as he did, and found that he was grossly negligent in the performance of his duties as tree warden, they might find that he acted wantonly. Willfully to do an irreparably injurious act without trying to ascertain what his rights and duties were, and to go on in gross negligence of his duties, indicated a spirit of wantonness and reckless disregard of right and wrong in his conduct affecting others. We are of opinion that the instructions on this branch of the case were substantially correct, and that the defendant's requests were rightly refused.

We are also of opinion that there was evidence to which the instructions were properly applicable, and which well warranted the finding of the jury. There were a variety of circumstances tending to sustain the contention of the commonwealth. The defendant admitted in cross-examination that he had not at any time taken any steps to inform himself as to his powers, duties, and authority as tree warden, except that he asked the mayor what he should do and was told to lop off trees in the highway which would obstruct carriages or the apparatus of the fire department; that he had never read any of the statutes or other sources of information concerning it, except that he looked once or twice in a book sent him by the state forester; that he had not seen anything in that concerning his duties in such a case as this; that he took no steps to inform himself as to his powers, duties, or authority after Mr. Nickerson made complaint about this cherry tree; that he did not attempt to ascertain what the permit was, or whether the building was of the dimensions given in the permit; that he made no inquiry of the mayor or the city clerk, and did not consult the city solicitor, although he knew he had a right to ask the city solicitor about it. It also appeared that he began the cutting without saying anything to the owner of the tree, and that, although

he saw her husband and talked with him the evening before the cutting after he had viewed the premises and made up his mind to cut the tree, he said nothing to the husband about it. There was also testimony for the consideration of the jury as to the way in which the tree was cut and as to the defendant's having said that he was doing Mr. Nickerson a favor. The bill of exceptions shows no error of law at the trial.

Exceptions overruled.

(300 Mass. 204)

#### HOWLAND v. PARKER et al.

(Supreme Judicial Court of Massachusetts.

Bristol. Nov. 24, 1908.)

#### 1. POWERS (§ 34\*) — RESIDUARY BEQUESTS — EXECUTION—MODE.

Where testator has the income of property for life with the power of disposal by deed or will, a residuary bequest or devise by him of his property constitutes an execution of the power.

[Ed. Note.—For other cases, see Powers, Cent. Dig. § 122; Dec. Dig. § 84.\*]

#### 2. POWERS (§ 36\*) — CONSTRUCTION — EXECUTION BY WILL — "DESIGNATED TO BE HELD IN TRUST."

A declaration of trust gave to testatrix \$250 a year from the principal of the trust fund, together with interest thereon, and authorized her to dispose of the balance by will. By the seventh clause of her will she gave the remainder of the money, securities, and deposits belonging to her estate in trust for G., etc., and by the eighth clause directed that all articles of personal property belonging to her not specifically bequeathed or "designated to be held in trust" and all interest, if any, she had in any real estate, she gave to C. *Held*, that the words "designated to be held in trust" meant "given in trust," and did not require that money, securities, and deposits should be excluded in all cases from the personal property covered by the eighth clause of the will, which therefore included all personal property not passing under previous provisions and constituted a valid exercise of the power, so that the remainder of the trust funds passed to testatrix's executrix, and did not revert to the creator of the trust.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 137, 144-147; Dec. Dig. § 36.\*]

Appeal from Superior Court, Bristol County.

Suit by Helen D. Howland, as executrix of the will of Mary E. Howland, deceased, against William C. Parker and others, trustees, and Barker O. Howland, claimant. From an order directing judgment in favor of claimant for \$5,449.52, the executrix appeals. Reversed, and judgment entered for claimant.

Plaintiff was duly appointed executrix of the will of Mary E. Howland, deceased, and defendants were trustees under a written instrument, hereafter referred to, claimant being Mary E. Howland's surviving husband.

Testatrix died March 25, 1907, and her will was duly probated.

During her lifetime and prior to the execution of her will an agreement was made between testatrix and claimant and William C. Parker and James L. Gillingham,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

trustees, while testatrix and her husband were living apart, whereby the trustees received in lieu of the cash payments provided for therein a note for \$5,500 signed by Sarah C. Howland and indorsed by Barker C. Howland, made payable on demand to the trustees. All conditions on which the trust were made were complied with and performed by testatrix up to the time of her death. Without the proceeds of the trust fund, testatrix's estate was insufficient to pay her debts, funeral expenses, and cost of administration. The note since the death of testatrix has been paid to the trustees, which sum is demanded by the executrix and by claimant; the question at issue being whether the power of appointment established in the trust has been executed by testatrix in her last will, so that the executrix becomes entitled to the fund.

The trust provided that whereas claimant and wife were not living harmoniously together, and she having left him, he delivered to the trustees \$8,500 to be disposed of for his wife's benefit according to certain restrictions, and that, in the event of the wife's death while the trust remained in force, the trust funds remaining should be paid by the trustees to certain persons or disposed of in such manner as the wife by her last will shall direct and in case she died intestate, said fund to be returned to the husband.

By the seventh clause of the will, the wife directed that, after the payment of her just debts, expenses of funeral, cremation and burial, and administration, and delivery of specific bequests, the remainder of the money, securities, or deposits belonging to her estate shall be held by her executrix during the lifetime of her cousin Susan A. Gilbert, and, during the continuance of the trust, the net income received therefrom shall, from time to time, and at least semiannually, be paid to her cousin for her own personal use and free from all interference or control of her husband.

The eighth clause provided that all articles of personal property belonging to her at her decease, not specifically bequeathed or designated to be held in trust, and all right, title, and interest, if any, which she might have in any real estate at her decease, she gave to her sister, Jessie E. Corson, and on the termination of the trust the net amount then remaining of the trust fund should be delivered and paid to her sister, who should receive and dispose of the same as her own individual property, free from the control and interference of her husband, to her and her heirs and assigns forever.

Eugene J. Hadley and Benj. B. Barney, for appellant. Perry, Jenney & Potter, for appellees.

LORING, J. The first contention made by the executrix is that the seventh clause of the will of Mrs. Howland was a valid execution of the power, and her second, that the

eighth clause is a valid execution of it if the seventh is not.

In this action it is not necessary to decide between the two. If either clause operates as an execution of the power the fund goes to the executrix under the rule established in *Olney v. Balch*, 154 Mass. 318, 28 N. E. 258.

We are of opinion that the fund passes under the eighth clause if it does not pass under the seventh clause.

It is settled in this commonwealth that where a testator has the income of property for life with a power of disposing of the principal by deed or by will, or by will alone, a residuary bequest or devise by him of his personal or of his real property is to be construed to be an execution of that power. *Amory v. Meredith*, 7 Allen, 397; *Willard v. Ware*, 10 Allen, 263; *Bangs v. Smith*, 98 Mass. 270; *Sewall v. Wilmer*, 132 Mass. 131; *Cumston v. Bartlett*, 149 Mass. 243, 21 N. E. 373; *Hassam v. Hazen*, 156 Mass. 93, 30 N. E. 590; *Stone v. Forbes*, 189 Mass. 163, 75 N. E. 141; *Tudor v. Vall*, 195 Mass. 18, 80 N. E. 590. "The reason which was led to the establishment of the general rule which now prevails in England (*St. 7 Wm. IV; 1 Vict. c. 26, s. 27*), as well as here, [is] that where one has the use and income of land during life with a power of disposition after death, it is natural for him to consider and treat it as his own property." *C. Allen, J., in Cumston v. Bartlett*, 149 Mass. 243, 250, 21 N. E. 373, 374. Not only that, but it is not unnatural for him to speak of it as his own property in making his will.

In the case at bar \$250 a year was to be paid to Mrs. Howland from the principal of the trust fund and the interest thereon.

The contention of the claimant is that the eighth clause of the will is not a bequest of the residue of the personal property not otherwise disposed of so as to include personal property, if any, described in the seventh clause which does not pass under that clause of the will. His argument is that the eighth clause covers "all articles of personal property belonging to me at the time of my decease not designated to be held in trust" by the seventh clause; and, since money, securities, and deposits are designated to be held in trust by the seventh clause, they are as matter of description excluded from the eighth clause. The bequest made in the eighth clause is "all articles of personal property belonging to me at my decease, which are not herein specifically bequeathed or designated to be held in trust and all right, title and interest, if any, which I may have in any real estate at my decease I give," etc. We are of opinion that the words "designated to be held in trust" must be construed to mean given in trust, and not to mean that money, securities, and deposits are excluded in all cases from the personal property covered by the eighth clause. The eighth clause, therefore, includes all person-

al property which does not pass under the previous provisions of the will. The devise contained in this article is confessedly a general residuary devise. It is evident that the bequest there made was intended to be equally extensive.

As to the contention of the executrix that the fund passed under the seventh clause of the will: The description of the personal property covered by that clause of the will indicates that the testator had this trust fund in mind. By the terms of the indenture creating the trust fund of \$5,500, it was to be paid in money and deposited in bank, and by the agreement of the parties a promissory note had been substituted therefor. Further, if it had appeared that Mrs. Howland had no money, securities or deposits on April 14, 1905, when she executed her will, that fact would warrant holding the seventh clause to be an execution of the power. See the third class of cases mentioned by Story, J., in *Blagge v. Miles*, 1 Story, 426, Fed. Cas. No. 1,479, referred to in *Amory v. Meredith*, 7 Allen, 397, 399. See, also, *Wallop v. Lord Portsmouth*, Appendix to Sugden on Powers (8th Eng. Ed.) 916; *Hurst v. Winchelsea*, 2 Kenyon, 444; *Id.*, 2 Burr. 879, and 1 Bl. 187; *Standen v. Standen*, 2 Ves. 589; *Grant v. Lyman*, 4 Russ. 292. The statement in the agreed facts that, "Without the proceeds of said trust fund, the estate of the said Mary E. Howland is insufficient to pay her debts, funeral expenses and charges of administration," is not tantamount to a statement that the testatrix had no money, securities, or deposits of her own to which the seventh clause could apply.

The question whether the fund passed under the seventh or eighth clause is a question which should be decided in a suit in which the legatees named in those two clauses are parties. Upon that question we express no opinion now. As we have said, the executrix is entitled to the fund, whichever way that question is answered.

The entry must be:

Judgment reversed; judgment to be entered for the plaintiff.

(200 Mass. 5)

# **BROOKS v. FITCHBURG & L. ST. RY. CO.**

(Supreme Judicial Court of Massachusetts.  
Worcester. Oct. 22, 1908.)

## **1. STATUTES (§ 225\*) — CONSTRUCTION — CONSTRUCTION WITH REFERENCE TO OTHER STATUTES.**

St. 1906, p. 506, c. 463, revising and reenacting the general railroad law, is as to part 1, § 63, almost identical with Rev. Laws, c. 111, § 267. St. 1907, p. 338, c. 392, amended St. 1906, p. 506, c. 463, pt. 1, § 63. St. 1907, p. 324, c. 375, amended Rev. Laws, c. 171, § 2. Held that, as the amending statutes are in effect the same as if they had been originally enacted in the Revised Laws, the same rules of construction are applicable as if

both were enacted at the same time and as part of the same general statutory scheme.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 303; Dec. Dig. § 225.\*]

## **2. STATUTES (§ 224\*) — CONSTRUCTION — CONSTRUCTION WITH REFERENCE TO OTHER STATUTES.**

Statutes alleged to be inconsistent in whole or in part must be so construed as to give reasonable effect to all, unless there be some positive repugnancy between them.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 302; Dec. Dig. § 224.\*]

## **3. DEATH (§ 9\*) — ACTIONS FOR — STATUTORY PROVISIONS—STREET RAILWAY COMPANIES.**

St. 1907, p. 324, c. 375, giving an action against any person or corporation whose negligence, or the negligence of whose servants, causes the death of a person other than an employé, does not include a street railway company; but damages against it for the death of a passenger can be recovered only under St. 1906, p. 506, c. 463, pt. 1, § 63, as amended by St. 1907, p. 338, c. 392, making street railways liable for the death of passengers, and persons other than passengers, not employés, in the exercise of due care.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 9.\*]

Appeal from Superior Court, Worcester County.

Action by Edwin L. Brooks, as administrator, against the Fitchburg & Leominster Street Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

James E. McConnell and J. H. P. Dyer, for appellant. Charles F. Baker and Emerson W. Baker, for appellee.

RUGG, J. The plaintiff's declaration alleges that his intestate, while a passenger upon the defendant street railway, received an injury on September 24, 1906, by reason of the negligence of the defendant's servants, from which she died on June 3, 1907, being survived by husband and children, and that the action is brought under St. 1907, p. 324, c. 375, the writ being dated February 17, 1908. The question presented is whether said statute, approved May 4, 1907, renders a street railway company liable in damages for death caused by the negligence of itself or its servants. It is contended, on the one side, that its language is plain and comprehensive and in its terms broad enough to include street railway companies, and on the other, that taking into perspective all our statutes authorizing recovery for death caused by negligence and giving to each its proper scope and construing them all so as to constitute an harmonious legal system, it was not the intent of the Legislature to include street railway companies within said act, but that damages for such a misfortune as is here set forth can be recovered only under St. 1906, p. 506, c. 463, pt. 1, § 63, as amended by St. 1907, p. 338, c. 392, approved May 8, 1907. Substantially this question was left open in *Beale v. Old Colony Street Railway Co.*, 196 Mass. 119, 81 N. E. 867,

and, while adverted to in *Oulighan v. Butler*, 189 Mass. 287, 295, 75 N. E. 726, in *Kelsey v. N. Y., N. H. & H. R. R. Co.*, 181 Mass. 64, 63 N. E. 8, and in *Hudson v. Lynn & Boston Railroad Co.*, 185 Mass. 510, 71 N. E. 66, was not decided.

In determining this question, the origin and subsequent history of the several statutes are important. It is elemental in this commonwealth that at common law there was no recovery for negligence causing loss of life. The earliest statute in this commonwealth, providing damages for death, was passed over 200 years ago, and related to death caused by defects in highways. *Prov. St. 1693*, p. 137, c. 6, § 6. Its substance is now found in *Rev. Laws*, c. 51, § 17, and has continuously been a part of our statute law ever since its first enactment. It was the only statute of the kind until *St. 1840*, p. 224, c. 80, was passed, which gave a remedy by indictment against all common carriers for causing, by their own negligence or the unfitness or gross carelessness of their employes, the loss of life of a passenger, whether in the exercise of due care or not. By *St. 1853*, p. 622, c. 414, railroad corporations were made liable to indictment for causing under similar conditions the loss of life of any person in the exercise of due care, not a passenger or employe, thus extending liability against railroads alone beyond that established in 1840 for all common carriers. The ground of liability and the measure of recovery were the same in both statutes. When the laws of the commonwealth were consolidated in the *General Statutes*, a chapter was devoted to railroad corporations, and by two sections the pre-existing liability of railroads for loss of life was continued: *Chapter 63*, § 97, *Gen. St. 1860*, continued that imposed by *St. 1840*, p. 224, c. 80, and section 98 that created by *St. 1853*, p. 622, c. 414. The liability for loss of life of a passenger by other common carriers was re-enacted in chapter 160, § 34, *Gen. St. 1860*. The ground of liability in both cases was the same, namely, the negligence or carelessness of the defendant itself or the unfitness or gross negligence or carelessness of its servants or agents. *St. 1864*, p. 155, c. 229, was the first general law respecting street railways. By section 37 it was provided that if, by reason of the negligence of the company or the unfitness, negligence or carelessness of its servants, the life of any person, whether passenger or not, in the exercise of due care, and not in the employ of the company, was lost, there should be a remedy by indictment. This section differed in important particulars from the preceding statutes. It imposed liability for the mere negligence of its servants and agents, while railroads and other common carriers were liable only for the gross negligence of their servants or agents. Street railways were made liable also for the death of persons other than passengers who were not its employes, being in this respect upon the same footing as railroads, and having a

severer liability than other common carriers, but, on the other hand, all persons, whether passengers or not, were required to be in the exercise of due care as a prerequisite to the liability, in this respect the burden as to passengers being less severe than that upon railroads or other common carriers. The next general codification of the street railway laws was *St. 1871*, p. 740, c. 381, § 49 of which continued this same liability of street railway companies. In 1874, by chapter 372, p. 347, of the Acts of that year, the general laws relating to railroads were consolidated and re-enacted, and by section 163 the liability of railroads in this regard was continued upon the same basis as that theretofore existing. By *St. 1881*, p. 521, c. 199, the important change was made in the law as to loss of life occasioned by railroad companies and proprietors of any steamboat, stage coach or common carriers of passengers, and for the life of a person lost by a defective highway, in that a new remedy, namely, an action of tort, was given for the benefit of the widow and near kindred of the person deceased. Section 6 of this act preserved as concurrent the remedy by indictment existing against railroads by *St. 1874*, pp. 396, 397, c. 372, §§ 163, 164, but made no corresponding preservation of remedy against other common carriers or municipalities. This act did not include street railways by name. When the *Public Statutes* were enacted, the liability to indictment disappeared against all except railroads and street railways. The *Public Statutes* made important changes in the laws theretofore existing, in that it combined the remedy by indictment against both steam railroads and street railways in a single section, and excluded the latter from liability for ordinary negligence of their servants and agents, and placed them on the more restricted ground, upon which railroads and other common carriers had always stood, of liability only for gross negligence of servants and agents. It also placed the street railways upon a more favorable footing than before, in that persons not passengers were required to be in the exercise of due diligence before liability for their death arose. *Pub. St. 1882*, c. 112, § 212. But this section did not by express phrase give the remedy by action of tort against street railways. *Pub. St. 1882*, c. 73, § 6, continued the liability of "the proprietor or proprietors of a steamboat or stage coach, or of common carriers of passengers," subjecting them only to an action of tort for loss of life of passengers, but upon the same conditions as before. Upon this state of legislation it was held, in *Holland v. Lynn & Boston R. R.*, 144 Mass. 425, 11 N. E. 674, without adverting to the distinctions in the statutes just pointed out between liability for gross and ordinary negligence nor the differences as to due care being a prerequisite to recovery, that street railway companies were not included within the purview of *Pub. St. 1882*, c. 73, § 6, rendering

"common carriers" liable to an action of tort, for the reason that the conclusion was irresistible that it was not the intent of the Legislature by that enactment to include such companies. St. 1883, p. 532, c. 243, imposed upon the railroads liability for the death of an employé occurring under such circumstances as would have entitled the deceased to maintain an action against the corporation if death had not resulted, under the same conditions and with the same remedies as if the deceased had not been an employé. The remedy by an action of tort, which had, by St. 1881, p. 521, c. 190, been given where there was liability for death, against steam railroads and other common carriers, was extended to street-railway companies by St. 1886, p. 117, c. 140, thus supplying the omission pointed out in *Holland v. Lynn & Boston R. R. Co.*, 144 Mass. 425, 11 N. E. 674. In 1871, by chapter 352, p. 699, of the acts of that year it was enacted that a railroad should be liable to indictment as provided by Gen. St. 1860, c. 63, § 98, for causing death by collision with its engines or cars at a grade crossing where sounding of a whistle or ringing of a bell was required and these signals were not given, unless the deceased or those responsible for him in addition to the want of ordinary care, was also guilty of gross or wilful negligence or acting in violation of the law and these contributed to the death. This relieved a plaintiff in one respect from the burden of proof, and imposed a heavy burden of proof upon the railroad as an affirmative defense. *Commonwealth v. B. & M. R. R.*, 133 Mass. 383; *Manley v. B. & M. R. R.*, 159 Mass. 493, 34 N. E. 951; *McDonald v. N. Y. C. & H. R. R.*, 186 Mass. 474, 72 N. E. 55. This provision has been retained without very material change, except that an action of tort has been also given, until the present time. St. 1874, p. 397, c. 372, § 164; St. 1881, p. 521, c. 190, § 2; Pub. St. 1882, c. 112, § 213; Rev. Laws, c. 111, § 268; St. 1906, p. 580, c. 463, pt. II, § 245. It is not necessary to trace the history of employer's liability (St. 1887, p. 399, c. 270), because it imposes liability upon all employers of labor (with certain exceptions), and contains, so far as this inquiry is concerned, no distinctions between different kinds of employers, and as to street railway companies does not furnish a remedy upon the same ground as St. 1907, p. 324, c. 375, or chapter 392 (page 338). The next change of importance was by St. 1897, p. 388, c. 416, which subjected corporations operating gas or electric light plants or systems to an action of tort, where the life of a person, exercising due diligence and not an employé, was lost by the negligence of the corporation or the unfitness or gross negligence of its servants or agents, but this statute did not confer the remedy by indictment. St. 1898, p. 724, c. 565, provided an action of tort against any person or corporation whose negligence or the gross negligence of whose

servants or agents caused the loss of life of a person, other than an employé, in the exercise of due care. This is the precursor of the statute, under which the plaintiff claims, and is the first statute of the kind, which omits unfitness of the servant or agent as a ground of liability. This statute would not ordinarily be construed as a repeal of existing statutes as to common carriers of all kinds, because they might be liable for the death of a passenger, not in the exercise of due care. The statutes being remedial, it cannot be inferred that a repeal was intended by the enactment of a new statute imposing a more onerous burden of proof upon a plaintiff, without much clearer manifestation of legislative will than this statute shows. But the legislative intent can be best ascertained from its action in the compilation of the Revised Laws, where these two statutes were combined in chapter 171, § 2, and the liability was based upon the negligence of the person or corporation causing the death or the gross negligence of its servants or agents, omitting again, as an express ground, unfitness of servants. The liability of railroads and street railways for causing the death of any person was included in a single section, Rev. Laws, c. 111, § 267, in substantially the same language as that before used. See, also, section 268. The liability of other common carriers was re-enacted in Rev. Laws, c. 70, § 6. The liability of municipalities for death caused by defects in highways was continued by Rev. Laws, c. 51, § 17. The employer's liability act, giving an action for causing the death of an employé, is found in Rev. Laws, c. 106, §§ 72, 73, 74, 75.

In this state of the statute law it is plain, from the origin and history of the various acts of legislation and their collocation in this compilation, that five different classes of liability for causing death are established: First, that relating to death of employés; second, that against municipalities for death occurring by defects upon highways; third, that against railroads and street railways for causing the death of passengers and persons other than passengers, not employés, in the exercise of due care, except in the case of railroads causing death at a grade crossing when the burden of proving the gross negligence of the deceased rests on the railroad, and against railroads alone for causing the death of employés, who, if not killed, might have recovered damages; fourth, that against other common carriers, who are liable only for the death of passengers; and, fifth, that against all other persons and corporations for causing the death of others than employés. The three last classes were not intended to exist as concurrent remedies, giving an election between them to the persons entitled to maintain them, because there were important differences in the liability imposed by the several statutes. It is unlikely that the Legislature would by express enactment impose

different civil liabilities for the same act for the benefit of the same persons. The railroad and street railway and other common carriers were liable for death occasioned by the unfitness of their employes, while the last mentioned class of persons was not, by the express phrase of the statute, made so liable. Whether this makes a substantial difference in the rights of the parties may be open to inquiry when the proper occasion arises. Railroads, street railways, and other common carriers were liable for the death of a passenger, even if such passenger was not in the exercise of due care, while in the latter class due care on the part of the person deceased was a condition precedent to recovery. Again, the remedy for indictment was provided against railroads and street railways, while only the action of tort exists against the other persons liable. And, finally, an employe of the railroad is in some respects placed on the same footing as a stranger to the employment, not a passenger. In important particulars, therefore, the liability of steam railroads and street railways is greater than that provided against the other classes. In the light of this situation we proceed to examine the subsequent legislation. The general railroad law was revised and re-enacted by St. 1906, p. 506, c. 463, pt. 1, section 63 of which is almost identical with Rev. Laws, c. 111, § 267. St. 1907, p. 338, c. 392, amended St. 1906, p. 506, c. 463, pt. 1, § 63, by increasing the maximum of liability in case of death of a person other than an employe from \$5,000 to \$10,000, and by striking out the words "gross" before "negligence." St. 1907, p. 324, c. 375, under which the plaintiff claims to recover, is an amendment of Rev. Laws, c. 171, § 2. It makes a similar increase of maximum liability and change in the degree of negligence of employes, for which a defendant may be liable. In effect both these amending statutes are the same as if they had been originally enacted in the Revised Laws in the form, in which they now appear. *Bartley v. Boston & Northern St. Ry. Co.*, 198 Mass. 163, 83 N. E. 1093. Therefore, the same rules of construction are applicable as if both statutes were enacted at the same time, and as a part of the same general statutory scheme. The liability of common carriers other than railroads and street railways established by Rev. Laws, c. 70, § 6, has been unchanged. The principle of interpretation is well established, that statutes alleged to be inconsistent with each other, in whole or in part, must be so construed as to give reasonable effect to all, unless there be some positive repugnancy between them. *U. S. v. Lee Yen Tai*, 185 U. S. 218, 22 Sup. Ct. 629, 46 L. Ed. 878; *Pollock v. Lands Improvement Co.*, 87 Ch. Div. 861; *Thorpe v. Adams*, L. R. 6

C. P. 125; *Hill v. Hill*, 1 Exchequer Div. 411; *Copeland v. Springfield*, 166 Mass. 496, 44 N. E. 605; *Brown v. Lowell*, 8 Metc. 172.

This review of the statutes demonstrates that the Legislature has always, in the respects now under consideration, treated railroads and street railways as separate classes of corporations, not always upon the same basis, and has generally held them to a higher degree of liability than other persons or corporations. This legislative policy continues in the statutes as they now exist, save only as to the limitation of the time, within which action may be brought. It cannot be assumed, as before pointed out, that the statutes, upon which the plaintiff relies, repealed by implication (for there is no express repeal) Rev. Laws, c. 70, § 6, and St. 1906, p. 506, c. 463, pt. 1, § 63. Such an assumption would be especially violent in view of St. 1907, p. 338, c. 392, passed four days later than the one under which the plaintiff claims, which reaffirmed with increased liability the remedies against railroads and street railways. There is room for a reasonable application and ample field for operation of St. 1907, p. 324, c. 375, by treating it purely as a remedial statute, and applicable to other persons and corporations not subjected by existing statutes to any like liability, although, in view of the statutes respecting liabilities of cities and towns for death occasioned by defects in highways, and *Linehan v. Cambridge*, 109 Mass. 212, it may be doubtful whether it was intended to apply to municipalities.

The conclusion we have reached gains strong support from the fact that these several provisions are all enacted in a general compilation of the body of statute law of the commonwealth, which was first made by a commission of three learned lawyers, after a labor of about five years, whose report shows no indication of a thought of inconsistency or duplication of remedies, and was subjected to prolonged examination by a joint special committee of the General Court sitting after the close of the regular session (Resolves 1901, p. 531, c. 111), and from the further fact that both the railroad and street railway statute and the general death liability statute were re-enacted in a new form, as before pointed out, by the Legislature of 1907. Arguments which might have plausibility touching detached statutes, passed at different sessions of the Legislature, have no force as to such a body of law. It is inconceivable that these divers provisions for differing grades of liability could exist without deliberate intention. The view we take upon this question renders it unnecessary to discuss the other defense raised.

Judgment affirmed.

(200 Mass. 232)

**SHERLAG v. KELLEY.**(Supreme Judicial Court of Massachusetts.  
Bristol. Nov. 24, 1908.)**1. DEATH (§ 9\*)—RIGHT OF ACTION.**

Independent of statute, no recovery can be had for damages arising solely from death, however wrongfully caused, either in actions of contract or of tort.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 10; Dec. Dig. § 9.\*]

**2. DEATH (§ 9\*)—RIGHT OF ACTION—STATUTORY PROVISIONS.**

Rev. Laws 1902, c. 171, § 2, as amended by St. 1907, p. 324, c. 375, giving a right of action for a death and applying to all corporations and persons not within statutes applying to deaths caused by particular corporations or classes of persons, covers death by negligence, whether the relations of the parties are such that there is a breach of an express or implied contract, or whether the duty neglected arises outside of a contract, and the remedy is exclusive of any other in the cases to which it applies.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 11; Dec. Dig. § 9.\*]

**3. PHYSICIANS AND SURGEONS (§ 18\*)—CONTRACT FOR SERVICES—ACTION FOR BREACH—DAMAGES.**

In an action for breach of a contract by a physician to render necessary and proper medical care to plaintiff's wife, plaintiff could recover for additional expenses for her treatment caused by defendant's failure to perform his contract, though the failure resulted in the wife's death.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 46; Dec. Dig. § 18.\*]

**4. CONTRACTS (§ 337\*)—ACTION FOR BREACH—PLEADING—ALLEGATIONS OF BREACH—SUFFICIENCY.**

A breach of contract may be assigned in the negative of the words of the contract, except where such a negative would not plainly show that there is a breach.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1682, 1683; Dec. Dig. § 337.\*]

**5. DAMAGES (§ 142\*)—PLEADING—GENERAL AVERMENT IN AD DAMNUM—SUFFICIENCY.**

A general averment of damages in the ad damnum in an action for breach of contract is sufficient where there are previous averments showing a liability, unless special damages are claimed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. 406, 413; Dec. Dig. § 142.\*]

Appeal from Superior Court, Bristol County.

Action by Lawrence Sherlag against Samuel J. Kelley. A demurrer to the declaration was sustained, and plaintiff appeals. Reversed, and demurrer overruled.

Frank A. Pease, for appellant. Hugo A. Dubuque, for appellee.

**KNOWLTON, C. J.** The question intended to be raised by the defendant's demurrer to the declaration, and the question principally discussed at the argument is whether, under an action of contract brought upon the implied agreement of a physician with a husband to render necessary and proper medical care and service to his wife in her illness, a recovery can be had for the husband's loss

of her society, care, and comfort, resulting from her death caused by the defendant's failure to perform his contract.

For many years it has been held in this commonwealth that, without a statutory provision, no recovery can be had for the death of a person, however wrongfully caused by another. This has been decided in cases where the plaintiff was in such relations to the deceased person that, by reason of the death, he was deprived of valuable legal rights, as in the case of a husband suing for loss of the services and consortium of his wife whose death was caused by the defendant's negligence (*Carey v. Berkshire Railroad Company*, 1 Cush. 475, 48 Am. Dec. 616), and in a similar case, where the action was brought by a father for loss of services of his minor son (*Skinner v. Housatonic Railroad Company*, 1 Cush. 475, 48 Am. Dec. 616). So it was held that a promise to pay an annuity to a widow, on account of the death of her husband through the defendant's negligence, and upon her agreement to forbear to sue, could not be enforced, although she was deprived of her husband's support and of his consortium. (*Palfrey v. Portland, Sac. & Portsmouth Railroad Company*, 4 Allen, 55. See *Nolin v. Pearson*, 191 Mass. 283, 77 N. E. 890, 4 L. R. A. (N. S.) 643, 114 Am. St. Rep. 605. It was recognized that in some countries, under different systems of jurisprudence, the law was different. *Carey v. Berkshire Railroad Company*, 1 Cush. 475, 48 Am. Dec. 616. But, except as changed by statute, this doctrine is firmly established in the law of this commonwealth. *Barrett v. Dolan*, 130 Mass. 366, 39 Am. Rep. 456; *Richardson v. New York Central Railroad Company*, 98 Mass. 85-89; *Worcester & Suburban Street Railway Company v. Travelers' Insurance Company*, 180 Mass. 263-265, 62 N. E. 364, 57 L. R. A. 629, 91 Am. St. Rep. 275. The decisions exclude, as a ground of recovery, all elements of damage which arise solely from death, and as to such damage they are applicable to actions of contract as to actions of tort.

The whole subject is now covered by statutes, of which some apply only to deaths caused by certain corporations or classes of persons, as railroad and street railway corporations, common carriers and employers of labor, and one is general (Rev. Laws, c. 171, § 2, amended by St. 1907, p. 324, c. 375), applying to all other corporations and persons. This last statute covers death by negligence, whether the relations of the parties are such that there is a breach of an express or implied contract, or whether the duty neglected arises outside of any contract. The remedy given by it is exclusive of any other in the cases to which it applies; and, if the present plaintiff had brought his action seasonably, he would have been entitled to a recovery under it. So far as the plaintiff

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

claims damages growing out of the death of his wife, we are of opinion that the first and second grounds of demurrer are a bar to his recovery.

The third ground of demurrer is as follows: "For that the plaintiff cannot recover in an action of contract for alleged injury to his wife, resulting in her death, as stated in the declaration." If, through a breach of the defendant's contract, there was an injury to the plaintiff's wife that caused him damage, he can recover for it in an action of contract, notwithstanding that it finally resulted in her death. If he was caused additional expenses for her nursing, care, and treatment by the defendant's failure to perform his contract, he is entitled to damages. The fact that his wife subsequently died from the same cause is immaterial. As to this part of the case the declaration may be considered as if the allegation of death and the consequences of the death were omitted.

The demurrer does not distinctly raise the question whether the declaration is insufficient to permit a recovery of nominal damages or of actual general damages, if any were suffered previous to her death. If the question were raised, we should be obliged to answer it adversely to the defendant. The implied contract is set out, and the defendant's failure to perform it. In *Hagan v. Riley*, 15 Gray, 515, Chief Justice Shaw says: "For every breach of a contract made on good consideration the law awards some damage."

The breach is sufficiently alleged. It is a general rule in pleading that a breach of a contract may be assigned in the negative of the words of the contract. The exception is when such a negative does not plainly show that there is a breach. *Marston v. Hobbs*, 2 Mass. 433, 3 Am. Dec. 61; *Bacon v. Lincoln*, 4 Cush. 210, 50 Am. Dec. 765; *Fisk v. Hicks*, 31 N. H. 535-541; *Randel v. Chesapeake & Delaware Canal Company*, 1 Har. (Del.) 151-175; *Karthauss v. Owings*, 2 Gill & J. (Md.) 430-441; *Poirier v. Gravel*, 88 Cal. 79-82, 25 Pac. 962; *Westbrook v. Schmaus*, 51 Kan. 558-561, 33 Pac. 306.

The only averment of damages is general in the *ad damnum*. Where there are previous averments that show a liability this is enough, unless special damages are claimed. The forms of pleading previously used in this commonwealth are authorized by Rev. Laws, c. 173, § 130. In Pub. St. 1882, c. 167, § 94, under the forms of declarations in actions of tort, is this language: "The *ad damnum* is a sufficient allegation of damage in all cases in which special damages are not claimed." In the form of declaration for breach of promise of marriage, there is no reference to the subject of damages, but the claim is left to the *ad damnum*. This is also true of some of the other forms in actions of contract is the same section. The principle

is recognized in many cases. *Baldwin v. Worcester Railroad Corporation*, 4 Gray, 333; *Prentiss v. Barnes*, 6 Allen, 410; *Warner v. Bacon*, 8 Gray, 397, 69 Am. Dec. 253; *Postlewaite v. Wise*, 17 W. Va. 1-24; *Hoffman v. Dickinson*, 31 W. Va. 142-146, 6 S. E. 53; *Louisville, etc., Railroad Company v. Smith*, 58 Ind. 575; *Laraway v. Perkins*, 10 N. Y. 371; *Peters v. Cooper*, 95 Mich. 191, 54 N. W. 694; *McCarty v. Beach*, 10 Cal. 462; *Mitchell v. Clarke*, 71 Cal. 163-167, 11 Pac. 582, 60 Am. Rep. 529; *Packard v. Slack*, 32 Vt. 9; *Wilson v. Clarke*, 20 Minn. 367 (Gill. 318); *Hadley v. Prather*, 64 Ind. 137. The declaration is sufficient to entitle the plaintiff to recover nominal damages, and general damages if any resulted to the husband from a breach of such a contract as is set out. There being no other averment than the statement of the contract and an allegation of a breach of it, it does not appear whether there will be a claim of general damage to the plaintiff in his wife's lifetime, and we need not consider whether further averments would be necessary to entitle him to anything more than nominal damages.

Because the declaration states a cause of action in the plaintiff, without reference to the averments of the death of his wife and the damages resulting from it, the judgment is reversed and the demurrer is overruled.

So ordered.

(200 Mass. 234)

HERLIHY v. LITTLE et al.

CRANE v. SAME.

(Supreme Judicial Court of Massachusetts. Essex. Nov. 25, 1908.)

1. PLEADING (§ 248\*) — AMENDMENT — NEW CAUSE OF ACTION.

Under Rev. Laws 1902, c. 173, § 48, authorizing amendments which will enable an action to be maintained for the cause for which it was originally intended to be brought, the court cannot allow an amendment which will introduce a new cause of action not intended at the time the writ was sued out.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.\*]

2. PLEADING (§ 248\*) — AMENDMENT — NEW CAUSE OF ACTION.

Rev. Laws 1902, c. 106, § 72, provides that if an injury to a servant by a defect in the master's ways, works, etc., results in the employé's noninstantaneous death preceded by conscious suffering, and there is any person who would have been entitled to sue under the following section, the legal representatives of the employé may recover for death in addition to damages for the injury. Section 73 provides that, if the employé is instantly killed or dies without conscious suffering, his widow or next of kin dependent on him for support may sue. A declaration for a servant's death charged that plaintiff was decedent's administratrix and that, by specified negligence, decedent was "mortally wounded and killed," and in another count was "greatly injured and died in consequence thereof," and in another that defendant inflicted great injury on intestate in consequence of which she died. *Held*, that the declaration did not unequivocally state a cause of action for death

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

after conscious suffering under section 72, and that the court did not err, therefore, in permitting plaintiff to amend her declaration so as to clearly allege a cause of action under section 73.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.\*]

**3. PLEADING (§ 248\*)—NATURE OF ACTION—DECLARATION—AMENDMENT.**

The fact that an action for death of a servant was brought in the name of decedent's administratrix, and that the notice of intent to sue required by Rev. Laws 1902, c. 106, § 75, alleged a death preceded by conscious suffering, was not conclusive that plaintiff at the time the writ was sued out or the declaration drafted intended to sue for death preceded by conscious suffering authorized by Rev. Laws 1902, c. 106, § 72, and not for instantaneous death without conscious suffering authorized by section 73.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.\*]

**4. DEATH (§ 44\*)—PARTIES—SUBSTITUTION—ADMINISTRATRIX AND NEXT OF KIN.**

Where an action for death has been erroneously brought in the name of decedent's administratrix instead of decedent's next of kin, the mistake may be corrected by amendment.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 44.\*]

**5. APPEAL AND ERROR (§ 681\*)—FINDINGS—REVIEW.**

A finding as to the nature of the action plaintiff originally intended to bring, on which an order permitting an amendment was based, cannot be reviewed on appeal where the circumstances have not been reported.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2883; Dec. Dig. § 681.\*]

**6. DEATH (§ 19\*)—STATUTORY NOTICE.**

While the giving of notice of an intent to sue for the death of a servant required to be served by Rev. Laws 1902, c. 106, § 75, is a condition precedent to recovery, such a notice is not to be construed with technical refinement, especially when no counternotice is given as authorized by such section and chapter 51, § 22.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 13; Dec. Dig. § 19.\*]

**7. DEATH (§ 19\*)—NOTICE—CONTENTS.**

The purpose of the notice of an intent to sue for the wrongful death of a servant required to be given by Rev. Laws 1902, c. 106, § 75, is to notify the employer of the time, place, and cause of the death, and not to advise him specifically as to its details or effects; and hence a description of the injury is not necessary.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 13; Dec. Dig. § 19.\*]

**8. DEATH (§ 19\*)—NOTICE—CONTENTS—CONSCIOUS SUFFERING.**

Where a notice of intent to sue for the wrongful killing of a servant required by Rev. Laws 1902, c. 106, § 75, informed defendants that the death was the result of a certain injury, and of its time, place, and cause, plaintiff was not required to give any further information, and was not therefore bound by a statement that the injuries resulted in death preceded by conscious suffering.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 13; Dec. Dig. § 19.\*]

**9. MASTER AND SERVANT (§ 247\*)—DEATH OF SERVANT—VIOLATION OF RULES.**

Where a servant's violation of a rule was a mere condition, and not the cause of the accident in which he was killed, it would not preclude a recovery for his death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 799; Dec. Dig. § 247.\*]

**10. MASTER AND SERVANT (§ 289\*)—DEATH OF SERVANT—KNOWLEDGE OF DANGER—QUESTION FOR JURY.**

Where a servant was killed by the falling of an elevator, and the evidence was conflicting as to whether he knew of any defect or irregularity therein prior to the accident, whether he had such knowledge was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1110-1112; Dec. Dig. § 289.\*]

**11. TRIAL (§ 244\*)—REQUEST TO CHARGE.**

It is not the duty of the trial court to deal separately with particular phrases or fragments of the testimony, and instruct thereon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. § 244.\*]

**12. APPEAL AND ERROR (§ 1067\*)—REVIEWS—INSTRUCTIONS—REFUSAL OF REQUESTS—PREJUDICE.**

Where a case was submitted under general instructions which were not excepted to, prejudice in the denial of defendants' specific requests was not shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1067.\*]

**13. MASTER AND SERVANT (§ 295\*)—DEATH OF SERVANT—ACTION—INSTRUCTIONS.**

In an action for death of a servant by the fall of an elevator, a request to charge on assumed risk which omits the requirement that, in the exercise of reasonable prudence, it would have been possible for deceased to have discovered the defect which resulted in the injury in time to have avoided it, was properly refused.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1175; Dec. Dig. § 295.\*]

**14. MASTER AND SERVANT (§ 234\*)—DEATH OF SERVANT—KNOWLEDGE OF DANGER—APPRECIATION OF RISK.**

Mere knowledge of the condition of an elevator, by the fall of which a servant was killed, without an appreciation of the risk of its use, would not preclude a recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 706, 707; Dec. Dig. § 234.\*]

**15. MASTER AND SERVANT (§ 289\*)—DEATH OF SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**

A servant was not negligent as a matter of law in refusing to heed the suggestion of one who knew nothing about the subject respecting which he undertook to direct, and with reference to whom the injured servant owed no duty of obedience.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1127, 1128; Dec. Dig. § 289.\*]

**16. EVIDENCE (§ 5\*)—JUDICIAL NOTICE—NEGLECT.**

In the absence of evidence, it could not be said as a matter of common knowledge that it was dangerous to pull the shipper of an elevator so as to cause it to descend when it stuck.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4; Dec. Dig. § 5.\*]

Appeal from Superior Court, Essex County.

Actions by Ann Herlihy, as administratrix of Mary F. Herlihy, deceased, and by Charles W. Crane, as administrator of the estate of Benjamin O. Crane, deceased, against Alexander E. Little and others. Verdict for plaintiff in each case, and defendants appeal. Judgment on verdict.

Starr Parsons, H. Ashley Bowen, and John Ingraham, for plaintiffs. Walter I. Badger and Wm. Harold Hitchcock, for defendants.

RUGG, J. These two actions were brought in the name of the personal representatives respectively of Mary F. Herlihy and of Benjamin O. Crane. The declaration in the Herlihy Case contained four counts, each alleging, in substance, that the plaintiff was the administratrix of Mary F. Herlihy and that her intestate, by reason of specified negligence, in the first count, was "mortally wounded and killed"; in the second, "was greatly injured and died in consequence thereof"; and, in the third and fourth, was riding in an elevator, which fell "thereby inflicting great injury \* \* \* on the \* \* \* intestate, in consequence of which injury she died." The notice given under Rev. Laws, c. 106, § 75, stated that the death was preceded by conscious suffering. At the trial the plaintiff, Herlihy, moved to amend her writ by striking out the words indicative of her representative capacity, and by inserting, as descriptive of her, words of nearest kinship to the deceased and of dependency for support upon her wages, and to amend the declaration so as clearly to allege a cause of action under Rev. Laws, c. 106, § 73. The action thus set out after the amendment was by the dependent next of kin for the death, instantaneous or not preceded by conscious suffering, of her intestate. This amendment was allowed against the exception of the defendants, who contend that upon this record the court had no power to allow such an amendment. Rev. Laws, c. 173, § 48, empowers the superior court to allow any amendment which will enable an action to be maintained for the cause for which it was originally intended to be brought. The court has no power to allow an amendment, which will introduce a new cause of action not intended at the time the writ was sued out. *Silver v. Jordan*, 139 Mass. 280, 1 N. E. 280. It is possible that the writ and declaration as originally framed set forth a cause of action under Rev. Laws, c. 106, § 72, for the recovery of damages for conscious suffering followed by death. But it does not unequivocally state conscious suffering, and, narrowly construed, asserts no such claim, while it does distinctly allege death as the result of the injury. At best it is doubtful on its averments whether the death was preceded by conscious suffering or not. It may be assumed that a cause of action under section 72, Rev. Laws, c. 106, is a different cause of action from the one under section 73 of the same chapter. The notice given under Rev. Laws, c. 106, § 75, sets forth death and preceding conscious suffering, but such statements necessarily preceding, and perhaps by a considerable time, the commencement of the action, are of slight consequence

in determining the plaintiff's intent at the time of suing out the writ or drafting the declaration. The fact that the action was brought in the name of the administratrix of the deceased is some indication of an intent to proceed under section 72, but it is by no means conclusive, and amendments are often allowed to correct a mistake in this respect. *Hutchings v. Tucker*, 124 Mass. 240; *Adams v. Weeks*, 174 Mass. 45, 54 N. E. 350; *Silva v. New England Brick Co.*, 185 Mass. 151, 69 N. E. 1054; *Drew v. Farnsworth*, 186 Mass. 365, 71 N. E. 783. The allowance of the amendment made certain which section of the statute was relied upon, and cleared up what was before doubtful upon the pleadings. Hence it cannot be said as matter of law on this record that it introduced a new cause of action. If it be suggested that something occurred outside the record, it must be assumed that the trial court before allowing the amendment was satisfied upon what appeared before him that the cause of action intended to be brought was for the recovery of death without conscious suffering. The circumstances under which this finding was made are not reported, and hence cannot be reviewed. *St. 1908, p. 415, c. 457*, was enacted too recently to be applicable to this case.

In the Herlihy Case it is argued that because the notice required by the employers' liability act was given by the administratrix, and contained the statement that the deceased "received personal injuries resulting in death preceded by conscious suffering," it will not support an action for death without conscious suffering. While the giving of a sufficient statutory notice is a condition precedent to a recovery, such a notice is not to be construed with technical refinement. Especially is this true when no counter notice is given as provided in Rev. Laws, c. 106, § 75, and chapter 51, § 22. A description of the injury is not required. The purpose is to give to the employer information as to its time, place, and cause, not to advise him specifically as to its details or effects. *Carroll v. N. Y., N. H. & H. R. R.*, 182 Mass. 237, 65 N. E. 69. By the present notice the defendants were informed of death as the result of the injury and of its time, place, and cause. The plaintiff was not required to give any further information. Amplification, which may turn out to be incorrect as to a subject-matter not required, cannot be held to invalidate an otherwise sufficient notice.

It has not been and could not properly have been argued in either action that there was no evidence of the negligence of the defendants. There was ample testimony to support a finding of that fact.

The intestate of each plaintiff was killed by the sudden drop of an elevator, in which they were riding, and the break and fall of a counterweight connected with its operation. There was evidence tending to show

that at some time prior to the day of the accident a notice had been posted in the elevator, to the effect that only ten persons could ride at one time, and there appears to have been no dispute that at the time of the accident there were thirteen people in it. The jury might have found that there was no notice in the elevator at the time of the accident, and that Miss Herlihy was in the elevator before the prohibited number was reached. There was evidence also from several experts that the added weight caused by the three persons above the permitted number did not contribute to the accident. It might have been found that the violation of the rule, if any was committed, was merely a condition of the accident, and not its cause, and was to be considered with all the other circumstances as bearing upon the question of the due care of the plaintiff's intestate. *McCarthy v. Morse*, 197 Mass. 332, 83 N. E. 1109. It was open also for the jury to infer that there was no violation of the rule, on the ground that the notice had been removed before the accident and was no longer in force.

In the Crane Case also there was a motion to amend the declaration, which was allowed against the defendant's exception. The first count in his original declaration clearly alleged instantaneous death as the ground of liability. For this reason, as well as for those heretofore stated, respecting the amendment in the Herlihy Case, no error is disclosed in the allowance of the amendment.

The deceased, Benjamin O. Crane, was the assistant superintendent in the employ of the defendants, whose duty it was to see that the machinery in the factory was kept in repair, except that, with respect to the elevators, if they were out of order, it was his duty not to repair, but to report to the owners of the building. There was contradictory evidence as to whether Crane knew of any defect in the elevator or any irregularity in its working prior to the accident. Whether he did or not was, therefore, a question of fact. In other material aspects the evidence was conflicting. Even where it was not conflicting, it was still for the jury to say how much of that which bore against the plaintiff's contention was entitled to credence. Without reviewing it in detail, it is plain that a verdict for the defendant could not have been directed. Therefore the first request for ruling was properly refused.

As to the several other specific requests for rulings made by the defendants, it is perhaps enough to say that they dealt with particular phases or fragments of the testimony, which were not decisive of the case. It was not the duty of the court to deal with each of these severally, and instruct the jury upon them. It appears that the

case was submitted to the jury under general instructions which were not excepted to. Hence the defendants do not appear to have suffered harm. But, if they are examined in detail, no error appears in the refusals to grant them. The third prayer was properly refused, because it omits the necessary element, that, in the exercise of reasonable prudence, it would have been possible for the deceased to have discovered the defect, which actually resulted in the injury. The fourth could not have been given because mere knowledge of the conditions of the elevator was not sufficient to preclude recovery. There must also have been an appreciation of the risk of its use. The fifth and sixth requests did not correctly state the law as applicable to the evidence. The only evidence that it was dangerous so to pull the shipper as to cause the elevator to descend, when it stuck, came from a foreman in the employ of the defendants, who said he had a general knowledge about machinery, but was not an expert, who was not shown on the testimony to have possessed any knowledge as to elevators, and who was the inferior of Crane in position. He testified that he once told Crane not to start the elevator downward when it stuck. It is not, as matter of law, want of due care to refuse to heed the suggestion of one who knows nothing about the subject respecting which he undertakes to direct, unless there is a duty of obedience. Although experts upon elevators were witnesses, it does not appear that they were asked what might naturally have been expected to be the result of pulling the shipper as the plaintiff's intestate did under the then known conditions. In the absence of evidence, it cannot be said to have been so plainly a careless act as matter of common knowledge as to warrant an instruction to that effect.

What has been said respecting the notice in the elevator restricting the number of passengers to 10 applies with almost equal force to the Crane Case. It is not clear that the notice was in the car at the time of the accident, nor how long before it had been removed, nor could it be said to be clear upon the evidence that the accident resulted from the overloading of the elevator.

Judgment on the verdict in each case.

(300 Mass. 208)

#### WOOD v. FARMER.

(Supreme Judicial Court of Massachusetts.  
Bristol. Nov. 24, 1908.)

#### 1. PARTIES (§ 84\*) — OBJECTIONS — MANNER — PLEA IN ABATEMENT — SUFFICIENCY.

A paper filed by defendant, entitled, "Motion to Dismiss and Demurrer," stating that other persons are necessary parties defendant, and averring that defendant should, therefore,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not be held to answer and that the action should be dismissed, is an answer in abatement, and properly raises the question of nonjoinder.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 136; Dec. Dig. § 84.\*]

## 2. GUARANTY (§ 31\*)—CONSTRUCTION—JOINT OR SEVERAL.

An undertaking to jointly guaranty the payment of a certain sum, or any part thereof, pro rata, is joint, not several, notwithstanding the words "pro rata," as they are used to indicate the payment of any proportional part of the whole sum in the same manner and upon the same terms as payment of the whole would be made.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 33, 34; Dec. Dig. § 31.\*]

## 3. GUARANTY (§ 31\*)—CONSTRUCTION—JOINT OR SEVERAL.

The legal effect of an undertaking to jointly guaranty the payment of a certain sum, or any part thereof, pro rata, as a joint and not a several contract, was not changed by a letter written by the obligee to one of the guarantors, after the contract was signed, but before delivery, merely stating the advice of counsel that each of the guarantors was only liable for one-seventh of the whole amount, and expressing the concurrence of the obligee in that advice, where there is nothing to indicate that the principal debtor, or either of the other six guarantors, had any knowledge of the letter.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 33, 34; Dec. Dig. § 31.\*]

## 4. GUARANTY (§ 82\*)—ACTIONS—PARTIES.

An action cannot be maintained on a joint guaranty of payment without a joinder of all the guarantors.

[Ed. Note.—For other cases, see Guaranty, Dec. Dig. § 82.\*]

## 5. GUARANTY (§ 82\*)—ACTIONS—PARTIES—ASSIGNEE.

Under Rev. Laws 1902, c. 173, § 4, permitting an assignee of a chose in action to sue at law in his own name, an assignee of a contract of guaranty may so sue, where it appears that all conditions necessary to create a liability upon the guaranty have been performed, and, so far as appears, there was nothing more to be done by obligee at the time of the assignment.

[Ed. Note.—For other cases, see Guaranty, Dec. Dig. § 82.\*]

## 6. GAMING (§ 11\*)—GAMBLING CONTRACTS AND TRANSACTIONS.

Rev. Laws 1902, c. 74, § 7, directed against gambling contracts in the form of sales of stock, does not avoid a contract not for the sale of stock not owned by the seller, but contemplating the performance of various conditions, among them being the organization of a corporation with a certain stock capitalization, and the purchase by the corporation of the property of another corporation, and the selection of a part of the directors in a specified way and the sale of a certain number of shares of such stock.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 11.\*]

Report from Superior Court, Bristol County; Robert F. Raymond, Judge.

Action by Edmund Wood against Walter B. Farmer. Judgment ordered for defendant, and case reported to the Supreme Judicial Court. Judgment ordered for defendant, unless within 15 days plaintiff show cause for some other disposition of the case in the superior court.

Elliot D. Stetson and Gerrett Gells, Jr., for plaintiff. Brandeis, Dunbar & Nutter and Edward F. McClennen, for defendant.

KNOWLTON, C. J. The defendant filed a paper which is entitled: "Motion to Dismiss and Demurrer." It begins by stating that six other persons whose names are given are necessary parties defendant in the suit, and avers that therefore the defendant should not be held to answer, and the writ should be abated and the action dismissed. This is an answer in abatement, and it properly raises the first question in the case. Then follows, in the same paper, without waiving the preceding answer, a demurrer setting up these and other facts as grounds of the demurrer. No question is raised by either party on the pleadings.

The question as to nonjoinder arises under the third clause of the contract declared on, which is in these words: "In consideration of the premises the guarantors jointly guaranty the payment of said twenty-five thousand dollars, or any part thereof, pro rata, and also that the Securities Company will fully and completely perform and fulfill the terms of the agreement with the parties of the first part." The defendant is one of seven guarantors who signed the contract. Is the undertaking contained in this clause joint or several? The words "pro rata" are all that create a possibility of a doubt about it. Without these words, even if the word jointly were omitted, it would be unquestionably a joint undertaking. *Bartlett v. Robbins*, 5 Metc. 184; *Donahue v. Emery*, 9 Metc. 63. The word jointly emphasizes its character by an express statement. Do the words pro rata change its meaning and legal effect? We think they do not. See *Bartlett v. Robbins*, ubi supra. *Penniman v. Stanley*, 122 Mass. 310. It is difficult to understand their exact significance. They are not proper to characterize several action as distinguished from joint action. They more naturally refer to the proportion of the whole amount that the guarantors are to pay jointly, if payment of only a part should be required under the guaranty. The first thing provided for is a guaranty of payment of the whole sum of \$25,000, and the second thing provided for is the payment of any part thereof, pro rata. It seems to us to be an inapt expression used to indicate a payment of any proportional part of the whole sum in the same manner and upon the same terms as payment of the whole would be made. We think it was not intended to change the whole character of the undertaking from what is expressly said to be a joint guaranty to a several guaranty by each person of only a fractional one-seventh of the whole sum of \$25,000 or any part thereof.

The next question is whether the letter written to the defendant by Abbott and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

White, after the contract was signed and before its delivery, changed its legal effect. We think it plain that it did not. The letter did not suggest a change in the contract, much less did it purport to make a change. It told of the advice of counsel that each of the guarantors was liable for only one-seventh of the whole amount, and it expressed the concurrence of the writers in that advice and opinion. There is nothing to indicate that the Commonwealth Securities Company, or either of the six joint guarantors other than the defendant, had any knowledge of the letter. It was a mere expression of opinion as to the legal effect of the contract in writing. This opinion and the expression of it to one of the seven guarantors did not change the contract, or affect the legal rights of any of the parties. The action cannot be maintained without a joinder of the other necessary parties. The same considerations apply alike to both counts of the declaration.

The presiding judge sustained the demurrer and ordered judgment for the defendant. The grounds of his decision are not stated in the report. Very likely they were those which we have already considered. Other grounds of demurrer have been argued by both parties, and it may be well to consider them. It is contended that the plaintiff cannot maintain his action as assignee of Abbott and White. An action at law brought in his own name by the assignee of a chose in action is now permitted by Rev. Laws, c. 173, § 4. Upon the averments of the declaration, it appears that all conditions necessary to create a liability upon the guaranty to White and Abbott have been performed, and, so far as appears, there was nothing more to be done by them at the time of the assignment. The conveyance simply worked a transfer of their right to receive a payment from the guarantors, without affecting the interests of the guarantors. The decisions in *Boston Ice Company v. Potter*, 123 Mass. 28, 25 Am. Rep. 9, and *Pike v. Waltham*, 168 Mass. 581, 47 N. E. 437, cited by the defendant, are not applicable to this case.

Nor can a successful defense be made under Rev. Laws, c. 74, § 7. One of the purposes of this statute is to prevent the making of gambling contracts in the form of sales of stock. This is not an action upon a contract for a sale of a certificate of stock of which the party contracting to sell is not the owner. It is a contract contemplating the performance of various conditions. Among them were the organization of a corporation with a certain capitalization of stock, and the purchase by the corporation of the property of another corporation, and the selection of a part of the directors in a specified way, and the sale of a certain number of shares of this stock to the Commonwealth Securities Company, all of which, according to the averments of the declaration, have been perform-

ed. The contract declared on is not void under the statute just cited.

The pleadings and the form of the report leave us doubtful in regard to the order that should be entered. The case was heard upon issues of law, and from the fact that the judge ordered judgment for the defendant after sustaining the demurrer, and then reported the case, we infer that the plaintiff did not desire to amend his writ. There was no formal joinder of an issue of law upon the answer in abatement. On a decision of such an issue against the plaintiff, or upon a similar decision on the demurrer, judgment for the defendant would follow, unless the plaintiff moved to amend his writ. The entry is to be judgment for the defendant, unless within 15 days, the plaintiff shows cause for some other disposition of the case in the superior court.

So ordered.

(200 Mass. 237)

BLISS et al. v. TOWN OF ATTLEBORO.

(Supreme Judicial Court of Massachusetts.  
Bristol. Nov. 25, 1908.)

1. MUNICIPAL CORPORATIONS (§ 663\*) —  
STREETS—DISCONTINUANCE—EFFECT.

Where an abutting landowner owns to the middle of the street, a discontinuance of a part of the street vests in him by reversion the full title to the part discontinued.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1439; Dec. Dig. § 663.\*]

2. MUNICIPAL CORPORATIONS (§ 657\*) —  
STREETS—DISCONTINUANCE.

In the absence of any action by a town or its officers either discontinuing a part of a street, or altering or relocating it, the fact that only a part of the space within the original street lines is wrought for use as a way is not a discontinuance by the town, under the rule that a way once laid out continues to be such until legally discontinued.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1429; Dec. Dig. § 657.\*]

3. RAILROADS (§ 99\*)—MAINTENANCE—ABOLITION OF GRADE CROSSINGS—DAMAGES.

Rev. Laws 1902, c. 111, § 149 et seq., conferred power on commissioners to abolish railroad grade crossings, and section 152 required that they specify what portion of an existing public or private way should be discontinued, and what land or other property it considers necessary to be taken. *Held* that, where the commissioners in a decree abolishing grade provided for the discontinuance of parts of certain streets and in describing a parcel of land taken from petitioners' estate described it as bounded by the line of P. street, and did not provide specifically for the discontinuance of any part of such street, there was no discontinuance of a part of the street for which abutting owners were required to suffer a deduction against damages sustained by the change of grade.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 99.\*]

Exceptions from Superior Court, Providence and Bristol Counties.

Petition by Albert N. Bliss and others

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

against the Town of Attleboro. A verdict was returned for petitioners for less than the relief demanded, and petitioners bring exceptions. Sustained.

The petition was for the assessment of damages occasioned by the work done under the report of commissioners for the abolition of grade crossings in Attleboro. Petitioners' property was located on the south side of Park street, in the town of Attleboro, next west of the railroad track of the Boston & Providence Railroad. Park street runs from South Main street on the west easterly past petitioners' property, and across the railroad track. At the time of the abolition of grade crossings buildings on the north and south sides of Park street from South Main street to the railroad were used for business purposes and for offices. Park street was relocated June 17, 1884, by votes of the town of Attleboro and by the county commissioners of Bristol county. By the terms of the decree abolishing grade crossings in Attleboro, the railroad tracks were raised and carried over Park street on two successive arches. The grade of Park street beginning at or near the westerly line of petitioners' property was changed and inclined downward, so that the street might pass under the elevated railroad. The cut at the easterly line of the petitioners' premises next to the railroad was 8.14 feet, and at the westerly line of petitioners' property the new and the old grade nearly coincided. By the terms of the decree Park street was not to be worked to the new grade to its full width as previously laid out and used. A portion of the street in front of petitioners' property included in the layout of June 17, 1884, was left at the old grade. Petitioners' property consisted of a three-story building about 50 by 40 feet with a one-story storehouse annexed in the rear, and comprised about 6,000 square feet of land, including a private right of way on the west. The easterly portion of petitioners' land was occupied by a building belonging to one Everett; the land being rented to Everett by a tenant at will for a ground rent. Prior to the changes under the decree abolishing grade crossings, Park street in front of petitioners' premises was traveled to its full width as laid out in 1884. A sidewalk was constructed right up to the front of the buildings. Petitioners claimed that that part of the sidewalk in front of the buildings was outside the 1884 layout, and was on their private property; while the respondent contended that the public had acquired a right of way by prescription over the entire sidewalk in front of petitioners' property prior to the changes. There was no mark on the sidewalk distinguishing between the portion claimed to be within the lines of the 1884 layout and the part without such line.

R. C. Estes and J. M. Morton, Jr., for petitioners. Choate, Hall & Stewart, for respondent.

**SHELDON, J.** The fundamental question in this case is whether the effect of the proceedings for the abolition of the grade crossing of Park street by the Boston & Providence Railroad was to discontinue that part of Park street which lay between the petitioners' estate and the line of the new grading of that street. The petitioners' ownership extended to the middle line of the street; and if there was such a discontinuance, the full title to the part so discontinued as a highway reverted to them. There was no vote of the town discontinuing this portion of the street; there was no express provision for its discontinuance or abandonment in the report of the commissioners, which was confirmed by decree of the superior court. But there was ample evidence, and we do not understand that it was disputed, that the effect of the changes in the grade of Park street and of the construction of the embankment and retaining wall by which the railroad was carried over the street, was such that the part of the highway claimed to have been discontinued was practically, as it was left by the new construction, no longer adapted or available for use as part of the highway, and could not become so except by working it down to the new grade, and even then leaving its width to abut directly against the dead end created by the retaining wall of the railroad embankment.

The claim of the respondent is that the order in the commissioners' report that Park street should be graded to the width to correspond to the bridge by which the railroad was to be carried over the street, with suitable curbstones, gutters and sidewalks, amounted to an alteration or relocation of the street, and that the discontinuance of so much of the old way as was not included in the new location resulted from the alteration *ipso facto*, without any express words of discontinuance. *Johnson v. Wyman*, 9 Gray, 186; *Bowley v. Walker*, 8 Allen, 21; *Hobart v. County of Plymouth*, 100 Mass. 159. The respondent's counsel refer also to *Commonwealth v. Boston & Albany Railroad*, 150 Mass. 174, 22 N. E. 913; *Commonwealth v. Westborough*, 8 Mass. 406; *Commonwealth v. Cambridge*, 7 Mass. 158; *Bliss v. Deerfield*, 13 Pick. 102; *Sprague v. Walte*, 17 Pick. 309. But as to most of these decisions it is enough to say that there has been here, as has been already stated, no action by the town or its officers either discontinuing any part of this street or altering or relocating it; and the mere fact that only a part of the space included within the original street lines is wrought for use as a way is not of itself enough to show a discontinuance by the town. No such claim ever has been made to our knowledge; and *Johnson v. Wyman*, 9 Gray, 186, is a direct authority against its being made. A way once duly laid out continues to be such until legally discontinued. *Loring v. Boston*, 12

Gray, 209; Harrington v. County Commissioners, 22 Pick. 263, 33 Am. Dec. 741; Stetson v. Faxon, 19 Pick. 147, 31 Am. Dec. 123. Nor is it contended that the disclaimer filed by the respondent and not accepted by the petitioners could of itself operate as a discontinuance or abandonment. The case must be determined by the action of the commissioners, upon which the ruling made at the trial was rested.

That ruling was in substance that the report of the commissioners, having been duly confirmed, operated as matter of law as a discontinuance or an abandonment of all that portion of the highway which lay between the petitioners' property and the grade line established in the commissioners' report; and that the land over which the highway was thus discontinued reverted to the petitioners, and the increase thus caused to the value of their estate was to be set off against their damages.

The power of these commissioners was given by Rev. Laws, c. 111, § 149 et seq. See now St. 1906, p. 490, c. 463, § 29 et seq. The commission was required by Rev. Laws, c. 111, § 152 (St. 1906, p. 494, c. 463, § 36), to "specify what portion of an existing public or private way shall be discontinued, the grades for the railroad and the way, and the general method of construction and what land or other property it considers necessary to be taken." It is at least doubtful whether under this requirement a discontinuance could be found to have been made by implication. Certainly, when the statute requires specification not only of any such discontinuance, but also of the grade which is to be established, it would be yet more difficult to infer one of these requisites from a declaration of the other. But we need not consider this general question; for we are of opinion that their report, which has been laid before us, shows no intention to discontinue this part of Park street.

The commissioners, having no doubt in mind the requirement of the statute that they should specify what portions of any streets were to be discontinued, have expressly provided in their report for many discontinuances. The provision as to the grade of Park street is closely preceded by a statement that "the way known as Starkey avenue is hereby discontinued" within certain limits stated. It is immediately preceded by an order for the change of grade of Hope street without the discontinuance of any part thereof, and for the grading of Holden street extension, which the report had just laid out 40 feet wide, to a width between certain fences of 26 feet. There are also provisions for the discontinuance of parts of Mill street, South Main street, Maple street, Thurber avenue, and Mendon road. A new way, called Olive street extension, is laid out 40 feet wide, and is ordered to be

graded to the width of 35 feet, so as to cross the railroad by a bridge. Another way, called Thurber avenue, is laid out in place of that part of Thurber avenue which was discontinued, 40 feet wide, and ordered to be graded to the width of 20 feet, so as to cross the railroad by a bridge of that width.

These examples show clearly that the commissioners had in mind the distinction between the width of the layout of a street and the width to which it is to be graded or wrought for travel. They speak with precision of each of these two subjects. They must be taken with reference to each of them to have meant just what they said; and there is no ground to infer that they intended a provision for the one to be inferred from a provision for the other. In the absence of any provision for an alteration of the lines of Park street or for the discontinuance of any part thereof, we cannot say that such a provision is necessarily implied from the language of their report.

Moreover, in describing a parcel of land taken from the petitioners' estate, the commissioners describe it as bounded by the line of Park street, which can mean nothing but the line as existing before the report was made, and certainly indicates that there was no intention to operate a change in that line. But, if that line remained unchanged, there could be no discontinuance or abandonment of any part of the existing location of the street.

Accordingly the petitioners' damages should not have been diminished by any set-off for a partial discontinuance or abandonment of the street, and the first four of their requests for rulings should have been given. It does not seem likely that the other questions raised by the exceptions will be presented again in the same way, and they need not be considered.

Exceptions sustained.

(200 Mass. 237)

# **BELLEVEAU v. S. C. LOWE SUPPLY CO.**

(Supreme Judicial Court of Massachusetts.

Bristol. Nov. 24, 1908.)

## **1. HIGHWAYS (§ 184\*)—INJURIES TO TRAVELERS—COLLISION—EVIDENCE.**

Where, in an action for injuries to a pedestrian struck by an automobile, there was evidence that he and his companions, while on the street, took precautions against injury, evidence that just before the accident one of the companions looked back, and stated that two street cars were coming, and that he looked back a second time and said that, if they hurried, they could catch the second car, was admissible as bearing on plaintiff's care, on the jury finding that plaintiff was justified in relying on his companions.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 184.\*]

## **2. HIGHWAYS (§ 184\*)—INJURIES TO TRAVELERS—COLLISION—EVIDENCE.**

Where, in an action for injuries to a pedestrian struck by an automobile, the chauffeur

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

testified that there were four lamps on the machine all lighted, and on cross-examination stated that he understood that the law required that any two of the lamps in front should have the number of the machine, the refusal to permit plaintiff to go into the matter whether there were any numbers on either light was not erroneous; no claim being made that a violation of the law contributed to the accident.

[Ed. Note.—For other cases, see *Highways*, Dec. Dig. § 184.\*]

Exceptions from Superior Court, Bristol County; Robert F. Raymond, Judge.

Action by Antone Belleveau, per pro ami, against the S. C. Lowe Supply Company. There was a judgment for defendant, and plaintiff brings exceptions. Sustained.

John W. Cummings and Charles R. Cummings, for plaintiff. D. F. Slade, for defendant.

**MORTON, J.** This is an action of tort to recover for injuries sustained by the plaintiff in consequence of being run over by an automobile owned and operated by the defendant. There was a verdict for the defendant and the case is here on exceptions by the plaintiff to the exclusion of certain testimony that was offered by him. We think that there was error in the exclusion of the testimony and that the exceptions must be sustained.

The accident occurred January 6, 1907, at about half past 8 at night while the plaintiff with two companions of about his own age was walking towards Fall River on the state highway between Fall River and New Bedford. The night was very dark. The highway ran about east and west and at the place where the accident happened was about 25 feet wide and was straight and level for about a mile in the direction from which the automobile was coming which was from New Bedford. On the south side of the highway were double tracks for the street railway. Next to the north rail of the north track was about five feet of level road, then fifteen feet of macadam and then five feet more of level road. The plaintiff and his companions kept on the southern or left-hand half of the highway. The plaintiff testified that, "as they walked along, they were all three taking precautions against any thing coming on them from behind; that they listened and in turn they looked back." There was testimony tending to corroborate this. The plaintiff offered to show as bearing on the question of his due care that just before the accident one of his companions turned and looked back and said, "There are two cars coming," and then looked back a second time, and said, "Let's hurry up we can catch the second car at Reed's corner." This evidence was excluded. We think that it should have been admitted for the purpose for which it was offered. It could not be ruled as matter of law that the plaintiff and his com-

panions had not the right to rely upon each other. Whether in the exercise of due care they were justified in doing so was for the jury to say. If they were justified in relying upon each other then what one said to the others as he turned and looked back was clearly competent as tending to show in connection with the other facts in the case the circumstances under which the plaintiff acted and with reference to which his conduct was to be judged. See *Sullivan v. Scripture*, 8 Allen, 564.

The defendant called its chauffeur as a witness and he testified that there were four lamps on the car and that they were all lighted. On cross-examination he testified that he understood that the law required him to have the number of the machine on the lights or on any two lights in front. He was then asked, "Were there any numbers on either light?" and he answered "No," but upon the defendant's request and against the plaintiff's objection the court struck out the answer and refused to allow the plaintiff to go into the matter and the plaintiff excepted. The plaintiff contends that there was evidence tending to show that but one lamp was lighted on the automobile and that that was what led the plaintiff and his companions to think that the light was that of a street car. And he further contends that testimony that there were no numbers on the lamps would have furnished a reason for not lighting the lamps and would therefore have tended to affect the weight to be given to the chauffeur's testimony, and to corroborate the testimony introduced by the plaintiff. He does not now contend that the violation of law contributed or could have been found to contribute to the accident, and there is nothing to show that he made any such contention at the trial. The court well may have thought that the connection between the absence of numbers on the lamps and the accident was so remote as to render the evidence of no value and have excluded it on that ground. But because of the error in the exclusion of the testimony that was offered as to what was said by the plaintiff's companion the entry must be:

Exceptions sustained.

(200 Mass. 265)

**KANE v. BOSTON MUT. LIFE INS. CO.**

(Supreme Judicial Court of Massachusetts. Essex. Nov. 24, 1908.)

**1. CORPORATIONS (§ 497\*) — OFFICERS AND AGENTS—RATIFICATION—SLANDER.**

Letters written by the superintendent of agencies of an insurance company do not show a ratification of slanderous statements by agents where expressing disapproval of what had been done by the agents.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 497.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**2. CORPORATIONS (§ 497\*) — OFFICERS AND AGENTS—RATIFICATION—SLANDER.**

Mere nonaction by an insurance company and a refusal by its superintendent of agencies to do anything for an insurance solicitor, of whom its agents had made slanderous statements, does not show a ratification of what did not appear to have been done in the name or on behalf of the company, or with the help of its resources, or for its advantage.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 497.\*]

**3. CORPORATIONS (§ 497\*) — OFFICERS AND AGENTS—RATIFICATION—SLANDER.**

That an insurance solicitor's business was diminished after slanderous statements spoken of him by defendant insurance company's agents, and that a part of the business which he lost went to defendant, is not enough to show a ratification of the slanderous statements, in the absence of evidence that defendant knew such facts.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 497.\*]

**4. TRIAL (§ 46\*)—RECEPTION OF EVIDENCE—OFFER—SUFFICIENCY.**

An offer of proof in an action against an insurance company for slanderous statements by its agents merely to show that insurance solicitors employed by defendant "severally published the various oral statements as set out in the several counts of the plaintiff's declaration," which counts charged that "the defendant by its agents and servants" uttered the slanders, there being no offer to prove that what was said by the solicitors was in the course of their employment, or while acting in the apparent scope thereof, was insufficient to raise the issue of whether the slanders were uttered by the solicitors in the course of their employment.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 46.\*]

**5. CORPORATIONS (§ 492\*) — OFFICERS AND AGENTS—TORTS—COURSE OF EMPLOYMENT.**

The mere making of slanderous statements by insurance solicitors cannot authorize the inference that they were made in the course of their employment.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 492.\*]

**6. CORPORATIONS (§ 492\*) — OFFICERS AND AGENTS—TORTS—LIABILITY—SLANDER.**

An insurance company cannot be held liable for slanderous statements by its solicitors not spoken in the course of their employment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1903; Dec. Dig. § 492.\*]

Exceptions from Superior Court, Essex County; George A. Sanderson, Judge.

Action for slander by James J. Kane against the Boston Mutual Life Insurance Company. Judgment for defendant, and plaintiff excepts. Exceptions overruled.

Sylvester F. Whalen and James H. Sisk, for plaintiff. Joseph F. Quinn, Alexander H. Bullock, and John M. Thayer, for defendant.

**SHELDON, J.** It may be assumed that the words alleged to have been uttered by the defendant's agents were spoken of the plaintiff in his business of an insurance solicitor, and that they were actionable. *Lovejoy v. Whitcomb*, 174 Mass. 586, 588, 55 N.

E. 322, and cases cited. But the vital question is whether the defendant corporation can be held responsible for them.

It could not be found that any actual authority had been given by the defendant to its solicitors to make the slanderous statements, or that they were made with its knowledge; nor did anything on the plaintiff's offer of proof tend to show that there had been any ratification of these wrongful acts. The letters of Bradley, the defendant's superintendent of agencies, show no such ratification. They express disapproval of what had been done by the solicitors. The mere inaction of the defendant and Bradley's refusal to do anything for the plaintiff cannot indicate a ratification of what did not appear to have been done in the name or behalf of the defendant, or with the help of its resources or for its advantage. Nor is there any evidence that Bradley had authority to ratify these acts. The facts offered to be proved fall far short of what appeared in *Fogg v. Boston & Lowell R. R.*, 148 Mass. 513, 20 N. E. 109, 12 Am. St. Rep. 583, and *White v. Apsley Rubber Co.*, 194 Mass. 97, 80 N. E. 500, 8 L. R. A. (N. S.) 484. Nor would the facts that the plaintiff's business was diminished after the alleged slanders, and that a part of the business which he lost went to the defendant, be enough to show a ratification in the absence of evidence that the defendant knew these facts. The defendant did not knowingly receive the benefit of its agents' misconduct, and cannot be held on that ground to have ratified and adopted such misconduct. We find nothing in the cases cited by the plaintiff to support his contention on this point.

The plaintiff contends further that the defendant can be held on the ground that the slanders were uttered by its agents in the course of their employment, even though they were uttered without any prior authority or subsequent ratification from the defendant. But his offer of proof raises no such issue. That offer, as to this question, was simply to show that three solicitors of insurance employed by the defendant "severally published the various oral statements as set forth in the several counts of the plaintiff's declaration." These counts charge that "the defendant by its agents and servants" uttered the alleged slanders. There was no offer to prove that what was said by either of the three solicitors was said in the course of his employment or while acting in the apparent scope thereof. Everything that they said may have been uttered wholly outside their employment, and without any reference to their employer. As in *Obertini v. Boston & Maine R. R.*, 186 Mass. 481, 71 N. E. 980, 67 L. R. A. 422, the mere doing of the acts cannot authorize the inference that they were done in the course of the employment. *Washington Gaslight Co.*

v. Lansden, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543. Manifestly, for such utterances the defendant cannot be held liable.

We do not mean to throw any doubt upon the statement of Lathrop, J., in *Comerford v. West End St. Ry.*, 164 Mass. 13, 14, 41 N. E. 59, that it is at least questionable whether the defendant would have been liable if the utterance of the defamatory words by its agents had been in the course of their employment. *Behre v. National Cash Register Co.*, 100 Ga. 213, 27 S. E. 986, 62 Am. St. Rep. 320; *Singer Mfg. Co. v. Taylor* (Ala.) 43 South. 210, 9 L. R. A. (N. S.) 929; *Redditt v. Singer Mfg. Co.*, 124 N. C. 100, 32 S. E. 392; *Hussey v. Norfolk Southern R. R.*, 98 N. C. 34, 8 S. E. 923, 2 Am. St. Rep. 812; *Dodge v. Bradstreet Co.*, 59 How. Prac. (N. Y.) 104. And see *Odgers on Slander & Libel*, § 265; 10 Cyc. 1216; 18 Am. & Eng. Encyc. of Law (2d Ed.) 1059. It is difficult to say that such a wrong as this was committed in the agent's service and for the principal's benefit within the meaning of the rule as stated by Lord Selborne in *Holdsworth v. City of Glasgow Bank*, 5 App. Cas. 317, 326, and by Campbell, J., in *Philadelphia, Wilmington & Baltimore R. R. v. Quigley*, 21 How. 202, 210, 16 L. Ed. 73.

Exceptions overruled.

(200 Mass. 299)

#### GALLIGAN v. McDONALD et al.

(Supreme Judicial Court of Massachusetts.  
Bristol. Nov. 30, 1903.)

#### 1. WILLS (§ 601\*)—CONSTRUCTION—ESTATES DEVISED—EXECUTORY DEVISE—"ESTATE REMAINING."

Testator devised his real estate to his son, to hold "the same to him and his heirs forever," and provided that if he died leaving no issue surviving, or if such issue should die during minority, the "estate remaining" at the death of the son should go to designated persons. *Held*, that the words "estate remaining" did not mean a remainder in a technical sense, but meant what the son should not dispose of during life, and by necessary implication the son had power to dispose of any or all of the estate, and the limitation over, being inconsistent with the power of disposal, could not take effect as an executory devise.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1341; Dec. Dig. § 601.\*]

#### 2. WILLS (§ 601\*)—CONSTRUCTION—ESTATES DEVISED—LIFE ESTATES.

The limitation over did not cut down the son's estate to a simple life estate, or to a life estate with power of disposal.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1340; Dec. Dig. § 601.\*]

Case Reserved from Superior Court, Bristol County; Lloyd E. White, Judge.

Suit by Harry W. Galligan against Edward McDonald and others. The cause was heard on bill and answers, and the justice reported the cause for the consideration of the full court. Decree ordered for plaintiff.

Arthur M. Alger, for plaintiff. John B. Tracy, for defendants McDonald and Richard. P. Coughlin, for defendants Jas. H. and Ann Galligan.

MORTON, J. This case comes here on a reservation and report by a justice of the superior court on the bill and answers. The question at issue relates to the construction of the fifth clause of the will of one Edward A. Galligan of Taunton. The clause is as follows: "Fifth. I devise to my son Harry W. Galligan, all the real estate of which I may die possessed and he shall hold the same to him and his heirs forever, provided however, that in case my said son shall die leaving no issue him surviving, or such issue shall de cease during minority, then and in either of such cases, my will is that my brother James H. Galligan and my sister Ann Galligan shall have and take all my real estate remaining at the death of my son, share and share alike to them and to their heirs forever." In addition to the averments contained in the bill and admitted by the answers, it is agreed that the testator died seised of several distinct parcels of land with the buildings thereon including the one which is the subject of this suit.

The complainant contends that the word "remaining" is not to be construed in the technical sense of a remainder, but as meaning such part of the real estate devised to him as shall not have been disposed of by him at his death; that the limitation over must take effect, if at all, as an executory devise; that it cannot take effect as such because an absolute power of disposal is impliedly given him, and the limitation over is, therefore, void, and he takes an estate in fee simple absolute. The respondents contend that the provision applies to all of the real estate devised to the plaintiff; that the effect of the devise is to vest in the plaintiff a qualified fee determinable upon the contingency of his dying without issue surviving him, or upon the death of such issue, if any, during minority; and that the limitation over is, therefore, a valid executory devise. It is manifest that, according as the complainant's or respondent's contention is sustained, the complainant can or cannot give "a good and clear title," as he has agreed to do, to the real estate in question.

We are unable to distinguish this case from *Kelley v. Meins*, 135 Mass. 231, and *Ide v. Ide*, 5 Mass. 500. In *Kelley v. Meins*, supra, there was first a devise to the son by the testatrix of all her estate real and personal "to have, and to hold the same to him \* \* \* his heirs, executors, administrators and assigns forever." Then it was provided by a second codicil that the son should not come into possession till he reached the age of twenty-five, and by the first codicil that if he should die without leaving living issue any portion of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexed

the property which should remain should be equally divided amongst the sisters and neices of the testatrix, and "their female heirs and assigns." The son arrived at the age of 25 and died shortly after intestate and without issue; the trustee under the mother's will having in the meantime conveyed to him certain real estate which had come to him by the foreclosure of a mortgage, and which the court treated as if the testatrix had been seised of it at her death. Thereupon the sisters and neices of the testatrix brought a writ of entry against the heirs at law of the son to recover the premises which had been thus conveyed by the trustee to him. It was held that by the portion which should remain was meant the portion which should remain at the death of the son, and that the construction to be given to the will and the first codicil was that the son should have during his life the absolute power of disposition of all the property given to him; that this power of disposal was inconsistent with an executory devise, and that the limitation over was, therefore, void. In *Ide v. Ide*, supra, the devise was to a son and "his heirs and assigns forever" with a limitation over if the son should die and leave no lawful heirs of "what estate he shall leave, to be equally divided between my son J. and my grandson N. to them and their heirs forever." It was held that the limitation over was only of such estate as the son should leave at his death; that by necessary implication the testator intended that the son should have the power to dispose of any or all of the estate devised; and that, that was inconsistent with the limitation over, and the limitation was, therefore, void and the son took an absolute estate. See, also, *Richardson v. Noyes*, 2 Mass. 56, 3 Am. Dec. 24; *Gifford et al. v. Choate*, 100 Mass. 343; *Damrell v. Hartt et al.*, 137 Mass. 218; *Joelin v. Rhoades*, 150 Mass. 301, 23 N. E. 42; *Knight v. Knight*, 162 Mass. 460, 38 N. E. 1131; *Bassett v. Nickerson*, 184 Mass. 169, 68 N. E. 25. "In the case at bar there is," as was said in *Ide v. Ide*, supra, "first an express fee simple devised" to the son, the plaintiff. This would give the plaintiff the absolute right to dispose of the property devised to him if it stood alone. Then follows the provision relied on by the defendant, "that in case my said son shall die leaving no issue him surviving, or such issue shall de cease during minority, then and in either of such cases my will is that my brother James H. Galligan and my sister Ann Galligan shall have and take all my real estate remaining at the death of my son," etc. By estate remaining at the death of the son is meant estate that shall not have been disposed of by the son during his life. It is upon such estate, if any, that the proviso is to take effect, and not upon all of the real estate devised. By necessary implication the son is to have the power to

dispose of any or all of the estate devised to him. Such a power is inconsistent with an executory devise and the limitation over cannot therefore take effect as an executory devise. Neither do we think that the effect of the limitation over is to cut down the son's estate to a life estate, pure and simple, or to a life estate with a power of disposal, though the latter construction would not help the defendant. *Damrell v. Hartt*, supra; *Hale v. Marsh*, 100 Mass. 468; *Lyon v. Marsh*, 116 Mass. 232. If by "estate remaining" were meant a remainder, in the technical sense of the words, applicable to all the real estate devised to the son, then the limitation over could and should take effect as an executory devise contingent upon the son's dying without issue or the issue dying during minority, and the son would take a qualified fee determinable on the happening of either one of those events; or taking the whole devise together, perhaps it might be construed in such case as vesting in the son an estate for life with remainder to the brother and sister. *Whitcomb v. Taylor*, 122 Mass. 243; *Schmaunz v. Goss*, 132 Mass. 141; *Hooper v. Bradbury*, 133 Mass. 303; *Welch v. Brimmer*, 169 Mass. 204, 47 N. E. 699. But, as already observed, we think that by "estate remaining" is meant what the son shall not have disposed during his life, and not a remainder in the technical sense of that word.

The only objection that is made to the maintenance of the bill is that the plaintiff cannot give a good and clear title as he has agreed to do and that the defendant cannot and should not therefore be compelled to specifically perform the contract. For reasons stated above we are of opinion that the plaintiff can give "a good and clear title," and it follows that he is entitled to a decree in his favor.

#### Decree for plaintiff

(200 Mass. 281)

#### WHITMORE v. H. K. WEBSTER CO.

(Supreme Judicial Court of Massachusetts.

Essex. Nov. 25, 1908.)

#### MASTER AND SERVANT (§ 281\*)—INJURIES TO SERVANT—ACTIONS—EVIDENCE.

In an action for injuries to an employé by catching his hand in the feeder of a grist mill, evidence held to show that the plaintiff was negligent so as to bar a recovery.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 987-996; Dec. Dig. § 281.\*]

Report from Superior Court, Essex County. Action by Bertram Whitmore against the H. K. Webster Company. On report from the superior court after verdict for defendant. Judgment on verdict.

J. P. Sweeney and L. S. Cox, for plaintiff. Walter I. Badger and Wm. Harold Hitchcock, for defendant.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 86 N.E.—20

**SHELDON, J.** The plaintiff was injured in consequence of having inserted his hand into the feeder and rolls of a grinding mill, to clean away corn which had gathered upon the rolls. Martin, the miller, had raised the countershaft to stop the mill, but by reason of the belt which operated the driving pulley having been recently made too short, or the pulley having been raised too high, the effect of what Martin did was, as it might have been found, to stop only one set of the rollers, the "slow rollers" as they were called, and to leave the other set, the fast rollers, revolving, although more slowly than if Martin had not endeavored to stop the mill. The plaintiff had seen what Martin did, supposed that the mill had stopped, and inserted his hand for a proper purpose and in what would have been a proper manner if the mill had been wholly stopped.

The first question presented is whether the jury had a right to find that the plaintiff was in the exercise of due care in acting on the assumption that the mill had been stopped by what Martin had done. He knew that the belt had been shortened, and that in consequence of this the mill was likely not wholly to stop because the belt was too tight, but he had been told by Martin that this would be remedied. Whether it had been remedied he did not know, and apparently did not concern himself with the question. He did not claim that he acted in reliance on Martin's statement. But Webber, an expert witness called by the plaintiff, testified that if the belt was in motion it could be seen plainly, and that the pulleys would revolve so that they could be seen. And the plaintiff himself testified that standing where he was, on the back side of the machine, the differential side as it was called, the belt on the driving side came down on his right, and by looking at the belt he could have seen whether the rolls were moving or not; that if he had looked he would have seen this at a glance; that he put his hand down between the rolls, knowing that if either one of them was moving they probably would take his fingers off, without looking either at the belt or the rolls, or the pulleys, to see whether they were moving. He testified that he could not see the rolls; but the belt and the pulleys on the side where he was were plainly visible. There was no other testimony inconsistent with this. There is nothing to show that he needed or was expected to act so quickly as to excuse him from looking at what was obvious to be seen. In our opinion it cannot be said that in thus failing to use his senses to guard against a danger of which he was well aware he was in the exercise of proper diligence. *Daily v. Fiberloid Co.*, 186 Mass. 318, 71 N. E. 554; *Meunier v. Chemical Paper Co.*, 180 Mass. 109, 61 N. E. 810; *Kelley v. Calumet Woolen Co.*, 177 Mass. 128,

58 N. E. 182; *Silvia v. Wampanoag Mills*, 177 Mass. 194, 58 N. E. 590; *Robinska v. Lyman Mills*, 174 Mass. 432, 54 N. E. 873, 75 Am. St. Rep. 364.

The verdict for the defendant was rightly ordered; and in accordance with the terms of the report there must be:

Judgment on the verdict.

(200 Mass. 153)

# BARLOW MFG. CO. v. STONE.

(Supreme Judicial Court of Massachusetts.  
Hampden. Nov. 24, 1908.)

## 1. SET-OFF AND COUNTERCLAIM (§ 27\*)—SUBJECT-MATTER—CLAIMS ARISING OUT OF THE SAME CONTRACT OR TRANSACTION.

Damages which may be recouped must have arisen out of same subject-matter, contract, or transaction as that on which plaintiff relies.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 45, 46; Dec. Dig. § 27.\*]

## 2. CONTRACTS (§ 171\*)—CONSTRUCTION—ENTIRE OR SEVERABLE—"SEVERABLE CONTRACT."

The question whether a contract is entire or severable is primarily one of intent, but, as a general rule, where the part to be performed by one party consists of several distinct items and the price to be paid is apportioned to each item according to the value thereof, and not as a part of a round sum, the contract will be regarded as severable.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 754-757; Dec. Dig. § 171.\*]

For other definitions, see Words and Phrases, vol. 7, p. 6454.]

## 3. SET-OFF AND COUNTERCLAIM (§ 27\*)—SUBJECT-MATTER—CLAIMS ARISING OUT OF SAME CONTRACT.

Where, notwithstanding store fixtures and furniture and wall cases were all ordered at the same time and a certain amount was paid on account generally, the articles themselves were entirely distinct from each other, except so far as they formed parts of the same lot, and the price for each article was different and the amount due had to be ascertained by adding together the amounts to which the different articles came at the prices agreed upon, the contract was severable; and hence, in an action for the price of certain of the fixtures and furniture, there could be no recoupment for damages because of delay in delivery of the wall cases.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 45, 46; Dec. Dig. § 27.\*]

## 4. SALES (§ 62\*)—CONTRACTS—CONSTRUCTION—ENTIRE OR SEVERABLE.

Where store fixtures and furniture and wall cases having all been ordered at the same time and a certain amount paid on account generally, the wall cases were thereafter paid for, the act of the seller in crediting the amount paid when the articles were ordered on the account for the fixtures and furniture has no material significance in determining whether the contract was entire or severable, as it was the only thing he could do after the wall cases had been paid for.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 171-178; Dec. Dig. § 62.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Exceptions from Superior Court, Hampden County; John C. Crosby, Judge.

Action by the Barlow Manufacturing Company against Samuel Stone. Judgment for plaintiff, and defendant excepts. Exceptions overruled.

N. P. Avery, for plaintiff. Frank A. Pease, for defendant.

MORTON, J. This is an action of contract to recover upon an account annexed for certain store fixtures and furniture furnished by the plaintiff to the defendant. At the same time that the goods described in the account were ordered, certain wall cases were also ordered by the defendant of the plaintiff, and the defendant paid \$25 on account on all of the goods ordered. The articles in suit were delivered to and accepted by the defendant, and no fault is found in regard to them as to price, quantity or quality, or the time of delivery. Nor is any fault found as to the price, quantity or quality of the wall cases. But the defendant contends that it was agreed that all of the articles should be delivered promptly, that the wall cases were not so delivered, and that he was damaged thereby and is entitled to recoup in this action the damages thus sustained. There was evidence tending to show that the wall cases were to be ordered by the plaintiff from Michigan, and were so ordered, and were delivered to and accepted by the defendant and were paid for by him pursuant to a draft therefor with a bill of lading attached, drawn on him by the plaintiff.

The defendant concedes that the right to recoupment does not extend to any transaction which is not involved in this suit. But he contends that the purchase of the goods, including the wall cases as well as those in suit, constituted an entire contract which has not been severed by the act of the parties or otherwise, and that he therefore can recoup in this action the damages sustained by reason of the failure of the plaintiff to deliver the wall cases promptly as agreed. The first question therefore is whether the contract was or was not an entire contract. If the contract was an entire one and there has been no severance of it, then the right to recoup is clear. If it is not an entire contract, then it is equally clear that no right of recoupment exists. *Sawyer v. Wiswell*, 9 Allen, 39.

Primarily, the question whether a contract is entire or separable is one of intention. But the general rule is that where the part to be performed by one party consists of several distinct and separate items and the price to be paid is apportioned to each item according to the value thereof and not as

one unit in a whole, or a part of a round sum, the contract may and will be regarded as severable. And this holds true, even though the contract may be in a sense entire, if what is to be paid is clearly and distinctly apportioned to the different items as such, and not to them as parts of one whole. *West End Mfg. Co. v. Warren Co.*, 198 Mass. 320, 84 N. E. 488; *Young & Conant Mfg. Co. v. Wakefield*, 121 Mass. 91; *Robinson v. Green*, 8 Metc. 159; *Miner v. Bradley*, 22 Pick. 457; *Badger v. Titcomb*, 15 Pick. 409, 26 Am. Dec. 611; *Pierson v. Crooks*, 115 N. Y. 539, 555, 22 N. E. 349, 12 Am. St. Rep. 831; 2 *Parsons on Contracts* (9th Ed.) 517; *Hammond on Contracts*, § 463. For a case in which it was held that the contract was entire although possessing elements of divisibility, see *Stewart v. Thayer*, 168 Mass. 519, 47 N. E. 420, 60 Am. St. Rep. 407. In the present case the articles sued for and the wall cases were all ordered at the same time, and \$25 was paid on account generally. But the articles themselves, though of the same general nature, namely, store fixtures and furniture, were entirely separate and distinct from each other, except so far as they formed parts of the same lot, and the price for each article was different from that of the other articles, except as aforesaid, and the amount which would be due from the defendant to the plaintiff had to be ascertained, not with reference to some unit of value, but by adding together the amounts to which the different articles came at the prices agreed upon. There was no agreement to sell or buy the articles ordered for a round sum, but the articles were bought and sold at the prices affixed to each. In effect there was, as said in *Young & Conant Mfg. Co. v. Wakefield*, supra, a contract for each article or lot of articles sold, and the defendant's contention that the contract was an entire one cannot therefore be sustained. The fact that the goods were all ordered at one and the same time, and that \$25 was paid on account, though tending to show that in a sense the contract was entire, does not show that it must be so construed as matter of law. The act of the plaintiff in crediting the \$25 on the account in suit has no material significance one way or the other. It was the only thing that he could do after the defendant had paid for the wall cases. It follows that the ruling of the court excluding the evidence that was admitted de bene in regard to the matter of damages was correct. This view of the case renders it unnecessary to consider whether there was evidence which would have warranted the finding of a severance, if the contract had been entire.

Exceptions overruled.

(200 Mass. 225)

**DE PONTA v. DRISCOLL.**(Supreme Judicial Court of Massachusetts.  
Bristol. Nov. 24, 1908.)**BOUNDARIES (§ 40\*)—ASCERTAINMENT—QUESTIONS FOR JURY.**

Where the evidence as to the true location of boundary lines is conflicting, the question is for the jury.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 196-204; Dec. Dig. § 40.\*]

Exceptions from Superior Court, Bristol County; Lloyd E. White, Judge.

Action by Manuel De Ponta against Patrick Driscoll. Verdict for defendant, and plaintiff excepts. Exceptions overruled.

David R. Radovsky, for demandant. John W. Cummings, Charles R. Cummings, and James Little, for tenant.

**MORTON, J.** The only exception in this case is to the refusal of the court to instruct the jury, as requested by the demandant, that he was entitled to recover the triangular piece of land, which, as the case finally went to the jury, was all that there was in dispute between the parties. Whether the demandant or the tenant was entitled to this piece of land depended on where the east line of the tenant's lot and the west line of the demandant's lot was, the two being coincident. This presented a question of fact to be determined according to the evidence. The land court found that the line was where the tenant contended that it was and that the demandant was not entitled to the triangular piece or any part of it. The report of the land court, which is made prima facie evidence by statute (St. 1905, p. 208, c. 288) of the facts found so far as they relate to or bear upon any of the questions raised, was introduced by the tenant. There was also other evidence introduced by the tenant tending to show that the line was where he contended that it was, as well as evidence introduced by the demandant tending to show that it was where he claimed that it was. The question thus presented was, as already observed entirely one of fact for the jury. It could not be ruled as matter of law that the demandant was entitled to a verdict in his favor.

Exceptions overruled with double costs.

(200 Mass. 310)

**JEWETT v. JEWETT et al.**(Supreme Judicial Court of Massachusetts.  
Essex. Nov. 24, 1908.)**1. WILLS (§ 440\*)—CONSTRUCTION—INTENTION OF TESTATOR.**

The intention of testator is to be ascertained from the language of the whole will in view of all the circumstances, and is to be followed, unless inconsistent with the rules of law.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 956; Dec. Dig. § 440.\*]

**2. WILLS (§ 524\*)—CONSTRUCTION—HEIRS—TIME OF ASCERTAINMENT.**

Testatrix gave her son one-fourth of her residuary estate and the other three-fourths to trustees, the income to be paid primarily to her daughters, but in certain events in part to her son and in part to the descendants, if any, of her daughters, until the death of the last surviving daughter. She then provided that the trustees should, on the death of the last surviving daughter, convey the remaining trust property to the surviving descendants of her children, and, in the event of there being no surviving descendants of her children, then the trust property to go to her heirs. Held, that the time of ascertainment of the heirs to take was the death of testatrix, and not the death of the last survivor of her daughters.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1117, 1118, 1122; Dec. Dig. § 524.\*]

**3. WILLS (§ 475\*)—CONSTRUCTION—REMAINDERS—POWER OF DISPOSITION.**

A testatrix cannot be held not to have intended that her children should not have power to dispose of their respective interests in remainder because her husband by his will had expressly given such a power to the survivor of his children and she did not make a similar provision, and it may be inferred that she was acquainted with the contents of her husband's will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 990; Dec. Dig. § 475.\*]

**4. WILLS (§ 524\*)—CONSTRUCTION—REMAINDERS.**

A provision that the share of the income of the trust fund which was to be paid to testatrix's daughters or to their female descendants should be paid to them or for their benefit independently of their husbands does not warrant the inference that testatrix wished to deprive her daughters of any interest in remainder lest they should exercise their unrestricted power of disposition by bequeathing it to their husbands.

[Ed. Note.—For other cases, see *Wills*, Dec. Dig. § 524.\*]

Case Reserved from Supreme Judicial Court, Essex County; Arthur P. Rugg, Judge.

Petition by George R. Jewett, trustee, under the will of Elizabeth Howes, deceased, against George R. Jewett, executor of the will of Susan B. Cabot, deceased, surviving child of Elizabeth Howes, and others, for directions for the disposition of the trust fund. Case reserved for the consideration of the full court. Decree that petitioner pay the fund to the administrator with the will annexed of the estate of Susan B. Cabot, deceased.

Eldredge & Pierce, for plaintiff. Francis Burke, for respondent Franklin G. Burley. Hutchins & Wheeler, for respondent Susan B. Cabot. Peabody & Arnold, for respondents Frederick Whitney and others. John W. Farley and James W. Spring, for respondent Fredericka Wheeler.

**SHELDON, J.** The petitioner holds a trust fund created under the will of Elizabeth Howes. She died in 1859, leaving two daughters and a son, all of whom have now died without issue. The last survivor of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied.

these children of Elizabeth Howes was Susan B. Cabot, who died in 1907.

Mrs. Howes by her will gave to her son one-fourth of all the residue of her estate. The other three-fourths she gave to trustees, with provisions that the income should be paid primarily to her daughters, but in certain events, in part to her son and in part to the descendants, if any, of her daughters, until the decease of the last survivor of her daughters. The will then provided, in the fifth paragraph of the second article, that the trustees should "on the decease of the last survivor of my said daughters \* \* \* convey, assign, deliver and distribute the whole remaining trust property to the then surviving descendants of my said children respectively, the share to the descendants of each of my said daughters to be equal to that of the descendants of each other of them, and the share of the then surviving descendants of all of my said children to be in the same proportion in which they would at the time be entitled to share in the rents, interest and income of the trust property, and in case of there then being no surviving descendants of any of my said children, then the trust property is to go to my heirs and in either case the trust is to cease." The trust fund is now to be paid to her heirs, and the question is whether those heirs are to be determined at the time of her own decease, or at the time of the death of Mrs. Cabot, the last survivor of her children. In the latter event, the fund would go to certain cousins or other collateral kindred of the testatrix. In the former event, her heirs were her son and two daughters; and as Mrs. Cabot acquired in her lifetime the whole interest of her brother and sister by their wills, the whole fund would now be paid to the administrators of her estate with the will annexed.

As was said by this court in *Whall v. Converse*, 146 Mass. 345, 348, 15 N. E. 660, 662: "The general rule is settled that, in case of an absolute limitation like that of the fund in question to the testator's heirs at law, the persons to take are those who answer the description at the time of the testator's death. *Dove v. Torr*, 128 Mass. 38, 40; *Minot v. Tappan*, 122 Mass. 535, 537; *Abbott v. Bradstreet*, 3 Allen, 587. The reasons for this rule are that the words cannot be used properly to designate anybody else; that such a mode of ascertaining the beneficiary implies that the testator has exhausted his specific wishes by the previous limitations, and is content thereafter to let the law take its course; and, perhaps, that the law leans toward a construction which vests the interest at the earliest moment." The same rule often since has been restated by this court. *Boston Safe Deposit & Trust Co. v. Parker*, 197 Mass. 70, 83 N. E. 307; *Gray v. Whittemore*, 192 Mass. 367, 380, 78 N. E. 422, 10 L. R. A. (N. S.) 1143, 116 Am. St. Rep. 246; *Holmes v. Holmes*, 194 Mass. 552,

557, 80 N. E. 614; *Blodgett v. Stowell*, 189 Mass. 142, 143, 75 N. E. 138; *International Trust Co. v. Williams*, 183 Mass. 173, 66 N. E. 798; *Pierce v. Knight*, 182 Mass. 72, 64 N. E. 692; *Rotch v. Rotch*, 173 Mass. 125, 53 N. E. 268. It is needless to refer to the many other cases that might be cited to the proposition.

It is true, however, that this principle "is not a rule of substantive law, but a rule of interpretation which has been adopted by the courts as one means of ascertaining the intention of the testator as expressed in his will, and it never should be resorted to to defeat what from the whole will appears with reasonable certainty to have been his intention." *Heard v. Reed*, 169 Mass. 216, 223, 47 N. E. 773, 781. That intention is to be ascertained from the language of the whole will in view of all the circumstances of the case, and is to be followed unless it is inconsistent with the rules of law. *McCurdy v. McCallum*, 186 Mass. 464, 469, 72 N. E. 75; *Crapo v. Price*, 190 Mass. 317, 320, 76 N. E. 1043. Accordingly, in many cases a limitation to the heirs of a testator or of a beneficiary after the termination of a life estate which is prolonged beyond the period of his own life has been construed as requiring the heirs to be determined at the date of the termination of the subsequent life estate, because it was found that otherwise an intention which the testator had clearly manifested would be frustrated. *Boston Safe Deposit & Trust Co. v. Blanchard*, 196 Mass. 35, 81 N. E. 654, in which the doctrine is stated with sufficient citation of cases. But we do not find in Mrs. Howes' will any manifestation of such an intent.

The fact that her heirs at her death were her children, that an absolute bequest was made to her son, and that life estates were given to her daughters does not indicate an intention that these same children should not finally take as her heirs after the termination of the special limitations which she chose to make. *Childs v. Russell*, 11 Metc. 16; *Abbott v. Bradstreet*, 3 Allen, 587; *Cushman v. Arnold*, 185 Mass. 165, 70 N. E. 43; *Boston Safe Deposit & Trust Co. v. Parker*, 197 Mass. 70, 83 N. E. 307. Nor can we say that this testatrix did not intend that her children should not have power to dispose of their respective interests in remainder, because her husband by his will had expressly given such a power to the survivor of his children, and she did not make a similar provision; and it may be inferred that she was acquainted with the contents of her husband's will. The careful provision that the share of the income of the trust fund which was to be paid to her daughters or to their female descendants should be paid to them or for their benefit independently of their husbands does not warrant the inference that she wished to deprive her daughters of any interest in remainder lest they should exercise their un-

restricted power of disposition by bequeathing it to their husbands. The testatrix imposed such restrictions as she chose; we cannot reverse the ordinary rule, *expressum facit cessare tacitum*, and infer that she intended to impose additional restrictions which she did not mention.

We have carefully considered all the suggestions made in the elaborate arguments, and have examined all the cases to which we have been referred; and we find nothing in the will of the testatrix which discloses any intent to benefit her collateral relatives. We are of opinion that having, as in *Rotch v. Rotch*, 173 Mass. 125, 133, 53 N. E. 268, made provision for each of her daughters during all her life and for her issue if she should leave any, and having secured to her son what she regarded as an adequate portion for him, she was content, if her children should leave no issue, to let her estate go as the law might direct.

Accordingly the petitioner should be instructed that it is his duty to pay the trust fund to the administrators with the will annexed of the estate of Susan B. Cabot.

Decree accordingly.

(200 Mass. 183)

**RYAN v. FALL RIVER IRON WORKS CO.**

(Supreme Judicial Court of Massachusetts.  
Bristol. Nov. 26, 1908.)

**1. TRIAL (§ 140\*)—QUESTION FOR JURY—CREDIBILITY OF TESTIMONY.**

Though testimony as to how an accident occurred and as to defects in machinery was contradicted and weakened somewhat on cross-examination, the jury might still give it full credence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.\*]

**2. MASTER AND SERVANT (§ 125\*)—INJURIES TO SERVANT—KNOWLEDGE OF MASTER.**

It is not necessary, to establish a master's negligence for failure to repair defective machinery, that he had notice of the precise defect which caused the injury, but it is sufficient if, under the circumstances, the accident would probably not have occurred except for his act or omission amounting to a want of ordinary precaution.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 243-251; Dec. Dig. § 125.\*]

**3. MASTER AND SERVANT (§ 278\*)—ACTS CONSTITUTING NEGLIGENCE—RES IPSA LOQUITUR.**

The mere starting of a machine without the intervention of human agency is of itself evidence of its defective condition.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 955; Dec. Dig. § 278.\*]

**4. MASTER AND SERVANT (§ 286\*)—INJURY TO SERVANT—ACTIONS—QUESTION FOR JURY—DEFECTIVE MACHINERY.**

That the loom, by the sudden starting of which an employé was injured, had been used a number of years, together with slight evidence that a new shaft was adjusted to the loom in such a manner as to render it probable that the belt would work from its proper place, in

connection with the sudden starting of the loom without apparent cause, was sufficient evidence that the machine was defective to go to the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1010-1014; Dec. Dig. § 286.\*]

**5. MASTER AND SERVANT (§ 286\*)—INJURIES—ACTIONS—QUESTION FOR JURY—MASTER'S NEGLIGENCE.**

That the loom, by the sudden starting of which an employé was injured, had been used a number of years, together with slight evidence that a new shaft was adjusted to the loom in such a manner as to make it probable that the belt would work from its proper place, in connection with the sudden starting of the loom without apparent cause, was sufficient evidence that the master might have discovered the defective condition by the exercise of proper precaution, to go to the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1080; Dec. Dig. § 286.\*]

**6. TRIAL (§ 194\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE—UNCONTRACTED EVIDENCE.**

An instruction that, there being uncontradicted evidence that the loom which caused plaintiff's injury was started by a fellow servant, plaintiff could not recover, was improper, since the jury may have disbelieved the testimony, though uncontradicted.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 452; Dec. Dig. § 194.\*]

**7. MASTER AND SERVANT (§ 285\*)—INJURY TO SERVANT—SUFFICIENCY OF EVIDENCE—MASTER'S NEGLIGENCE.**

The happening of an accident is not always of itself evidence of negligence, and, when the precise cause is uncertain and may reasonably be as consistent with due care as with negligence, a verdict should be directed against a servant suing for injuries caused by the accident.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 285.\*]

**8. MASTER AND SERVANT (§ 85\*)—INJURIES TO SERVANT—MASTER'S LIABILITY—LIABILITY AS INSURER.**

A master does not insure his servants against injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 136; Dec. Dig. § 85.\*]

**9. MASTER AND SERVANT (§ 127\*)—INJURIES TO SERVANTS—APPLIANCES—DUTY TO REPAIR.**

An employer must furnish and maintain reasonably safe and proper appliances for use by his employes so far as he may by proper care, and his duty is a continuing one, and may require frequent inspection and repair.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 252; Dec. Dig. § 127.\*]

**10. MASTER AND SERVANT (§ 103\*)—APPLIANCES—DUTY TO FURNISH—DELEGATION.**

A master's duty to furnish reasonably safe and proper appliances involves exclusive control, so far as is necessary for its performance, and this duty cannot be delegated.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 175; Dec. Dig. § 103.\*]

**11. EVIDENCE (§ 570\*)—EXPERTS—FACTS SUPPORTED BY EVIDENCE—WEIGHT OF EXPERT TESTIMONY.**

Before the jury could give weight to an answer by an expert witness to a hypothetical question, they must find that there was sufficient evidence to support a finding of the facts assumed in the question.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2395; Dec. Dig. § 570.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Exceptions from Superior Court, Bristol County; William Schofield, Judge.

Action by Annie Ryan against the Fall River Iron Works Company. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

John W. Cummings and Charles R. Cummings, for plaintiff. Richard P. Borden, for defendant.

RUGG, J. This is an action of tort brought under the employer's liability act, for injuries occasioned to the plaintiff while an operator in the weave room of the defendant's cotton mill, and caused by a defect in its ways, works, and machinery. The plaintiff had been at work for the defendant for about 13 years prior to the accident. One of the machines upon which she worked was a Mason loom, which had been in use a good many years. It was started and stopped by a shipper, which moved the belt on to and from a tight and a loose pulley. The plaintiff testified, in substance, that about three months before the accident she had a lot of trouble with this loom. It required oiling more frequently than any other loom, and the pulleys were "going up and down"; it not being her duty to care for the machinery, she reported, and a loom fixer did something to it. The following week he took both pulleys off, and did some filing, and then replaced the pulleys, and put some pieces of tin or hoop iron in the side of the loom where the shaft runs above the box, "between the box and the side of the loom holding the box into the side of the loom." Some of these pieces came out twice and dropped on the floor, and she again called the fixer's attention to it. After these pieces fell out, both the tight and loose "pulleys would keep jumping up and down" at the same time, both when the belt was on the loose pulley and when it was on the tight pulley. The pieces seemed to her to be put in to prevent the shaking of the pulleys. After the loom had been fixed, it did not run right, and the shafting used to get hot, and the fixer came to it. It had been running all right for a week before the accident. There was also evidence tending to show that the use of hoop iron for holding the box of the shaft, on which were tight and loose pulleys, into the side of the loom, was not a proper appliance, and that its use for packing, although common, was not right, and the tendency of such appliances, the purpose of which was to hold the shaft true, would be to let the shaft get out of true, and that this would permit the belt to creep from the loose to the tight pulley. According to the plaintiff, the accident happened in this way: She stopped the loom for the purpose of repairing a bad place in the weaving. While doing this, with no one else near, the loom started without any apparent cause, and caught and injured her arm. The force of

all this testimony was broken somewhat by the cross-examination, but the jury might still have given it full credence. There was also testimony from the loom fixer of the defendant that the repairs made consisted of replacing an old and worn out shaft with a new one. This evidence, if believed, was sufficient to bring the case within the rule established in a considerable number of decisions. In most cases of the automatic starting of machines from a state of rest, there has been some evidence of a previous similar starting, with notice of which the defendant might have been charged. *Donahue v. Drown*, 154 Mass. 21, 27 N. E. 675; *Mooney v. Conn. River Lumber Co.*, 154 Mass. 407, 28 N. E. 325; *Martineau v. National Blank Book Co.*, 166 Mass. 4, 43 N. E. 513; *Packer v. Thompson-Houston Electric Co.*, 175 Mass. 496, 56 N. E. 704; *O'Neil v. Ginn*, 188 Mass. 346, 74 N. E. 868; *Lynch v. M. T. Stevens Co.*, 187 Mass. 397, 73 N. E. 478; *Fontaine v. Wampanoag Mills*, 189 Mass. 498, 75 N. E. 738. But it is not necessary, in order to establish negligence of the defendant, that it should have had express notice of the precise irregularity, which resulted in the injury. It is enough if such circumstances appear as to render it likely that the harmful event would not have happened except for some act or omission amounting to a want of ordinary precaution. The mere starting of a machine, without the intervention of any human agency and when it should have remained at rest, is of itself evidence of some defective condition. To this extent the doctrine of *res ipsa loquitur* has been established. *Gregory v. Am. Thread Co.*, 187 Mass. 239-242, 72 N. E. 962. See *Coleman v. Mechanics' Iron Foundry Co.*, 168 Mass. 254, 46 N. E. 1065; *White v. Boston & Albany R. R.*, 144 Mass. 404, 11 N. E. 552.

Here the machine had been in use many years, and the shaft had become so worn that it was necessary to substitute a new one, and there was some slight evidence that the adjustment of the new shaft to the old loom was made in such a manner that it might have been foreseen, by one familiar with the mechanism, that the belt was liable to work from the loose to the tight pulley. These circumstances, in connection with the fact of the starting of the machine, constituted not only evidence of a defective condition of the machine, but also that the defendant, in the exercise of due precaution, might have discovered the defect. *Gregory v. Am. Thread Co.*, 187 Mass. 239, 72 N. E. 962; *Connors v. Durite Mfg. Co.*, 156 Mass. 163, 30 N. E. 559. The defendant's first, fourth, sixth, and eighth requests for instructions were therefore properly refused.

Its ninth request, to the effect that, there being uncontradicted evidence that the loom was started by the act of a fellow servant, the plaintiff could not recover, ought not to have been given, for the reason that the jury may have disbelieved this testimony, even

though uncontradicted. *Lindenbaum v. N. Y., N. H. & H. R. R.*, 197 Mass. 814, 84 N. E. 129.

The defendant has strongly argued that there was error in that portion of the charge by which the jury were told: "If you are not satisfied as to what was the specific cause of the starting of the loom, but do find as a fact that it did start suddenly from a position of rest when it had been properly stopped, you may consider that fact as evidence to show that there was some defective condition in the loom and some negligence in connection with that defective condition, even though you can't state specifically what the defective condition was." This statement and various amplifications of it used by the trial court follow almost exactly the language which was held to be correct as applicable to similar facts in *Byrne v. Boston Woven Hose Co.*, 191 Mass. 40, 77 N. E. 696. In that case, as in this, the machine had never before started of its own motion, but there it had broken down two weeks before and been repaired, while here a part had been worn out and had been replaced by a new one, which had not in all respects worked well. It has been urged that the jury might have found on the evidence that the loom had been put in good condition by the repairs made upon it, and that, if this was so, then mere automatic starting is not evidence of negligence. The occurrence of an accident, standing alone, is not always evidence of negligence. It may be as consistent with the innocence as with the fault of the person controlling the agency by which the accident happened. When the precise cause is left to conjecture and may be as reasonably attributed to a condition for which no liability attaches as to one for which it does, then a verdict should be directed against the plaintiff. The law knows no general rule of absolute insurance against injury. *Kennerson v. West End St. Ry. Co.*, 168 Mass. 1, 46 N. E. 114; *Saxe v. Walworth Mfg. Co.*, 191 Mass. 338, 77 N. E. 883, 114 Am. St. Rep. 613; *Hill v. Iver-Johnson Sporting Goods Co.*, 188 Mass. 75, 74 N. E. 303; *Flynn v. Beebe*, 98 Mass. 575; *Curtin v. Boston Elev. Ry.*, 184 Mass. 260, 80 N. E. 522; *Thompson v. National Fire Works Co.*, 195 Mass. 328, 81 N. E. 256; *Hofnauer v. R. H. White Co.*, 186 Mass. 47, 70 N. E. 1038; and *Childs v. Am. Express Co.*, 197 Mass. 337, 84 N. E. 124, are illustrations of this doctrine. But the unexplained automatic starting of a machine, when it ought to remain at rest, stands upon a different basis. It is a personal duty of the employer to furnish and maintain for employés for use in their work reasonably safe and proper machinery and appliances, so far as the exercise of proper care will secure them. This duty arises out of the relation of master and servant and cannot be delegated. It is a continuing obligation and may require frequent and efficient inspection and repair. It involves exclusive control, so far as necessary for performance

of the duty. Under these circumstances the court is not justified in saying that the jury may not find, as men of experience in common affairs of life, that such a machine does not ordinarily start automatically without some negligence of omission or commission on the part of the employer, and that the existence of such negligence is the rational explanation of the starting. This was the decision in *Byrne v. Boston Woven Hose Co.*, 191 Mass. 40, 77 N. E. 696, and is supported by the principle elaborated in other authorities in addition to those heretofore cited. *Copithorne v. Hardy*, 173 Mass. 400, 53 N. E. 915; *Oahill v. New England Tel. & Tel. Co.*, 193 Mass. 415, 79 N. E. 821; *Moynihan v. Hill Co.*, 146 Mass. 586-591, 16 N. E. 574, 4 Am. St. Rep. 848; *Toy v. U. S. Cartridge Co.*, 159 Mass. 313, 34 N. E. 461; *Graham v. Badger*, 164 Mass. 42, 41 N. E. 61; *Minihan v. Boston Elev. Ry. Co.*, 197 Mass. 367, 83 N. E. 871; *Flaherty v. Norwood Engineering Co.*, 172 Mass. 134, 51 N. E. 463; *Griffin v. Boston & Albany R. R.*, 148 Mass. 143, 19 N. E. 166, 1 L. R. A. 698, 12 Am. St. Rep. 526; *Hebblethwaite v. O. C. St. Ry.*, 192 Mass. 295, 78 N. E. 417; *Mulvaney v. Peck*, 196 Mass. 95, 81 N. E. 874. There is nothing in *Ross v. Pearson Cordage Co.*, 164 Mass. 257, 41 N. E. 284, 49 Am. St. Rep. 459, in conflict with these conclusions. The plaintiff in that case did not rest upon the liability which might spring prima facie from the automatic starting of the drawing frame, but, having shown by her own expert that there was no defect in the machine, sought to fasten responsibility for her injury upon the employer on the ground that the shipper, by which power was communicated to and disconnected from the machine, should have been fitted with some device for securing it in position, although it was in the same condition as at the time the contract for service began, and of a type in common use. The decision was placed upon the ground that the mere absence of these contrivances under such circumstances was not enough to charge the defendant. In this as well as in the other respects pointed out in *Mulvaney v. Peck*, 196 Mass. 95, 81 N. E. 874, *Ross v. Pearson Cordage Co.* is distinguishable from the case at bar.

The defendant objected that in the question to the plaintiff's expert facts were assumed, which were not in evidence, and excepted to the refusal of the court to exclude the question on this ground. The court correctly ruled that the jury must find that there was sufficient evidence to support a finding of the facts assumed in the question before they could give any weight to the answer. The facts assumed in the question were the holding of the box, through which ran the shaft carrying the fast and loose pulleys, into the side of the loom, with pieces of hoop iron. The plaintiff testified that the pieces of hoop iron were holding the box into the side of the loom. Upon this

state of evidence the question to the expert could not have been excluded.

Exceptions overruled.

(200 Mass. 252)

DUNN et al. v. CROSSMAN, Mayor.

(Supreme Judicial Court of Massachusetts.  
Bristol. Nov. 25, 1908.)

**1. MUNICIPAL CORPORATIONS (§ 204\*) — OFFICERS—REMOVAL—FINDINGS—REVIEW.**

The decision of the mayor of Taunton removing sewer commissioners from office under St. 1886, p. 222, c. 219, § 4, providing that such commissioners shall be subject to removal by the mayor for cause, re-enacted in St. 1904, p. 339, c. 384, § 9, is not open to review on the facts, nor unless there has been an arbitrary exercise of power, and the cause of removal is unreasonable and legally insufficient.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 550; Dec. Dig. § 204.\*]

**2. MUNICIPAL CORPORATIONS (§ 454\*) — SEWERS—ASSESSMENTS—LEVY—TIME.**

St. 1904, p. 336, c. 384, § 8, requires the Taunton sewer commissioners to assess the owners of land within the territory embraced by a system of sewers the "estimated average cost" thereof; that the cost of sewers in the territory built prior to the adoption of the system, but made a part thereof, shall be taken to be their cost after a reasonable deduction for depreciation; and that the assessments shall be made on every street in which the trunk sewer is constructed, or in which there is a common sewer connected with such trunk sewer, etc. *Held*, that the sewer commissioners were not entitled to delay the levy of a general sewer assessment under such act until completion of the whole system, but that it was their duty to levy assessments for completed sewers or sections of sewers as soon in each case as it could reasonably be done.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 454.\*]

**3. MUNICIPAL CORPORATIONS (§ 204\*) — OFFICERS—SEWER COMMISSIONERS—REMOVAL—GROUNDS.**

That sewer commissioners delayed for an unreasonable time to levy assessments for the construction of sewers, as expressly required by St. 1904, p. 336, c. 384, § 8, constituted ground for their removal.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 550; Dec. Dig. § 204.\*]

Appeal from Supreme Judicial Court, Bristol County.

Petition by James P. Dunn and others against Edgar S. Crossman, as mayor of Taunton, to review the latter's proceedings culminating in the removal of petitioners from their office as sewer commissioners of such city. Petition dismissed, and petitioners appeal. Affirmed.

John B. Tracy and William E. Kelley, for petitioners. H. F. Hathaway, for respondent.

SHELDON, J. This is a petition for a writ of certiorari to quash the proceedings of the respondent as mayor of the city of Taunton in removing the petitioners from their offices as members of the board of sewer

commissioners of that city. At a hearing before a single justice of this court upon the petition and answer and the exhibits attached thereto, the petition was dismissed; and the case comes before us by an appeal from this order.

The respondent, at a hearing upon certain charges preferred by him against the petitioners as a ground for their removal, found that the first of these charges was proved. This charge was that the petitioners had neglected to take any action in the matter of sewer assessments, as provided by St. 1904, p. 336, c. 384, § 8. That section reads as follows: "The sewer commissioners of said city shall assess the owners of lands hereinafter described within the territory embraced by said system of sewers, by a fixed uniform rate based upon the estimated average cost of all the sewers of said system. In making such estimate and for all purposes under this act, the cost of sewers in said territory which were built prior to the adoption of said system, but which have been made or are to be made a part thereof, shall be taken to be their cost, after a reasonable deduction for depreciation, if any, on account of age and use has been made. Such assessments shall be made as aforesaid on the lands in said territory on every street or way in which the trunk sewer of said system is constructed, or in which there is a common sewer, directly or indirectly connected with said trunk sewer, whether such sewer was built prior or subsequent to the fourteenth day of August, eighteen hundred and ninety-seven, and shall be made according to the frontage of such lands on such street or way, and according to the area of such lands within a fixed depth from such street or way; but no assessment in respect to any such land which, by reason of its grade or level or any other cause, cannot be drained into such sewer, shall be made until such incapacity is removed; and in cases of corner lots and lots abutting on more than one sewered street or way, the same area shall not be assessed more than once. The lien hereinafter provided for shall attach to the parcel assessed. If payment has been made of any prior assessment or charge imposed in respect to any such land on account of any common sewer of said system, an allowance shall be made for such payment, and the owner shall be assessed for the remainder only. Said sewer commissioners shall certify all assessments made under this section to the collector of taxes of said city for collection. After receiving an assessment list, the collector shall forthwith send notice to each person assessed of the amount of his assessment, in like manner as notices of taxes are sent." The findings and rulings of the mayor as to this charge, as set out at length in the record, are as follows:

"The board of sewer commissioners is a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

board consisting of three members. William E. Bellamy and the respondents, William B. Granfield and James P. Dunn, were appointed members and took office on the first Monday in February, 1907, for the term of one, two, and three years, respectively. Bellamy served until the expiration of his term, January 31, 1908, and Granfield and Dunn remain in office. It appeared from the records of the board of sewer commissioners and from other competent evidence that no sewer assessments have ever been made as required by St. 1904, p. 336, c. 384, § 3, and that from the time the members of the board went into office on the first Monday in February, 1907, to the time of the hearing before me, no steps were taken by such members towards making assessments under the law cited. The statute of 1904 referred to was duly accepted by the city council of Taunton July 21, 1904. There are about 25 miles of sewers in Taunton, of which about 24 miles consist of the trunk sewer and of laterals directly or indirectly connected therewith. The 24 miles of sewers are part of the system of sewers legally adopted by the city and referred to in the law cited. By the mandatory requirement of section 3 of this law, the sewer commissioners are bound to assess, in the manner specified, the owners of lands on every street or way in which such sewers are located. The statute went into effect over four years ago. The respondents have been in office for more than a year. Prior to their taking office the cost of all the sewers of the system has [had] been determined, a fixed uniform rate for assessments had been established by competent experts, and all these things were matter of record. The necessary data for proceeding at once to make assessments as required by the statute referred to, on abutters on the 24 miles of sewers above described, were on file in the office of the sewer commissioners; but, as I find on the evidence, the respondents have negligently omitted to make, or to take any steps towards making, such assessments, I accordingly find that the first charge is sustained.

"On the question whether the neglect of the respondents thus found to comply with the requirements of the law referred to is sufficient cause to justify their removal from office, the circumstances are to be considered. The law which it is the duty of the respondents to obey, but which they have persistently disregarded, is entirely plain, and it was in evidence that their attention was called to it and to the necessity of proceeding under it when they first took office. No valid excuse for their negligence has been offered by them, and none appears. They did not themselves testify at the hearing, but called Mr. Bellamy, their former associate, as a witness in their behalf. From a stipulation entered into at the hearing that if called they themselves would testify as Mr. Bellamy had testified, and from the argument of their counsel, the position which they take admits

of no doubt. They give no intimation that if permitted to remain in office they will comply with the requirements of the law. On the contrary, they contend that they are the exclusive judges as to when, if at all, they shall take action under it, and, in support of their contention they have called attention by their counsel to the case of *Fairbanks v. Fitchburg*, 132 Mass. 48. The case is an authority against and not for the respondents' contention.

"Apart from the apparent unwillingness of the respondents to make assessments under the law, and the probability that if not removed they would persist in disregarding the law, I conclude from the evidence that the respondents are inexcusably ignorant of the true meaning and scope of the law and of the duties which it imposes on them. This was shown by the testimony of Mr. Bellamy, which by the stipulation above mentioned, the respondents adopted as their own. Mr. Bellamy testified that the board had made no assessments under the law, because until the entire sewer system is substantially completed it is impossible to determine its cost, and therefore, until the happening of that event, the fixed uniform rate of assessment called for by the law cannot be established; it being necessary in fixing the rate to know the actual cost of all the sewers of the city. In other words, the theory advanced by Mr. Bellamy and concurred in by the respondents is that assessments in accordance with the requirements of the law cannot be made until substantially all the sewers of the city are completed. It is enough to say that it is not the actual cost, but the estimated cost, on which the rate is to be based, and that it may be a hundred years before the entire system is substantially completed, depending upon the growth of the city.

"What the law seeks to accomplish is stated briefly thus: The sewers of the city generally discharged into Mill river. This created a nuisance. To obviate the nuisance, a system of sewers was adopted, the main feature of which is a great trunk sewer, which at present empties into Taunton river, but later on is to take the sewage to a filtration field in Berkeley. All the lateral sewers of the system are to be connected directly or indirectly with the trunk sewer, thereby intercepting the flow of sewage into Mill river. While a sewer of small sections may be sufficient to serve an individual estate, obviously the sewer into which it empties must be larger if it is to receive the flow of several such sewers and so on to the trunk sewer. The latter, of course, is made of great size and therefore at great cost, in order that it may take the flow of all the lateral sewers of the system. As matter of fairness, then, under a system of sewers, the abutter should pay his proportional part of the cost of constructing, not merely the abutting sewer, but of constructing the system of sewers of which it forms

a part; and this is just what the law seeks and requires. There are about 24 miles of existing sewers in the system of the city, all connected directly or indirectly with the trunk sewer. In order that abutters on these sewers, and on such sewers as may be added to the system from time to time in the future, may be called on to pay what they fairly ought to pay towards the cost of the system, the law provides that assessments shall be made presently on the abutters of existing sewers, who are now enjoying the benefit of the system, and hereafter on abutters on future sewers, when built, at a fixed uniform rate based on the estimated average cost of all the sewers of the system. The methods to be employed by the assessing board in determining and laying the assessments are plainly stated in the law, and, in order that no injustice may be done in making assessments on abutters on old sewers, it is provided that allowance shall be made for any assessment which may have been paid in the past. The law is perfectly clear in itself. Moreover, it has been fully discussed and explained in official reports and documents, with which the respondents ought to be familiar.

"The conduct of the respondents in omitting to comply with the requirements of the law shows gross negligence, and, if not intentional disregard of the law, and incapacity to grasp its meaning or an indifference to it for which there appears to be no excuse. The plain inference from all the circumstances is that the respondents are not suitable persons to fill the extremely important position of sewer commissioners. The injury to the public interest which results from their failure to perform their duty and carry out the plain requirements of the law is serious. As I have already said, there are about 24 miles of existing sewers which are a part of the system of sewers adopted by the city, having been connected directly or indirectly with the trunk sewer, on account of which assessments should be made. The failure to make these assessments when they could and ought to have been made has deprived the city of the use of very large sums of money to which it is entitled, thereby adding to the burden of general taxation. It appeared in evidence that since the respondents went into office the sewer commissioners have in a few instances imposed a charge for the privilege of entering sewers, but this, of course, was not in any sense a compliance with the requirements of the law referred to. Moreover, while such a charge might have been permissible under the general statutes before the special law was passed, it probably was not warranted after the special law went into effect. The respondents have not only failed to look after the interests of the city, in that they have omitted to make assessments on account of the sewers which were in exist-

ence when they came into office, but they have failed to make assessments on account of the only sewer which they themselves have constructed. They built a sewer on West Water street which cost about \$30,000, and it was shown that they have made no assessment on abutters, but have contented themselves with imposing in a single instance a charge for the privilege of entering the sewer.

"Having found on the evidence that the first charge is true, and this being in my opinion sufficient cause for the removal of the respondents James P. Dunn and William H. Granfield from office, I do hereby by virtue of the authority vested in me by section 9 of chapter 384, p. 339, St. 1904, remove them from office as members of the board of sewer commissioners."

It is provided by St. 1895, p. 222, c. 219, § 4, that the sewer commissioners of the city of Taunton "shall be subject to removal by the mayor for cause," and this is re-enacted in St. 1904, p. 339, c. 384, § 9. This is the same provision that was considered in *Hogan v. Collins*, 183 Mass. 43, 66 N. E. 429, in which it was said by this court that the decision of the mayor upon the facts "is not open to revision here, either to pass upon the weight of the evidence or to determine whether the evidence justified the finding. *Farmington River Water Power Co. v. County Commissioners*, 112 Mass. 206, 212." And in *Gaw v. Ashley*, 195 Mass. 173, 80 N. E. 790, it was held by this court that the official action of the mayor of a city under a power of removal "for cause" can be revised by this court only when there has been an arbitrary exercise of power, and the cause alleged for the removal is unreasonable and in law insufficient. And see to the same effect *Ayers v. Hatch*, 175 Mass. 489, 56 N. E. 612.

But the petitioners contend that the cause alleged and found by the mayor is insufficient in law to warrant their removal. They say in their brief that the only question which they seek to present is whether it was their duty, under any and all circumstances, to levy the general assessment provided for by St. 1904, p. 336, c. 384, § 3, at once upon the completion of any section of the system of sewers, or whether the time of levying the general assessment was a matter resting within the sound discretion of the board, and whether a failure to levy the general assessment as soon as any section of the system was completed was a sufficient cause for their removal from office. They do not now contend, as they apparently contended before the mayor, that the general assessment should be delayed until the time, perhaps in the remote future, when the whole system of sewers shall have been completed, so that the assessment may be based upon the actual cost of all the sewers, rather than upon their "estimated average cost," as the statute pro-

vides. It would have been difficult, if not impossible, to construe the statute as requiring, or even allowing, such a delay as this, with the protracted uncertainty of both the amount and the time of payment of the incumbrance which, under section 4 of the statute, thus would be cast upon at least a large part of the land in the city for perhaps a very long period of time.

But even the present contention of the petitioners goes too far. The board of which they were members had doubtless a certain discretion as to the time of levying the assessment in question; but it does not follow that on this ground they could delay indefinitely to perform the duty cast upon them. The manifest intent of the statute is to require assessments to be made for completed sewers or sections of sewers upon the estates benefited thereby, as soon in each case as this reasonably can be done, so that the expense of construction may be borne in proper proportion by the general taxpayers and those who derive special benefits from the construction. Upon the findings of the mayor under the first charge, the petitioners neglected to take any action in this matter, and their delay became unreasonable. There is nothing in *Fairbanks v. Fitchburg*, 132 Mass. 42, 43, which helps the petitioners. That case merely decides that an assessment finally made by an assessing board which is not restricted by any positive rule as to the time of making the assessment cannot be declared to be void because of a delay of some six years in making it. A very different question would have been presented if there had been a direct complaint against the members of that board for their delay. We cannot say that the ruling asked for by the petitioners should have been given, or that the cause of removal charged and found was insufficient.

The petitioners, apparently desiring to lay the foundation of a claim that the findings of the mayor were unwarranted, have, as they aver, set out in their petition the whole of the evidence presented to the mayor. *Haven v. County Com'rs*, 155 Mass. 467, 471, 29 N. E. 1083. And, although there is in the answer no admission of this averment and there has been no agreement upon the subject, still the averment is not denied in the answer. *Weed v. Boston*, 172 Mass. 28, 51 N. E. 204, 42 L. R. A. 642. But the petitioners have not claimed that the findings were not warranted by the evidence, if their request for a ruling was rightly refused; and we have not felt at liberty to go beyond the record. This was not a case in which the respondent introduced extrinsic evidence to show that substantial justice did not require that the proceedings should be quashed, and thus opened the door to the petitioners to offer evidence upon that question. *Ward v.*

*Newton*, 181 Mass. 432, 63 N. E. 1064, and cases there cited.

The decree dismissing the petition must be affirmed.

So ordered.

(200 Mass. 218)

## ROSENBERG v. SCHRAER.

(Supreme Judicial Court of Massachusetts.  
Bristol. Nov. 24, 1908.)

### 1. PARTNERSHIP (§ 178\*)—FIRM DEBTS—PRIMARY LIABILITY.

The primary fund for the payment of firm debts is firm property.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 312; Dec. Dig. § 173.\*]

### 2. PARTNERSHIP (§ 179\*)—FIRM DEBTS—PRIMARY LIABILITY.

A third person who received from a partner for use in the payment of firm debts \$250 of the firm money and a mortgage for \$775, the separate property of the partner, must, in the absence of other facts, first apply the firm money to the firm debts, and only then can apply the mortgage, and, where the \$250 was not applied by the third person to the payment of firm debts, the money in his hands belonged to the partner, and not to the firm.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 314; Dec. Dig. § 179.\*]

### 3. PARTNERSHIP (§ 199\*)—FIRM DEBTS—PRIMARY LIABILITY.

A partner gave to a third person \$250 of firm money, and assigned a mortgage for \$775, his separate property, for use in the payment of firm debts. The firm money was not used to pay firm debts. Subsequently the third person dealt with the partner individually, and they made a settlement, whereby defendant, in consideration of a payment made by the partner and the mortgage, gave the partner a release of all demands. The third person had made advances against the mortgage, and had used the money in payment of firm debts. *Held*, that there was but one transaction between the partner and the third person, and that, so far as the agreement related to firm property, it was made by the partner as trustee for the firm, so that an action for the \$250 must be brought in his name.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 363; Dec. Dig. § 199.\*]

### 4. EQUITY (§ 409\*)—EXCEPTIONS TO MASTER'S REPORT—RIGHT TO DRAW INFERENCES FROM THE FACTS FOUND.

Where exceptions to a master's report raised inferences of fact to be drawn from the facts found by the master, the court dealing with the exceptions may draw inferences of fact from the facts found.

[Ed. Note.—For other cases, see *Equity*, Dec. Dig. § 409.\*]

Appeal from Superior Court, Bristol County.

Bill by Philip Rosenberg against Myer Schraer. From a decree for plaintiff, defendant appeals. Affirmed.

Charles P. Ryan, for appellant. Frank A. Pease, for respondent.

LORING, J. It appears from the master's report that the plaintiff and three others were partners "in the clothing and furnishing business" prior to the afternoon of De-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ember 11, 1902. On the morning of that day an attachment of the firm property was made, and in the afternoon a general assignment was made by the firm to one Ettenson, attorney for the attaching creditor.

The plaintiff owned as his separate property a mortgage for \$775, made by one Perrusse, pledged for a private loan to him, amounting to \$100. "Under date of December 10, 1902," the plaintiff assigned this mortgage, and on December 11th he paid to the defendant \$250, the proceeds of a check drawn on the firm bank account both to be used in paying the firm debts. The fact that this \$250 was the proceeds of a firm check was known to the defendant.

The defendant conceded that the \$250 was not applied to the payment of the debts of the firm. His story was that he cashed the check by handing to the plaintiff \$150 on December 10th, and the balance on the morning of December 11th. The master did not believe the defendant's story, and (as we have said) found that the \$250 was paid to the defendant to be used with the Perrusse mortgage in paying the creditors of the firm.

One of the many contentions put forward by the defendant before the master, and the only one insisted upon here, is that the \$250 being firm money belongs to the firm and not to the plaintiff, and can be recovered only in a suit brought in the name of the firm. In support of this contention, he relies on *Hewes v. Bayley*, 20 Pick. 96. The primary fund for the payment of firm debts is firm property. For that reason it was the duty of the defendant to apply the firm's \$250 to the payment of the firm's debts in the first instance, and only after that fund had been exhausted to have recourse to the Perrusse mortgage. It would follow that (were there nothing else in the case), since only \$250 out of the \$900 was not applied to paying the firm debts, the money now in the defendant's hands belongs to the plaintiff and not to the firm.

But there is something else in the case. The master found that after March 31, 1903, "the defendant continued to deal with the plaintiff and to sell the plaintiff goods, the balance due from the plaintiff to the defendant being usually about \$200." Shortly before April 5, 1904, the defendant sued the plaintiff for the balance then due. On April 5, 1904, the parties made a settlement by which the plaintiff paid the defendant \$175, and the defendant gave the plaintiff a release of all demands in consideration of the \$175 and the Perrusse mortgage. The master found "that the Perrusse mortgage became at that time, if it had not become before, the absolute property of the defendant." It appears from the master's report that the Perrusse mortgage had not been collected, but that the defendant had made advances

against it and used the money so advanced in paying the debts of the plaintiff's firm. How much had been so advanced did not appear.

Had there been originally two agreements, one between the plaintiff's firm and the defendant relating to the \$250, and the other between the plaintiff and the defendant relating to the Perrusse mortgage, the result of this release would have been to leave the defendant liable to the firm for misapplication of the \$250. The release would have operated to make the \$250 the money of the firm as between the plaintiff and the defendant, although it would remain the money of the plaintiff as between the plaintiff and his partners.

But we find on the facts stated in the master's report that the defendant made but one agreement, and that the one agreement was an agreement with the plaintiff. It is manifest that there was but one transaction, and it is equally manifest that one accounting only was within the contemplation of the parties. So far as that agreement related to firm property it was made by the plaintiff as trustee for the firm. In such a case the action must be brought in the name of the trustee. *Boyden v. Hill*, 198 Mass. 477, 85 N. E. 413.

Where exceptions to a master's report raise inferences of fact to be drawn from the facts found by the master, it is for the court which has to deal with those exceptions to draw inferences of fact from the facts found by the master. *Kennedy v. Welch*, 196 Mass. 592, 83 N. E. 11.

Decree affirmed.

(200 Mass. 261)

#### WILSON v. PUFFER MFG. CO.

(Supreme Judicial Court of Massachusetts.  
Essex. Nov. 25, 1908.)

#### 1. APPEAL AND ERROR (§ 500\*)—QUESTIONS FOR REVIEW.

Where the record does not show that the exceptions to the master's report were overruled, or that plaintiff's appeal was from anything except the final decree, but it is stated in defendant's brief that the exceptions were overruled, and the case is argued by both parties upon the assumption that such is the fact, and that the questions thereon are saved to the plaintiff, the exceptions will be considered on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2295; Dec. Dig. § 500.\*]

#### 2. APPEAL AND ERROR (§ 931\*)—QUESTIONS FOR REVIEW.

Where the evidence before a master has not been reported to the appellate court, it will be assumed that it warrants findings based thereon, and therefore it is unnecessary to consider in detail the exceptions to the report.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3762; Dec. Dig. § 931.\*]

Appeal from Superior Court, Essex County.

Action by Katherine C. Wilson against the Puffer Manufacturing Company. From a judgment dismissing the bill, plaintiff appeals. Affirmed.

John C. Sanborn, for appellant. Sullivan & O'Mahoney, for appellee.

HAMMOND, J. The record before us does not show that the exceptions to the master's report were ever overruled, or that the plaintiff's appeal was from anything except the final decree. Inasmuch however, as it is stated in the brief of the defendant that the exceptions to the report were overruled, and as the case has been argued by both parties upon the assumption that such is the fact and that the questions arising thereon are saved to the plaintiff, we have considered the case upon that basis.

Although the master at first excluded certain evidence offered by the plaintiff, he finally admitted it in order to avoid a recommitment of the cause if in the opinion of the court his rulings excluding it should be regarded as erroneous. Upon all the evidence he has found in substance that the carbonator "when delivered and set in the plaintiff's store corresponded in all respects with the defendant's representations to the plaintiff"; that the plaintiff "failed to show any defect in the carbonator to which the bad quality of the soda was traceable"; that "the defendant made no false and fraudulent representations or misrepresentations to the plaintiff"; and that "there was no breach of warranty." Having made these findings of fact, he found generally for the defendant.

The evidence before the master has not been reported to the court, and it must be assumed that it warrants the findings. Under these circumstances it becomes unnecessary to consider in detail the exceptions to the report. The findings dispose of the case, and we have no occasion to consider the other grounds of defense. Nor do we see any ground for recommitment of the case.

Decree affirmed.

(200 Mass. 263)

**TAYLOR v. HENNESSEY et al.**

(Supreme Judicial Court of Massachusetts.  
Essex. Nov. 25, 1908.)

**MASTER AND SERVANT (§ 281\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.**

In an action for the death of defendant's servant from falling into an elevator well, evidence held to show contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 987-996; Dec. Dig. § 281.\*]

Exceptions from Superior Court, Essex County.

Action by William J. Taylor, administrator of the estate of Stephen F. Taylor, against Augustus A. Hennessey and others for the death of plaintiff's intestate while in defendant's employ. From a judgment for defendants, plaintiff brings exceptions. Exceptions overruled.

James W. Sullivan, for plaintiff. Matthews, Thompson & Spring, for defendants.

HAMMOND, J. So far as material to the question of the due care of the deceased, the case stated by the counsel for the plaintiff in his opening was substantially as follows:

The deceased was a boy 14 years and 11 months old at the time of the accident. He had been at work upon the premises a week, for one Demaris, who was working by the job at relasting shoes for the defendants, who owned and controlled the factory. He had worked previously for some weeks in another factory of the defendants. His duty was to carry racks of shoes to and from Demaris, who worked on the third floor, and for this purpose he used the elevator. About 5 o'clock in the afternoon of the day of the accident he went upstairs upon the elevator, as he had done many times during the week, in the performance of his duty. Upon arriving at the desired floor, he got out of the elevator on to the floor, and spoke a word or two with one La Chappelle, who was working on that floor 12 or 15 feet from the elevator well. The last that La Chappelle saw of the boy he (the boy) had hold of a rack of shoes and was walking backward towards the well, drawing the rack after him. He had got within two feet of the well when La Chappelle turned back to his work, but immediately heard a loud noise and cry. The boy had fallen into the well, and was fatally injured.

So far as material, the elevator and gate were described as follows: "The gate \* \* \* as originally installed was a balance gate. That is, it was a gate which when thrown up it ran in a groove." It consisted of two bars with cross-pieces. As originally constructed the gate, when thrown up, would be held up by a weight connected with it as a balance, like a window weight, but some time before the accident the top bar had been broken and an extra piece had been nailed on, making the gate heavier, so that, when thrown up, it sometimes stayed up and sometimes fell down of its own weight. The elevator and gate had been in this condition for several months. The plaintiff's evidence did not show whether immediately after the accident the gate was up or down. Except as above stated, there was nothing on the elevator to tell when it was taken away from the floor, "there was no method of locking the elevator at that floor, no bell or anything which would warn one who might expect it to be there that it had gone." Shortly after the boy fell the platform of the elevator was found at the floor above. There was light enough for the boy to see.

The evidence would seem to show that the boy who had brought the elevator to the floor stepped out for a few seconds, and then, on his return with the rack of shoes, backed into the well without looking to see whether the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

elevator was still there, or else he turned around, raised the gate, and then stepped into the well.

It is to be noticed that the gate was not connected automatically with the elevator. The position of the gate did not indicate where the elevator should be and the boy knew it. The case therefore is clearly distinguishable from cases like *Wright v. Perry*, 188 Mass. 268, 74 N. E. 328, and *Hamilton v. Taylor*, 195 Mass. 68, 80 N. E. 592, upon which the plaintiff relies. In each of those cases the gate was automatically connected with the elevator and at the time of the accident it indicated by its position that the platform of the elevator was there.

In the case before us there was no such misleading signal. Upon the opening statement it must be held that the deceased was not in the exercise of due care; and hence a verdict for the defendant was rightly ordered.

Exceptions overruled.

(200 Mass. 247)

# **RICHARDSON v. MULLERY et al.**

(Supreme Judicial Court of Massachusetts.  
Essex. Nov. 24, 1908.)

## **1. CHARITIES (§ 1\*)—PUBLIC CHARITY—GIFT TO UNITED STATES LIFE SAVING STATION.**

A bequest to "the life saving station to be built and established" at a certain place was equivalent to a gift to the proprietors of the station for the benefit of the station, and was a public charity, its benefits extending generally to all the members of the class or classes for whose benefit the station was to be established.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. §§ 1-6; Dec. Dig. § 1.\*]

## **2. CHARITIES (§ 24\*)—ENFORCEMENT—REFUSAL TO ACCEPT.**

The United States government being the owner of the life saving station, and nobody else having authority to interfere with it, the refusal of the government to accept the bequest made the charity impossible of execution in the exact way contemplated by the donor.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 8; Dec. Dig. § 24.\*]

## **3. CHARITIES (§ 37\*)—ADMINISTRATION—APPLICATION OF DOCTRINE OF CY PRES.**

Where the intent of a testatrix in bequeathing a sum to a United States life saving station was apparently not limited to the maintenance of the station itself, which was the specific object named in the will, but was a wish to be helpful to persons exposed to the perils of the sea in the neighborhood by any reasonable method and the execution of the charity in the exact way contemplated, was rendered impossible by the government's refusal to accept the gift, the charity may be administered cy pres; some other scheme being devised by or under the direction of the probate court for the use of the money within the general charitable purpose of the testatrix.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. §§ 91-93; Dec. Dig. § 37.\*]

Case Reserved from Supreme Judicial Court, Essex County; James M. Morton, Judge.

Petition by Charles W. Richardson, admin-

istrator of Harriet M. King, against Harriet P. Mullery and others, for the construction of decedent's will. Will construed.

Dana Malone, Atty. Gen., and Fred T. Field, Asst. Atty. Gen., for the Commonwealth. Fredk. Manley Ives and M. Stuart Taylor, for respondents Mullery and Gulon.

KNOWLTON, C. J. The petitioner asks for instructions as to the effect of this clause in the will of Harriet M. King, late of Salem, deceased: "I give and bequeath the rest and residue of my estate to my sister, Eliza A. Hoffman, for her use during her life, at her death to be given to the life saving station to be built and established in Marblehead or Nahant, not yet decided upon." The holder of the interest for life having deceased, the question is what shall now be done with the residue, which amounts to about \$6,000. It appears by the agreed facts that, when the will was made, the testatrix knew of the intention of the United States government to establish a life saving station in the neighborhood of Nahant. Her will was made on March 19, 1900, and the construction of the life saving station at Nahant was completed on February 18th of the same year, although it is averred in the bill and not denied in the answer that the station did not go into commission until September 13, 1900. This station is on the shore at Nahant, about four or five miles across the bay from the nearest part of the shore of Marblehead. No life saving station has been established at Marblehead, and none is contemplated by the United States government or the officers having the life saving service in charge. This station is maintained under the authority of the Secretary of the Treasury of the United States, acting under a law of the United States. "The building of the station is an accomplished fact, and there is no doubt that it will always be maintained by the government." The Congress of the United States has taken no action towards the acceptance of the legacy, and the Secretary of the Treasury has filed in the case a disclaimer of any interest in the residue of the estate of the testatrix. The keeper and crew of six or seven men live in the station, and the keeper has quarters for his family there. No provision is made for the families of the men of the crew.

The gift is "to the life saving station to be built and established," etc. This is equivalent to a gift to the proprietor or proprietors of the life saving station, for the benefit of the station. The charitable nature and object of the gift, and the fact that its benefits are to extend generally to all the members of the class or classes for whose benefit the life saving station is established, make it a public charity. *Johnstone v. Swan*, 3 Maddox, 457; *Fire Insurance Patrol v. Boyd*, 120 Pa. 624, 15 Atl. 553, 1 L. R. A. 417, 6 Am.

St. Rep. 745; *Minns v. Billings*, 183 Mass. 126-129, 66 N. E. 593, 5 L. R. A. (N. S.) 686, 97 Am. St. Rep. 420; *Jackson v. Phillips*, 14 Allen, 539-558; *Drury v. Natick*, 10 Allen, 169-178; *Attorney General v. Shrewsbury*, 6 Beav. 220; *Attorney General v. Day*, L. R. (1900) 1 Ch. 31; *Coggeshall v. Pelton*, 7 Johns. Ch. (N. Y.) 291, 11 Am. Dec. 471; *Hamden v. Rice*, 24 Conn. 350; *Stuart v. Easton*, 74 Fed. 854, 21 C. C. A. 146. If the United States government, by act of Congress, had accepted the trust, the money would have been paid over to be used for the maintenance and support of the life saving station in a way to make it as beneficial as possible to those for whose safety and protection it was established. But the United States declines to accept the trust. See *Dixon v. U. S.*, 125 Mass. 311, 28 Am. Rep. 230; *State v. Blake*, 69 Conn. 64, 36 Atl. 1019. The management and control of the station is in its owner, the United States government, and no one else can interfere with it. If a trustee were to be appointed by the court to execute the trust, he could not use the money in the way in which the testatrix intended it to be used for the maintenance and support of this station.

The trust has, therefore, become impossible of execution in the exact way contemplated by the testatrix, and we come to the question whether it must fail altogether, or whether it can be administered *cy pres*. That depends upon whether the trust created by the testatrix is limited to the direct maintenance and support of this station by the expenditure of money in aid of the government for that purpose, or whether the charitable purpose was broader, and was intended to include the promotion of the general interests which the station was designed to serve, and kindred interests in furtherance of a purpose to be helpful in this general field. The question

that arises in cases of this kind is often hard to answer, and in the present case it is not free from difficulty. We are of opinion that the desire and purpose of the testatrix in devoting her gift to the life saving station was not limited to the maintenance of the station itself, which is the specific object named in the will, but was a charitable wish to be helpful to persons exposed to the perils of the sea in this neighborhood. We think the precise method of accomplishing her purpose stated in the will was not so important in her thought as the general saving of life and relief of suffering in cases of shipwreck in the vicinity of Nahant and Marblehead. As we interpret the language of the will, any reasonable method of promoting this object was within her general purpose. There may be ways of promoting this object other than by aiding in the maintenance of the station in the way in which the United States government chooses to maintain it. Methods may be adopted for rendering the dangerous service more attractive to the brave men who are needed in it, either by making provision for themselves or their families in case of their misfortune or in other ways. Or some other scheme may be devised for the use of the money which will be within this general charitable purpose of the testatrix.

The charity should be administered under the doctrine of *cy pres* under a scheme to be devised by or under the direction of the probate court. *Attorney General v. Briggs*, 164 Mass. 561, 42 N. E. 118; *Weeks v. Hobson*, 150 Mass. 377, 23 N. E. 215, 6 L. R. A. 147; *Theological Educational Society v. Attorney General*, 135 Mass. 285; *Jackson v. Phillips*, 14 Allen, 539. Most if not all of the methods of expenditure particularly proposed in the decree of the probate court would not be improper for embodiment in such a scheme.

So ordered.

(171 Ind. 350)

**MARTINDALE v. INCORPORATED TOWN OF ROCHESTER et al.** (No. 21,120.)

(Supreme Court of Indiana. Nov. 24, 1908.)

**1. MUNICIPAL CORPORATIONS (§ 513\*)—PUBLIC IMPROVEMENTS—ASSESSMENT—ENJOINING ENFORCEMENT—PRESUMPTIONS.**

Where the complaint, in a suit to enjoin an assessment for public improvements, does not show that notice of the time and place of hearing of the declaratory resolution was not given, as required by Acts 1905, p. 404, c. 129, § 265 (Burns' Ann. St. 1908, § 8959), it will be presumed that proper notice was given.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 513.\*]

**2. MUNICIPAL CORPORATIONS (§ 513\*)—PUBLIC IMPROVEMENTS—SUITS TO ENJOIN ASSESSMENTS—PRESUMPTIONS.**

Acts 1905, p. 404, c. 129, § 265 (Burns' Ann. St. 1908, § 8959), provides that the common council or board of trustees shall hear any persons affected by the proposed public improvement, and, upon such hearing, the declaratory resolution may be confirmed, modified, or rescinded. The complaint, in an action to enjoin assessments, alleged that after the hearing of objections, the declaratory resolution was not confirmed, modified, etc., by resolution, but on the day after hearing objections, the board of trustees adopted another resolution, ordering the improvement of the street by grading and paving with certain material and in the manner directed. *Held* that, as the latter resolution related to the same improvement, and was in the form a final resolution, it would be presumed that it was adopted as the final resolution; the allegations of the complaint being insufficient to overcome the presumption.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 513.\*]

**3. MUNICIPAL CORPORATIONS (§ 294\*)—PUBLIC IMPROVEMENTS—RESOLUTIONS—FINAL RESOLUTION—NOTICE.**

Acts 1905, p. 404, c. 129, § 265 (Burns' Ann. St. 1908, § 8959), relating to proceedings by a town for public improvements, and requiring, among other things, that the declaratory resolution shall be confirmed or modified, after the hearing of objections, by the final resolution, does not require notice to be given of such final resolution.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 294.\*]

**4. MUNICIPAL CORPORATIONS (§ 269\*)—PUBLIC IMPROVEMENTS—IMPROVEMENTS BY TOWNS—STATUTORY AUTHORITY.**

Acts 1905, pp. 286, 287, c. 129, § 107 (Burns' Ann. St. 1908, § 8710), prohibiting contracts for street improvements, etc., in cities of the first, second, or third class, the total cost of which exceeds 50 per cent. of the value of the property, applies only to improvements in cities of the classes named, and not to improvements in towns; Acts 1905, p. 404, c. 129, § 265 (Burns' Ann. St. 1908, § 8959), expressly providing that street improvements in incorporated towns shall be governed by Acts 1905, pp. 288, 307, c. 129, §§ 108-120.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 269.\*]

**5. MUNICIPAL CORPORATIONS (§ 304\*)—PUBLIC IMPROVEMENTS—PROCEEDINGS—RESOLUTION OF NECESSITY—KIND OF MATERIAL.**

Acts 1905, p. 404, c. 129, § 265 (Burns' Ann. St. 1908, § 8959), provides that the board of trustees of an incorporated town shall order street improvements by a resolution declaring its necessity, and stating the kind, size, location, and terminal points of the improvement. The resolution, of necessity, provided for the im-

provement of a street by grading and paving with vitrified shale or clay paving block or other paving material, and by setting all necessary curbs and sewer inlets to a certain width. *Held*, that the resolution was a substantial compliance with the statute, and that permission to use two or more kinds of material did not render the resolution void.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 812; Dec. Dig. § 304.\*]

**6. MUNICIPAL CORPORATIONS (§ 304\*)—PUBLIC IMPROVEMENTS—SPECIFICATION OF MATERIAL.**

Acts 1905, p. 404, c. 129, § 265 (Burns' Ann. St. 1908, § 8959), provides that the final determination of the material to be used in a street improvement shall be set forth in the final resolution, and upon the hearing on the resolution of necessity it may be confirmed, modified, etc., but the kind of improvement to be made shall be determined before its final adoption, and gives a right of petition on the question of the kind of pavement to be used, and provides that the board of trustees cannot use any other kind of pavement except that named in the petition without a two-thirds vote, and further provides that, if there is no petition as to the kind of material to be used, it shall be determined and set forth in the final resolution. *Held* that, construing the statute as a whole, the kind of improvement to be made, and the material to be used in the wearing surface, is determined by the final resolution.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 812; Dec. Dig. § 304.\*]

**7. MUNICIPAL CORPORATIONS (§ 314\*)—PUBLIC IMPROVEMENTS—PRELIMINARY PROCEEDINGS—CONTRACTS—PLANS AND SPECIFICATIONS.**

Acts 1905, p. 404, c. 129, § 265 (Burns' Ann. St. 1908, § 8959), providing that, on the adoption of the final resolution for public improvements, the board of trustees shall immediately adopt and file with the town engineer or town clerk detailed plans and specifications of the improvement, is to enable prospective bidders to ascertain the amount and kind of work to be done, and only requires the adoption, and filing of such plans within a reasonable time after the adoption of the final resolution, and before notice of the letting of the contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 827; Dec. Dig. § 314.\*]

**8. MUNICIPAL CORPORATIONS (§ 324\*)—PUBLIC IMPROVEMENTS—CONTRACTS—VALIDITY.**

A provision, in a contract for the construction of a street, that the contractor might appropriate the surplus dirt from the street did not render the proceeding or the contract void on collateral attack.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 324.\*]

**9. MUNICIPAL CORPORATIONS (§ 284\*)—PUBLIC IMPROVEMENTS—POWER TO AUTHORIZE—DELEGATION OF POWER.**

While the common council of a city, or the board of trustees of a town, cannot delegate its power to authorize public improvements, it may delegate the performance of ministerial duties connected with the making of such improvements.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 756; Dec. Dig. § 284.\*]

**10. MUNICIPAL CORPORATIONS (§ 328\*)—PUBLIC IMPROVEMENTS—AUTHORITY TO MAKE.**

Those dealing with public corporations are charged with notice of their power to contract, and that their officers and agents can only bind them in the manner and to the extent authorized

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by law; and, if a board of trustees had no power to delegate to the town engineer authority to conclusively determine the fulfillment of a contract for street improvements, those interested in the contract were bound to take notice that such delegation of authority was unlawful and void.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 851; Dec. Dig. § 323.\*]

**11. APPEAL AND ERROR (§ 843\*)—REVIEW—QUESTIONS NECESSARY TO BE CONSIDERED.**

On appeal, in a suit to enjoin an assessment for public improvements, it was unnecessary to determine whether the board of trustees had authority to delegate to the town engineer the power to conclusively determine the fulfillment of the contract, since the attempted delegation of power would be void to the extent that the board had no authority to delegate it.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 843.\*]

**12. MUNICIPAL CORPORATIONS (§ 339\*)—PUBLIC IMPROVEMENTS—CONTRACTS—VALIDITY.**

The lack of power, if any, of the board of trustees to authorize the town engineer to conclusively determine the fulfillment of a contract for street improvements, the amount due the contractor, etc., did not render the entire contract void.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 339.\*]

**13. MUNICIPAL CORPORATIONS (§ 341\*)—PUBLIC IMPROVEMENTS—PRELIMINARY PROCEEDINGS—IRREGULARITIES.**

Irregularities will not invalidate proceedings for street improvements, even though they relate to the acquiring of jurisdiction, unless there is an entire absence of jurisdiction.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 874; Dec. Dig. § 841.\*]

**14. MUNICIPAL CORPORATIONS (§ 323\*)—PUBLIC IMPROVEMENTS—RESTRAINING MAKING OF IMPROVEMENTS—IRREGULARITIES IN PRELIMINARY PROCEEDINGS.**

Only such questions as go to the jurisdiction of the board of trustees in making public improvements can be raised in a suit to enjoin the improvements, as all questions which are properly triable on appeal, or by a particular tribunal created for the purpose of hearing such questions, must be so tried, and not by injunction.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 842, 843; Dec. Dig. § 323.\*]

**15. MUNICIPAL CORPORATIONS (§ 265\*)—PUBLIC IMPROVEMENTS—POWER TO MAKE.**

Under Burns' Ann. St. 1908, §§ 8960, 8961, 8963-8965, relating to the general powers of the board of trustees of a town over the streets, etc., that body has full jurisdiction over the making of street improvements.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 265.\*]

**16. MUNICIPAL CORPORATIONS (§ 340\*)—PUBLIC IMPROVEMENTS—CONTRACTS—CONFORMITY TO RESOLUTION.**

On collateral attack on proceedings for street improvements, that the contract for the improvement provided that the contractor should furnish materials, etc., for which he was to be paid, which were not mentioned or included in the resolution directing the improvement, did not render the contract void; and a property owner cannot complain that the contract requires from the contractor more than his bid contemplated.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 869; Dec. Dig. § 840.\*]

**17. STATUTES (§ 64\*)—VALIDITY—INVALID IN PART.**

Acts 1905, p. 291, c. 129, § 110 (Burns' Ann. St. 1908, § 8716), requiring the circuit or superior court of a county to appoint three freeholders of the city to reassess benefits arising from the street improvements, upon the petition of a property holder claiming that assessments for benefits for public improvements were excessive, and requiring the report of such freeholders to be entered upon the records of the court, and making it final upon all parties, even if unconstitutional, as depriving such courts of judicial powers, would not render the entire act void; it being still complete in itself and capable of enforcement.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 58-66; Dec. Dig. § 64.\*]

**18. MUNICIPAL CORPORATIONS (§ 341\*)—PUBLIC IMPROVEMENTS—EFFECT OF DEFECTS IN PRELIMINARY PROCEEDINGS.**

Acts 1905, p. 404, c. 129, § 265 (Burns' Ann. St. 1908, § 8959), prohibiting suits by a property holder to enjoin the construction of a public improvement, unless brought within 10 days from the letting of the contract, precludes a property owner from preventing a contractor to recover for work because of irregularities before the contract was executed, and a mere objection by an owner to an improvement, without calling the contractor's attention to any invalidity in the contract or proceedings, would not prevent a recovery by the contractor.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 874; Dec. Dig. § 841.\*]

Appeal from Circuit Court, Fulton County; Harry Bernetha, Judge.

Suit by Warren B. Martindale against the Incorporated Town of Rochester and others. From a judgment sustaining a demurrer to the complaint, complainant appeals. Affirmed.

Enoch Myers, for appellant. Jas. H. Biber and Holman & Stephenson, for appellees.

**MONKS, J.** After the substantial completion of an improvement of Main street in the town of Rochester, under section 265, Acts 1905, p. 404, c. 129, being section 8959, Burns' Ann. St. 1908, appellant brought this suit to enjoin appellee from making, or attempting to make or collect, any assessment against his real estate abutting on said street, where the same was improved, to pay the cost thereof. Appellee's demurrer for "want of facts" to the complaint was sustained, and appellant refusing to plead further, judgment was rendered against him on demurrer. The only error assigned is that the court erred in sustaining said demurrer to the complaint.

It is first claimed that appellee town was without jurisdiction to make said improvement or enter into any contract therefor, because there was "no sufficient notice given of the declaratory resolution, adopted November 16, 1905, and of the time and place, when and where the board of trustees would hear objections to the necessity of said improvement." Section 265 (8959), supra, provides that "notice of the time and place of hearing such resolution shall be given by

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

two weekly publications in a newspaper of general circulation, published in such city or town, or if no such paper be published in such city or town," then by posting, etc. This is the only notice required of such hearing, and as the allegations of the complaint do not show that such notice was not given, it must be presumed, as against this collateral attack, that the proper notice was given. Elliott's *Roads & Streets* (2d Ed.) § 608, p. 638; *Jenkins v. Stetler*, 118 Ind. 275, 20 N. E. 788; *City of Bloomington v. Phelps et al.*, 149 Ind. 596, 599, 49 N. E. 581; *Dyer v. Woods*, 166 Ind. 44, 53, 76 N. E. 624, and cases cited.

It is next insisted that the proceeding was without jurisdiction, and the contract for improvement void, because "said declaratory resolution was never confirmed, changed, modified, altered, or rescinded by said board." Section 265 (8959), *supra*, provides that "such common council or board of trustees shall meet at the time and place, set forth in such notice and shall hear any and all persons who desire to be heard in person or by attorney, whose property may be affected by the proposed improvement; and upon such hearing, such resolution may be confirmed, modified, changed, altered or rescinded but the kind of improvement to be made shall be determined and specified before the resolution is finally adopted." It is alleged in the complaint on this subject: "That after the hearing of said objections, said defendant did not confirm, change, modify, alter, nor rescind said declaratory resolution by any order, resolution, ordinance, or in any other manner, but, on the contrary, afterwards, to wit, on the 9th day of December, 1905, said defendant, by its said board of trustees, by another resolution adopted and entered of record, ordered the improvement of that part of Main street aforesaid, by 'grading and paving with vitrified shale paving block,' and setting marginal curbs and sewer inlets, the width of paving from the south line of Pearl street south to the first alley, to be 50 feet between curbs, and thence to the south line of lot 4 in Jonas Goss' addition to said town, said paving to be 42 feet between curbs." The time for hearing objections to said declaratory resolution, as stated in the notice, was December 8, at 7 o'clock, p. m. The resolution adopted December 9, 1905, was concerning the same improvement as that mentioned in the declaratory resolution of November 16, 1905, and it was adopted the next day after the hearing of objections to the declaratory resolution on the 8th, and as a part of the proceeding for the improvement of said street, and was in form a final, and not a declaratory, resolution. We must presume, therefore, that it was adopted as the final resolution in the proceedings for the improvement of said Main street, the allegations of the complaint not being sufficient to overcome this presumption. Elliott's

*Roads & Streets* (2d Ed.) § 608, p. 638; *City of Bloomington v. Phelps et al.*, 149 Ind. 596, 599, 49 N. E. 581; *Jenkins v. Stetler*, 118 Ind. 275, 20 N. E. 788; *Dyer v. Woods*, 166 Ind. 44, 53, 76 N. E. 624, and cases cited.

It is next insisted that said proceeding was without jurisdiction and void, because "no notice was given of the adoption of the resolution, on December 9, 1905, and that no notice was given of the time and place, when and where, the owners of property affected might present their objections thereto." It is sufficient answer to this contention to say that said resolution was the final resolution for said improvement, and no notice thereof is required by the statute.

It is also contended that said board had no jurisdiction to contract for said improvement or cause the same to be made, because "(1) the cost of said improvement, as fixed by the contract, exceeded 50 per cent. of the aggregate value of the property, as it was assessed for taxation, exclusive of improvements, subject to be assessed to pay for said improvement; (2) the cost of that part of said improvement south of the south line of Perry street, as fixed by said contract, exceeded 50 per cent. of the aggregate value of all the real estate within said limits, as the same was assessed for taxation exclusive of improvements, subject to be assessed to pay for that part of said improvement; (3) the cost of said improvement was estimated for the entire length thereof per running foot, whereas portions of that part of Main street to be improved were not uniform in the extent and kind of the proposed improvement." Appellant's said grounds 1, 2, and 3 for claiming that the board of trustees was without jurisdiction seem to be predicated upon the theory that this proceeding is governed by section 107, c. 129, pp. 286, 287, Acts 1905, being section 8710, Burns' Ann. St. 1903, in which, among other things, it is provided that, "nor shall any contract be let for the improvement of any street, alley or other public place, in any city of the first, second or third class, the total cost of which shall exceed fifty per cent. of the aggregate value of the property as it is assessed for taxation, exclusive of improvements, and subject to be assessed, to pay for said proposed improvement." It is expressly provided in section 265 (8959), *supra*, that the improvement of streets in incorporated towns should be governed by said section 265 (8959) and sections 108-120 of said act of 1905 (Acts 1905, pp. 288-307, c. 129). Said section 107 only applies to improvements in cities of the first, second, or third class, and has no application whatever to the improvement of streets or alleys in towns.

It is next insisted by appellant that appellee's board of trustees has no jurisdiction to order or make such improvement, or to contract therefor, and the same was void, because (1) the declaratory resolution adopted

November 16, 1905, was "too indefinite as to the kind of material to be used in the proposed paving, two kinds being named"; (2) "said resolution did not state the size or kind of paving block to be used, nor the size nor kind of curbing, nor the extent of excavation contemplated in grading, nor the number, size, kind, or character of the sewer inlets to be constructed, and did not declare a necessity for changing the grade of the street at any point between the termini of the proposed improvement"; (3) said board of trustees did not, prior to the adoption of said final resolution on December 9, 1905, "determine and specify the kind of improvement to be made"; (4) "said board did not, immediately after the adoption of said final resolution, adopt detailed plans and specifications of said proposed improvement"; (5) "by the terms of the contract the contractor, Hoffman, was authorized to sell the earth excavated from Main street, in front of and adjoining appellant's said real estate, and to appropriate the proceeds thereof to his own use"; (6) "said contract authorized the engineer to finally and conclusively determine its fulfillment, to in like manner determine the sum of money due the contractor for work done, to pass upon the quality of material to be used, and because it provides that the contractor shall furnish material and do work not mentioned nor included in said resolution." Section 265 (8959), supra, provides that, whenever the board of trustees of an incorporated town desire to improve a street in such town at the expense of the "abutting or adjacent property," "it shall order the same by a resolution declaring such improvement to be necessary and also stating the kind, size, location and terminal points thereof." It is alleged in the complaint that the board of trustees "adopted and caused to be entered upon the records a resolution, declaring a necessity for the improvement of said Main street in said town to the south line of Pearl street in said town to the south line of lot 4 in Jonas Goss' addition to Rochester, a distance of about 3,100 feet, by grading and paving with 'vitrified shale or clay paving block, or other paving material,' and by setting all necessary curbs and sewer inlets, to the width of 42 feet." This was a substantial compliance with that part of section 265 (8959), supra, above set out. The fact that two or more kinds of material for the improvement of said street were mentioned in said resolution does not render it void.

At the hearing of said resolution provided for by said section, the board of trustees hear, among other things, objections and suggestions in regard to the material to be used, and in the final resolution ordering the improvement designate the material to be used in said improvement. Said section 265 (8959), supra, sustains this view, for it provides that the "final determination of the material to be

used in the wearing surface as well as general designation of the rest of the improvement contemplated, shall be set forth in such final resolution." Section 265 (8959), supra, provides that upon the hearing of the resolution of necessity the same may be confirmed, etc., "but the kind of improvement to be made shall be determined and specified before the resolution is finally adopted." This is followed by a proviso giving the right of petition on the question of the kind of pavement to be used in such improvement, and providing that the board of trustees "shall not have the power to make such improvement with any other kind of pavement, except that named in the petition," except by a two-thirds vote "of the board of trustees." Said section then proceeds as follows: "If there be no such petition filed the final determination of the material to be used in the wearing surface, as well as general designation of the rest of the improvement contemplated shall be set forth in such final resolution." The two parts of said section 265 (8959), above set out, must be read and construed together, and when so read and construed, it is evident that "the kind of improvement to be made" is determined by the adoption of the final resolution, which contains the "final determination of the material to be used in the wearing surface, as well as the general designation of the rest of the improvement contemplated."

It is alleged in the complaint "that defendant town did not immediately after the adoption of said resolution, adopt detailed plans and specifications of said improvements." It is provided in section 265 (8959), supra, "on the adoption" of the final resolution, that the "board of trustees shall immediately adopt and place on file in \* \* \* the town engineer's office, if there be a \* \* \* town engineer, and if there be no \* \* \* town engineer then in the office of the \* \* \* town clerk, detailed plans and specifications of such improvement and upon the adoption and filing of such detailed plans and specifications by such \* \* \* board of trustees, it shall at once give notice of the letting of a contract for such improvement," etc. The reason for requiring the adoption of detailed plans and specifications of the proposed improvement, and that the same be filed in the proper office before notice of the letting of the contract, is evident. It was required in order that persons desiring to bid on said work, as well as others interested, could ascertain and know the amount and kind of work to be done. To comply with said provision of said section it is only necessary to adopt and file detailed plans and specifications within a reasonable time after the adoption of the final resolution, and before notice of the letting of said contract. There is no allegation in the complaint that detailed plans and specifications were not adopted before notice of the letting of the contract was

given, nor are any facts alleged showing that such detailed plans and specifications were not adopted and filed in the proper office within a reasonable time after the adoption of said final resolution.

The provision in the contract that the contractor might appropriate the surplus earth from said street did not render the proceeding or contract void. The same question arose in *Jenkins v. Stetler*, 118 Ind. 275, 20 N. E. 788, where the surplus earth, taken from a street being improved, was to be the property of the contractor. It was claimed that this made the proceeding illegal. The court said (page 277 of 118 Ind., page 789 of 20 N. E.): "We do not find it necessary to inquire concerning the title to surplus earth which accumulates in the course of a street improvement. It is not disclosed that there was any in fact growing out of the improvement involved in the present case, nor that the contractors appropriated any earth belonging to the appellee, or any other person. If it did so appear, the fact would not vitiate the contract so as to exonerate the appellee from paying for the benefit of a completed improvement, which presumably enhanced the value of his property to an amount equal to the sum assessed against it. The provision in the ordinance in reference to the disposition of the surplus earth relates to a matter which arose prior to the making of the contract, and by the very terms of the statute is no longer a subject of inquiry. Section 3165, Rev. Stat. 1881; *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501; *Clements v. Lee*, 114 Ind. 397, 16 N. E. 799. Where a common council, by taking all the preliminary steps acquires jurisdiction, and makes a contract for the street improvements, a party benefited will not be permitted to stand by until the work is completed, and then claim exoneration when the contractor seeks to obtain pay for his work."

It is claimed by appellant that the board of trustees "had no power to delegate to the town engineer the power to conclusively determine the fulfillment of the contract, the amount of money due the contractor at any time, nor the quality of the material to be used, nor to decide all the questions that might arise," etc., "and that to the extent the board attempted to confer upon the engineer these extraordinary powers it abdicated its own functions." While the common council of a city or the board of trustees of a town cannot delegate its power to make public improvements, this does not prevent the delegation of the performance of ministerial duties connected with the making of such improvements. 1 *Dillon's Mun. Corp.* (4th Ed.) §§ 96, 97, 98; 1 *Abbott's Mun. Corp.* § 112; 1 *Smith on Pub. Corp.* §§ 564, 565; 28 Cyc. 967-969; *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659; *Harrisonburg v. Rollin*, 97 Va. 582, 585, 586, 34 S. E. 523. It has been held that a contract between a municipal corporation

and a contractor for the improvement of a street, construction of a public sewer, or other public improvement, which provides that the engineer shall determine the quantity and quality of the several kinds of work and material, and their conformity to the contract, and that the same shall be conclusive on the parties, is valid and binding upon the parties, in the absence of fraud, or such gross mistakes as imply bad faith. *Bowman v. Stewart*, 165 Pa. 394, 30 Atl. 988; *Drhew v. Altoona*, 121 Pa. 401, 15 Atl. 636; *Hostetter v. City of Pittsburgh*, 107 Pa. 419; *Omaha v. Hammond*, 94 U. S. 98, 24 L. Ed. 70; *Guild v. Andrews*, 137 Fed. 369, 70 C. C. A. 49; *Brady v. Mayor, etc.*, New York, 132 N. Y. 415, 30 N. E. 757; *People v. Mayor, etc.*, City of Syracuse, 65 Hun. 321, 20 N. Y. Supp. 236; *Baltimore v. Stewart*, 92 Md. 535, 549, 550, 48 Atl. 165, and cases cited; *Green v. Jackson*, 66 Ga. 250; *McGuire v. City of Rapid City*, 6 Dak. 346, 352-356, 43 N. W. 706, 5 L. R. A. 752; 28 Cyc. 967-969. It is not necessary, however, for us to determine whether or not the board of trustees had the authority or right to delegate the powers mentioned to the town engineer, for the reason that, to the extent the board had no such power, the attempt to delegate the same to said town engineer was void. Persons dealing with public corporations are charged with notice of their power and authority to contract, and that they can only be bound to the extent of such power and authority (*Johnson v. Common Council, etc.*, 18 Ind. 227), and that their officers and agents can only bind them in the manner and to the extent authorized by law. *City of La Porte v. Gamewell, etc., Co.*, 146 Ind. 486, 475, 45 N. E. 588, 35 L. R. A. 686, 58 Am. St. Rep. 359, and cases cited; *Lee v. School Tp.*, 163 Ind. 339, 340, 341, 71 N. E. 956, and cases cited. If said provision in regard to the authority of the town engineer was an undue delegation of authority, and was therefore unlawful and void, as claimed by appellant, the parties thereto, and all others interested, were bound to take notice of the extent of power, on the part of said town of Rochester, appellee, to grant such authority to its engineer, and that the same was therefore unlawful and void; but, as said in *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659, "the contract between the parties is in force so far as it is lawful." It is evident that such want of power, if any, of the board of trustees did not render the other parts of the contract void. *State v. Common Council of Michigan City*, 138 Ind. 445, 37 N. E. 1041.

It is alleged in the complaint that the contract for said improvement provided "that the contractor shall furnish materials and do divers other acts for which he is to be paid but which were not mentioned nor included in the resolution directing said improvement." Appellant contends, in his sixth ground of objection, that said provision in

the contract renders the proceeding and contract void. The contractor bid on the work provided for in the final resolution, and the detailed plans and specifications adopted by the board of trustees and on file in the office of the town engineer. If the contract required the contractor to furnish more material and perform more work than his bid required, appellant has no just grounds for complaint. An objection was made to the contract in *Boyd v. Murphy*, 127 Ind. 174, 25 N. E. 702, for the reason that it included extra work not specified or mentioned in any resolution or ordinance, or in the advertisement for the bids. The court said, on page 177 of 127 Ind., on page 703 of 25 N. E.: "Had the common council let the contract to the appellees without requiring the additional improvements, its action would have been conclusive. This being true, we are unable to understand any ground of complaint, because by the contract, as made, additional benefits were secured to the city and its property holders. If the council arrived at the conclusion that the bid of the appellees was the best bid, and at the same time could secure the additional sidewalks and gutters and the waterway without extra cost to the city, it was eminently proper that it do so."

It is thoroughly settled that irregularities will not make void the proceeding and the contract for the improvement of a street on collateral attack, and this has been extended to the irregularities in what has been termed the "acquiring of jurisdiction." *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501; *McEnaney et al. v. Town of Sullivan*, 125 Ind. 407, 25 N. E. 540; *Barber, etc., Co. v. Edgerton*, 125 Ind. 455, 463, 25 N. E. 436; *Reeves et al. v. Grottendick*, 131 Ind. 107, 30 N. E. 889; *Hibben v. Smith*, 158 Ind. 206, 62 N. E. 447; *Brown v. Central, etc., Co.*, 162 Ind. 452, 69 N. E. 150. This suit is a collateral attack upon the proceeding of the municipal officers, and for that reason only such questions as go to the jurisdiction can be tried. The law is that all questions which are properly triable on appeal, or by some tribunal authorized to try the same, or created for that purpose, must be so tried and not by injunction. *Taylor v. City of Crawfordsville*, 155 Ind. 403, 405, 406, 58 N. E. 490, and cases cited. Only such questions as go to the jurisdiction of the board of trustees can be tried by injunction, because if such body has jurisdiction it cannot be enjoined from making the improvement or the assessment of benefits therefor. *Cason v. City of Lebanon*, 153 Ind. 567, 574, 55 N. E. 768, and cases cited; *Lux, etc., Co. v. Donaldson*, 162 Ind. 481, 485-487, 68 N. E. 1014, and cases cited; *Brown v. Central, etc., Co.*, 162 Ind. 452, 457-459, 69 N. E. 150; *Edwards v. Cooper*, 168 Ind. 54, 70, 79 N. E. 1047; *Pittsburgh, etc., R. Co. v. Taber*, 168 Ind. 419, 425, 77 N. E. 741, and cases cited; *Dyer v. Woods*, 166 Ind. 44, 56, 57, 76 N. E. 624, and cases

cited. For ought that appears in the complaint the board of trustees had full and complete jurisdiction of the subject-matter of said proceeding. It had full and complete jurisdiction of the subject-matter of the improvement of the streets of said town (sections 8960, 8961, 8963-8965, *Burns' Ann. St. 1908* [Acts 1905, pp. 407-409, c. 129, §§ 266-270]; *Cason v. City of Lebanon*, 153 Ind. 567, 572, 55 N. E. 768, and authorities cited; *Brown v. Central, etc., Co.*, 162 Ind. 452, 456, 69 N. E. 150, and cases cited; *Vandalla R. Co. v. State*, 166 Ind. 219, 231, 76 N. E. 980, 117 Am. St. Rep. 370), and of all persons whose property might be affected by said improvement, by virtue of the notice given of the time when and place where objections from such persons would be heard to said declaratory resolution. It is evident that nothing in said grounds of objections 1 to 6, inclusive, shows that said proceeding and contract were void.

It is insisted by appellant that the act concerning municipal corporations, approved March 6, 1905, Acts 1905, pp. 219-240, c. 129, is unconstitutional, because under section 111 of said act, being section 8716, *Burns' Ann. St. 1908*, "the circuit or superior court is compelled to render judgment on the assessment made by the appraisers appointed by it, without regard to the justice of such assessment; that said section deprives each of said courts of its judicial powers and makes it a mere clerk to a board of its own creation." It is not necessary to determine whether or not appellant's contention as to the duties and powers of the circuit and superior courts under said section is correct, or whether or not the provisions of said section in regard to the duties and powers of said courts is in violation of section 1, art. 7, of the Constitution of this state as claimed by appellant, for the reason that such provisions may be eliminated from said section 111 without affecting or impairing the remainder of said section or the act "as a whole, and it would still be complete in itself and capable of being executed." Such being the case it is well settled that, even if said provision in regard to said courts is unconstitutional, a question we need not and do not determine, the law in other respects should be upheld. *Swartz v. Board, etc.*, 158 Ind. 141, 151, 152, 63 N. E. 31, and cases cited. Besides it will be observed that all the grounds or reasons set out in this opinion which appellant claims show that the proceeding and contract for said improvement were void relate to matters before or at the time of the letting of the contract. It is expressly provided in section 265 (8959), *supra*, "that no suit to enjoin the construction of any improvement shall be brought by any property owner, unless brought within ten days from the letting of such contract." The object of said statute is evident, and its effect just, for it requires the property own-

er who desires to question the validity of the contract to commence his action therefor "within ten days from the letting of the contract"; that is, before any substantial part of the improvement is made. If the property owner does not commence such suit within the 10 days mentioned, he cannot, after the improvement is completed, maintain a suit to enjoin the making or collection of benefits for any ground existing prior to the expiration of said 10 days. So construed, this statute gives effect to a well-settled principle of equity, for it precludes a property owner who permits a contractor to improve a street from defeating a recovery for the work because of errors or irregularities which occurred before the time the contract was executed. *Taber v. Ferguson*, 109 Ind. 227, 231, 9 N. E. 723, and cases cited; *Barber, etc., Co. v. Edgerton*, 125 Ind. 455, 462-463, 25 N. E. 436, and cases cited; *McEneney v. Town of Sullivan*, 125 Ind. 407, 409-412, 25 N. E. 540; *McCoy v. Able*, 131 Ind. 417, 422-426, 30 N. E. 528, 31 N. E. 453, and cases cited; *De Pauw School v. City of Alexandria*, 152 Ind. 443, 451, 452, 52 N. E. 608; *Board v. Plotner*, 149 Ind. 116, 119, 121, 48 N. E. 635, and cases cited.

It was said in *Board, etc., v. Plotner*, supra: "It is a general rule, now fully accepted in this state, that where the owner of property subject to assessment for public improvements stands by and makes no objection to such improvements which benefit his property, he may not deny the authority by which the improvements are made, nor defeat the assessment made against his property for the benefits derived. And this is true, both where the proceedings for the improvement are attacked for irregularity, and where their validity is denied, but color of law exists for the proceedings. *Palmer v. Stumph*, 29 Ind. 329; *Hellenkamp v. City of Lafayette*, 30 Ind. 192; *City of Evansville v. Pfisterer*, 34 Ind. 36, 7 Am. Rep. 214; *City of Lafayette v. Fowler*, 34 Ind. 140; *Muncey v. Joest*, 74 Ind. 409; *City of Logansport v. Uhl*, 99 Ind. 531, 49 Am. Rep. 109; *Peters v. Griffie*, 108 Ind. 121, 8 N. E. 727; *Taber v. Ferguson*, 109 Ind. 227, 9 N. E. 723; *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501; *Prezinger v. Harness*, 114 Ind. 491, 16 N. E. 495; *Western Paving, etc., Co. v. Citizens' Street R. Co.*, 128 Ind. 525, 26 N. E. 183, 28 N. E. 88, 10 L. R. A. 770, 25 Am. St. Rep. 462; *McCoy v. Able*, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; *Vickery v. Board, etc.*, 134 Ind. 554, 32 N. E. 880; *Cluggish v. Koons*, 15 Ind. App. 599, 43 N. E. 158. In *Vickery v. Board, etc.*, supra, the proceedings were attacked upon the ground that the law under which they were had was unconstitutional, and this court held that one who

receives the benefits under an unconstitutional law cannot deny the constitutionality of such law. In *Cluggish v. Koons*, supra, it was held that the proceeding under a law which had been repealed may not be attacked, as invalid by one who has stood by and permitted his property to be benefited by such proceedings. In *McCoy v. Able*, supra, it was said: 'Principal and authority forbid that property owners should be allowed to stand by, inactive and passive, until after the work has been done, and then come in and take from the contractor the value of his work and materials without compensation. For such persons the law has no very tender regard.' In *Ross v. Stackhouse*, supra, it was said that 'In any event, one who acquiesces, with knowledge, until after the improvement has been completed cannot escape payment for the actual benefits received, even though the proceedings turn out to be void, provided the contractor proceeded in good faith and without notice from the property owner. He cannot enjoy the benefits and escape the burden unless he interferes or gives notice before the benefit is received.' In *Prezinger v. Harness*, supra, it was said: "The authorities fully justify the statement that, where an improvement is made under color of statutory proceedings, unless such proceedings are so totally and palpably void as that the person who made the improvement or performed the work must have proceeded with a degree of recklessness that amounted to bad faith, the property owner who stood by and received the benefits assessed against his property will be estopped to assert the invalidity of the proceedings without first paying, or offering to pay, the benefits."

Appellant alleged in his complaint "that said contractor, Hoffman, over the protest and against the will of the plaintiff, entered upon the performance of said contract, and has substantially completed the same," etc. What said protest was is not alleged. Merely stating to the contractor that appellant was opposed to said improvement, and that he protested against it being made, as we may assume he did from the allegations of the complaint, without calling the contractor's attention to anything affecting the validity of the contract, or that would put the contractor upon inquiry as to its validity, would not in any way avoid the effect of the principle of equity above stated.

Having determined all questions stated in appellant's points (*Inland Steel Co. v. Smith*, 168 Ind. 245, 252, 80 N. E. 538; *Pittsburgh, etc., R. Co. v. Lighthouse*, 168 Ind. 438, 467, 78 N. E. 1033; *Baltimore, etc., R. Co. v. Evans*, 169 Ind. 410, 429, 82 N. E. 773), and finding no available error, the judgment is affirmed.

(171 Ind. 189)

**PITTSBURGH, C., C. & ST. L. RY. CO. v. HUNT et al.** (No. 21,237.)

(Supreme Court of Indiana. Nov. 20, 1908.)

**1. CONSTITUTIONAL LAW (§ 48\*)—STATUTES—CONSTRUCTION—LIMITATION.**

Where a statute is not unconstitutional as applied to all cases, the court will so limit it in particular cases as to keep it within constitutional bounds.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.\*]

**2. EMINENT DOMAIN (§ 47\*)—PROPERTY SUBJECT TO APPROPRIATION—PREVIOUS APPROPRIATION TO PUBLIC USE—PROPERTY OF RAILROADS.**

In one sense, the property of a railroad company is private, and as such is within the protection of the federal and state Constitutions; but it is also subject to due regulation as devoted to a public use in a limited sense for the purposes of a public highway.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 111, 112; Dec. Dig. § 47.\*]

**3. RAILROADS (§ 5\*)—REGULATION—LEGISLATIVE POWER.**

The Legislature may, to a reasonable extent, convert such imperfect obligations owing by a railroad company to the public, left to the performance of such railroad companies, into absolute legal duties.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.\*]

**4. RAILROADS (§ 9\*)—REGULATION—RAILROAD COMMISSION—ORDERS—PRESUMPTION.**

Orders of the railroad commission created by Act March 9, 1907 (Laws 1907, p. 454, c. 241), while not conclusive in any given case, where seasonably attacked, are presumptively valid, and will be set aside only when a clear case is made against them.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 19; Dec. Dig. § 9.\*]

**5. WORDS AND PHRASES—"NECESSARY."**

The word "necessary," as used in an allegation, in a railroad company's complaint to restrain the enforcement of an order requiring the construction of a connection with another road, that all the land it was required to use for such connection was "necessary" to enable it to handle its traffic, meant nothing more than that the lands would be reasonably convenient (citing Words and Phrases, title "Necessary").

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4705-4710; vol. 8, p. 7729.]

**6. RAILROADS (§ 51\*)—CONNECTIONS WITH OTHER ROADS—OBJECTIONS—GROUNDS.**

Where a railroad commission ordered the construction of a connection of plaintiff's road with another road at a junction point, it was no ground for objection that such connection would greatly increase the danger of handling plaintiff's traffic; it being presumed that the commission on application would so regulate the placing and handling of cars on the connecting track as would safeguard plaintiff's business so far as possible and protect it from unnecessary inconvenience.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 51.\*]

**7. RAILROADS (§ 51\*)—CONNECTIONS WITH OTHER ROADS—CONSTRUCTION—OBJECTION.**

Where it is more convenient and economical for shippers along two intersecting railroad lines that facilities be provided at the junction for an interchange of car load freight, it is not a valid objection to an order requiring such connection that, at the particular point of intersection, the

objecting company will be deprived of a small amount of trackage.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 51.\*]

**8. RAILROADS (§ 9\*)—CONNECTIONS WITH OTHER ROADS—RAILROAD COMMISSION—POWERS—INTERSECTIONS.**

Dangerous railroad and street intersections being matters over which the railroad commission is given quasi jurisdiction by Burns' Ann. St. 1908, § 5553, a commission's order, fixing the place for a connection between railroads at a junction point, will not be set aside by the courts, except on a plain case of mistake or an abuse of the commission's powers.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 9.\*]

**9. EMINENT DOMAIN (§ 85\*)—COMPENSATION—PROPERTY DEDICATED TO PUBLIC USE—RAILROAD PROPERTY—POLICE POWER.**

A railroad company, having dedicated its property to public use for purposes of transportation, was not entitled to compensation for the taking of its property necessary for the construction of a connection with another railroad at a junction point, pursuant to the railroad commission's reasonable order for an interchange of traffic.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 226; Dec. Dig. § 85.\*]

**10. RAILROADS (§ 9\*)—CONNECTIONS WITH OTHER ROADS—ORDER OF RAILROAD COMMISSION—REVIEW BY COURTS.**

A railroad commission passed an order directing complainant within 60 days to put in a connection with another road at a junction, to be used for the interchange of freight, and also ordered that jurisdiction be retained to determine, if necessary, any question of expense, trackage, interchange, or other matters pertinent to the proceeding and within the jurisdiction of the commission, and to enforce compliance with the law and order. *Held* that, as the jurisdiction so retained related only to the execution of the order, it would be treated as final for purposes of attack in the courts, in the absence of any question being raised concerning it, in that respect.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 9.\*]

**11. RAILROADS (§ 51\*)—CONNECTIONS WITH OTHER ROADS—OWNERSHIP OF LAND.**

Where a railroad commission's order requiring connection between plaintiff's railroad and another road at a junction point, contemplated that the other company should bear part of the expense, the fact that plaintiff owned most of the land to be occupied by the connecting track was a mere fortuitous circumstance; it being presumed that so far as plaintiff would be deprived of its property, either because of the use of the track or by its interfering with the use of its property for other purposes, or in so far as plaintiff might be put to expense, it would be compensated by switching rates or transfer charges.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 51.\*]

**12. RAILROADS (§ 51\*)—CONNECTIONS WITH OTHER ROADS—USE OF TRACK—INTERSTATE COMMERCE LAW.**

A railroad commission's order, requiring construction of a connection between plaintiff's railroad and that of another company at a junction point, did not give such other company the use of complainant's track or terminal facilities, within Interstate Commerce Act (Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]), requiring common carriers by railroad to provide reasonable facilities for interchange of traffic, etc., but declaring that

such provision should not require any such carrier to give the use of its track or terminal facilities to another carrier engaged in like commerce.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 51.\*]

**13. CARRIERS (§ 33\*)—REGULATION—INTERSTATE COMMERCE ACT—CONSTRUCTION—FACILITIES TO CONNECTING LINES.**

The provision of Interstate Commerce Act, § 3 (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]), that the requirement that all railroads shall provide reasonable facilities for the interchange of traffic shall not require one carrier to give the use of its track or terminal facilities to another engaged in like commerce, is not a substantive enactment, but a mere interpretation clause designed to restrain, if necessary, the generality of the language preceding it.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 33.\*]

**14. COMMERCE (§ 12\*)—POWER TO REGULATE INTERSTATE COMMERCE—STATE REGULATION.**

State legislation is not prohibited, where it amounts to no more than a reasonable regulation of an instrumentality of interstate commerce, and only affects such commerce secondarily or in a remote degree.

[Ed. Note.—For other cases, see *Commerce*, Dec. Dig. § 12.\*]

**15. COMMERCE (§ 10\*)—POWER TO REGULATE INTERSTATE COMMERCE—NONEXERCISE OF POWER BY CONGRESS.**

Where a railroad company chartered by the state, one of its purposes being to transport intrastate commerce, was ordered by the state railroad commission to join in the construction of a connection with an intersecting railroad, under Burns' Ann. St. 1908, § 5551, providing that the act authorizing the commission to order such connections should apply only to the transportation of passengers and property between points within the state, and to switching, delivering, storing, and handling of such property, the order was not void as a regulation of interstate commerce; the subject being one on which Congress had not expressly acted.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 8; Dec. Dig. § 10.\*]

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company against Union B. Hunt and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Samuel O. Pickens and Owen Pickens, for appellant. Shiveley & Shiveley, for appellees.

GILLET, C. J. Appellant instituted this suit to enjoin the railroad commission of Indiana from enforcing, or attempting to enforce, an order requiring appellant to put in a certain interchange track, connecting it with a track of the Chicago, Cincinnati & Louisville Railroad Company, and requiring said companies to interchange business with each other in car load lots. So far as material for present purposes, it may be said that the first paragraph of the complaint after showing that appellant, a consolidated railway corporation organized and incorporated under the laws of the states of Indiana, Il-

linois, Ohio, West Virginia, and Pennsylvania, owns and operates lines of railroad in all of said states, among others a line extending from Pittsburgh, in the state of Pennsylvania, through the city of Richmond, in this state, to the city of Indianapolis, and that appellant is a common carrier of freight, over said line of railroad, in and among the states, alleges that, in a certain proceeding then pending before it, said commission, after a hearing, made a final order in certain words and figures. This order, omitting its title, is shown by said paragraph to be as follows: "This case having been heard and considered, and the commission being fully advised in the premises, it is ordered that the respondents herein shall, on and after the 1st day of December, 1907, interchange business with each other in car load lots at the intersection of their railroads in the city of Richmond, Ind. It is further ordered that the respondent, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, shall within sixty (60) days from the date of this order construct and put in a track to be used for said interchange of cars between said respondent's lines, and shall join said track to and connect it with the respondent Chicago, Cincinnati & Louisville Railroad Company's exchange track, now constructed, said track to connect at said point of junction about 10 feet west of the west line of Fourth street and about 80 feet north of the north line of North street, and leading out of the Chicago, Cincinnati & Louisville Railroad Company's main track with a curvature of 16 degrees to the right, and up an ascending grade of two and five-tenths (2.5) per cent., and to have a capacity of not less than eight (8) cars. Said track is shown and designated by letters and figures as follows: 'Capacity, 8 cars; 16 degrees curve, grade 2.5 per cent.' And in red lines, on P. C. C. & St. L. Ry. Co. print dated June 15, 1906, showing respondent's addition to Richmond freight yard, and said print is attached to, and, so far as applicable, made a part of this order. It is further ordered that jurisdiction is retained in this proceeding to determine, if necessary, between said respondents, if they cannot agree, any questions of expense, trackage, interchange, or other matters pertinent to this proceeding and within the jurisdiction of this commission. And it is further ordered that jurisdiction is retained for the purpose of enforcing, if necessary, compliance with the law and this order by appropriate actions for penalties and mandates."

After setting out said order, the paragraph alleges the following additional facts: "Plaintiff further avers: That the said interchange track will be about 500 feet in length, 400 feet of which will be upon the land of the plaintiff, and that the land upon which the said order requires the interchange track therein prescribed to be located and con-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

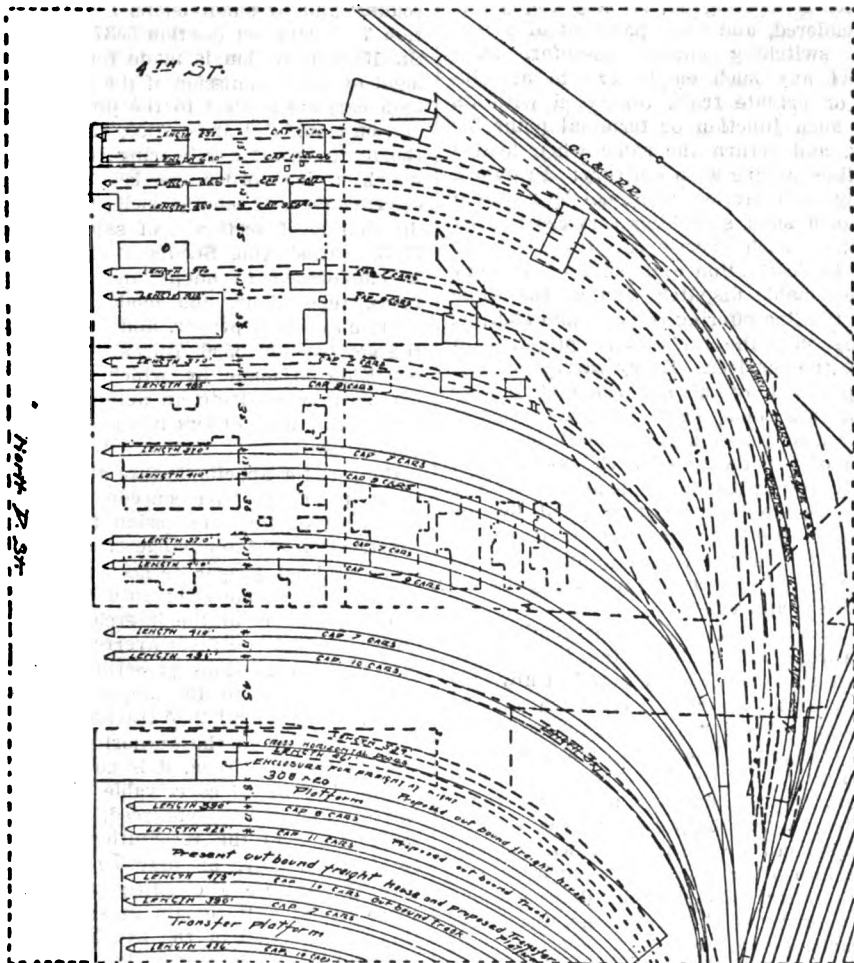
structed is a part of a larger tract of land bounded on the north by plaintiff's main and side tracks, on the south by North D. street, on the east by Sixth street, and on the west by Fourth avenue, the Chicago, Cincinnati & Louisville Railroad, and the Whitewater river. That the plaintiff is, and for more than a year past has been, in possession of all of said land and the owner in fee simple thereof. That the said tract of land was purchased by the plaintiff for a large sum of money for the construction and operation of its freight yard and terminals for the handling of its traffic at the city of Richmond. That all of said land is necessary to enable the plaintiff to handle its said traffic at the city of Richmond and to discharge its duties as a common carrier. That, before the commencement of said proceeding before said commission, plaintiff had, by the expenditure of a large sum of money, located and was operating upon said tract of land a large number of tracks, platforms, sheds, buildings, and other structures constituting its terminal facilities necessary to the proper handling of said traffic, and, prior to the commencement of said proceeding before said commission, the plaintiff had laid out and planned the construction of additional tracks upon said land; all of which additional tracks are, or in the near future will be, needed by the plaintiff for terminal facilities for the handling of plaintiff's traffic at that point. That the track required to be constructed by the said order of the commission, if constructed, will occupy the land upon which the plaintiff's said additional tracks are laid out and planned to be constructed, and will deprive plaintiff of the use of said additional tracks and the land upon which they would be constructed, and require the plaintiff to surrender to, and for the use of, the said Chicago, Cincinnati & Louisville Railroad Company of the said part of plaintiff's land and tracks which it has purchased and needs for its terminal facilities to handle its traffic and discharge its duties as a common carrier of commerce over its lines of railroad between said states as aforesaid. Plaintiff further avers that by reason of the advantageous location of plaintiff's railroad tracks, sidings and switches, at said city of Richmond, more than 82 per cent. of all car load business in and out of said city is handled by the plaintiff upon its tracks, sidings and switches. Plaintiff further avers that the construction and operation of said interchange track as prescribed by the said order of the commission will, by reason of the location of plaintiff's main tracks, its sidings, and switches of said freight terminal yard, and the congested condition of the traffic upon said tracks and in said yards, greatly interfere with the operations on and about the sidings and switches of said freight terminal yard, and will also interfere with and endanger the movement of passenger and freight trains upon the plaintiff's said main

tracks adjacent to said yard and its passenger station at the city of Richmond. Plaintiff further avers that the main track of said Chicago, Cincinnati & Louisville Railroad Company crosses the plaintiff's railroad under grade almost at right angles, and runs along and upon a narrow strip of land between the western boundary of said tract of land so acquired by the plaintiff for its terminal freight yard and the Whitewater river; that, by reason of the said location of said crossing, the main track of the said Chicago, Cincinnati & Louisville Railroad Company, and the said Whitewater river, which river at that point runs in a deep gorge, it is impossible for the plaintiff, or the said Chicago, Cincinnati & Louisville Railroad Company, to acquire by appropriation or otherwise any additional land at the junction of the said railroads upon which to construct said interchange track. Plaintiff further avers that it is practicable to construct and operate an interchange track between the roads of the plaintiff and the said Chicago, Cincinnati & Louisville Railroad Company a short distance north of the junction of the said railroads, which track, if there located, would be convenient for both of said companies, and for the handling of the business of their patrons, and plaintiff is willing and ready to join the said Chicago, Cincinnati & Louisville Railroad Company in the construction and operation of an interchange track at said place. And plaintiff further avers that the construction of said interchange track will cost the plaintiff \$3,000, and that the land upon which it is ordered to be constructed is of the value of \$2,000 to the plaintiff, and that the use of said track would be of no value or benefit to the plaintiff."

The paragraph then charges that the act of the General Assembly approved March 9, 1907 (Laws 1907, p. 454), being chapter 241 of the acts of the sixty-fifth session of the General Assembly, is void in so far as said act requires, or authorizes said commission to require, the construction of said track as ordered, because it takes the plaintiff's property without just compensation and without due process of law, and denies to the plaintiff the equal protection of the laws, and because said act is in contradiction of section 3 of the act of Congress to regulate commerce, approved February 4, 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]), as amended by an act approved June 29, 1906 (Act June 29, 1906, c. 3591, § 1, 34 Stat. 585 [U. S. Comp. St. Supp. 1907, p. 892]).

The second paragraph of the complaint appears to be substantially the same as the first, except that the second assails the order on the grounds indicated, and on the further ground that it will take the property of the plaintiff, which is already appropriated to a public use, and appropriate it to another and different use.

tracks and switches at all such points so that carload traffic may be conveniently interchanged between such carriers at such points, and for the purpose of enabling such carriers to comply with this requirement they are empowered to jointly purchase and own, or appropriate under the present or future laws of this state concerning the exercise of the powers of eminent domain, any additional lands or property necessary to enable them to comply with this require-



Subdivision M of said section is as follows: "Every such connecting carrier shall, upon the order of the commission made upon complaint filed and after a hearing is had,

as provided in this act, receive from its connecting lines at junction points, all carload shipments tendered by any such connecting line, and upon payment of reasonable transfer or switching charges therefor, shall transport such car over its tracks and deliver the same to the consignee on his private track connected with such tracks. Every such connecting carrier at junction or terminal points, upon like complaint, proceedings and order of the commission, as provided in this paragraph, shall accept from any other connecting carrier any empty car there tendered, and upon payment of a reasonable switching charge therefor, shall transport any such empty car to any industry or private track connected with its line at such junction or terminal point for loading, and return the same when loaded to the line making such delivery: Provided, that any such carriers shall not be required to perform such switching services in any case where such carrier can transport the freight to destination and point of delivery with reasonable dispatch, and at the same rate as the line offering the car, and shall at the time offer the car and be prepared to perform the services. Every carrier subject to the provision of this act who shall receive a car or cars belonging to another carrier at a terminal or junction point, shall, upon the demand of the owner of such car or cars, promptly return the same loaded or empty to such terminal or junction point by the most direct route, and any court of competent jurisdiction shall, upon proper application, have full power and authority to enforce this requirement."

Subdivision N of said section reads thus: "All railroad companies doing business in this state shall, upon the demand of any person or persons interested, establish reasonable joint rates for the transportation of freight between points upon their respective lines within this state, and shall receive and transport freight and cars over such route or routes as the shipper may direct. Carload lots shall be transferred without unloading into other cars, unless such unloading into other cars shall be done without charge therefor to the shipper or receiver of such carload lots, and unless such transfer be made without unreasonable delay; and less than carload lots shall be transferred into the connecting railway's cars at cost, which shall be included in and make a part of the joint rate adopted by such railway companies, or established in this act."

In the first part of said section, the commission is given power to require and supervise the location and construction of connections between railroads, and to adopt all necessary rules and regulations governing the transfer and switching of cars from one railroad to another at junction points. Authority is given to the commission by said section to regulate rates, including joint rates, transfer and switching charges, and to

determine, in case of disagreement, what is a fair and just division of the charges for the transportation of freight over connecting lines.

Provision is made by section 4 of said act (section 5534, Burns' Ann. St. 1908) for notice and a hearing, before the commission makes any order, concerning rates, or rules and regulations concerning the transfer or switching of cars from one railroad to another, or "respecting the location or construction of sidings and connections between roads," and by subdivisions B and C of section 7 of said act (section 5537, Burns' Ann. St. 1908) provision is made for the enforcement by the commission of the duties of common carriers subject to the provision of the act, on complaint and notice, and for the authority to grant a rehearing in any case in which a final order has been made, or to alter, change, or modify such order. By subdivision E of section 3 of said act (section 5533, Burns' Ann. St. 1908) the commission is empowered to adopt and enforce such rules, regulations, and modes of procedure as it may deem proper, and by section 6 of the act (section 5536, Burns' Ann. St. 1908) provision is made by which a dissatisfied carrier may institute an action to set aside or suspend final orders in cases like the one before us.

Counsel for appellant state at the outset of their argument: "We concede the power and authority of the commission to require the construction of interchange tracks in certain cases and on proper terms and conditions, but we deny its power or authority to require the construction of the interchange track in question upon the facts averred in the complaint and conditions prescribed by the order." Relative to the requirement of the statute that interchange tracks be constructed, as well as to the authority of the commission based thereon, it is not necessary to affirm that in all conceivable circumstances the statute will be enforced. On the contrary, since in the recognition of such exceptions, if any, as may be necessary to give the statute a constitutional operation, there would still remain in such a case as this the sanction of the legislative will, we should have no hesitation in so limiting the statute in particular cases as to keep it within constitutional bounds. *United States Express Co. v. State*, 164 Ind. 196, 73 N. E. 101; 2 *Lewis' Sutherland, Statutory Construction* (2d Ed.) § 385; *Tsai Sim v. United States*, 116 Fed. 920, 54 C. C. A. 154; *Commonwealth v. Gagné*, 153 Mass. 205, 26 N. E. 449, 10 L. R. A. 442; *Colquhoun v. Hedden*, 24 L. R. (Q. B. D.) 491. The validity of the claim that in this case there is a taking of property without just compensation, or a deprivation of property without due process of law, or a denial of the equal protection of the laws, depends almost wholly upon whether it is shown that in the upholding of the or-

der, in so far as its terms are fixed, there is an unreasonable interference with appellant in the enjoyment of its property rights. Notwithstanding the concession of counsel as to the validity of the statute as applied to ordinary cases, it will be helpful to consider the nature of the duty enjoined, in the determination of the question whether in the particular instance it is shown that any constitutional right has been invaded.

In one sense of the term appellant's property is private, and as such it is within the protection of the federal and state Constitutions; but such property is subject to due regulation, since it has been devoted to a public use, particularly since that use is, in a limited sense of the term, for the purposes of a public highway. *Lake Superior, etc., R. Co. v. United States*, 93 U. S. 442, 23 L. Ed. 965. As was said in *Barton v. Barbour*, 104 U. S. 126, 135, 26 L. Ed. 672: "A railroad is authorized to be constructed more for the public good to be subserved than for private gain. As a highway for public transportation it is a matter of public concern, and its construction and management belong primarily to the commonwealth, and are only put into private hands to subserve the public convenience and economy; but the public retain rights of vast consequence in the road and its appendages with which neither the company nor any creditor or mortgagee can interfere. They take their rights subject to the rights of the public, and must be content to enjoy them in subordination thereto." While railroad companies are chartered for the purpose of affording due facilities of transportation, yet at the common law there are certain obligations of an imperfect character which have been left to such carriers, upon the presumption that their business interests will cause them sufficiently to discharge such duties, as in the building of interchange freight tracks, the erection of depots, and the like. It is clear, however, that the Legislature, which possesses the right to make all manner of reasonable and wholesome laws within constitutional limits, may, to the extent of that which is reasonable, convert such imperfect obligations into absolute legal duties. *Minneapolis, etc., R. Co. v. State ex rel.*, 193 U. S. 53, 24 Sup. Ct. 396, 48 L. Ed. 614.

*Wisconsin, etc., R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194, was a case in which, in addition to the element of cost, the objection was made to the enforcement of an order for a track connection, and for the interchange of freight that the carrying out of the order would divert certain freight business theretofore carried by the plaintiff in error to its competitor, since such business, if so routed, would not have to be carried so far to reach the market. In passing upon these objections the court said: "These are the facts upon which the plaintiff in error must rest its argument, that to enforce the judgment would compel it to

pay its share of the cost of the construction of a track to be used for the purpose of depriving the company of its traffic and transferring it to its competitor. The facts do not afford a fair foundation for the argument.

\* \* \* Although to carry out the judgment may require the exercise by the plaintiff in error of the power of eminent domain and will result in some, comparatively speaking, small expense, yet neither fact furnishes an answer to the application of the defendant in error. \* \* \* Can it be possible that a railroad chartered and built primarily for the accommodation and in the interests of the public can, under such facts, legally refuse the track connections directed in this case? Can it refuse to obey the commands of the Legislature in such a case, upon the sole ground that it may thereby somewhat lessen the earnings of its road? We think these questions should receive a negative answer. The interests of the public should not be thus wholly and, as it seems to us, unjustifiably ignored."

In *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, which arose out of an order requiring the railroad company to restore a train connection for the accommodation of a large number of people traveling between the eastern and the western part of the state, it was contended that, as the carrying out of the order would require the operation of a train at a loss, the order was void, as in violation of the company's constitutional rights, even if the loss so occasioned would not have the effect of reducing the aggregate net earnings of the company below a reasonable profit. The court, however, in distinguishing the case before it from cases directly involving the validity of orders reducing rates, said: "The distinction between an order relating to such a subject and an order fixing rates, coming within either of the hypotheses which we have stated, is apparent. This is so because, as the primary duty of the carrier is to furnish adequate facilities to the public, that duty may be compelled, although by doing so, as an incident, some pecuniary loss from rendering such service may result. It follows therefore that the mere incurring of a loss from the performance of such a duty does not, in and of itself, necessarily, give rise to the conclusion of unreasonableness."

When the case of *Wisconsin Central R. Co. v. Jacobson*, above mentioned, was before the Minnesota Supreme Court, the court, in discussing the power of the state reasonably to regulate railroad companies in the matter of interchanging freight, said: "These two railroads are public highways, and all of these objections amount simply to this: It is wholly foreign to the purpose of two public highways of the same character to require them to connect where they cross each other so that public traffic may pass from one to the other. And, where a private charter is

granted to construct, maintain, and operate such public highway, with the right to charge reasonable compensation for its services in so doing, it is a violation of its charter to compel it to connect its highway with another intersecting highway of the same character, unless the right to require connection is expressly reserved in the charter. We cannot so hold. \* \* \* The Legislature chartered appellant to construct, maintain and operate a public highway, not a cul-de-sac, or something worse, which has no connection with like highways either at its ends or sides. A railroad is an improved highway, on which certain modern appliances are used. It will not, as a general rule, serve fully the purposes for which it was intended, unless the connections between it and the other highways which cross or touch it are improved in like manner and the same modern appliances are used in passing over one road to the other over those connections." 71 Minn. 519, 74 N. W. 893, 40 L. R. A. 389, 70 Am. St. Rep. 358.

In *Chicago, etc., R. Co. v. Dey*, 76 Iowa, 278, 41 N. W. 17, the Supreme Court of Iowa, after stating that the business custom of railroad companies to transfer cars from one company to another without breaking bulk was so well known as to be judicially recognized, said: "Surely the course of business so long pursued, and so extensively prevailing and demanded by the convenience of the country, cannot, where recognized and required by the statute, become so objectionable in principle, so oppressive in operation, as to require the statute to be declared unconstitutional. The railroad company, as a common carrier, is required to receive and transport freight offered to it for transportation. The reason upon which this rule is founded imposes upon it the obligation of hauling cars of other companies brought to it for transportation over its own road. As the course of business of a railroad company and the rules of law require them to transport the cars of other companies, surely a statute prescribing and enforcing the duty thus imposed cannot be regarded as interfering with the constitutional guaranties for the protection of the rights and property of such companies."

While it is evident from the framework of the act that it was not the legislative purpose to make the order of the commission conclusive in any given case, where seasonably attacked, yet it is to be remembered that the commission is the chosen agent of the General Assembly for the carrying out of its will, and that as the commission proceeds upon complaint and notice with an opportunity to the company to be heard, the presumption in favor of the validity of an order made by the commission for a track connection is strong, and a clear case must be made out to justify the overthrow of its action. See *Jacobson v. Wisconsin, etc., R. Co.*, 71 Minn. 519, 74 N. W. 893, 40 L. R. A. 389, 70

Am. St. Rep. 358. The map referred to in the commission's order shows that the interchange track has been ordered constructed with reference to appellant's general scheme for the building of its yards, and located, as it is, well up into the northwestern part of said yards, it is apparent that it was the design of the commission to create the least possible interference with appellant consistently with location of said track at the crossing and south of appellant's main tracks. We think that it may also be said that the map shows that the amount of yard room of which appellant would be deprived would be small. The presumption is against the pleader, and all uncertainties in the complaint must be resolved in favor of the defendants. The averment that all of the land described in the complaint is "necessary" to enable appellant to handle its traffic at the city of Richmond and to discharge its duties as a common carrier may be assumed merely to mean that said lands would be reasonably convenient. See *Words and Phrases*, title "Necessary." So the statement concerning the lands which appellant has purchased and "needs" for its terminal facilities, if not a mere recital relates to a matter which is in no wise definite in degree. There is nothing to show that other lands may not be obtained for additional yards, along appellant's main tracks, in or about Richmond, and, besides, it is apparent from the map that but few cars could be stored along such tracks as the building of the proposed track might interfere with. We fail to perceive, in view of the situation, how the construction of said track would greatly interfere with the operation of appellant's sidings and switches, or how it would seriously interfere with or endanger the movement of passenger or freight trains upon appellant's main tracks. The original map shows that the interchange track connects with a track four tracks south of the nearest main, into which first-mentioned track all or nearly all of said yard tracks lead, and we can only infer that the interference and danger referred to have relation to putting additional business into the yard and to the handling of it upon said exchange track. Of course, it is always true that the greater the business of a railroad the greater the inconvenience and danger of handling it, but this of itself is not necessarily a sufficient reason for the failure of appellant to discharge its public duties. Besides, it is to be presumed that the commission would, upon application, make all such rules and regulations concerning the placing and handling of cars on such track as would safeguard appellant's business so far as possible and protect it from unnecessary inconvenience.

Relative to the casting of transfer business upon appellant's yards, the fact is not to be forgotten that the very purpose of the statutory requirement and order is to facilitate the movement of commerce, that the two

railroad companies may the more efficiently perform the function for which they were chartered. If it is more convenient and economical for many shippers along two important lines of railroad which intersect each other that facilities should be provided at such junction for the interchange of freight in car load lots—as may fairly be assumed in view of the silence of the complaint upon the subject—it is an altogether insufficient answer that at the particular point of intersection the objecting company will be deprived of trackage for a few cars.

As to the averment of the complaint that it is "practicable" to construct and operate an interchange track a short distance north of the junction, which track would be convenient for both of the companies, and for the handling of the business of their patrons, we have to say that this affords a most meager description of the suggested track. It might be convenient for the companies and their patrons, and, from an engineering standpoint, practicable to construct it; but this gives us no idea as to its cost, or as to the danger and inconvenience which it might occasion to the public. Dangerous railroad and street intersections, for instance, are matters over which the commission has at least a quasi jurisdiction (section 5553, Burns' Ann. St. 1908), and in determining whether the commission has reasonably exercised its authority in the designation of the place for building an interchange track due consideration must be given to the public interest in respect to the matters suggested. There may be difficulties which might be urged against a track connection either to the south or to the north of the point of junction, but the facts before us do not warrant the conclusion that the statute should give way in the particular instance, and we would not reverse the holding of the commission as to the place of connection except upon a plain case of mistake or abuse of its powers. The showing made does not make out such a case. The questions of the cost of the property and of want of benefit to appellant are not, in the circumstances, as shown by the authorities we have referred to, elements of sufficient importance to overthrow the order.

It is contended by appellant's counsel that the order amounts to a taking of its property without due compensation. It is true that the building of the interchange track would interfere with certain other tracks of appellant, but it by no means follows that it is entitled to compensation for that. The power of eminent domain and the police power spring from radically different sources, and when it is considered that appellant has dedicated its property to the use of the public for the purposes of transportation, and that the connection of intersecting lines of railroad greatly facilitates the shipment of freight, it is evident—the regulation being found to be reasonable—that uncompen-

sated obedience is required. The extent of the police power in the regulation of the use of railway tracks is well illustrated by Mayor, etc., v. Baltimore, etc., Co., 166 U. S. 673, 17 Sup. Ct. 696, 41 L. Ed. 1160. See, also, Richmond, etc., R. Co. v. City, 96 U. S. 521, 24 L. Ed. 734; United States v. Union Bridge Co. (D. C.) 143 Fed. 377; Lake Erie, etc., R. Co. v. Shelley, 163 Ind. 36, 71 N. E. 151; Vandalla R. Co. v. State, 166 Ind. 219, 76 N. E. 980, 117 Am. St. Rep. 370; Cincinnati, etc., R. Co. v. Connersville (Ind.) 83 N. E. 503. The fact that the order is a regulation of appellant in the use of its property is sufficient to distinguish this case from a class of cases, which deny in ordinary circumstances the right to take property already devoted to a public use, under a general grant of the power of eminent domain, where the two uses cannot reasonably coexist. The power to require the construction of an interchange track could not be exercised at all if there were not authority under the statute to require the construction of such a track up to the point of junction with each railroad company's track, and, in view of this, and of the general grants of authority under the statute—the enactment being remedial rather than as against common right, as in the case of eminent domain—we are constrained to hold that interchange tracks may be ordered constructed on the property of railroad companies already devoted to a public purpose, provided always that the order is not in the particular circumstances unreasonable. As to the item of expense in constructing and maintaining the track and facilities, it appears to us that, if the companies cannot agree, application should be made to the commission under the clause of the order reserving jurisdiction for that purpose. Because of the form of the order, we have entertained some doubt whether it was final; but, since it purports finally to settle certain rights, and as the matters reserved look only to the execution of the order, we have been disposed to treat it, in the absence of any question being made about it in that respect, as a final order, for the purposes of attack in the courts. See 2 Ency. of Pl. & Pr. 55, 2 Cyc. 588. It is true that appellant owns more of the land to be occupied by the interchange track than the other company, but this is a mere fortuitous circumstance. In so far as appellant will be deprived of its property, either on account of the use of said track for interchange purposes or by the same interfering with the use of its property for other purposes, or in so far as appellant may be put to expense, it is to be presumed that it will be compensated therefor by the fixing of adequate rates for switching or transfer charges. The commission's order indicates its contemplation that the other company shall bear some part of the expense of making such connection, and, although it may have completed the building of the track upon its own land, it should be

charged with a fair share of the whole work and of maintaining the same; but it is our view, nevertheless, that by the making of such contribution the other company acquires no interest in appellant's land (other than the right to have the track connection and the interchange of business), but, on the contrary, that appellant is entitled to make any proper use of the track within the limits of its own property that would be consistent, in view of all of the circumstances, with its paramount purpose as a transfer track. The commission has the right to adjust details, but the statute should be administered upon the principle of not impinging upon original property rights except to the extent that the circumstances reasonably require it to be done.

It is next contended that Congress has legislated upon the subject of interchange of traffic, and that therefore the order of the commission is void. The provision upon which counsel for appellant rely is section 3 of the interstate commerce act (Act. Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]). That section requires common carriers by railroad to offer all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, for the receiving, forwarding, and delivering of passengers and property to and from their several lines thus connected therewith; "but," the section provides, "this shall not be construed as requiring any such common carrier to give the use of its track or terminal facilities to another carrier engaged in like commerce." We do not think that the order in question can be said to give to the Chicago, Cincinnati & Louisville Railroad Company the use of appellant's track or terminal facilities within the sense of the above statute. While the commission may doubtless make all appropriate regulations concerning the handling of cars on the interchange track, yet the other company can only use it for the purpose of locating or shifting cars which, if not actually moving at all times, may still be said to be at all times—speaking with reference to the due course of business—in transit from one railroad to the other. The language above quoted from the interstate commerce act cannot, however, be said to amount to a substantive enactment. It is a mere interpretation clause, which is designed to restrain, if necessary, the generality of the language which precedes it. See *In re Day*, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519. It appears that the case is one in which Congress has not enacted any law which is inconsistent with the right of the state to order the connection made. As was said in *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108, and repeated in *Asbell v. Kansas*, 209 U. S. 251, 28 Sup. Ct. 485, 52 L. Ed. 778: "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police power of the

states, even where it may do so, unless its purpose to effect that result is clearly manifested." The case is certainly not one in which the interference with interstate commerce is direct, wherein the silence of Congress is an inhibition of state legislation upon the subject. Local legislation is not prohibited where it amounts to no more than a reasonable regulation of an instrumentality of interstate commerce and only affects such commerce secondarily or in a remote degree. *Smith v. Alabama*, 124 U. S. 475, 8 Sup. Ct. 504, 31 L. Ed. 508; *Western Union Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105; *Chicago, etc., R. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702. Appellant was chartered by the state, and, since one of the ends of its being is to furnish due facilities for the transportation of intrastate commerce, it should not be intended that a reasonable regulation by the state to effectuate that purpose is in conflict with the dominancy which the federal government must necessarily enjoy within the sphere of its own operations. We perceive no reason for holding that the order in question invades the federal authority.

Finally, it is contended that the provision of the order that the companies interchange business with each other in car load lots at the intersection of their railroads makes the order void as a regulation of interstate commerce because it of necessity includes cars moving in such commerce. The proper construction of the order is a state and not a federal question. While we have no doubt that whatever the commission does in the way of ordering the construction of an interchange track must, from the relation of the carriers to interstate commerce, be held to inure to the benefit of such commerce, yet the order made must be considered in the light of the provision of the railroad commission act that it shall "apply only to the transportation of passengers and property between points within this state and to the receiving, switching, delivering, storing and handling of such property." Section 5551, Burns' Ann. St. 1908. Just as an act of the Legislature is to be read in the light of the Constitution, and the general language of the act be ascribed to an effort to exercise lawful legislative authority, so, without express limitation in the words of an order of an administrative board, it is to be assumed that it was designed to be in consonance with the statute under which the board lives and has its being. See *McCullough v. Virginia*, 172 U. S. 102, 19 Sup. Ct. 134, 43 L. Ed. 382; *Commonwealth v. Gagne*, 153 Mass. 205, 26 N. E. 449, 10 L. R. A. 442; *People v. Butler, etc., Co.*, 201 Ill. 236, 66 N. E. 349; *Colquhoun v. Hedden*, 24 L. R. (Q. B. D.) 491. As stated in *Mississippi Railway Commission Cases*, 116 U. S. 347, 6 Sup. Ct. 348, 29 L. Ed. 650: "It is presumed that they (the com-

missioners) will always act within the limits of their constitutional authority. It will be time enough to consider what may be done to prevent it when they go beyond." It appears to us, however, that the order may be supported as in aid of interstate commerce. *Chicago, etc., R. Co. v. Solan, supra*; *Missouri, etc., R. Co. v. Haber, 169 U. S. 613, 18 Sup. Ct. 488, 42 L. Ed. 878*. Upon this question the case of *Wisconsin, etc., R. Co. v. Jacobson, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194*, is much in point. It was there said: "To provide at the place of intersection of these two railroads, at Hanley Falls, ample facilities by track connections for transferring any and all cars used in the regular business of the respective lines of road from the lines of track of one of said companies to those of the other, and to provide at such place of intersection equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding, and delivering of property and cars to and from their respective lines, as provided for by this judgment, would plainly afford facilities to interstate commerce, if there were any, and would in no wise regulate such commerce within the meaning of the Constitution."

There is nothing in the argument of counsel which leads to the conclusion that the order of the commission should be set aside.

The judgment of the court below is therefore affirmed.

(171 Ind. 288)

BRANDT et al. v. STATE ex rel. CONRAD.  
(No. 21,208.)

(Supreme Court of Indiana. Nov. 24, 1908.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 69\*)—  
CHANGE OF SITE—STATUTES—REPEAL.

Burns' Ann. St. 1903, § 6590, relating to the powers of school meetings at other than the annual meeting, and authorizing them to petition the township trustee for the removal of a schoolhouse, and section 6591, requiring them to furnish the trustee the probable cost of such removal, were repealed, in so far as they relate to the removal of school buildings, by Acts 1893, p. 17, c. 18 (Burns' Ann. St. 1903, § 6417), providing that, before removing and re-establishing a school building, the township trustee shall petition the county superintendent of schools, stating the place of removal, the purpose, etc.; such petition to be signed by the trustee and a majority of the patrons of the school where the building is to be located.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 69.\*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 69\*)—  
PUBLIC SCHOOLS—REMOVAL OF SCHOOL SITE.

Under Acts 1893, p. 17, c. 18, § 1, providing that, before removing and re-establishing a school site, the township trustee shall petition the county superintendent of schools, stating the place of removal, the purpose, etc., such petition to be signed by the trustee and a majority of the patrons of the school where the building is to be located, and section 2, requiring the trustee to file with the superintendent an affidavit that he caused notice to be given of such petition,

etc., where the trustee did not sign a petition, but was opposed to a change, and the question was taken before the superintendent on an attempted appeal from the trustee's decision, there was no compliance with the statute so as to authorize a change of site.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 69.\*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 69\*)—  
PUBLIC SCHOOLS—COUNTY SUPERINTENDENT—  
AUTHORITY.

The jurisdiction of the county superintendent in such cases is original, and not appellate, and he has no jurisdiction to order a change of site until a proper petition is filed with him and the requisite notice has been given.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 69.\*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 71\*)—  
PUBLIC SCHOOLS—SCHOOL BUILDINGS—CON-  
STRUCTION.

The proper procedure for the erection of a new school building upon an existing site is by petition to the township trustee and an appeal from him to the county superintendent.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 71.\*]

Appeal from Circuit Court, Newton County: C. W. Hanley, Judge.

Mandamus by the State, on the relation of Platt M. Conrad, against Christian L. Brandt, trustee, and others, to compel defendant to remove and re-establish a school building. From a decree awarding a peremptory writ, defendants appeal. Reversed, with directions to sustain demurrer to the alternative writ.

Herman C. Rogers and Dallas C. Rogers, for appellants. T. B. Cunningham, for appellee.

MONTGOMERY, J. The court below issued an alternative writ of mandate upon the application of the relator. The writ recited the following facts, in substance: That the relator is a voter and taxpayer of school district No. 5 in Lake township, Newton county, and that at the last enumeration there were 18 children of school age in said district, and that appellants are the duly elected, qualified, and acting trustee and members of the advisory board of said township. That on and prior to October 18, 1905, the school for said district was located and conducted at a particularly described place in section 27, township 31 north, range 9 west, which tract is still owned by said township, and prior to said date by proper legal proceedings said schoolhouse was ordered removed and located upon a different site. That on November 24, 1906, a petition by legal voters of said district was filed with appellant Brandt, as trustee, praying for the erection of a new schoolhouse, at a cost not to exceed \$800, upon the old school site in section 27. This petition is fully set out and purports to be verified by an affidavit affirming that it was subscribed by more than two-thirds of the voters of said district. It is alleged, further, that the prayer of the petition was denied by

\*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes  
86 N.E.—22

the trustee, and an appeal taken to the county superintendent, who, after hearing the matter, reversed the decision of the trustee and ordered and directed him to grant the prayer of said petition, which order is in full force. It is also averred: That a writ of mandamus was issued by the circuit court requiring the trustee to call the township advisory board together in special session, to make the necessary appropriation for the building of said schoolhouse, and to submit to such board plans and specifications for such building; that on June 29, 1907, in obedience to said writ, the trustee called the township advisory board together and submitted a requisition with plans and specifications for said schoolhouse, but at such session said board found that no emergency for the proposed work existed and entered its finding upon the record; and that at the next regular session of said advisory board the trustee failed and neglected to submit his requisition for an appropriation of funds for the purpose of building said schoolhouse, and the advisory board failed and neglected to make any appropriation whatever for said purpose. Upon these facts the writ commanded appellant Brandt, as trustee, to call the advisory board together, and to submit to them plans and specifications and a requisition for funds for the purpose of constructing a schoolhouse upon the described site in section 27, and for furniture and supplies necessary to maintain a public school therein, and said writ required the other appellants, as members of the township advisory board, upon notice, to meet in special session and to appropriate and authorize the trustee to expend of the available funds an amount necessary for the construction and maintenance of such building and school, and, in case the funds on hand were insufficient, that the trustee be empowered to borrow money for such purposes, and requiring the trustee and advisory board to receive bids and award and enter into a contract for the building of such schoolhouse, and to do all other things necessary in the construction of said school building and the maintenance of school therein, or show cause why the same should not be done. Appellants demurred to the writ on the ground of insufficient facts, but their demurrer was overruled. The issues were closed by the filing of a return and a reply thereto, and upon a trial by the court a finding was made in favor of the relator and for the issuance of a peremptory writ.

The merits of the case are presented by the assignment that the court erred in overruling appellants' demurrer to the alternative writ of mandate. It is made to appear from the alternative writ in this case that the relator and other persons, basing their proceedings upon sections 6590 and 6591, Burns' Ann. St. 1908, petitioned appellant Brandt, as trustee, to erect a new schoolhouse at a designated site, two miles west of the one

already established and in use for school purposes. It is manifest that the primary aim of the petitioners was to change the site of the existing school in district No. 5, and to relocate the same at the place named; and the secondary object was the erection of a new building in lieu of the old one, which was deemed unsuitable and inadequate for their needs. The accomplishment of their objects would operate to discontinue the school at the place where it is now located. The procedure prescribed for the relocation of a school site is essentially different from that necessary to secure the erection of a new school building upon an existing site. Sections 6590 and 6591, supra, in so far as they relate to the removal of school buildings and the changing of school sites, were repealed by the act of February 7, 1893 (Acts 1893, p. 17, c. 18; section 6417, Burns' Ann. St. 1908). Under the former law the trustee was authorized to exercise his own discretion, regardless of petitions, with respect to the removal and relocation of schoolhouses, subject only to the overruling judgment of the county superintendent upon appeal. Section 6590, Burns' Ann. St. 1908; *Crist v. Brownsville Tp.*, 10 Ind. 461; *Trager Tp. v. State*, 21 Ind. 317; *Braden v. McNutt, Trustee*, 114 Ind. 214, 16 N. E. 170; *Knight, Trustee, v. Woods*, 129 Ind. 101, 23 N. E. 306; *Carnahan, Trustee, v. State ex rel.*, 155 Ind. 156, 57 N. E. 717. The act of 1893 is entitled "An act to limit the power of township trustees in removal of school buildings and changing sites of such buildings, prescribing penalties for violations thereof, and repealing conflicting laws." The body of the act reads as follows:

"Section 1. Be it enacted by the General Assembly of the state of Indiana, that whenever it becomes necessary for the trustee of any township in this state to change and re-establish the site of any school building and remove said building to a new site and location therefor, such trustee shall first present to the county superintendent of schools of the county in which township it is situate, a petition setting forth therein the place and particular point to where it is desired to change and relocate the site of any such building, and to move the same thereto, together with a brief statement of the purposes and reasons for such proposed change of location of said school building, and upon such petition shall first procure an order from such county superintendent authorizing him to change the site and location of such school building and remove said building to its new site and location: Provided, that said petition shall be signed by said trustee and the majority of the patrons of the school where said building is located, and satisfactory proof shall be made to said county superintendent that the persons signing said petition constitute a majority of the patrons of said school.

"Sec. 2. Before such county superintendent-

ent shall grant such order, such trustee shall make and file with said superintendent his affidavit that he has caused notice to be given of such petition, the purposes thereof, the place of the change of location of such school building and the time when the same will be presented to the said county superintendent by posting notices in not less than five public places in his township, three of which shall be in the immediate neighborhood from where such school building is to be removed, at least twenty days prior to the time when the same is to be heard by said county superintendent.

"Sec. 3. The trustee of any township in this state violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than fifty nor more than five hundred dollars.

"Sec. 4. All laws and parts of laws in conflict with the provisions of this act are hereby repealed." Acts 1893, p. 17, c. 18.

This statute was construed in the case of Carnahan, Trustee, v. State ex rel., supra, wherein this court said: "Under the act of 1893 the change of schoolhouse site can be effected only by the concurrent desires and action of three parties: (1) A majority of the patrons of the school, (2) the trustee of the school township, and (3) the county superintendent of schools. The wishes of the first two parties are to be expressed by signing and presenting a petition to the county superintendent, and of the third by an order for or against the change." It is apparent from the allegations of the alternative writ that the change of school site desired has not been procured in the manner prescribed, or in any other authorized way. The judgment and desire of the township trustee is a prerequisite in securing the relocation of a schoolhouse. His desire must concur with that of a majority of the school patrons and be evidenced by his signature to a joint petition with them for such change. The county superintendent has no jurisdiction to act in the matter of relocating a schoolhouse until such petition is filed with him, and until 20 days' notice thereof and of the time of hearing the same shall have been given. His jurisdiction over such cases is original and not appellate. The action of the trustee with reference to that of the school patrons must be voluntary and concurrent, and not coerced and contrary. Conceding that a majority of the patrons of the school in question desired to change the location of their schoolhouse and duly subscribed the petition therefor, yet the trustee did not sign at any time, but has always been opposed to the proposed change. The matter was not taken before the county superintendent upon a proper petition and notice, but by an attempted appeal from the adverse decision of the trustee. The order of the superintendent made in such a

proceeding could have no effect in changing the proper location of the schoolhouse of the district. If the building of a new house upon the existing site were the object sought, the procedure by petition to the trustee and appeal from him to the county superintendent would have been proper; but that was not the purpose and desire of the petitioners. It follows that the existing schoolhouse stands upon the only authorized school site in the district, and that the township trustee and advisory board cannot be compelled to construct a new school building at a different location. *Henricks, Trustee, v. State ex rel.*, 151 Ind. 454, 50 N. E. 559, 51 N. E. 933; *Kessler, Trustee, v. State ex rel.*, 146 Ind. 221, 45 N. E. 102; *Koontz v. State ex rel.*, 44 Ind. 323.

The judgment is reversed, with directions to sustain appellants' demurrer to the alternative writ of mandate.

(171 Ind. 238)

MARSHALL et al. v. MATSON. (No. 21,112.) (Supreme Court of Indiana. Nov. 24, 1908.)

1. APPEAL AND ERROR (§ 598\*)—RECORD—TRANSCRIPT—ORIGINAL PAPERS—STATUTORY PROVISIONS.

Under Burns' Ann. St. 1908, §§ 690, 691, providing for the making by the clerk of a certified transcript of the record for appeal, no original paper can be incorporated in the transcript, but all papers must be copied therein, and if any original paper be incorporated, it will be disregarded, except that under the direct provisions of section 637 an original bill of exceptions containing the evidence may be embraced in the transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2639; Dec. Dig. § 598.\*]

2. APPEAL AND ERROR (§ 612\*)—RECORD—TRANSCRIPT—CLERK'S CERTIFICATE.

Where a transcript on appeal contains only such papers and entries as can be incorporated therein by copying them, the clerk should not follow the form of certificate set out in Burns' Ann. St. 1908, § 637, that the "transcript contains \* \* \* correct copies or the originals," etc., but the words "or the originals" should be omitted; and, if the original bill of exceptions containing the evidence is embraced in the transcript, the certificate should show the fact so as to identify the bill.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2698; Dec. Dig. § 612.\*]

3. APPEAL AND ERROR (§ 612\*)—RECORD—TRANSCRIPT—CLERK'S CERTIFICATE.

Where the clerk's certificate to a transcript on appeal was that the transcript contained "full, true, and correct copies, or the originals, of all papers and entries in said cause required by the foregoing præcipe," and the præcipe only required "copies," and not "the originals," the certificate sufficiently showed that all the papers and entries in the transcript were copies.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 612.\*]

4. PLEADING (§ 310\*)—COMPLAINT—EXHIBITS—MATERIALITY.

A suit for the dissolution of a partnership and an accounting, and for a sale of the partnership property, not being founded on the articles of partnership, even if they were filed with the complaint as an exhibit, they formed no

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

part thereof, and could not be referred to either to sustain or overthrow the complaint or any part thereof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 944-947; Dec. Dig. § 810.\*]

**5. APPEAL AND ERROR (§ 151\*)—RIGHT OF REVIEW—PERSONS ENTITLED—"PARTY AGGRIEVED"—STATUTORY PROVISIONS.**

In an action for the dissolution of a partnership, and for a receiver, where the complaint alleged that all defendants were members of the partnership, and asked relief against them all, even if the articles of partnership were not signed by one of the defendants, he was a "party aggrieved," within Burns' Ann. St. 1908, § 1289, allowing an appeal by a "party aggrieved" in a proceeding wherein a receiver is appointed or refused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 947; Dec. Dig. § 151.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 273-278; vol. 8, pp. 7569, 7570.]

**6. APPEAL AND ERROR (§ 323\*)—RIGHT TO REVIEW—APPEAL BY PART OF COPARTIES.**

If all defendants "aggrieved" do not appeal, the rights of those who do appeal are not affected thereby, since the statutes allow an appeal by part of several coparties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1798; Dec. Dig. § 323.\*]

**7. APPEAL AND ERROR (§ 517\*)—RECORD—CONTENTS—SUMMONS AND RETURN—"APPEARANCE" BY DEFENDANTS.**

Where a summons, dated August 15th, and served August 22d, required defendants to appear on October 15th, and an appeal was taken from an interlocutory order appointing a receiver in vacation, the transcript being filed in the Supreme Court August 22d, there could be no "appearance" by defendants until after the appeal was taken, within Burns' Ann. St. 1908, § 691, providing that certain documents shall be deemed part of the record, except a summons for defendant, when all the persons named in it have appeared to the action; and hence the summons and return thereon are part of the record, especially in view of section 663, providing that any pleading or paper filed, or offered to be filed, shall be a part of the record, etc.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2341; Dec. Dig. § 517.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 449-451.]

**8. ACTION (§ 64\*)—COMMENCEMENT—STATUTORY PROVISIONS—SUMMONS—"ISSUED."**

A summons is not "issued" within Burns' Ann. St. 1908, § 317, providing that a civil action shall be commenced by filing a complaint, and causing a summons to be issued thereon, until it is delivered to the officer charged by law with its service.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 727; Dec. Dig. § 64.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3773-3782; vol. 8, p. 7693.]

**9. STATUTES (§ 225½\*)—RE-ENACTMENT—ADOPTION OF CONSTRUCTION.**

Where a statute has been construed by the Supreme Court, a re-enactment thereof operates as an adoption by the Legislature of the construction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 306; Dec. Dig. § 225½.\*]

**10. PROCESS (§ 133\*)—SERVICE—RETURN—DATE OF RECEIVING SUMMONS.**

A sheriff's return on a summons should show when the summons was received by him,

since the action is not commenced until the summons is delivered to him.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 133.\*]

**11. RECEIVERS (§ 33\*)—APPOINTMENT—TIME FOR APPLICATION.**

Where a summons, in an action for the appointment of a receiver, was dated August 15th, and the complaint was filed and a receiver appointed the same day, while the summons was not delivered to the serving officer until the next day, the appointment was made before the action was commenced, and hence while the court had no jurisdiction.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 51; Dec. Dig. § 33.\*]

**12. RECEIVERS (§ 59\*)—APPOINTMENT—COLLATERAL ATTACK—APPEAL FROM INTERLOCUTORY ORDER OF APPOINTMENT.**

An appeal from an interlocutory order appointing a receiver is not a collateral, but a direct, attack on the order.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 59.\*]

**13. RECEIVERS (§ 37\*)—APPOINTMENT—PROCEEDINGS—EVIDENCE—AFFIDAVITS—STATUTORY PROVISIONS.**

Burns' Ann. St. 1908, § 1288, prohibiting the appointment of receivers without notice, except upon sufficient cause shown by affidavit, limits the evidence, at a hearing without notice, to affidavits, which must be filed in the cause, and includes the complaint if properly verified.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 37.\*]

**14. APPEAL AND ERROR (§ 518\*)—RECORD—CONTENTS—APPLICATION FOR RECEIVER—BILL OF EXCEPTIONS.**

Under Burns' Ann. St. 1908, § 663, providing that every pleading, deposition, etc., filed or offered to be filed, in any proceeding shall be a part of the record from the time of filing, or offer to file, a verified complaint and all affidavits read in evidence on an ex parte application for a receiver are a part of the record on appeal without a bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2342; Dec. Dig. § 518.\*]

**15. APPEAL AND ERROR (§ 663\*)—RECORD—CLERK'S CERTIFICATE—VERITY.**

The clerk's certificate to the contents of a transcript on appeal imports absolute verity.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2853; Dec. Dig. § 663.\*]

**16. APPEAL AND ERROR (§ 663\*)—RECORD—TRANSCRIPT—CLERK'S CERTIFICATE.**

On appeal from an ex parte appointment of a receiver, where the præcipe called for a transcript of the complaint and all affidavits and papers filed, and the clerk's certificate stated that the transcript contained copies of all papers and entries required by the præcipe, all evidence given at the hearing was shown thereby to be in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2854; Dec. Dig. § 663.\*]

**17. RECEIVERS (§ 35\*)—APPOINTMENT WITHOUT NOTICE—STATUTORY PROVISIONS.**

To warrant appointment of a receiver without notice, under Burns' Ann. St. 1908, § 1288, providing that receivers shall not be appointed until the adverse party shall have appeared, or shall have had reasonable notice of the application, except upon sufficient cause shown by affidavit, it must appear, either in the verified complaint or by affidavit, not only that there is cause for the appointment of a receiver, but

that there is cause for the appointment without notice.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 57; Dec. Dig. § 35.\*]

**18. COURTS (§ 89\*)—RECEIVERS—APPOINTMENT—GROUNDS—PRECEDENTS.**

The statute being silent as to what will constitute cause for the appointment of a receiver without notice, the court will look to precedents, and adjudged cases in determining the question.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 89.\*]

**19. RECEIVERS (§ 35\*)—APPOINTMENT—EQUITY PRACTICE INDEPENDENT OF STATUTE.**

Independent of statute, courts of equity, being averse to interference *ex parte*, will entertain in ordinary cases an application for the appointment of a receiver only after notice to defendant or a rule to show cause.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 54; Dec. Dig. § 35.\*]

**20. RECEIVERS (§ 35\*)—APPOINTMENT WITHOUT NOTICE.**

In a proceeding for the appointment of a receiver, where it did not appear that defendants were beyond the jurisdiction of the court, or could not be found, nor that there was an emergency rendering interference before there was time to give notice necessary to prevent waste or destruction, nor that notice itself would jeopardize the taking possession of the property in question, nor that there was any imperious necessity requiring immediate action, nor that protection could not be offered plaintiff by a temporary restraining order without notice, or in any other way, the appointment of a receiver without notice was error.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 54; Dec. Dig. § 35.\*]

**21. RECEIVERS (§ 36\*)—APPOINTMENT—PROCEEDINGS—EVIDENCE—COMPLAINT—SUFFICIENCY OF VERIFICATION.**

A complaint, in an action for the dissolution of a partnership and a receiver, to be admissible in evidence on an *ex parte* application for a receiver, must be verified in positive terms, and a verification on the "belief" of the party making it is not sufficient.

[Ed. Note.—For other cases, see *Receivers*, Dec. Dig. § 36.\*]

Appeal from Circuit Court, Monroe County; James B. Wilson, Judge.

Action by James H. Matson against Harley E. Marshall and others for the dissolution of a partnership and appointment of a receiver. From an interlocutory order appointing a receiver in vacation without notice, defendants appeal. Reversed.

Lee & Darby and Miers & Corr, for appellants. Duncan & Batman, for appellee.

**MONKS, J.** This is an appeal from an interlocutory order appointing a receiver in vacation without notice. Appellee insists "that as no original paper (except a bill of exceptions containing the evidence), if embraced in the transcript, forms a part thereof, considering appellant's præcipe and the clerk's certificate together, it is not shown 'what parts' of the transcript are 'copies,' and what 'originals,' and that therefore no question is presented for determination, because this

court cannot say what parts of said 'transcript are a part of the record.'" Under our Code of Civil Procedure no original paper, document, or entry in a cause can be incorporated in the transcript filed on appeal to this court, but all papers, documents, and entries must be copied into the transcript, and if any original paper, document, or entry is incorporated in the transcript, it will be disregarded. Sections 690, 691, Burns' Ann. St. 1908 (sections 661, 662, Burns' Ann. St. 1901); *Mankin v. Pennsylvania Co.*, 160 Ind. 447, 451, 452, 67 N. E. 229, and cases cited. The only exception to this rule is that created by section 657, Burns' Ann. St. 1908 (section 638a, Burns' Ann. St. 1901), under which an original bill of exceptions containing the evidence may be embraced in the transcript, without copying it therein. *Mankin v. Pennsylvania Co.*, 160 Ind. 451, 452, 67 N. E. 229. The præcipe called for copies of "the complaint, summons, and the return of the sheriff thereon, all affidavits and papers filed, and the orders made by the judge, and all proceeding thereon," while the clerk certified that the transcript contains "full, true, and correct copies, or the originals of all papers and entries in said cause required by the foregoing præcipe." The certificate to the transcript is copied from the form set out in section 7, Acts 1903, p. 341, c. 193, being section 667, Burns' Ann. St. 1908. When, as in this case, the transcript contains only such papers and entries as can be made a part of the transcript by copying the same therein, the words "or the originals" should be omitted from said certificate. When the original bill of exceptions containing the evidence is embraced in the transcript, that fact should be shown by the clerk's certificate, so as to identify it. It will be observed, however, that said clerk's certificate is that the transcript contains "full, true, and correct copies, or the originals, of all papers and entries in said cause required by the foregoing præcipe" and as the præcipe only required "copies," and not "the originals," of any paper or entry, the meaning of the clerk's certificate is that all the papers and entries in the transcript are copies, because that is what the præcipe required.

It is next insisted by appellant that May, one of the defendants, "is not a member of the partnership, and did not sign the articles of copartnership, and therefore is not such an 'aggrieved party' as can appeal under section 1239, Burns' Ann. St. 1908 (section 1245 Burns' Ann. St. 1901)," which provides that "the party aggrieved" may appeal from interlocutory orders appointing a receiver. Said May was named as one of the defendants in the complaint, and it is alleged therein that said defendants entered into a partnership with four other persons named in the complaint. Appellee, however, claims that the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"articles of copartnership," which are filed with the complaint, and made a part thereof as "Exhibit A," show that said agreement was not signed by May, and "that therefore it appears that he is not a member of said partnership." We do not think said exhibit, even if not signed by May, shows that he was not a member of said firm, as against the direct allegation of the complaint that he was a member. Besides, this is a suit for the dissolution of said partnership and an accounting, and for a sale of the partnership property, and it is not, therefore, founded on said articles of copartnership; and, even if filed with the complaint as an exhibit, they form no part thereof, and cannot be referred to, either to sustain or overthrow the complaint or any part thereof. *Gum-Elastic, etc., Co. v. Mexico Co.*, 140 Ind. 158, 160, 161, 39 N. E. 443, 30 L. R. A. 700, and authorities cited. As May is a defendant, and the complaint alleges that all the defendants were members of said copartnership, and asks relief against them all, he, as well as his codefendants, is "aggrieved" within the meaning of said section 1289 (1245) *supra*, and is entitled to appeal thereunder. If all of the defendants "aggrieved" did not appeal, as claimed by appellee, this will not affect the rights of those who did appeal, because the statute gives the right of appeal to a part of several coparties.

Appellants insist that the interlocutory order appointing the receiver was made before the commencement of the action, and was therefore without jurisdiction. The summons issued in the cause and the return of the sheriff thereon are set out in the transcript. The summons is dated August 15, 1907, the same day the complaint was filed and the receiver appointed, and required the defendants to appear and answer the complaint on October 15, 1907. The return of the sheriff shows that the summons "came to hand 9 o'clock a. m. August 16, 1907," and that he served the same on each of the defendants August 22, 1907. Appellee insists that "the summons and the return thereon form no part of the record where all the defendants appear"—citing section 691, *Burns' Ann. St. 1908*; *Miles v. Buchanan*, 36 Ind. 490. The record does not show that the defendants, or any of them, appeared to said action. Taking the appeal from the interlocutory order appointing the receiver was not an appearance to the action. The appeal was taken in vacation of the court below, and the transcript filed in this court August 22, 1907. The next term of said court, at which the defendants were required to appear and answer, commenced October 14, 1907, so that there could be no opportunity for appellants to appear to said action within the meaning of section 691 (662), *supra*, until long after the appeal was taken. We hold, therefore, that the summons and return of the sheriff thereon are properly in

the record and form a part thereof. See, also, *Acts 1903, c. 193, p. 339, § 3* (section 663, *Burns' Ann. St. 1908*).

It has been provided by the statute, since the taking effect of the Code of Civil Procedure in 1853, that "A civil action shall be commenced by filing in the office of the clerk a complaint and causing a summons to be issued thereon." 2 Rev. St. 1876, p. 46, § 34; section 314, Rev. St. 1881; section 317, *Burns' Ann. St. 1908*. It has been uniformly held by this court under said section that the summons is not issued until delivered to the officer charged by the law with the service thereof. *Fordice v. Hardesty*, 36 Ind. 24; *Charlestown, etc., Tp. v. Hay*, 74 Ind. 127; 1 *Works, Prac. & Pldg.* §§ 204, 247. In 1881 the Legislature, with a knowledge of said construction of said provision, re-enacted the same (*Acts 1881, § 55, p. 249, c. 38*; section 317, *Burns' Ann. St. 1908* [section 316, *Burns' Ann. St. 1901*]), and thereby adopted said construction. *Board, etc., v. Conner*, 155 Ind. 484, 496, 58 N. E. 828, and authorities cited; *Cain v. Allen*, 168 Ind. 8, 17, 18, 79 N. E. 201, 396. It has been held under said section of the Acts of 1881, that the process must be delivered to the officer authorized to serve it before the action is deemed commenced. *Alexander, etc., Co. v. Irish*, 152 Ind. 535, 53 N. E. 762. As the action is not commenced until the summons is delivered to the sheriff, his return should show, as it does in this case, when the summons was received by him. 1 *Works, Prac. & Pldg.* § 247. The summons and the return thereon, therefore, show that the receiver was appointed the day before the action was commenced. It follows that the judge had no jurisdiction to appoint a receiver. *Alexander, etc., Co. v. Irish*, 152 Ind. 555, 53 N. E. 762. This is not a collateral attack on said order appointing the receiver, as claimed by appellee, but a direct attack thereon by appeal. *Van Fleet's Collateral Attack, § 2*.

Appellee contends that this court cannot review the case upon the evidence, because there is no bill of exceptions containing the evidence in the record, and nothing to show what evidence was given at the hearing, when the interlocutory order was made appointing the receiver. Section 1288, *Burns' Ann. St. 1908* (section 1244, *Burns' Ann. St. 1901*), prohibits the appointment of receivers without notice "except upon sufficient cause shown by affidavit." This provision clearly limits the evidence at such hearing to affidavits, which must be filed in the cause. This includes the complaint, if properly verified. In *Sullivan, etc., Co. v. Blue*, 142 Ind. 407, 41 N. E. 805, this court said, concerning said provision (pages 417, 418, of 142 Ind., page 808, of 41 N. E.): "Where there is an appearance by the adverse party to an application for the appointment of a receiver, or where there has been notice of such application to such party, the complaint

and affidavits may not contain or state facts enough to warrant or justify the appointment of a receiver, and yet the oral evidence adduced may have been sufficient to enlarge the cause stated on paper, so as to entitle the applicant to the appointment applied for. Not so in the case of an appointment without notice. There the statute quoted has wholesomely provided that cause for an appointment of a receiver, without notice to the adverse party, must be shown by affidavit. That implies that it must be in writing and filed as the cause of such appointment. Thus the adverse party may know the exact facts upon which the judge acted in appointing a receiver in his absence and wresting from him the control of his property without a hearing or an opportunity for such hearing. Without such facts being spread upon the record, on appeal to a higher court from such an interlocutory order allowed by another section of the same statute, the appeal might prove to be fruitless and unavailing. So that we must look to the facts stated on paper, at the time the application in this case was made, exclusively to find the cause, if any there was, to justify the appointment without notice." The verified complaint and all affidavits, if any, read in evidence on the ex parte application for the appointment of the receiver, are a part of the record without a bill of exceptions, under section 3, Acts 1903, p. 339, c. 193, being section 663, Burns' Ann. St. 1908.

The praecipe called for a transcript of the "complaint," and "all affidavits and papers filed," and the clerk's certificate, which imports absolute verity (*Justice v. Justice*, 115 Ind. 201, 16 N. E. 615; *Bozeman et al. v. Cale et al.*, 139 Ind. 187, 191, 35 N. E. 828, and cases cited), certifies that the transcript contains copies of all papers and entries required by the praecipe. It is shown, therefore, that all the evidence given at the hearing is in the record. As no affidavit is contained in the record, except the verified complaint, we must say that the only evidence given at the ex parte hearing for said appointment was the verified complaint, which reads as follows: "The plaintiff complains of the defendants, and says that he and said defendants are all citizens and residents of Monroe county, Ind., living in or near the town of Ellettsville of said county, that theretofore, to wit, on the day of —, 1900, they, together with Gilbert K. Perry, Isaac N. Pressley, Steve Szawkowski, and George W. Fletcher, entered into a partnership for the purpose and installation of a switch board, and certain wires and other fixtures, to be used in connection with a system of telephones, in and near said town, which said agreement is in writing, is filed herewith, marked "Exhibit A," and made a part hereof; that in pursuance of said written agreement a switch board, certain wires, and other fixtures were purchased and in-

stalled at the cost of about \$400; that for the purpose of operating said telephone, poles were erected and wires extended to different persons, each person paying a stipulated amount per month for the services of the operator, besides paying for the drop. Trunk lines were also brought by said copartners, connecting said switch board at Ellettsville with White Hall, Spencer, Gosport, and with other towns and switch boards, all of which wires were the property of said partnership; that property to a considerable value thus accumulated; that from the charges made different ones, for the use of said switch board, and for the payment of operators, there has now accumulated, and is now in the hands of said Lincoln May, as the treasurer of said partnership, the sum of \$148.91. And this plaintiff avers that he became the owner by purchase of the interest of said Herman U. Grant in said switch board, accumulations, profits, trunk lines, etc., and that said Grant now has no interest therein. And this plaintiff alleges that the poles in use by the patrons of said switch board have many of them become rotten; that many have fallen, and others are liable to fall, that there never was any franchise granted by the town of Ellettsville for the use of its streets or alleys for the erection of poles, or the maintenance and operation of said telephone; that the wires were and are fastened to trees, houses, and other buildings, causing great danger from fire and lightning; that the owners are not giving it proper attention; that some of them are threatening to sell or dispose of the whole outfit to another set of men, whom this plaintiff is informed have no rights in said town, for the erection and operation of a telephone line; that no satisfactory records or accounts of the receipts and expenditures are kept; that threats are being made to remove the said switch board to another place, thus destroying or impairing its usefulness; that it is not receiving the care and attention that its importance demands; that it is connected with many patrons, who are entitled to good service, and who are not receiving it; that trouble is existing among the owners; that persons who have no interest in said switch board, trunk lines, or accumulations are assuming to and are controlling it; that it is running down and deteriorating, and will soon be worth nothing if not given the proper care and attention; that this plaintiff is informed and believes there are dues owing for services, and for the use of said switch board, long past due, and which no effort is being made to ascertain and collect; that it is being run without profit and unsatisfactorily to the owners; that if said property is not taken into the care of some competent and reliable person, who will take care of the property, who will account for the rents and profits, collect the past unpaid dues and charges, it will be a total loss to the owners.

The plaintiff therefore asks that said partnership be dissolved; that an accounting be had; that there be a marshaling of the assets; that the debts be collected, and that the assets be converted into cash; that for the purpose of operating the said telephone, and the collection of the revenues, the collection of the unpaid indebtedness, the conversion of the assets into cash, the marshaling of the assets, a receiver be appointed by this court under its order, and by its direction take possession of and operate said telephone; take possession of said trunk lines, switch board, money on hand, other property belonging to said partnership, collect the revenues, collect all uncollected dues or rentals, and that when so collected under the order of the court, hereinafter to be made, he sell said property; and your petitioner would show that, by reason of the threats to dispose of said switch board, to remove it to other quarters, to sequester said cash on hands, by reason of which the value of said property will be greatly decreased, if not entirely destroyed, the emergency exists for appointment of a receiver, and that if the time is taken to give notice, great damage is likely to result to your petitioner and likewise to the owners of said property. He therefore asks that a receiver be appointed without notice, and for all other and proper relief."

Section 1288, Burns' Ann. St. 1908 (section 1244, Burns' Ann. St. 1901) provides: "Receivers shall not be appointed, either in term or vacation, in any case, until the adverse party shall have appeared, or shall have had reasonable notice of the application for such appointment, except upon sufficient cause shown by affidavit." It is evident under said section that it must appear, either in the verified complaint or by affidavit, not only that there was a cause for the appointment of a receiver, but that there was cause for such appointment without notice. If sufficient cause for not giving reasonable notice is not shown by affidavit, the appointment is forbidden by said section and is erroneous. The statute being silent as to what will constitute sufficient cause, we must look to precedents and adjudged cases to determine that question. *Wabash R. Co. v. Dykeman* (1892) 133 Ind. 56, 65, 82 N. E. 823. By the established practice, independent of statute, courts of equity, being adverse to interference ex parte, will entertain in ordinary cases an application for the appointment of a receiver only after notice to the defendant or a rule to show cause. High, Receivers (3d Ed.) §§ 111, 112. There is nothing in said verified complaint showing, as required by the authorities, that the defendants were beyond the jurisdiction of the court, or could not be found, or that there was an emergency rendering interference, before there was time to give notice, necessary to prevent waste or

destruction or loss, or that notice itself would jeopardize the taking possession of the property over which the receivership may be ordered, or that there was any imperious necessity requiring immediate action, and that protection could not be afforded the plaintiff by a temporary restraining order without notice or in any other way. Without such proof the appointment of a receiver without notice is erroneous. *Henderson v. Reynolds*, 168 Ind. 522, 523-530, 81 N. E. 494, 11 L. R. A. (N. S.) 960, and cases cited; *Continental, etc., Co. v. Bryson*, 168 Ind. 485, 81 N. E. 210, and cases cited. Appellee cites *Fink v. Montgomery*, 162 Ind. 424, 68 N. E. 1010, and *Goshen v. City, etc.*, 150 Ind. 279, 49 N. E. 154, but there was notice to the adverse party in the case last cited, and an appearance at the hearing in the case first cited, as required by section 1288 (1244) supra. Those cases are therefore not in point here. The verification of the complaint was on the "belief" of the party making it, and the same was not therefore admissible in evidence at the hearing of the application. The complaint, to be admissible in evidence, must be verified in positive terms. *Henderson v. Reynolds*, 168 Ind. 522, 523-526, 81 N. E. 494, 11 L. R. A. (N. S.) 960, and authorities cited; *Spurgeon v. Rhodes*, 167 Ind. 1, 7, 78 N. E. 228.

The interlocutory order appointing a receiver is therefore reversed.

(42 Ind. A. 554)

DEPUTY et al. v. DOLLARHIDE et al.  
(No. 6,437.)

(Appellate Court of Indiana, Division No. 2  
Nov. 24, 1908.)

1. JUDGMENT (§ 518\*)—DIRECT ATTACK.

An action to review a judgment in partition on the ground that plaintiffs at the time of the filing of the partition action were nonresidents; that none of them were personally served with summons and did not appear in the action; that judgment went against them by default; and that the partition was unequal and fraudulent—is a direct attack on the judgment.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 518.\*]

2. PROCESS (§ 84\*)—PUBLICATION—STATUTORY REQUIREMENTS—NECESSITY FOR COMPLIANCE.

Failure to strictly follow Burns' Ann. St. 1908, §§ 322, 496, 504 (Burns' Ann. St. 1901, §§ 320, 481, 489), providing for publication of notice of an action to nonresidents and for proof of such publication, invalidates the judgment.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 98; Dec. Dig. § 84.\*]

3. JUDGMENT (§ 17\*)—PROCESS TO SUSTAIN—RETURN AND PROOF OF SERVICE OR PUBLICATION—NECESSITY.

No jurisdiction is acquired in an action until a return of process or proof of publication.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 81; Dec. Dig. § 17.\*]

#### 4. PROCESS (§ 188\*)—NOTICE OF ACTION—PROOF OF PUBLICATION—SUFFICIENCY.

Under Burns' Ann. St. 1908, § 504 (Burns' Ann. St. 1901, § 489), providing that proof of service of any process issued by the court or of any notice required to be served on any party shall be as follows: " \* \* \* Third: In case of publication, a printed copy with the affidavit of the printer, his foreman or clerk or of any competent witness"—a paper purporting to be an affidavit of publication of notice of an action was insufficient where no name was subscribed to the jurat.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 181-186; Dec. Dig. § 138.\*]

#### 5. AFFIDAVITS (§ 12\*)—JURAT.

A jurat must be signed by an officer with the addition of his official seal.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. §§ 48, 52, 53; Dec. Dig. § 12.\*]

#### 6. JUDGMENT (§ 525\*)—ACTION TO REVIEW—RECITAL OF JURISDICTION—CONCLUSIVE-NESS.

The mere finding of jurisdiction is not conclusive, and, in case of default, the question of jurisdiction may be raised by a direct attack.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 568, 982½; Dec. Dig. § 525.\*]

#### 7. COURTS (§ 35\*)—JURISDICTION—PRESUMPTION—DEFECTS APPARENT IN RECORD.

The presumption in favor of the jurisdiction of a court will not prevail where the proof of publication of notice appears in the record to be insufficient.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 141; Dec. Dig. § 85.\*]

#### 8. PARTITION (§ 93\*)—JUDGMENTS—REVIEW.

The right of a party not served with process in partition to be relieved from the judgment or to a review thereof is not limited to Burns' Ann. St. 1908, § 646 (Burns' Ann. St. 1901, § 628), relating to the review of judgments, and providing that the complaint may be filed for any error of law appearing in the proceedings and judgment within one year, etc., but he may proceed under section 1266 (Burns' Ann. St. 1901, § 1223), pertaining to the partition of real estate, and providing that, on showing sufficient cause, any person not served with summons may within one year after such partition is confirmed appear and open the proceedings and obtain a review thereof, etc.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 95.\*]

#### 9. PARTITION (§ 114\*)—JUDGMENTS—REVIEW.

Though Burns' Ann. St. 1908, § 1265 (Burns' Ann. St. 1901, § 1222), authorizes the court to allow reasonable attorney's fees in partition, the allowance of \$300 fees was erroneous as to defaulted parties not served with process where only \$200 was demanded in the complaint; since, in the absence of an answer, the relief granted cannot exceed the relief demanded, and as to such defaulted parties the amount claimed was not amendable below and could not be treated as amendable on appeal.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 114.\*]

#### 10. PARTITION (§ 94\*)—REPORT OF COMMISSIONERS—FAILURE TO EXCEPT—WAIVER.

Defendants in partition who were not served with process, and were not in court, waived nothing by failing to except to the report of the commissioners.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 94.\*]

Appeal from Circuit Court, Jennings County; F. M. Thompson, Judge.

Action by Charles W. Deputy and others

against Winnifred Dollarhide and others. Judgment for defendants, and plaintiffs appeal. Reversed with instructions to overrule the demurrer to the complaint.

Dixon & Meloy and Batchelor & Son, for appellants. New & New, for appellees.

COMSTOCK, P. J. Action to review a judgment in partition, being based on sections 645, 646, Burns' Ann. St. 1908 (sections 627, 628, Burns' Ann. St. 1901), for review of judgments generally, and section 1266, Burns' Ann. St. 1908 (section 1223, Burns' Ann. St. 1901), for review of judgments in partition. A demurrer for want of facts filed by appellees Elizabeth Lett, Timothy S. Lett, Martha Gruber, and John H. Gruber was sustained. Plaintiffs refusing to plead further, judgment was rendered against them for costs. The action of the court in sustaining said demurrer is assigned as error.

Summarized, the amended complaint alleged: That the plaintiffs were at the time of the filing of the partition action and ever since had been nonresidents of the state of Indiana. That none of the plaintiffs were personally served with summons of the pendency of said action, and that they did not appear in said action, either in person or by counsel. That judgment was taken against them in said action by default. That they had no notice or knowledge of the report made by the commissioners until long after said report had been approved. That none of the plaintiffs have taken possession of the tracts attempted to be set off to them in severalty, have accepted no benefits under the alleged judgment, nor acted in any manner under the same. That the partition so made should be reviewed and set aside for the following reasons: First. That certain errors of law were committed by the court in said partition action, to wit: (a) That the court erred in finding that due notice had been given by publication to appellants of the pendency of said action; it being alleged that there was no proof of publication of notice in said cause. (b) That the advancement to Winnifred Dollarhide was not taken into consideration by the commissioners in the partition, although the original complaint alleged such advancement, and all the defendants defaulted. (c) That the court erred in allowing the attorney for the plaintiffs in said partition suit a fee of \$300 when only \$200 was asked for in the complaint, and that the proportionate part of said attorney's fee is taxed against and made a lien on the respective shares so set off to the plaintiffs. Second. That the partition so made is grossly unequal and fraudulent, in that at least one-third part in value was set off to Elizabeth Lett, and one-fourth part in value was set off to Martha Gruber, when, as provided in the interlocutory decree, only one-sixth part in value should have been set

off to each of said parties. That the portion set off to said Elizabeth Lett and Martha Gruber comprises all the bottom and fertile land; while the parts set off to the plaintiffs comprises only upland, in a large part untillable and of small value compared to the parts set off to said Elizabeth Lett and Martha Gruber. That, although said real estate was easily of the value of \$10,000 to \$15,000, the share set off to Elizabeth Lett is worth at least \$4,000, and the share set off to Martha Gruber is worth at least \$2,500, while the share set off to plaintiff Charles Deputy is worth not to exceed \$1,500. That the share set off to the plaintiff Addie McCaslin is worth not to exceed \$1,200, and that the share so set off to the plaintiff Opal Purdue is worth not to exceed \$300. That the shares set off to Mary Potter, Addie Class, and Wesley D. Class are worth much less than one-fourth the value of the share of Elizabeth Lett, and that the share of Winnifred Dollarhide is worth not to exceed one-half the value of the share of said Elizabeth Lett, although the said interlocutory decree provided that said real estate should be set off in the following proportions: To Martha Gruber, Elizabeth Lett, Charles W. Deputy, Addie Deputy, and Winnifred Dollarhide each one-sixth part in value; to Opal Purdue, Addie Class, and Wesley D. Class and Mary Potter each one twenty-fourth part in value. That said real estate is not susceptible of division, and that the commissioners were well aware of said fact. That, in addition to setting off the valuable land to said Elizabeth Lett and Martha Gruber in a far greater proportion than said parties were entitled, said commissioners did further cut up the other shares of the real estate into irregular shapes by granting a roadway through the entire tract to said Elizabeth Lett, thereby making them less valuable. That the entire proceedings, pleadings, and papers in the original partition action are set out in said amended complaint. That the prayer of the complaint is that the judgment be reviewed and set aside, and, if the court finds said real estate to be susceptible of division, that commissioners be appointed to divide that portion and to sell the remainder, or, if the court finds that said real estate is not susceptible of division, that commissioners be appointed to sell the same and divide the proceeds according to the respective interests of the parties, and for all other proper relief.

Where an attack on a judgment is collateral—that is, not for the express purpose of annulling, modifying, or correcting it—the remedy is by appeal within the time and in the manner prescribed by law. The case before us is a direct attack. *Harman v. Moore*, 112 Ind. 221, 13 N. E. 718. The appellants contend that the court had no jurisdiction over them because they were nonresidents, and because no proof of pendency of action was filed. The record in the former action shows

an order for the publication of nonresident notice. The decree defaulting them is as follows: “\* \* \* And plaintiffs further show that the defendants Addie D. Deputy, Opal Purdue, Mary Potter, and Charles Wesley Deputy, being nonresidents of the state of Indiana, as shown by the affidavit heretofore filed, have also been served with the notice of the filing and pendency of said complaint and the time and place fixed for the hearing thereof by publication of such notice for three weeks successively in the *Banner Plain Dealer*, a public newspaper of general circulation, printed in the city of North Vernon, Ind., the last of which publications was made and completed at least 30 days prior to this time and to the date set for the hearing of said petition, a copy of which notice and the proof of publication thereof as aforesaid being now filed and reading as follows [here insert]; and, it appearing to the court that the defendants Winnifred Dollarhide, Addie Class, Wesley D. Class, and Mary Potter are minors, the court appoints William Fitzgerald guardian ad litem for said infant defendants, who now appears and accepts said trust and for and on their behalf files as such guardian the following: Their separate answers in general denial thereof. And, the said defendants Addie D. Deputy, Opal Purdue, Charles Wesley Deputy failing to appear, they are each on motion three times loudly called, but come not, and herein wholly make default.” The alleged proof of publication filed, or affidavit, omitting the notice attached, reads as follows: “Before me ——— a ——— this day personally came J. S. Smith, who, being duly sworn according to law, says that he is the publisher of the *Banner Plain Dealer*, a weekly paper published at North Vernon, in said county, and that notice of which the annexed is a true copy was published in said paper for four weeks successively, the first of which was on the 29th day of March, 1906, and the last on the 20th day of April, 1906. J. S. Smith. Subscribed and sworn to before me this ——— day of ———, 190—.” No name is subscribed to the jurat. The statute provides for notice to nonresidents by publication. Sections 322, 496, 504, Burns’ Ann. St. 1908 (sections 320, 481, 489, Burns’ Ann. St. 1901). The failure to strictly follow the statute invalidates the judgment. *Fontaine v. Houston*, 58 Ind. 316; *Pitts v. Jackson*, 135 Ind. 211, 35 N. E. 10; *Eel River R. R. Co. v. State ex rel.*, 143 Ind. 231, 42 N. E. 617; *Brenner v. Quick*, 88 Ind. 546; *Clark v. Hillis*, 134 Ind. 421, 34 N. E. 13; *Scott v. Brackett*, 89 Ind. 418; *Hartley v. Boynton (C. C.)* 17 Fed. 873; *Wade on Notice*, p. 451; *Elliott on App. Proc.* § 184; 1 *Freeman on Judgments* (4th Ed.) § 125. Jurisdiction is acquired by service and proof of service. No jurisdiction is acquired until a return of process or proof of publication. The record does not disclose proof of publication. “The proof of service of any process issued by the court, or of any notice re-

quired to be served on any party, shall be as follows: \* \* \* Third. In case of publication, a printed copy with the affidavit of the printer, his foreman or clerk, or of any competent witness. \* \* \* "An affidavit is a formal, written (or printed), voluntary, ex parte statement, sworn (or affirmed) to before an officer authorized to take it." 1 Am. & Eng. Ency. of Law (2d Ed.) p. 909. The jurat must be signed by an officer with the addition of his official seal. In *Gambia v. Howe*, 8 Blackf. 133 (a judgment confessed by virtue of a warrant of attorney), the court, at page 134, say: "A copy of a paper, purporting to be signed by Robert L. Douglas, and called an affidavit, appears upon the record, which paper was received in the circuit court as proof of the power of attorney; but it has no jurat nor certificate of having been sworn to attached. It amounts to nothing more than a simple certificate." See, also, *McDermald v. Russell*, 41 Ill. 489; *Matthews v. Reid*, 94 Ga. 461, 19 S. E. 247. The demurrer admits that the alleged proof was never sworn to.

It is claimed by appellees that the assumption of jurisdiction and the exercise of authority by the court is a decision upon the question of notice without any formal entry declaring the notice sufficient. In support of this claim they cite *Updegraff v. Palmer*, 107 Ind. 181, 6 N. E. 353; *Carr v. State*, 103 Ind. 548, 3 N. E. 375; *Platter v. Board*, etc., 103 Ind. 360, 2 N. E. 544; *Cauldwell v. Curry*, 93 Ind. 363; *Board v. Hall*, 70 Ind. 469. In the first case named the appellees appeared and filed answers, and did not challenge the sufficiency of the notice, nor question the method of service, nor the character of proof of notice. Such questions were therefore waived. The court, however, states that the assumption of jurisdiction is decisive upon questions of notice; citing the other cases above named. In each of these the attack was collateral. The mere finding of jurisdiction is not conclusive. In case of default, the question of jurisdiction may be raised by a direct attack. The presumption in favor of the jurisdiction of a court will not prevail where the proof of publication appears in the record to be insufficient. *Debs v. Dalton*, 7 Ind. App. 84, 34 N. E. 236; *Brown, Jurisdiction*, § 20; *Elliott, App. Proc.* § 716, and cases cited. It is also claimed by appellees that the affidavit of the publisher or other person making proof of publication need not be subscribed by affiant. *Turpin v. Eaglecreek Co.*, 48 Ind. 45, and *Bonnell v. Ray*, 71 Ind. 141, are cited as sustaining the claim. In *Turpin v. Eaglecreek Co.*, supra, the report of certain assessors was signed; the officer's jurat, signed by him follows,

showing that the oath was administered substantially in the words of the statute. The court held it sufficient; and, further, that, where an affidavit is not required to be subscribed by statute or some rule of court, it is sufficient without the subscription. *Bonnell v. Ray*, supra, is to the same effect. The cases are not applicable, because, as we have seen so far as the record here shows, there was no affidavit, simply a certificate of the publisher to the notice in question.

Appellees contend that the "sufficient cause" named in section 1266 (section 1223), supra, must be such error of law appearing in the proceedings and judgment as is referred to in section 646 (628), supra, in other words, that these two statutes mean the same. Said section 646 provides that the complaint may be filed for "any error of law" appearing in the proceedings and judgment within one year, or for material new matter discovered since the rendition thereof within three years, or for both causes within one year after the rendition of judgment without leave of court. Section 1266, pertaining to the partition or sale of real estate, provides that upon showing sufficient cause any person not served with summons may within one year after such partition is confirmed appear and open the proceedings and obtain a review thereof, and also any person of unsound mind or any infant whose guardian did not attend and approve such partition may within one year after the removal of his disability have a review of such partition. The right of a party to be relieved from a judgment or to a review of same is not limited to provisions contained in section 646. *Pepin v. Lautman*, 28 Ind. App. 74, 62 N. E. 60. The remedy given by section 1266 is to persons not served with summons of unsound mind and infants not represented by guardian in the partition proceedings.

The complaint in the original action demands \$200, plaintiff's attorney's fees. The court allowed \$300. Appellants insist that, as section 1265 (1222) authorized the court to allow reasonable attorney's fees, the amount claimed in the complaint is immaterial. Under the statute it is for the court to determine the attorney's fees subject to review. But, in the absence of an answer, the relief granted cannot exceed the relief demanded, and, as to the parties defaulted, the amount claimed was not amendable below, and cannot be treated as amended here. *Bozarth v. McGillicuddy*, 19 Ind. App. 26, 36, 47 N. E. 397, 48 N. E. 1042, and cases cited. Appellants not having been in court, they waive nothing by failing to except to the report of the commissioners.

Judgment reversed, with instructions to overrule the demurrer to the complaint.

(128 N. Y. S. 127.)

**PEOPLE ex rel. ERIE R. CO. v. BOARD OF SUP'RS OF ERIE COUNTY.**

(Court of Appeals of New York. Oct. 13, 1908.)

**1. TAXATION (§ 543\*)—RECOVERY OF EXCESSIVE PAYMENTS—SCHOOL TAX—STATUTORY PROVISIONS.**

Laws 1907, p. 1882, c. 721, § 1, amending Laws 1896, p. 795, c. 908, § 256, which repeal Laws 1890, p. 402, c. 269, providing that, when a school tax shall have been collected in any school district on a property assessment valuation, ascertained from the town assessment roll, which assessment shall have been adjudged erroneous by the court, the trustees of the school district shall cause to be paid to the person paying the tax the amount paid in excess of the proper tax, has no application to a proceeding to obtain from a county board of supervisors a refund of the amount of the excess of a school tax.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 543.\*]

**2. TAXATION (§ 537\*)—RECOVERY OF EXCESSIVE PAYMENTS—HIGHWAY TAXES.**

An excess in the amount of highway taxes, paid when a town was operating under the labor system, cannot be recovered.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 537.\*]

**3. TAXATION (§ 535\*)—RECOVERY OF EXCESSIVE PAYMENTS—ESTOPPEL.**

Where, on presentation by a taxpayer of its claim to a county board of supervisors for a refund of the amount in excess of what should have been paid for all taxes, the board allowed a refund as to state, county, and town taxes, but denied it as to school and highway taxes, and paid the refund allowed, which was accepted by the taxpayer without objection, and the determination acquiesced in for three years, the taxpayer cannot again open the matter, and obtain a reaudit of its claim.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 991; Dec. Dig. § 535.\*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Mandamus by the People, on relation of the Erie Railroad Company, against the Board of Supervisors of the County of Erie. From an order of the Appellate Division (126 App. Div. 920, 110 N. Y. Supp. 1140), affirming an order of the Special Term granting a peremptory writ, the Board appeals. Reversed and mandamus denied.

Thomas A. Sullivan, for appellant. William M. Wheeler, for respondent.

**WERNER, J.** The relator, the Erie Railroad Company, seeks in this proceeding to obtain from the board of supervisors of Erie county the repayment of a certain proportion of the taxes paid by it, under assessments levied upon its property in the town of Alden, Erie county, during the years 1890, 1900, and 1901. The Supreme Court, in three separate certiorari proceedings, instituted for the purpose of reviewing the assessments in question, reduced the amounts thereof, and by orders dated December 18, 1901, made pursuant to the provisions of section 256 of the tax law, directed the board of supervisors to re-

fund the proportion of the taxes which had been paid on the overvaluation of the relator's property. Thereafter, and on February 18, 1902, the relator presented a petition to the board of supervisors asking for a refund of such taxes. The board took the matter under consideration, and determined to repay only the amount of the excess of the state, county, and town taxes, amounting to \$499.50, but denied relator's claim to a refund of the excess of school and highway taxes. On May 2, 1902, the sum of \$499.50 was paid to the relator, which accepted the same, and apparently acquiesced in the determination of the board, until May, 1905, when a second petition was presented to the board of supervisors, asking for a refund of the amount of the excess of school and highway taxes, which three years earlier the supervisors had refused to pay. The board of supervisors denied the relator's claim a second time, and this proceeding was instituted to compel such payment. The courts below have granted the relief prayed for, and issued a mandamus directing the board to pay to the relator the sum of \$518.61, and thus the question is now presented to this court whether, under the circumstances disclosed by the record, a mandamus was properly issued.

The refund which is the subject of controversy was directed under the authority of section 256, Tax Law (Laws 1896, p. 884, c. 908), which provides: "If in a final order in any such proceeding it shall be ordered or adjudged that the assessment complained of was illegal, erroneous or unequal, and such order shall not be made in time to enable the assessors or other officers to make a new or corrected assessment for the use of the board of supervisors, then at the first annual session of the board of supervisors after such correction there shall be audited and allowed to the petitioner and included in the tax levy of such town, village or city, made next after the entry of such order, and paid to the petitioner, the amount paid by him, in excess of what the tax would have been if the assessment had been made as determined by such order of the court, together with interest thereon from the date of payment. In case the amount deducted from such assessment by such order exceeds ten thousand dollars, so much thereof as shall be refunded by reason of such corrected assessment, other than the proportion or percentage thereof collected for such town, village or city purposes, shall be levied upon the county at large and paid to the petitioner without further audit. The board of supervisors shall audit and levy upon such town, village or city, the proportion or percentage of such excess of tax collected for such town, village or city purposes, which shall be collected and paid to the petitioner without other or further audit." Two of the orders issued in the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

certiorari proceedings brought by the relator to review the assessments here in question recited that the taxes were for school, highway, county, and state purposes. The third did not recite the specific taxes. All the orders, however, contained the following provisions at the end thereof: "It is further ordered, adjudged and decreed that the board of supervisors of the county of Erie, at its first session after the granting of this order, at which said company makes application therefor, shall audit and allow and pay to said Erie Railroad Company and include in the tax of said town of Alden and said county of Erie, respectively, made next thereafter, so much of the respective taxes above set forth, together with interest \* \* \* so paid by said Erie Railroad Company, as is in excess of what said taxes and each of them would have been if the assessment of the property of said Erie Railroad Company in said town of Alden for the year 1899 had originally been made by said board of assessors as said sum of one hundred thousand dollars as herein determined, as said Erie Railroad Company is lawfully entitled to, in accordance with section 256 of chapter 908 of the Laws of 1896."

We have recently decided in *People ex rel. Eckerson v. Board of Education, etc., of Haverstraw*, 193 N. Y. —, 86 N. E. 1130; affirming 126 App. Div. 414, 110 N. Y. Supp. 769, that prior to 1897 there was no method by which the repayment of an excessive tax for schools, on an assessment taken from a town roll, could be recovered, the town not being liable therefor. That subject is now regulated by chapter 721, p. 1680, Laws 1907, which has no application to the case at bar. As to the excessive highway taxes paid by the relator, the record does not show whether the respondent town has adopted the money system provided for by Highway Law (Laws 1890, p. 1188, c. 568) § 49 et seq., or whether, when these highway taxes were paid, it was operating under what is known as the "labor system." If it was still working under the latter, it would, of course, preclude any recovery. But, even if we assume that the money system had been adopted, it is unnecessary for us to decide whether the relator is entitled to recover the excess of highway taxes paid by it. Upon this branch of the case it is enough to say that the relator presented its claim to the supervisors for a refund of the amount in excess of what should have been paid for all taxes in February, 1902. The supervisors took the claim under consideration, and shortly thereafter rejected it in so far as it related to school and highway taxes. It was followed by the payment to the relator of the amount due it for the excess of state, county, and town taxes. That amount seems to have been accepted by the relator without objection. The determination thus made was acquiesced in by the relator until 1905, and it is quite

probable that it would never again have presented the claim but for the decision in *People ex rel. N. Y. Cent. & H. R. R. Co. v. Matthias*, 84 App. Div. 122, 81 N. Y. Supp. 1105, which was handed down in 1903. The simple fact is that the relator had its opportunity to question the legality of the action of the supervisors, but saw fit to accept the amount offered. Three years later it sought to obtain a reaudit of its claim. Nothing is better settled in this state than the proposition that, where boards of supervisors have in good faith passed upon the merits of a claim, their action is final until reversed or set aside. *People ex rel. Myers v. Barnes*, 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739; *People ex rel. Johnson v. Supervisors of Del. Co.*, 45 N. Y. 196; *People ex rel. Phoenix v. Supervisors of N. York*, 1 Hill, 362; *People ex rel. Peck v. Town Board*, 27 App. Div. 476, 50 N. Y. Supp. 533. It is true that relator contends that this case does not come within the reason of the rule laid down in the authorities cited. Its position is that, under the statute referred to and the language of the orders granted in the certiorari proceedings, the supervisors had no discretion in the matter, and that their duty was to obey the plain mandate of the court; and from this it is argued that their determination not to pay the full amount of the claim was not an audit as that term is ordinarily used and understood. We are inclined to think otherwise. But whether this is true or not, it is really unnecessary to determine. The relator has treated the action of the supervisors as an audit. It has repeatedly so named it in various petitions, and has accepted benefits under it. By its acquiescence in the decision and by its conduct it has given a practical construction to the meaning and effect of the orders made in the certiorari proceedings which it should not now be permitted to repudiate. Having once elected to treat the decision of the supervisors as an audit, it is now too late to change its choice. To permit the matter to be now reopened, after the lapse of three years from the rendition of the original decision, would be the equivalent of allowing an entire claim to be split up and prosecuted piecemeal. *People ex rel. O'Mara v. Supervisors of Cayuga Co. (Sup.)* 16 N. Y. Supp. 254, affirmed, 63 Hun, 625, 17 N. Y. Supp. 314; *People ex rel. McDonough v. Supervisors of Queens Co.*, 33 Hun, 305; *Pakas v. Hollingshead*, 184 N. Y. 211, 77 N. E. 40, 8 L. R. A. (N. S.) 1042, 112 Am. St. Rep. 601.

For these reasons the order appealed from should be reversed, with costs in all courts, and the mandamus denied.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, HISCOCK, and CHASE, JJ., concur. VANN, J., not sitting.

Order reversed, etc.

(200 Mass. 162)

**ROLLINS v. QUIMBY.**(Supreme Judicial Court of Massachusetts.  
Worcester. Nov. 24, 1908.)**1. FRAUD (§ 22\*)—MISREPRESENTATIONS—POLICY OF LAW.**

The law will not save persons from the consequences of their own improvidence and negligence, but it looks with even less favor upon misrepresentation and fraud.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 19; Dec. Dig. § 22.\*]

**2. FRAUD (§ 18\*)—MISREPRESENTATIONS—REPRESENTATIONS AS TO MORTGAGES EXCHANGED FOR LAND.**

The representation by defendant that mortgages which he exchanged for plaintiff's land were first mortgages "as good as money in the bank" when, in fact, they were not first mortgages, was a material representation of fact, and not seller's talk.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 16; Dec. Dig. § 18.\*]

**3. FRAUD (§ 22\*)—MISREPRESENTATIONS—NEGLECT OF PERSON DEFRAUDED.**

If a person who took mortgages in exchange for her land on the misrepresentation that they were first mortgages, as well as her husband, was inexperienced, and did not know that the records could or should be examined to see whether the mortgages were first mortgages, she was not negligent as matter of law in not examining the records or having them examined.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 19; Dec. Dig. § 22.\*]

**4. FRAUD (§ 22\*) — MISREPRESENTATIONS — RIGHT OF RECOVERY—NEGLECT OF PERSON DEFRAUDED.**

Where the husband of plaintiff, who traded land to defendant for mortgages, misrepresented by him to be first mortgages, was inclined to consult a lawyer about the deed, but was told by defendant that it was not necessary, plaintiff was not as matter of law precluded from recovering for defendant's fraud because she did not have the records examined to discover the character of the mortgages, both plaintiff and her husband being inexperienced persons, since defendant's conduct might be found to have been calculated and intended to divert, and to have diverted plaintiff and her husband from sources of information which they would or might have otherwise resorted to.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 21; Dec. Dig. § 22.\*]

**5. FRAUD (§ 22\*) — MISREPRESENTATIONS — RIGHT OF RECOVERY — NEGLIGENCE OF DEFRAUDED PERSON.**

Where defendant exchanging mortgages for the land of plaintiff, who was an inexperienced person, misrepresented the mortgages to be first mortgages, and did not tell plaintiff what particular mortgages he proposed to transfer, nor do anything at the registry of deeds to put plaintiff and her husband on their guard, but in giving them the notes and mortgages, which did not show on their faces whether they were or were not first mortgages, put each note and mortgage into a separate envelope, put the separate envelopes into a larger one, and gave the assignments to the register to be recorded with directions to mail them to plaintiff's husband, and the fact that the mortgages were not first mortgages could only have been discovered from the covenant against incumbrances in the mortgage deeds, plaintiff in failing to examine the mortgages was not as matter of law so negligent, nor was the fact that the mortgages were not first

mortgages as matter of law so obvious, as to preclude her recovery for the fraud.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 19; Dec. Dig. § 22.\*]

Exceptions from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Action by Mildred L. Rollins against Walter H. Quimby. Judgment for defendant, and plaintiff excepts. Exceptions sustained.

John A. Thayer, Charles B. Perry, and Archer R. Greeley, for plaintiff. Marvin M. Taylor, for defendant.

**MORTON, J.** The evidence warranted a finding that the plaintiff was induced to sell the farm and stock by representations made by the defendant that the mortgages which he proposed to trade for the farm and stock "were first mortgages just as good as money in the bank," and that these representations were in part at least false and fraudulent. One of the mortgages was a first mortgage for \$500 on real estate in Stoneham; one was a second mortgage for \$2,200 on real estate in Worcester; and the other was a third mortgage for \$2,300, also on real estate in Worcester. The defense is that the damages, if any, which the plaintiff has sustained, were the result of her own negligence and that of her husband who acted as her agent. There was no testimony as to the value of the properties subject to these mortgages and the adequacy or inadequacy of the mortgages as security for the amounts named, and the plaintiff's case must stand or fall, therefore, on the representation that they were first mortgages.

The law does not attempt to save parties from the consequences of their own improvidence and negligence; but it looks with even less favor upon misrepresentation and fraud. And, accordingly, in later decisions, this court has manifested a disinclination to extend the immunity of vendors for statements or representations made by them beyond the limits already established. *Boles v. Merrill*, 173 Mass. 491, 53 N. E. 894, 73 Am. St. Rep. 308; *Kilgore v. Bruce*, 166 Mass. 136, 44 N. E. 108; *Way v. Ryther*, 165 Mass. 226, 42 N. E. 1128; *Whiting v. Price*, 172 Mass. 240, 51 E. 1084, 70 Am. St. Rep. 262; *Arnold v. Teel*, 182 Mass. 1, 4, 64 N. E. 413; *Long v. Athol*, 196 Mass. 497, 505, 82 N. E. 665.

There can be no doubt that the representation that the mortgages were first mortgages was a material representation of fact and not seller's talk, and the plaintiff's husband testified in effect that he relied upon it and would not have considered the matter if he had known that the mortgages were second mortgages. The defendant contends that it could have been readily ascertained by the plaintiff and her husband, from an examination of the documents themselves and from the records, that two of the mortgages were not first mortgages, and that, if she and her

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

husband took them as such, and have suffered damages thereby, it was due to their own carelessness and he is not liable for such damages.

So far as appears, the plaintiff had no knowledge concerning business matters of the nature of those involved in the transaction, and there was testimony tending to show that her husband was also inexperienced. If they were inexperienced, the degree of care required of them would be, or might be found to be, different from that required of them if they possessed the requisite knowledge and skill to put them on an equal footing with the defendant. "False statements," for instance, "as to market value may not be actionable if made to an experienced dealer. \* \* \* But it is otherwise if made to an unskilled person." Kilgore v. Bruce, 166 Mass. 136, 138, 44 N. E. 108, 109. See, also, Barndt v. Frederick, 78 Wis. 1, 11, 47 N. W. 6, 11 L. R. A. 199; Kendall v. Wilson, 41 Vt. 567, 571. If the plaintiff's husband had little or no experience in looking up titles, and did not know that the records could or should be examined to ascertain whether the mortgages were in fact first mortgages or not, we do not see how it could be ruled as matter of law that he was negligent in not examining the records himself, or in not having them examined by some one else.

Further, the plaintiff's husband testified that he spoke of going to a lawyer to have the deed made, and that the defendant said that it was not necessary, that it could be done in Worcester, and the defendant did not go to a lawyer. The jury could have found that this and the representation that the mortgages were first mortgages were calculated and were intended to divert, and did divert, the attention of the plaintiff and her husband from sources of information to which they would or might have resorted but for the confidence which they were induced to place in the defendant. If that was so, then even though they might, as said in substance in *Grimes v. Kendall*, 8 Allen, 518, 522, 523, by searching the records in the registry of deeds, have obtained information in relation to the mortgages, they were not bound to do so, and the plaintiff is not precluded, by the fact that she and her husband did not examine the records, from recovering of the defendant the damages, if any, which she has sustained in consequence of his fraud.

Similar considerations apply to the objection that an examination of the mortgages themselves would have shown that they were not first mortgages. The defendant at no time told the plaintiff what particular mortgages he proposed to transfer. And he did nothing at the registry of deeds in Worcester, where the transaction was completed, to put the plaintiff and her husband on their guard. In delivering the notes and mortgages he

put each note and mortgage into an envelope by itself and put these three envelopes into a larger one which he handed to the plaintiff's husband, and gave the assignments to the register to be recorded, with directions to mail them to the plaintiff's husband at his home in Webster. It was not until three weeks after, when the plaintiff had occasion to consult a lawyer in regard to raising some money on the mortgages, that the fraud was discovered. Very likely if the plaintiff and her husband had examined the mortgages at the registry of deeds, they would have discovered the fraud, though their alleged inexperience is not to be forgotten. But they could have discovered it only by an examination of the body of the mortgage deeds themselves. There was nothing, so far as appears on the face of the papers, to show whether they were first, second, or third mortgages. While the notes bore in the margin on their face statements that they were secured by mortgage on real estate, there was nothing on them to show whether they were or were not first mortgages. It was not necessary that the assignments should state whether the mortgages assigned were first mortgages or not, and presumably they did not. The plaintiff and her husband could have ascertained only by reading through the mortgage deeds whether they were first mortgages, and then they would have found the information which they sought only in the covenant against incumbrances. If, under such circumstances, induced by the defendant's representations and their confidence in him, they were led to refrain from an examination of the papers, we do not think that it can be held as matter of law that they were guilty of such carelessness, or that the fact that the mortgages were not first mortgages was so obvious, as to preclude the plaintiff from recovering. The case of *Arnold v. Teel*, supra, goes further in its facts than it is necessary to go in this case to sustain the plaintiff's exceptions. See, also, *Savage v. Stevens*, 126 Mass. 207; *Freedley v. French*, 154 Mass. 339, 28 N. E. 272; *Burns v. Dockray*, 156 Mass. 135, 30 N. E. 551; *Brady v. Finn*, 162 Mass. 260, 38 N. E. 506; *Holst v. Stewart*, 161 Mass. 516, 37 N. E. 755, 42 Am. St. Rep. 442; *Dean v. Ross*, 178 Mass. 397, 60 N. E. 119.

Exceptions sustained.

(200 Mass. 269)

BOWDEN et al. v. BROWN et al.

(Supreme Judicial Court of Massachusetts.  
Essex. Nov. 24, 1908.)

1. CHARITIES (§ 11\*)—NATURE OF CHARITY.

A gift to a town toward the erection of a building for the sick and poor, those without homes, constituted a public charity.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 35; Dec. Dig. § 11.\*]

## 2. CHARITIES (§ 24\*)—EXISTENCE—ACCEPTANCE BY DONEE.

Where a fund was bequeathed to a town toward the erection of a building for the sick and poor, the action of the voters of the town in declining to accept the legacy was equivalent to a refusal to erect the building as contemplated by the will, so that the charity must fail unless it can be administered under the court's direction.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 8; Dec. Dig. § 24.\*]

## 3. CHARITIES (§ 37\*)—ENFORCEMENT—CY PRES DOCTRINE.

Testatrix bequeathed \$3,000 to a town "toward the erection of a building for the sick and poor, those without homes," but the town refused to accept the legacy or erect the building. *Held*, that the legacy was given for the specific charity stated in the will, and the court could not apply it to some other similar charity under the doctrine of cy pres.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 91-93; Dec. Dig. § 37.\*]

## 4. CHARITIES (§ 38\*)—CONSTRUCTION—PURPOSES OF GIFT.

A legacy of \$8,000 to a town "toward the erection of a building" for the sick and poor, the fund being left in the hands of certain persons as trustees, did not contemplate the erection of a building entirely from the funds, but that a building would be erected and maintained by the town with the aid of her gift; the fund being insufficient alone for that purpose.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 65; Dec. Dig. § 38.\*]

## 5. WILLS (§ 849\*)—LAPSED LEGACIES—RIGHTS OF HEIRS.

Where a gift of testatrix's residuary estate to charity failed, it would go to her heirs at law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2165; Dec. Dig. § 849.\*]

Case reserved from Supreme Judicial Court, Essex County; John W. Hammond, Judge.

Petition by William S. Bowden and others, as trustees under a will, against Annie S. Brown and others, to determine the proper distribution of a legacy. Distribution as directed.

Dana Malone, Atty. Gen., and Fred T. Field, Asst. Atty. Gen. Frederick Manley Ives, for respondents.

KNOWLTON, C. J. Sarah E. Goodwin, late of Marblehead, deceased, after giving certain legacies in her will, provided for the remainder by language which ends as follows: "Be given to the town of Marblehead toward the erection of a building that should be for the sick and poor, those without homes. I leave this in the hands of William S. Bowden, Mary G. Brown and William Reynolds of Marblehead." This gift constitutes a public charity. *Richardson v. Mullery* (Mass.) 88 N. E. 319, and cases cited. But by the terms of the will, it is to go to a designated donee, to be used for a specified pur-

pose, for the benefit of a certain class of sick and poor. The donee, the town of Marblehead, at a meeting of the voters has declined to accept the legacy. It was given "toward the erection of a building" by the town. The action of the town is equivalent to a refusal to erect such a building. It appears that the charity cannot be administered in the way stated in the will. It therefore must fail altogether, unless it can be administered under the doctrine of cy pres. The question arises whether the purpose of the testatrix was to give her property for this specific charity, or whether her charitable purpose was general, so that the court is authorized to apply the money to some other charity, similar to that mentioned in the will, under a scheme to be devised for that purpose. It is manifest that the amount of the property, which is only about \$8,000 is insufficient for the erection and maintenance of such a building as the testatrix contemplated. She expected that the building would be erected and maintained by the town, with such aid as would be derived from the use of her gift. The trust was not for the erection of a building by trustees under her will, entirely from the proceeds of her property. It being impossible to do that which the testatrix had in mind, can we discover a purpose to do something else of a similar character? We think not. There is nothing to indicate that she intended to make provision generally for the sick and poor of the town, or particularly for those without homes, unless they could be provided with a home in a building to be erected for their use. General provision for the sick and poor would seem to include a charity much broader than anything in her contemplation. The case seems to fall within the class where no intent to use the gift for other charitable purposes can be discovered, if it is impossible to execute the particular charity for which provision is made. In such cases the charity fails altogether. Many cases of this kind are found in the books. See *Teele v. Bishop of Derry*, 168 Mass. 341, 47 N. E. 422, 38 L. R. A. 629, 60 Am. St. Rep. 401; *Bullard v. Shirley*, 153 Mass. 559, 27 N. E. 766, 12 L. R. A. 110; *Quill v. Attorney General*, 197 Mass. 232-237, 83 N. E. 676; *In re White's Trusts*, 33 Ch. Div. 449; *Attorney General v. Bishop of Oxford*, 1 Bro. C. C. 444, note; 4 Ves. Jr. 43.; *Brown v. Condit*, 70 N. J. Eq. 440, 64 Atl. 110; *Catt v. Catt*, 118 App. Div. (N. Y.) 742, 108 N. Y. Supp. 740.

We are of opinion that the gift fails, and that the residuary estate must go to the heirs at law.

So ordered.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(79 Oh. St. 79)

## STATE v. MATTINGLY.

(Supreme Court of Ohio. Nov. 10, 1908.)

## 1. MUNICIPAL CORPORATIONS (§ 642\*)—POLICE REGULATIONS—CRIMINAL PROSECUTIONS—APPELLATE JURISDICTION.

Under the provisions of section 7356, Rev. St. 1908, it is competent for the circuit court in the first instance to take and entertain jurisdiction of proceedings in error to review the judgment of the mayor of an incorporated village convicting the defendant of a crime.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 642.\*]

## 2. INTOXICATING LIQUORS (§ 241\*)—VIOLATION OF LOCAL OPTION LAW—PROSECUTION—APPEAL.

For the purpose of such review, under the provisions of section 20 of the act of the General Assembly entitled, "An act to provide for the enforcement of local option laws prohibiting the sale of intoxicating liquors as a beverage," passed February 23, 1906 (98 Ohio Laws, p. 12), the circuit court may grant leave to the convicted party to file a petition in error therein to review the judgment of conviction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 241.\*]

(Syllabus by the Court.)

Error to Circuit Court, Licking County.

Bernard J. Mattingly was convicted of an illegal sale of liquor, which on error was reversed, and the state excepts and brings error. Affirmed.

Wade H. Ellis, Atty. Gen., W. H. Miller, Asst. Atty. Gen., Wheeler & White, and Kibler & Montgomery, for plaintiff in error. Smythe & Smythe, for defendant in error.

PRICE, C. J. On the 23d day of December, A. D. 1907, a local option election was held in the village of Johnstown, Licking county, Ohio, at which the electors of said village by a majority vote decided against the sale of intoxicating liquors as a beverage therein, of which election and its result due record was made by the clerk of said village. On the 23d day of January, 1908, certain persons, of whom J. M. Wright was one, filed with the mayor of that village an affidavit against the defendant in error, Bernard J. Mattingly, charging, in substance, that on the 23d day of January, 1908, intoxicating liquors, to wit, distilled, malt, and vinous liquors, with the vessel in which they were contained, and implements and furniture used in connection with the illegal selling, furnishing, and giving away of said intoxicating liquors, were kept in the village of Johnstown, in said county of Licking and state of Ohio, on the premises and in the building thereon located. Then follows a description of the place formerly occupied by B. J. Mattingly on Main street as a saloon, and that said intoxicating liquors were kept for the purpose of being sold, furnished, and given away as a beverage in said village, in violation of the municipal local option law, and that said building is not a bona fide private residence. The affidavit proceeds to charge

that said intoxicating liquors are still concealed, and said vessels, implements, and furniture were then kept in said place for the purpose aforesaid. The record recites that the proceeding was being instituted under the Woods law, passed February 23, 1906, for the purpose of obtaining a warrant to search said premises and seize the contraband property, as well as the arrest of Mattingly. Service of the warrant was made and he was taken before the mayor for trial. He was found guilty, and ordered to pay a fine of \$200 and the costs of the prosecution, and that he stand committed until said fine and costs should be paid. Bond was given for a suspension of the sentence until the accused could obtain leave of the proper court to file a petition in error. A bill of exceptions was taken by Mattingly, containing the evidence adduced on the trial, which was allowed and signed by the mayor, as required by statute, on the 16th day of March, 1908. On the 2d day of April, 1908, Mattingly through his attorneys, and after due notice to the state of the intention to do so, presented to the circuit court of Licking county a motion, asking leave of that court to file therein a petition in error to review and reverse the judgment of said mayor. Leave was granted, and the petition in error and said bill of exceptions and original papers were filed. The state took exception to the granting of the leave. The case on error was heard by the circuit court, and it reversed the judgment of the mayor for error, to wit, "that the judgment of the said mayor is not sustained by sufficient evidence and is against the clear weight of the evidence." The case was remanded to the mayor's court for further trial according to law. To this judgment of reversal the state of Ohio excepted, and error is prosecuted in this court to obtain a reversal of the judgment of the circuit court.

The state challenges the jurisdiction of the circuit court to entertain the proceeding in error to review the judgment of the mayor, and of course denies the authority of the circuit court to grant leave to file therein a petition in error for such purpose. It is claimed that, if Mattingly desired to prosecute error to the judgment of the mayor, he should have first knocked at the door of the court of common pleas, and if his suit failed there, he might then, and only then, be heard in the circuit court. This is an important question in our criminal procedure, and its solution involves a consideration of section 7356, Rev. St. 1908, which is: "In any criminal case, including a conviction for a violation of an ordinance of a municipal corporation, the judgment or final order of a court or officer inferior to the common pleas court may be reviewed in the common pleas court; and a judgment or final order of any court or officer inferior to the circuit court may be reviewed in the circuit court; and a

judgment or final order of the circuit court or the common pleas court in cases of conviction of a felony or a misdemeanor, and the judgment of the circuit court in any other case involving the constitutionality or construction of a statute, may be reviewed by the Supreme Court; but the Supreme Court shall not in any criminal cause or proceeding, except when its jurisdiction is original, be required to determine as to the weight of the evidence." This is not a new provision, for its central rule is found in Rev. St. 1880, in a section bearing the same number, where it was provided that: "In any criminal case, including a conviction for a violation of an ordinance of a municipal corporation, a judgment of a court or officer inferior to the court of common pleas, may be reviewed in the court of common pleas; judgment of any court [or officer] omitted inferior to the district court may be reviewed in the district court; and the judgment of any court inferior to the Supreme Court may be reviewed in the Supreme Court." The section (7356) was amended April 18, 1883, by adding the words, "and the judgment of the district court in any other case involving the constitutionality or construction of a statute, may be reviewed in the Supreme Court; but in the Supreme Court only errors of law occurring at the trial or appearing in the pleadings or judgment can be reviewed." See 80 Ohio Laws, p. 170. And so the law stood until the advent of the circuit court, which supplanted the district court, and by virtue of the constitutional amendment under which the circuit court was organized, it took over the former powers and jurisdiction of the district court. The section was again amended February 7, 1885, leaving out the words, "but in the Supreme Court only errors of law occurring at the trial, or appearing in the pleadings or judgment can be reviewed," and substituting, "but the Supreme Court shall not in any criminal cause or proceeding, except when its jurisdiction is original, be required to determine as to the weight of the evidence." See 82 Ohio Laws, p. 39.

After undergoing the foregoing changes, we have our present section, which seems to be free of ambiguity and readily comprehended. Does the case at bar come within the provisions of the section? The affidavit before the mayor charged Mattingly with a violation of a criminal statute of the state. The village of Johnstown, at the date named therein, was what is called "dry territory," because of an election there held on the 23d day of the preceding December, when a majority of the electors of the village voted "against the sale of intoxicating liquors as a beverage." As a result of that election, it became unlawful for anyone engaged in the retail of intoxicating liquors as a beverage to continue said business after the period of 30 days from the date of said election. It was charged that Mattingly had the contraband goods on hand after the time expired at his former usual

place of business, and the complainants before the mayor availed themselves of the provisions of an act entitled "An act to provide for the enforcement of local option laws prohibiting the sale of intoxicating liquors as a beverage," passed February 23, 1906. See 98 Ohio Laws, p. 12. This act is sometimes called the "search and seizure law," the provisions of which are very stringent, in order that the will of the majority may be carried out. Suspected places may be searched, property taken, and the owner arrested and punished, as was done in this case, and by section 20 of the act it is provided that "no petition in error shall be filed in any court to reverse any conviction for violation of any law prohibiting the sale of intoxicating liquors in any territory or district, or to reverse any judgment affirming such conviction, except after leave granted by the reviewing court, and no such leave shall be granted except after good cause shown at a hearing of which counsel for the complainant in the original case shall have had actual and reasonable notice." Section 21 limits the time to file such petition in error to 30 days from date of conviction, and the case must be heard in the reviewing court within 30 court days from the filing of the petition in error. Therefore it was a criminal case that was presented to the circuit court, and which it admitted to its docket and afterwards reversed.

It is true that the petition in error might have been presented to the court of common pleas for leave to file the same, if such court was accessible during the 30-day period of limitation; but it may be that a common pleas court was not open in Licking county during that period, and the leave to file the petition cannot be given by a judge of such court. It can be obtained only from the reviewing court. In the case at hand the circuit court heard the application after lawful notice had been given, and granted it. Now according to section 7356, Rev. St. 1908, "In any criminal case \* \* \* a judgment or final order of any court or officer inferior to the circuit court may be reviewed in the circuit court." This does not mean that, before you can enter the circuit court, you must enter and pass through the court of common pleas. The clause last quoted would be superfluous if such restriction prevails, because without it error could be prosecuted in the circuit court to review the judgment of the court of common pleas. The jurisdiction of the circuit court in criminal cases is not confined to a review of judgments of the court of common pleas, but includes the power to review the judgment or final order of any court or officer inferior to the circuit court. So says the statute in plain words. Of course the circuit court may review the judgment of the court of common pleas in a criminal case. So can this court, but its jurisdiction does not end there, and for obvious reasons, one of which may have existed in the present

case, namely, the absence of a court of common pleas from, and the presence of the circuit court in, Licking county during the 30-day period of limitation.

The plaintiff in error cites *Burrows v. Vandevier et al.*, 3 Ohio, 383, *Bartlett v. State*, 22 Ohio St. 205, and *State v. Rouch*, 47 Ohio St. 478-481, 25 N. E. 59. The plaintiff in error is not benefited by *Burrows v. Vandevier*, supra. In fact it is an authority against its contention. The headline is "writ of certiorari lies from the Supreme Court direct to inferior jurisdictions, but will be sustained only in extraordinary cases." The writ of certiorari was addressed to the commissioners of Warren county, requiring them to certify to the court their proceedings in a certain road case, which was done. It was objected that the writ ought to be dismissed because it was not a case in which the exercise of a sound discretion requires that it should be allowed. The court said in that case: "It is admitted that the court possesses jurisdiction to award it in a case like this, but urged that it ought not to be sustained, because the plaintiff in certiorari had a more easy and expeditious remedy in the court of common pleas. We assent to the justness of this argument, but under existing circumstances we have concluded to sustain the writ in question. As the jurisdiction is conceded, and no rule had been laid down with respect to cases in which it would be exercised, we are not willing to turn the party out of court in whose case a rule is first to be made known to operate in other cases. Hereafter we shall not sustain a writ of certiorari direct to any inferior jurisdiction where the court of common pleas have power to act, unless the case be attended with some extraordinary circumstances. \* \* \*"

*Bartlett v. State*, supra, also fails to support the plaintiff in error. The case is disposed of in the following per curiam: "This is an application for the allowance of a writ of error to the police court of Cincinnati. We refuse to allow the writ for the reason that the application can be made as well to the court of common pleas. Were we to establish the practice that all such applications are to be made to this court, without first going to the common pleas, we should be utterly unable to dispose of the business of this court. Necessity, therefore, compels us to confine the hearing of such applications to exceptional cases, where the special circumstances render it necessary." In that statement the jurisdiction of the Supreme Court to hear an application for the review of the judgment of the police court is not questioned, but held to be ample, yet for the reason stated, this court would, except in special cases, remit the party to a lower court in the first instance. The case announces that under the rule then prevailing, it was a matter of discretion in this court

whether it would permit a party to come directly from the police court or court of common pleas to this court. We think the rule is the same now, and the circuit court might have refused leave to file a petition in error in this case, but it did not do so.

When we examine *State v. Rouch*, supra, we find that the case is likewise unfavorable to plaintiff in error. The syllabus contains nothing upon the subject, and there is nothing in the opinion that comes to the support of the claim made here.

Content with the plain language of the section (7356) under consideration, and believing the circuit court had jurisdiction in this case under its provisions, we will not prolong this opinion.

One or two other questions are argued in briefs of counsel, but their decision involves the weighing of the evidence, and we are not required to do that.

The judgment of the circuit court is affirmed.

Judgment affirmed.

CREW, SUMMERS, and SPEAR, JJ., concur.

(200 Mass. 179)

#### THORNLEY v. J. C. WALSH CO.

(Supreme Judicial Court of Massachusetts.  
Bristol. Nov. 24, 1908.)

##### 1. RECEIVERS (§ 206\*)—ANCILLARY RECEIVERSHIPS—APPOINTMENT.

A decree appointing a foreign receiver of a foreign corporation as the ancillary receiver in this state should direct the ancillary receiver not to transmit the assets in this state to himself as receiver in the foreign state until provision has been made for attaching creditors in this state.

[Ed. Note.—For other cases, see *Receivers*, Dec. Dig. § 206.\*]

##### 2. APPEAL AND ERROR (§ 713\*)—BILL OF EXCEPTIONS.

On appeal from an order appointing an ancillary receiver of a foreign corporation, a question as to the propriety of an exclusion of evidence is not properly before the appellate court where it is simply stated in findings of fact made by the single justice hearing the petition, more than five months after entry of the final decree appealed from, in accordance with Rev. Laws, c. 159, § 23, authorizing a report by the justice of his findings, if requested by appellant within four days after notice of entry of the decree as the only way of presenting such a question is by a bill of exceptions if an exception was taken at the trial, or by a reservation under Rev. Laws, c. 159, § 29, authorizing the trial justice to report the evidence and all questions of law therein for the consideration of the full court.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 713.\*]

##### 3. RECEIVERS (§ 206\*)—ANCILLARY RECEIVERSHIPS—APPOINTMENT.

St. 1903, p. 443, c. 437, § 58, directing that every foreign corporation engaged in this state in the construction or alteration of buildings, bridges, or railroad structures shall, before doing business in this commonwealth, appoint the commissioner of corporations its attorney upon whom all process may be served, does not pre-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

clude a creditor of a foreign corporation which has not complied with the statute from applying for the appointment of an ancillary receivership in this state, although such creditor is in fact the attorney for such insolvent corporation.

[Ed. Note.—For other cases, see *Receivers*, Dec. Dig. § 206.\*]

#### 4. APPEAL AND ERROR (§ 1056\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In proceedings for the appointment of an ancillary receiver of a foreign corporation, the exclusion of evidence as to the good faith of the proceeding is not prejudicial to the creditor opposing the appointment, where the trial justice states in his finding of facts that he ruled that the facts stated in the offers of proof were not conclusive as a matter of law, and that, if shown, he would still have granted the petition.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.\*]

Appeal from Superior Court, Bristol County; Charles U. Bell, Judge.

William H. Thornley petitioned for the appointment of an ancillary receiver for J. C. Walsh Company, a Rhode Island corporation. From a decree granting the petition, Jerome C. Borden, a creditor of the corporation, appeals. Decree modified and affirmed.

Wm. H. Thornley, in pro. per. Arthur S. Phillips, for appellant. Fred A. Otis and D. F. Slade, for appellee.

**LORING, J.** This is an appeal from a final decree appointing a receiver of the property of a Rhode Island corporation in a proceeding ancillary to a similar proceeding and appointment of the same person as permanent receiver by the superior court of that state.

The decree should have directed the receiver here not to transmit the Massachusetts assets to himself as receiver in Rhode Island until provision had been made for attaching creditors in Massachusetts. *Second National Bank v. Lappe*, 198 Mass. 159, 84 N. E. 301; *Reynolds v. Enterprise Transportation Co.*, 198 Mass. 590, 85 N. E. 110. It should be modified accordingly.

The appellant has argued a question as to the exclusion of evidence set forth in an offer of proof stated in findings of fact made by the single justice "in accordance with the provisions of section 23 of chapter 159 of the Revised Laws." These findings of fact were made more than five months after the final decree here appealed from had been entered.

That question is not properly before us. The only way of presenting such a question to this court is by a bill of exceptions, if an exception to the exclusion of the evidence was taken at the trial, or by a reservation under Rev. Laws, c. 159, § 29.

There is nothing, however, in the contention of the defendant in this connection. His contention is that as matter of law a credi-

tor of an insolvent foreign corporation cannot maintain an ancillary petition against it in the courts of this state where the foreign corporation has not complied with St. 1903, p. 443, c. 437, § 58; and, where the creditor who applies here applied for the appointment in the home state, was the attorney of the insolvent corporation, made the application at the solicitation and with the consent of the corporation, and was himself appointed the receiver. The appellant's argument is that, since the corporation under those circumstances has no standing in the courts of the commonwealth (as to which see *National Fertilizer Co. v. Fall River Bank*, 196 Mass. 458, 82 N. E. 671; *Friedenwald Co. v. Warren*, 195 Mass. 432, 81 N. E. 207), the attorney of the corporation who applies at its solicitation and with its consent has no greater right. If the application had been made by the plaintiff as the attorney of the insolvent corporation the conclusion urged by the appellant perhaps would have followed. But the petition here in question was made by the plaintiff as a creditor, not as the attorney of the insolvent corporation. The evidence stated in the offer of proof would have gone no farther than to raise a question as to the good faith of the proceeding, and it was so treated by the single justice. He states in his finding of facts: "I ruled that the facts stated in the offers of proof were not conclusive as matter of law and determined that, if proved, I should still upon the whole case grant the petition."

The decree must be modified by providing that the receiver appointed here is not to transmit to Rhode Island the assets received here until provision is made for attaching creditors in Massachusetts. So modified, the decree is affirmed.

So ordered.

(200 Mass. 166)

#### HUBBARD v. ALLYN.

(Supreme Judicial Court of Massachusetts.  
Hampden. Nov. 24, 1908.)

#### 1. LIBEL AND SLANDER (§ 9\*)—MISSTATEMENT OF FACT—MATERIALITY.

Where defendant, after making an examination of vanilla found on plaintiff's premises, published an article falsely stating that plaintiff paid \$2.75 a gallon therefor, basing such assertion on defendant's knowledge of the cost of the several ingredients composing the fluid, and further stating that the person who bought vanilla at such price was either criminally stupid or deliberately dishonest, that such purchase was absolutely without excuse, and was a flagrant violation of public confidence and physical welfare, the misstatement of the price was the pivotal fact which authorized a finding that the article was neither fair comment nor reasonable criticism, but a libel.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 86, 86½; Dec. Dig. § 9.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**2. LIBEL AND SLANDER (§ 48\*)—PRIVILEGED COMMUNICATIONS—PUBLIC INTEREST—COMMENT.**

While ridicule, sarcasm, and invective may be employed in the discussion of matters of public interest if based on fact, a person charged with libel may not make false statements of fact with reference to the conduct of another because the subject-matter is one of public interest.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 144; Dec. Dig. § 48.\*]

**3. TRIAL (§ 105\*)—RECEPTION OF EVIDENCE—OBJECTIONS—EFFECT OF FAILURE TO OBJECT.**

Where incompetent evidence is admitted without objection, it is to be accorded full probative force.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 261-266; Dec. Dig. § 105.\*]

**4. TRIAL (§ 54\*)—RECEPTION OF EVIDENCE—ADMISSIBILITY FOR PARTICULAR PURPOSE.**

Where evidence is competent for any purpose, it is not rendered incompetent because it also tends to influence the mind in a direction for which alone it is incompetent; the remedy being by application to have it restricted to the purpose for which it is admissible.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 126; Dec. Dig. § 54.\*]

**5. LIBEL AND SLANDER (§ 123\*)—PERSON LIBELED—QUESTION OF FACT.**

Whether an article was published concerning plaintiff is generally a question of fact.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 360; Dec. Dig. § 123.\*]

**6. LIBEL AND SLANDER (§ 123\*)—PERSON LIBELED—QUESTION FOR JURY.**

Evidence held to require submission to the jury whether an alleged libel was published concerning plaintiff.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 360; Dec. Dig. § 123.\*]

**7. APPEAL AND ERROR (§ 928\*)—EXCEPTIONS—REVIEW—PRESUMPTIONS.**

Where the charge of the trial court is not contained in the record on exceptions to the Supreme Court, it will be presumed that ample instructions were given covering a particular phase of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3750; Dec. Dig. § 928.\*]

**8. LIBEL AND SLANDER (§ 101\*)—PUBLICATION.**

Where the members of a board of health joined in the view that an article should be published as to the use of adulterated vanilla by plaintiff, a local baker, but it did not appear that they intended to authorize a libel or that a libelous article printed by defendant, a member of the board, was shown to the others or its precise tenor communicated to them before it was printed, it could not be presumed, in an action for libel, that the other members of the board intended that anything more than a fair comment on the matter should be published.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 101.\*]

**9. LIBEL AND SLANDER (§ 55\*)—DEFENSES—TRUTH—STATUTES.**

Where an alleged libelous article charged that plaintiff used adulterated vanilla for which he paid \$2.75 a gallon, and on this based the balance of the article, and there was no evidence that plaintiff paid \$2.75 a gallon for the vanilla he used, no defense could be predicated on Rev. Laws 1902, c. 173, § 91, providing that

the truth of an alleged libel shall be a justification, unless actual malice is proved.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 55.\*]

**10. LIBEL AND SLANDER (§ 5\*)—MISSTATEMENT OF FACT—ACTUAL MALICE.**

Where an alleged libel was based on a misstatement of fact, plaintiff was not required to prove actual malice.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 278; Dec. Dig. § 5.\*]

**11. LIBEL AND SLANDER (§ 101\*)—MALICE—PRESUMPTION.**

Malice is not to be presumed as a matter of law from the publication of the libel.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 278; Dec. Dig. § 101.\*]

**12. LIBEL AND SLANDER (§ 4\*)—"MALICE."**

"Malice" in the law of slander is used in a popular sense.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 111; Dec. Dig. § 4.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4298-4304; vol. 8, pp. 7712, 7713.]

**13. LIBEL AND SLANDER (§ 112\*)—ACTUAL MALICE—EVIDENCE—FINDING.**

In an action for libel, evidence held to sustain a finding of actual malice.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 329; Dec. Dig. § 112.\*]

**14. LIBEL AND SLANDER (§ 124\*)—ACTION—INSTRUCTIONS—MODIFICATION.**

In an action for libel consisting of a published article charging plaintiff with using adulterated vanilla, an instruction that the statement in the article that "the recent finding of wood alcohol in the so-called vanilla used in one of our local bakeries" referred to the quality of the vanilla, and, it being conceded that the statement was true, plaintiff could not recover for any damages caused thereby, was properly modified by a direction that the jury should consider it in connection with other statements in the entire article in determining whether there was something there stated untrue or unfair, under the rule that a single truth may be so interwoven with falsehood as to produce the effect of fabrication.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 366; Dec. Dig. § 124.\*]

**15. LIBEL AND SLANDER (§ 108\*)—INJURY TO BUSINESS—EVIDENCE.**

Where, in an action for libel, plaintiff claimed damages for loss of patronage because of an alleged libel charging him with the use of adulterated vanilla, evidence that, after the publication of the article, plaintiff's trade fell off, and that his customers, when refusing to trade, gave the publication of the article as the reason, was admissible.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 304; Dec. Dig. § 108.\*]

Exceptions from Superior Court, Hampden County; William Cushing Wait, Judge.

Action by Clarence E. Hubbard against Louis B. Allyn. Verdict for plaintiff, and defendant brings exceptions. Overruled.

Green & Bennett, for plaintiff. F. A. Ballou, for defendant.

RUGG, J. This is an action of libel for causing the printing in certain newspapers of an article alleged to be false, malicious, defamatory and published concerning the plaintiff and likely to injure him in his business, which caused him loss of patronage.

The defense is that the statements were true and made without malice, and that the article consisted of fair comment on a matter of public interest. The plaintiff is a baker. The defendant is an instructor in science in the State Normal School, and a member of the board of health of Westfield. Certain samples of vanilla flavoring were taken from the plaintiff by an agent of the board of health of Westfield, which, on analysis by the defendant, were found to contain a dangerous amount of wood alcohol. Thereafter the defendant wrote the article complained of, which, among other statements, contained the following:

"The recent finding of wood alcohol in the so-called vanilla used in one of our local bakeries brings a lesson of no little importance—the fallacy of expecting to get a large quantity of a good article for a small price. Such purchasers are among the greatest enemies and hindrances to the advent of pure food, inasmuch as they create a demand for cheap, worthless articles. Pure vanilla wholesales at about \$12 per gallon. What can one expect for \$2.75? He who buys at this price is either criminally stupid or deliberately dishonest. \* \* \* The extract in question was an evil smelling concoction as innocent of vanilla as some saloons are of whisky. \* \* \* A dealer, as in the present case, stands absolutely without excuse for purchasing an article of this extreme character. \* \* \* It is the attitude of the local board of health to prosecute to the limit any such flagrant violation of public confidence and physical welfare."

The court ruled that the subject was one of public interest, and that the defendant had a legal right to publish fair and reasonable comment thereon without liability. The case comes before us on exceptions by the defendant to the refusal to give certain instructions and as to the admission of evidence.

1. A verdict could not have been directed for the defendant. A reasonable inference from the published article was that the writer asserted that the plaintiff paid \$2.75 per gallon for the vanilla found on his premises, which contained the wood alcohol, a dangerously poisonous substance. There was no evidence whatever that the vanilla found on the plaintiff's premises cost him only \$2.75 per gallon. The defendant, from his knowledge as to the cost of the several ingredients found to compose this fluid, estimated that it could be bought for that price, but made the assertion without any knowledge or information as to what the plaintiff in fact paid for it. The evidence of the plaintiff, which was uncontradicted, was that he paid \$4 per gallon for it. Upon this statement as to price paid by the plaintiff, which the jury may have found to be false, the defendant bases the declaration that the person, who had bought at that price was either "criminally stupid or deliberately dishonest"; that he was "absolutely without excuse" for his action,

which was also characterized as a "flagrant violation of public confidence and physical welfare." These comments and criticisms are wholly deduced from a premise, which the jury might have found to be untrue. It cannot be said, as matter of law, that a verdict could have been ordered for the defendant, who made such a publication touching one whose business was that of furnishing food. The jury would have been warranted in finding that the substantially harmful statement contained in the article was not as to the mere presence of wood alcohol in the vanilla, but that any honest or competent person would know from the low price paid that the vanilla was of such poor quality as to be deleterious to health. Reading the whole statement, the price named was not an unimportant incident, but the pivotal fact on which hung much of the rest. If the jury found this statement of fact to be false, then they would be justified in saying further that the article was not fair comment or reasonable criticism, but an unwarranted attack, whose manifest tendency was to injure the plaintiff in his business. *Haynes v. Clinton Printing Co.*, 169 Mass. 512, 48 N. E. 275. The right of the defendant was not to make false statements of fact because the subject-matter was of public interest, but only to criticize, discuss and comment upon the real acts of the plaintiff and the consequences likely to follow from them, or upon any other aspect of the case in a reasonable way. This may be done with severity. Ridicule, sarcasm, and invective may be employed. But the basis must be a fact, and not a falsehood. *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97; *McQuire v. Western Morning News Co., Ltd.* [1903] 2 K. B. 100; *Dow v. Long*, 190 Mass. 138, 76 N. E. 667; *Thomas v. Bradbury, Agnew & Co. Ltd.* [1906] 2 K. B. 627.

2. It is argued that there was no evidence that the article was published concerning the plaintiff. The plaintiff's name is not mentioned in the article. The subject of the article is named only as "one of our local bakeries," in which "wood alcohol in the so-called vanilla" had been found, and "a dealer as in the present case." It may be conceded, as urged by the defendant, that knowledge of the person referred to on the part of the writer and of the plaintiff alone would not be enough to show that it was published of the plaintiff. Such descriptive language must be used as to indicate to others some particular individual under the circumstances existing in the community. It appeared that the plaintiff was the only baker in Westfield, upon whose premises vanilla containing wood alcohol had been found. The agent of the board of health had visited the plaintiff's place to get the samples, and a few days before the article was printed went to his bakery and carried the keg containing the so-called vanilla across a main street of the town to the rooms of the board of health.

One witness, a member of the board of health, testified that he knew when he read the article that the plaintiff was referred to. The plaintiff was permitted to testify that, from conversations with customers, he knew that it was understood that he was meant by an article published in a Springfield paper, which used substantially the same descriptive language. This evidence, though perhaps not competent if objected to, nevertheless being in without objection, was entitled to its probative force. *Damon v. Carrol*, 163 Mass. 404, 40 N. E. 185. It tended to show that such language in the then state of information of the public mind in Westfield would be understood as referring to the plaintiff, and that hence the defendant's article was so understood. The testimony of Rainault, that customers gave this article as a reason for not trading with the plaintiff, the exception to the admission of which will be discussed later, also had the same tendency. If competent for any purpose, it is not rendered incompetent by the fact that it also has a tendency to influence the mind in another direction, for which alone it would not be competent. *Whipple v. Rich*, 180 Mass. 477, 63 N. E. 5; *Weston v. Barnicoat*, 175 Mass. 454-456, 56 N. E. 619, 49 L. R. A. 612; *Commonwealth v. Johnson*, 199 Mass. 55, 85 N. E. 188. If the defendant desired to have its application restricted he should have made such request. It may have been found to be the reasonable inference from this testimony that a reference to the local baker, in whose shop vanilla containing wood alcohol had been found, would point inevitably to the plaintiff. Whether the article was published concerning the plaintiff is generally a question of fact. There is nothing exceptional in the present case to take it out of the general rule, but there was evidence enough to require submission to the jury. *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 34 N. E. 462, 20 L. R. A. 856.

The defendant has argued that the publication of advertisements by the plaintiff may have spread this knowledge. But the charge of the superior court is not given, and it must be assumed that ample instructions, covering this phase of the case, were given. Moreover, it is plain that the members of the board of health and its agent knew who was meant by "local dealer" as used in the article. Although they had joined in the expression of view that an article should be published, there is nothing to show that they intended to authorize the publication of a libel. The article was not shown to them in advance of being printed, nor its precise tenor communicated to them. It cannot be assumed that they intended anything more than that a fair comment upon the matter should be published.

3. The defendant requested a ruling in substance that there was no evidence of personal ill will toward the plaintiff on the part of the defendant. This may have been

refused properly on the ground that there was no sufficient evidence of the truth of the basic facts alleged respecting the plaintiff in the article. No testimony was introduced that the plaintiff paid \$2.75 per gallon for the vanilla. Therefore the defense afforded by *Rev. Laws, c. 173, § 91*, could not by any possibility have been made out on the evidence as it stood. Hence actual malice on the part of the defendant was of no consequence. *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 245, 28 N. E. 1, 13 L. R. A. 97. But, assuming that this ruling was applicable to the issues raised, no error is disclosed. There was some slight evidence tending to show actual malice by the defendant. Malice is used in this connection in the popular sense. *Conner v. Standard Publishing Co.*, 183 Mass. 480, 67 N. E. 596; *Fay v. Harrington*, 176 Mass. 270, 57 N. E. 369. It is not to be presumed as matter of law from the publication of the libel. *Brown v. Massachusetts Title Ins. Co.*, 151 Mass. 127, 23 N. E. 733. But it does not follow that the language of the libel itself may not be found as a fact to breathe the malevolence. The defendant deliberately inserted in the article the assertion of a fact concerning the plaintiff, as to the truth of which he had no knowledge, but whose truth was vital to much of the rest of the article. The agent of the board, of which the defendant was a member, sent its agent to the store of the plaintiff, which was in the centre of the business section of a large town and near the post office, between six and seven o'clock on a Wednesday evening, and caused him to carry the 10-gallon keg containing vanilla under his arm across the street to the room of the board of health. This may have been found suspiciously conspicuous, both as to time and manner. After the defendant had determined to write an article for publication, he was solicited by a newspaper reporter for it. Complaints in court had been made by the board of health against the plaintiff touching the conduct of his bakery, one of which was decided before, another after, the publication of the article, both in favor of the plaintiff. Whatever may be said as to the weight of each of those circumstances standing alone, and probably the last alone would not be sufficient (*Watson v. Moore*, 2 Cush. 133; *Kidd v. Parkhurst*, 3 Allen, 393; see *Com. Wharf Corp. v. Boston*, 194 Mass. 460, 80 N. E. 645), yet collectively they support a finding of a state of mind equivalent to actual malice.

4. The defendant asked for an instruction that "the statement in the alleged article, 'the recent finding of wood alcohol in the so-called vanilla used in one of our local bakeries,' refers to the quality of the vanilla, and since it is conceded that the statement is true the plaintiff cannot recover for any damages caused thereby." The superior court gave this instruction in substance, but added, "That statement you must take in

connection with other statements in the entire article, in order to see whether or not you can find that there was something there stated which was untrue or unfair." This was sufficiently favorable to the defendant. A single truth may be so interwoven with falsehood as to produce the effect of a fabrication.

5. One Raineault, an employé of the plaintiff, was permitted, against the exception of the defendant, to testify as to the reasons given by customers for declining to use the plaintiff's goods. These were declarations accompanying the act of refusal to trade with the plaintiff and explaining its nature. They were competent within the rule laid down in *Elmer v. Fessenden*, 151 Mass. 361, 24 N. E. 208, 5 L. R. A. 724, *Weston v. Barnicoat*, 175 Mass. 454, 58 N. E. 619, 49 L. R. A. 612, and *Pierson v. Boston Elevated R. R. Co.*, 191 Mass. 223, 77 N. E. 769. The act, namely, the refusal to buy goods, was an equivocal one. It might arise because no bakers' goods were needed at the time, or because a rival had secured the trade, or because of fear that the plaintiff's goods were poisonous or from other considerations. A contemporaneous declaration giving the reason for the act was therefore competent as disclosing its real character. It was not necessary for the plaintiff to show, as a part of his case, the names of the customers. This was a proper subject for cross-examination, and it does not appear that the defendant was deprived of his rights in this respect. One claim of the plaintiff respecting damages was a loss of patronage. It was competent for the driver of his baker's wagon to state that after the publication of the articles the trade fell off, and that his customers, when refusing to trade, gave the publication of the article in question as the reason.

Exceptions overruled.

(200 Mass. 293)

#### MARVEL v. COBB.

(Supreme Judicial Court of Massachusetts.  
Bristol. Nov. 28, 1908.)

#### 1. FRAUD (§ 31\*)—ACTIONS—NATURE AND FORM OF REMEDY—EFFECT OF REMEDY TO SET ASIDE CONTRACT.

A conveyance of a tract of land and a mortgage of another tract, if induced by fraud, may be set aside on a return of the consideration for the conveyance and the money lent, or an action for damages for deceit will lie.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 27; Dec. Dig. § 31.\*]

#### 2. EXECUTORS AND ADMINISTRATORS (§ 49\*)—ASSETS—RIGHTS OF ACTION.

A right of action to set aside a conveyance of a tract of land and a mortgage of another tract induced by fraud or for damages for deceit pass to the personal representative.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 301; Dec. Dig. § 49.\*]

#### 3. EQUITY (§ 87\*)—FOLLOWING STATUTE OF LIMITATIONS.

An action for fraud, being an action of tort is barred by Rev. Laws 1902, c. 202, §§ 2, 10, after six years, and no better standing can be acquired by bringing a suit in equity.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 242-244; Dec. Dig. § 87.\*]

#### 4. LIMITATION OF ACTIONS (§ 18\*)—LIMITATIONS APPLICABLE—SUIT TO SET ASIDE CONVEYANCE.

A bill to set aside a conveyance of a tract of land and the mortgage of another tract for fraud is barred after six years.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 70; Dec. Dig. § 18.\*]

#### 5. LIMITATION OF ACTIONS (§ 174\*)—PERSONS BARRED—ASSIGNEE OF CAUSES OF ACTION.

An assignee of causes of action barred by limitation has no greater rights than his assignor.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 659; Dec. Dig. § 174.\*]

#### 6. EQUITY (§ 239\*)—DEMURRER—ADMISSION OF ALLEGATIONS.

The allegations of a bill are to be taken as true on demurrer.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 494; Dec. Dig. § 239.\*]

#### 7. DESCENT AND DISTRIBUTION (§ 8\*)—EQUITY OF REDEMPTION.

The equity of redemption descends to the heirs of mortgagor.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 35; Dec. Dig. § 8.\*]

#### 8. MORTGAGES (§ 369\*)—FORECLOSURE—ACTIONS TO SET ASIDE—BILL—SUFFICIENCY.

A bill to set aside a mortgage foreclosure is fatally defective, where there is no offer to pay what is equitably due on the mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1097; Dec. Dig. § 369.\*]

#### 9. MORTGAGES (§ 369\*)—FORECLOSURE—ACTIONS TO SET ASIDE—PARTIES.

A mortgage foreclosure cannot be set aside in a suit to which a person to whom it is alleged the land has been conveyed with intent to defraud is not a party.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1096; Dec. Dig. § 369.\*]

#### 10. MORTGAGES (§ 369\*)—FORECLOSURE—ACTIONS TO SET ASIDE—TIME TO SUE.

The right to avoid a mortgage foreclosure must be exercised within a reasonable time, though the land is still held by the purchaser at the foreclosure sale.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1095; Dec. Dig. § 369.\*]

#### 11. MORTGAGES (§ 369\*)—FORECLOSURE—ACTIONS TO SET ASIDE—TIME TO SUE.

In the absence of sufficient excuse, a delay of 15 years and 2 months in exercising the right to avoid a mortgage foreclosure is more than a reasonable time.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1095; Dec. Dig. § 369.\*]

#### 12. MORTGAGES (§ 369\*)—FORECLOSURE—ACTIONS TO SET ASIDE—EXCUSE FOR DELAY.

An unreasonable delay in the exercise of the right to avoid a mortgage foreclosure is not excused by complainant's absence where he was not ignorant of the cause of action.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1095; Dec. Dig. § 369.\*]

#### 13. MORTGAGES (§ 369\*)—FORECLOSURE—ACTIONS TO SET ASIDE—EXCUSE FOR DELAY.

An unreasonable delay in the exercise of the right to avoid a mortgage foreclosure is not

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

excused by inaction of complainant's counsel, in the absence of instructions by complainant that he was ready to redeem.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1095; Dec. Dig. § 369.\*]

**14. MORTGAGES (§ 369\*)—FORECLOSURE—ACTIONS TO SET ASIDE—EXCUSE FOR DELAY.**

An unreasonable delay by an heir of mortgagor to exercise the right to set aside a mortgage foreclosure cannot be excused on the ground that, until he obtained an assignment of the cause of action from mortgagor's administrator, he could not bring the bill, as his right to redeem belonged to him as an heir to whom the land descended subject to the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1095; Dec. Dig. § 369.\*]

**15. MORTGAGES (§ 369\*)—FORECLOSURE—VOID MORTGAGE—REMEDY.**

The remedy against a foreclosure under a mortgage alleged to have been rendered void by fraudulent alteration by mortgagee is a writ of entry.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 369.\*]

Appeal from Superior Court, Bristol County; William Schofield, Judge.

Bill by William D. Marvel against John W. Cobb. Decree for defendant, and complainant appeals. Affirmed.

William D. Marvel, pro se. Albert Fuller and William J. Davidson, for defendant.

**LORING, J.** The bill in this suit is multifarious and argumentative. In addition, while it charges the defendant with fraud, cheating and forgery, it is almost entirely lacking in stating facts justifying those charges.

So far as a statement of what is thus charged can be made, it is in substance as follows:

The plaintiff is the son but not the only heir of his father, Dexter Marvel, a citizen of Massachusetts, who died intestate at Lynn, in Essex county, on October 28, 1890.

In April, 1890, and before, Dexter Marvel was the owner of two large tracts of land in the town of Bourne, Barnstable county, laid out in lots for summer cottages, and known as Pocasset Heights and Patuisset property, respectively. Those two tracts of land were subject to a mortgage held by the Bristol County Savings Bank in the sum of \$6,000.

In April, 1890, the defendant, at the request of the plaintiff's father, advanced the money necessary to take up this mortgage. The plaintiff's father conveyed to the defendant the Pocasset Heights and mortgaged to him the Patuisset property. In payment for the Pocasset Heights the plaintiff's father received from the defendant 105 shares of the Cobb Stove & Machine Company. As security for the money advanced by the defendant to take up the prior mortgage for \$6,000 on both properties, the defendant received from the plaintiff's father, in addition to the mortgage on the Patuisset property, the 105

shares received as the purchase price of the Pocasset property.

There is a long statement of false reports as to the condition and make-up of the stove company, but there are no allegations connecting that statement with the transactions between the plaintiff's father and the defendant. It is stated however that this transaction throughout was a fraudulent one on the defendant's part. It is also alleged that at the time of this transaction the plaintiff's father was ill and "unable to properly attend to his affairs."

For the breach of some condition in the mortgage to him of the Patuisset property the defendant advertised that property for sale on August 10, 1891. The plaintiff went to Pocasset and saw Cobb on August 8, 1891, and proposed that the mortgage of the Patuisset property and the deed of the Pocasset Heights property should be canceled and the shares in the stove company returned and the amount due the defendant determined by arbitration. This the defendant refused to do. Thereupon the plaintiff notified the defendant "that the pretended or so-called mortgage was fraudulent," that he should "denounce the mortgage as a fraud and forbid the sale." He also notified the defendant that the proposed mortgage sale had not been properly advertised. In consequence of the latter notice the sale was adjourned until August 17, 1891. At the auction sale on that day the plaintiff and the administrator of his father's estate were present. The plaintiff "under advice of counsel \* \* \* then and there made protest forbidding the sale and declared the so-called mortgage to be not only fraudulent but obtained by said Cobb under false pretenses." In spite of the protest the auctioneer proceeded with the sale. The administrator and the plaintiff each made a bid of \$6,000, interest and expenses, but the property was declared sold to one E. M. Reed for \$3,000. It had been alleged in an earlier paragraph of the bill that E. M. Reed was "the subservient tool and confidential agent of the defendant." It is further alleged in the bill that immediately after the foreclosure sale Reed conveyed the Patuisset property bought in by him at the sale to the defendant.

It is also alleged in the bill of complaint that the plaintiff's father's estate "was technically bankrupt"; that he was the largest creditor of it; and that it was agreed between the plaintiff and "his coheirs" that all outside debts should be paid and the residue then left should be assigned to the plaintiff. Apparently pursuant to that agreement, the administrator, on August 19, 1902, assigned to the plaintiff all personal property and rights of action then vested in him.

The bill was sworn to on October 18, 1906, and presumably filed soon after. That is to say, 16 years and 6 months after the deed

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and mortgage which it is now sought to set aside for fraud were made—16 years after the death of the father and 15 years and 2 months after the foreclosure sale which the plaintiff now seeks to have set aside.

If it is assumed, as the bill alleges, that the plaintiff's father was induced by false and fraudulent representations of the defendant (first) to convey to him the Pocasset Heights for 105 shares of the stove company, and (second) to mortgage the Patuisset property to him, he had a right to set aside that conveyance and that mortgage on returning the 105 shares and the money lent to him on executing the mortgage, or he could bring an action for damages based upon the fraud and deceit. These rights of action passed to and were vested in the administrator of his estate. The action for fraud and deceit being an action of tort, was barred by force of Rev. Laws, c. 202, §§ 2, 10, at the end of six years—that is to say, in 1896—and the plaintiff can get no better standing by bringing this suit in equity. *Ela v. Ela*, 158 Mass. 54, 32 N. E. 957. The right to avoid the sale and the loan was barred at the same time. *Dodge v. Essex Ins. Co.*, 12 Gray, 65. The plaintiff has not alleged any fact bringing the administrator of his father's estate within the disabilities prescribed by statute by reason of which a longer time is given a plaintiff in which to bring his action. These causes of action therefore were barred when the administrator assigned them to the plaintiff in 1903. Of course, the plaintiff has no greater rights than his assignor (the administrator) had.

The other cause of action to be gathered from the statements made in the bill of complaint is the right to set aside the foreclosure sale of the Patuisset property on the ground that the administrator and the plaintiff bid more than the \$3,000 for which it was sold to Reed.

The plaintiff's father died seised of the equity of redemption in the Patuisset property, and, upon the allegations of this bill (which are taken to be true for the purpose of disposing of the defendant's demurrer), with a right to avoid that mortgage for fraud. The equity of redemption descended to his heirs, including the plaintiff among others. So far as this cause of action is concerned, the bill is fatally defective for want of an offer to pay what is now equitably due on the mortgage, and because it is alleged that many sales of the Patuisset land have been made to purchasers, and that all the estate was conveyed to one Stone with intent to defraud the plaintiff. In a suit to which Stone is not a party the foreclosure of the land cannot be set aside. But apart from the lack of an offer to redeem, and apart from the fact that the land not sold to third persons now stands in the name of Stone, if it be assumed that the plaintiff is ready to pay the whole mortgage debt for the land not sold to third persons (since the

grantees of the land sold have not been made parties), the plaintiff is barred by his own laches.

The right to avoid a foreclosure sale which is voidable must be exercised within a reasonable time, even if the mortgaged land is still held by the purchaser at the foreclosure sale. *Learned v. Foster*, 117 Mass. 363; *Fennyery v. Ransom*, 170 Mass. 303, 49 N. E. 620; *Tetrault v. Fournier*, 187 Mass. 58, 72 N. E. 351. In the absence of sufficient excuse, 15 years and 2 months is more than a reasonable time. See *Learned v. Foster*, and *Tetrault v. Fournier*, *ubi supra*.

The first excuse alleged by the plaintiff is that he was absent from the city from 1891 until "the middle of the year 1902." That is no excuse to one who is not ignorant of the cause of action. See *Wells v. Child*, 12 Allen, 330; *Naddo v. Barden*, 51 Fed. 493, 2 C. C. A. 335. The plaintiff was present at the foreclosure sale, and does not plead ignorance.

His next excuse is that he "was repeatedly and frequently advised by the said administrator that his counsel and the counsel for the said John W. Cobb were negotiating and in progress for a settlement; that said counsel for said administrator and said E. M. Reed counsel for said Cobb were friends of intimate professional and personal relations and associations. Such condition of things continued without result, and, as complainant is informed and believes, and upon such avers, that with the knowledge of and at the behest of said John W. Cobb, said counsel for said administrator and said counsel for said Cobb were, tacitly, if not actually, in harmony to postpone and prevent any settlement, and such has been the result." If it be assumed that the counsel for the administrator was acting as counsel for the plaintiff, his inaction is no excuse in the absence of instructions by the plaintiff that he was ready to redeem.

His next excuse is that until he obtained the assignment from the administrator he could not bring this bill, and that it was not until 1903 that he succeeded in getting that assignment. That is not so. His right to redeem belongs to him as one of the heirs to whom the land descended subject to the mortgage.

There is one allegation which remains to be considered. It is that contained in paragraph No. 7, succeeding paragraph 23. It is there in substance alleged (as we understand it) that "when the said [original] documents were produced in court," the plaintiff "discovered" that a fraudulent alteration had been made in the mortgage of the Patuisset property which rendered that mortgage void. The alteration consisted in the erasure of the numbers 327 and 328 in the enumeration of lots originally contained in the Patuisset property previously sold, and therefore not included in the mortgage. As to this the amended bill contains this state-

ment: "Complainant has since the commencement of this action obtained knowledge of and now asserts his charges as a fact that at the time of obtaining said so-called mortgage and said so-called deed, collateral thereto (being all one inseparable transaction) by fraud, trickery, deceit and overreaching, the defendant John W. Cobb with malicious intent and in aggravation of his fraudulent practices in obtaining the said so-called mortgage and so-called deed made or procured to be made fraudulently and with felonious intent of effectually defrauding said Dexter Marvel, certain erasures (forgeries) in said so-called mortgage." It may be doubted whether this amendment to the bill is to be construed on the whole to state anything more than the fact that an erasure appeared on the face of the original mortgage when it was produced in court. But assuming in favor of the plaintiff that this is not so and that this amendment is an allegation that the mortgage was rendered void by a fraudulent alteration made by the defendant, his remedy is a writ of entry. See, for example, *First Baptist Church of Sharon v. Harper*, 191 Mass. 196, 77 N. E. 773.

Decree affirmed.

(200 Mass. 194)

### HALL v. HALL.

(Supreme Judicial Court of Massachusetts.  
Bristol. Nov. 24, 1903.)

#### 1. COURTS (§ 194\*)—COURTS OF INFERIOR JURISDICTION—DISTRICT COURTS—APPEAL—JURISDICTION.

On appeal from the district court, the jurisdiction of the superior court is wholly appellate.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 194.\*]

#### 2. COURTS (§ 194\*)—DISTRICT COURTS IN CITIES—BRISTOL DISTRICT COURT—SCOPE OF RELIEF ON APPEAL.

The jurisdiction of the superior court on appeal from the district court being wholly appellate, it could only render such judgment and try such issues as the district court could have rendered and tried.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 194.\*]

#### 3. COURTS (§ 168\*)—DISTRICT COURT—AMOUNT INVOLVED.

The district court would not have jurisdiction of an action for damages in the sum of \$2,000 for money had and received, so that its judgment would be void.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 168.\*]

#### 4. COURTS (§ 193\*)—DISTRICT COURTS IN CITIES—AMENDMENT—AMOUNT OF DAMAGES.

In an action in the district court for damages in the sum of \$2,000, it could allow an amendment reducing the damages alleged so as to give it jurisdiction.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 193.\*]

#### 5. COURTS (§ 194\*)—DISTRICT COURTS IN CITIES—AMENDMENTS ON APPEAL—SCOPE AFFECTING JURISDICTION.

While, under Rev. Laws 1902, c. 173, § 23, providing that the superior court, on appeal

from a district court, may order defendant to plead in the usual manner, when the case shall be tried on the issues as joined, amendments may be allowed in the superior court, they must be such as could have been made below, if they affect the jurisdiction of the lower court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 194.\*]

#### 6. COURTS (§ 194\*)—NATURE OF RIGHT.

The right of appeal to the superior court from a district court is wholly statutory.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 194.\*]

#### 7. COURTS (§ 194\*)—DISTRICT COURTS IN CITIES—AMENDMENTS ALLOWABLE ON APPEAL.

Plaintiff sued in the district court for \$1,000 money had and received, and, on appeal, the superior court allowed an amendment increasing the ad damnum to \$2,000, which amount was beyond the jurisdiction of the district court. Rev. Laws 1902, c. 173, § 97, provides that, upon appeal to the superior court from a district court, the case shall be tried as if originally commenced there. *Held*, in view of the history of the statute, that its purpose was to enable the case to be determined on appeal without regard to the decision below, and did not authorize an amendment in the superior court alleging damages in a greater sum than the district court had jurisdiction to award.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 194.\*]

Appeal from Superior Court, Bristol County; Robert F. Raymond, Judge.

Action by Helen M. Hall against Benjamin Hall. From an order allowing a motion to amend the declaration in the superior court, and from a judgment for plaintiff, defendant appealed. Judgment reversed, and order set aside.

David F. Slade, for appellant. Frank A. Pease, for appellee.

MORTON, J. This action was brought in the Second district court of Bristol, the jurisdiction of which is limited to one thousand dollars. The ad damnum of the writ was \$500, and the declaration, which was for money had and received, alleged that the defendant owed the plaintiff \$400. Subsequently the plaintiff was allowed in that court to amend her writ by making the ad damnum \$1,000 instead of \$500 and to amend her declaration by substituting \$1,000 for \$400. Judgment was rendered in the district court in favor of the plaintiff for the sum of \$379.60 and costs of suit, and the defendant appealed therefrom. In the superior court the case was sent to an auditor, who found in favor of the plaintiff in the sum of \$1,032.13 and interest from August 4, 1905, the date of the writ. Before the auditor's report was filed, the plaintiff moved in the superior court to increase the ad damnum from \$1,000 to \$2,000. This motion was allowed, and the defendant appealed from the allowance of it. The case was subsequently heard by the court without a jury, and the court found in favor of the plaintiff and assessed the damages in the sum of \$1,209.66.

The sole question is whether the superior

court had power to allow the amendment increasing the ad damnum from \$1,000 to \$2,000. We do not think that it had. The jurisdiction of the superior court was wholly appellate, and it could only render such judgment and try such issues as the court appealed from could have rendered and tried. *Kelley v. Taylor*, 17 Pick. 218, 221. It is clear that if the ad damnum of the writ as entered in the district court had been \$2,000 the case would have been beyond the jurisdiction of that court. *Ashuelot Bank v. Pearson et al.*, 14 Gray, 521; *Ladd, Ad'm, v. Kimball et al.*, 12 Gray, 139. That court could no doubt have allowed an amendment reducing the ad damnum so as to bring the case within its jurisdiction, but in the absence of such an amendment any judgment rendered by it would have been void. *Hart v. Waitt*, 3 Allen, 532. The case in the appellate court is a mere continuation of the original case, and, though amendments may be allowed in the appellate court (*Rev. Laws, v. 173, § 23*; *Fels v. Raymond et al.*, 134 Mass. 376), the amendments must be such, so far at least as they affect the question of jurisdiction, as could have been made in the court whose judgment is appealed from. See as supporting the general doctrine that an appeal is merely a continuation of the original case, *Union Pac. Ry. v. Ogilvy*, 18 Neb. 638, 26 N. W. 464, and *Bickett v. Garner*, 21 Ohio St. 659.

The plaintiff contends that the superior court had power to allow the amendment under *Rev. Laws, c. 173, § 97*, which provides, with certain exceptions, not now material that, after an appeal from "the judgment of a police, district or municipal court or trial justice in a civil action" has been entered in the superior court, the case "shall be there tried and determined as if it had been originally commenced there." But the object of this provision is simply to enable parties to have their rights determined in the appellate court without regard to any judgment or determination that may have been rendered in the court below. *Lew v. City of Lowell*, 6 Allen, 25, 27; *Ball v. Burke*, 11 Cush. 82. The right of appeal is wholly a statutory right and without some such provision as that referred to parties would be confined to the issues and evidence presented in the court below. That this is the true construction of the statute is also shown, we think, by its history. See *St. 1697, pp. 282, 283, c. 8, §§ 1, 2*; 1 Acts & Resolves, Province Massachusetts Bay, 282; *St. 1783, p. 608, c. 42, § 6*; *St. 1826, p. 152, c. 89, § 2*; *Rev. St. 1836, c. 85, § 13*; *Id. c. 87, § 36*; *Gen. St. 1860, c. 120, § 25*; *Id. c. 116, § 32*; *Pub. St. 1882, c. 155, § 28*; *Id. c. 154, § 39*; *St. 1893, c. 396, § 24*; *Rev. Laws, c. 173, § 97*.

The construction contended for by the plaintiff would require us to import into the statutes an exception in appealed cases to

the limit of the jurisdiction of the court appealed from, notwithstanding no such exception has ever been incorporated into any of the statutes relating to appeals from justices of the peace, trial justices or from police, district, or municipal courts. This, though not conclusive, furnishes a strong argument against the soundness of the construction contended for.

The plaintiff relies upon cases from New York and Wisconsin. *Jackson v. Covert's Adm'rs* (N. Y.) 5 Wend. 139; *Palmer v. Wyllie*, 19 Johns. (N. Y.) 276; *Dressler v. Davis*, 12 Wis. 58; *Hare v. Marsh*, 61 Wis. 435, 21 N. W. 267, 50 Am. Rep. 141. The statute in New York differs somewhat from our own statute, and the highest court in Wisconsin was of opinion that their own statute so closely resembled that of New York as to warrant them in following the decisions of the courts of that state. It is perhaps a matter on which courts of last resort would differ, but we think that the construction which we have given to our own statute is the correct one.

Judgment reversed. Order allowing motion set aside.

(236 Ill. 554)

CHICAGO TITLE & TRUST CO. v. DANFORTH et al.

(Supreme Court of Illinois. Oct. 28, 1908.  
Rehearing Denied Dec. 2, 1908.)

RECORDS (§ 15\*) — ABSTRACTS OF TITLE — RIGHTS OF ABSTRACTOR—COPYING COUNTY ABSTRACT BOOKS.

Act May 31, 1887 (*Laws 1887, p. 258*; *Hurd's Rev. St. 1903, c. 115*) § 21, in amendment of the act of 1874 (*Rev. St. 1874, c. 115, § 12*), provides that "all records," indices, abstract and "other books" kept in the office of any recorder, shall be open to public examination, and that all persons shall have free access for examination thereof, and shall have the right to take memoranda and abstracts thereof without fee. Act June 16, 1887 (*Laws 1887, p. 258, § 1*, as amended by *Laws 1903, p. 291, § 1*), makes it the duty of the recorder to keep a complete set of books, so as to enable him to furnish perfect abstracts of title to real estate, but provides that nothing in the act shall be construed to empower the recorder to prevent the public from examining and taking memoranda from all records, indices, and other books, but that it shall be his duty to allow all persons without fee to examine them and take memoranda. *Held*, that a person or corporation engaged in the abstract business may copy the abstract books belonging to the county, for the purpose of making and selling abstracts in competition with the recorder.

[Ed. Note.—For other cases, see *Records, Cent. Dig. § 19*; *Dec. Dig. § 15\**]

Appeal from Appellate Court, First District, on appeal from Circuit Court, Cook County; Thomas G. Windes, Judge.

Bill by the Chicago Title & Trust Company against Jerome J. Danforth and others. From a judgment of the Appellate Division (137 Ill. App. 333), affirming a decree dis-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

missing the bill, complainant appeals. Affirmed.

The Chicago Title & Trust Company, in its capacity of a taxpayer of Cook county, filed a bill against Jerome J. Danforth, the Abstract Construction Company, the Real Estate Title & Trust Company, Abel Davis, as recorder of Cook county, and the county of Cook, to enjoin the three first-named defendants from copying the abstract books or tract indices belonging to Cook county, and to enjoin the last-named two defendants from permitting the other defendants to make any such copies, either verbatim or substantial. The bill also prayed for a return to the county of Cook of all such copies of said books as may have been made, and for an accounting for any compensation that may have been received for the making of abstracts of title from the copies of the abstract books or tract indices which may have wrongfully come into the hands of the three defendants first above named. All of the defendants below, other than the county of Cook and the recorder, filed a general demurrer to the bill in its amended form, which was sustained by the circuit court and the bill dismissed for want of equity. The recorder and Cook county answered the bill. The former admits all of the allegations of the bill, and joins in the prayer for relief, and the latter by its answer admits the substance of the bill, but denies that the complainant is entitled to any relief. Upon an appeal from a decree dismissing the bill for want of equity the Appellate Court for the First District affirmed the decree below. This appeal is prosecuted by the complainant below from the judgment of affirmance in the Appellate Court. From the averments of the amended bill it appears that the recorder of Cook county caused to be made, at the expense of the county, a set of abstract books, and that the recorder used such abstract books in supplying the public with abstracts of land titles in that county, in accordance with the provisions of, and for the compensation provided in, "An act to authorize recorders of deeds in counties where recorders of deeds are elected to keep abstract books, make abstracts and fixing the fees and compensation therefor" approved June 16, 1887, in force July 1, 1887. The bill sets out in detail when and how these abstract books were made, and the cost of the same to the county. It appears, further, from the bill that the Abstract Construction Company is a corporation organized in 1904, with a capital stock of \$200,000, and that Jerome J. Danforth is president of said company; that said company has been engaged in copying the abstract books for something over a year; that a short time before the filing of the bill the Real Estate Title & Trust Company, another corporation, was organized, with a capital stock of \$1,000,000, and that the Abstract Construction Company has assigned and transferred to the Real Es-

tate Title & Trust Company all of the abstract books, tract indices, and other information which had been compiled by the Abstract Construction Company from the abstract books belonging to Cook county. The bill is framed on the theory that a private person or corporation engaged in the abstract business has no legal right to copy the abstract books belonging to the county, for the purpose of making and selling abstracts to its customers in competition with the recorder. Appellant's contention is that the abstract books are a species of public property, and that the copying of such books by a private abstract company for use in its business is such a misappropriation of public property as will give a taxpayer standing in a court of equity to prevent by injunction. Appellees' contention is that the abstract books are public records, and that any person has the legal right to inspect such records, and make copies or memoranda thereof, and that, conceding that the books themselves are public property, the mere making of copies from the books is not in any sense an appropriation of the property itself; and, finally, appellees contend that appellant has no such interest, by virtue of being a taxpayer, as will enable it to maintain this bill.

Harrison B. Riley and Charles L. Bartlett (Wilson, Moore & McIlvaine, of counsel), for appellant. Darrow, Masters & Wilson, Kraus, Alschuler & Holden and Charles T. Farson, for appellees.

VICKERS, J. (after stating the facts as above). The labor of the court has been greatly increased in this case by the unnecessary length of the briefs counsel have seen fit to file. There are no questions of fact involved, and the questions of law are not more difficult than the majority of questions with which this court is required to deal, yet appellant has filed a brief of more than 200 pages, and appellees have filed one equally as large. In addition to the main briefs, appellant has filed a reply brief consisting of 77 pages, which is largely made up of a mere reiteration of what is contained in its main brief. Thorough and painstaking investigation is in all cases to be encouraged and commended, and when properly and intelligently carried on, it ought to result in the elimination of collateral and immaterial matters, and the presentation of the controlling questions involved so clearly that they can be readily decided. The mistake counsel in this case have made is in attempting to make a compilation of all the law that can be found upon the subjects treated. The result of their efforts is that they have gotten together the material out of which proper briefs and arguments might have been constructed, leaving the court to cull, out of the nearly 500 pages of printed matter, such arguments and authorities as are helpful in determining the question involved. If the

briefs in this case had been limited to one-third their length, they would have been more useful and less burdensome to the court.

The principal question presented in this record is the proper construction to be given to the statutes passed in 1887 in relation to the keeping of abstract books by recorders. Before coming directly to the acts of 1887, it is important to have before us the state of the law prior to the enactments in question. In the revision of our statutes of 1874 (Hurd's Rev. St. 1905, c. 115), the Legislature passed an act to revise the law in relation to recorders, section 12 of which provided that the recorder shall keep an entry book, a grantors' index, a grantees' index, and an index to each book of records. The fifth clause of said section 12 reads as follows: "When required by the county board, an abstract book, which shall show by tracts every conveyance or incumbrance recorded, the date of the instrument, time of filing the same, the book and page where the same is recorded; which book shall be so kept as to show a true chain of title to each tract and the incumbrances thereon, as shown by the records of his office." It will be noted that there are several defects in clause 5 above quoted, the most important of which is that the statute only authorizes the keeping of abstract books showing a chain of title as "shown by the records of his office." The act made no provision for keeping any records of judgment liens, execution and tax sales, and other judicial proceedings which are essential to a complete abstract. The act not only failed to define the duties and fix the compensation for the performance thereof, but it left the right of the public to inspect and use such books to be determined without the aid of legislation. These defects in the law of 1874 no doubt led the Legislature in 1887 to pass an act, entitled "An act to amend the act of 1874 by adding thereto another section," which is found as section 21 of chapter 115 of Hurd's Revised Statutes of 1905, and is as follows: "All records, indices, abstract and other books kept in the office of any recorder, and all instruments filed for record therein shall, during office hours, be open for public inspection and examination; and all persons shall have free access for inspection and examination to such records, indices, books and instruments, which the recorders shall be bound to exhibit to those who wish to inspect or examine the same; and all persons shall have the right to take memoranda and abstracts thereof without fee or reward." The above act was approved May 31, 1887 (Laws 1887, p. 258) and in force July 1, 1887.

At the same session of the Legislature another act was passed, entitled "An act to authorize recorders of deeds in counties where recorders of deeds are elected to keep abstract books to make abstracts of title, and

fixing the fees and compensation therefor," which was approved June 16, 1887, and in force July 1, 1881 (Laws 1887, p. 256). This act makes it the duty of the recorder, in a county where the recorder is elected, to keep abstract books showing all conveyances and incumbrances and judicial proceedings affecting the title to real estate, indices to tax sale books, forfeiture records, and, in short, a complete set of books, so as to enable the recorder to furnish perfect abstracts of title to real estate. The act fixes the fees that the recorder shall charge for abstracts, and requires him to give a bond in the sum of \$20,000, conditioned to secure the accuracy and correctness of any and all such abstracts as he might make, to indemnify any and all persons purchasing abstracts from the recorder for loss or damage which they might sustain by reason of any errors, mistakes, or omissions in such abstracts. A proviso was added to section 1 of this act, as follows: "Provided, that nothing in this act shall be construed to empower the recorder to prevent the public from examining and taking memoranda from all records and instruments filed for record, indexes and other books in his official custody, but it shall be his duty at all times, when his office is or is required by law to be open, to allow all persons without fee or reward to examine and take memoranda from the same." This act was amended in 1903 by the addition of two new sections (Laws 1903, p. 291), one of which reduced the amount of the bond required to be given by the recorder from \$20,000 to \$10,000, and provided that the bond was to be for the indemnity of the county, to reimburse the county for any loss or damage which the county might be required to pay by reason of errors or omissions of the recorder in any abstract that he might make. This section made the county liable directly to parties injured or damaged through errors, mistakes, or omissions of the recorder in making abstracts. The other added section provided for setting apart 5 per cent. of all fees received by the recorder for abstracts, in a special indemnity fund, until such fund should reach the sum of \$100,000, when the payments thereto were to be reduced to 2½ per cent. and continue at the rate of 2½ per cent. as long as said fund remained \$100,000 or more, and whenever it should fall below said sum, the payments at the rate of 5 per cent. should be resumed. This fund was required to be paid to the county treasurer, who was to invest such fund in United States, state, county, or municipal bonds, and report annually the amount of interest received, and it was provided that said fund should be held to satisfy judgments obtained against the county for loss or damage, as aforesaid, and the payment thereof was to be made only upon the order of the county board.

The main contention of the parties is whether, under the law, a private abstract

company has the right to make up a set of abstract books from the data obtained from the abstract books of the recorder. In the view that we take of this controversy it is not necessary to resort to common-law authorities or analogies, since it is one to be determined exclusively under the statutes above referred to. In the outset it is to be observed that the act of June 16, 1887, does not attempt to create a new office, but the duty in relation to keeping abstract books and making abstracts of title is added to the duties of the recorder. Original abstract books, whether made by the recorder or by a private individual, must be made from an examination of the original records kept in the various public offices in the county. Appellant admits, both in its bill and briefs, that any private person or corporation desiring to do so may make a set of abstract books from the original sources of information. In its bill appellant avers that "it is perfectly practicable to make up from the records of instruments, and court and other records, a complete set of such abstract books or tract indices, in the same manner and by the same methods that the said recorder's abstract books have been made up, and every subsisting set of such abstract books or tract indices, whether in public or private hands, excepting those of defendants hereinafter named, have been so made up." It is conceded that the expense of making up a set of abstract books from the original sources of information would be five times the amount that it would cost to make such abstract books from the compiled data of the records. The supposed injury which is sought to be prevented by the injunction is the loss to the county in revenue, which may result from competition if appellants are permitted to go into the abstract business with books made by copying those kept by the recorder. The logic of appellant's contention is that the recorder should enjoy a monopoly of the abstract business in Cook county, excepting in so far as his competitors might divide the business by the use of books made from the original records. There is no averment in the bill from which it may be assumed that, if appellees are enjoined from the use of the abstract books, they will not resort to the original records and make such abstract books therefrom. In fact, the bill shows that there are other sets of abstract books, whether few or many, that are in use in Cook county, and have thus been made from the original records. Presumably the only effect of granting the injunction in this case would be to compel appellees to resort to the original records, instead of the abstract books, for their material. The increased cost of compiling abstract books from the original records, which is suggested in the bill, would have no effect upon the competition with the recorder's office after such books were completed. If it had any effect, it would tend

to increase the efforts of such competing abstract company, for the reason, upon appellant's showing here, it would have five times as much capital invested in its abstract plant, and therefore under the necessity of doing a larger business in order to make a profit. If appellant desired to increase the revenue of the recorder's office for the making of abstracts, then logically it ought to file a bill to enjoin all persons from making abstract books from the original records. If such a bill could be maintained, then the monopoly of the recorder would ultimately become complete, and that office would have entire control over the business of furnishing all abstracts of title, but, confessedly, this cannot be done. The right of any person to inspect and make memoranda from the original records, with a view of engaging in the furnishing of abstracts of title for compensation, is, as already indicated, an admitted fact upon the record of this case. Is there, then, any warrant in law for discriminating between the public records which the recorder keeps in connection with his abstract business and the original records from which these books were made?

Until the passage of the act of May 31, 1887, there was no statute purporting to give any person the right to examine any of the records in the recorder's office. The right existing prior to that time was only the right guaranteed by the common law. The extent and limitation of this right is not involved here. The act above referred to provides that "all records, indices, abstract and other books kept in the office of any recorder, and all instruments filed for record therein, \* \* \* the recorders shall be bound to exhibit to those who wish to inspect or examine the same; and all persons shall have the right to take memoranda and abstracts thereof, without fee or reward." This statute enlarged the common-law right by extending it to all persons, regardless of whether such persons had a special interest, which was required as a basis of the right at common law. It will be noted that by this statute the right to inspect, examine, and take memoranda and abstracts therefrom extends to all the records in the recorder's office, including the abstract and other books. We are wholly unable to differentiate between the right to inspect and examine and take memoranda and abstracts from abstract books and the other records required by law to be kept in the recorder's office. There is as much reason for granting the one as the other, and we are unable to see how it can be said, as appellant contends, that the law will freely permit the inspection and examination of all public records kept by the recorder, save and except only one particular record known as the "abstract book," and yet such appears to be the logic of appellant's bill.

The right to inspect records and make memoranda therefrom is limited to such rec-

ords as the recorder is required by law to keep and as to these the right must necessarily be exercised subject to such reasonable regulations as the recorder sees proper to make for the orderly government of his office. There is no charge that appellees are not conforming to such regulations, if any have been made. In the view that we take of this case appellees are simply exercising the rights which they have under the statute of May 31, 1887, and the proviso in the act of June 16, 1887. This view of the case renders it wholly unnecessary to discuss the right of appellant, in its capacity of taxpayer, to file this bill. On this question we do not find it necessary to express any opinion.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

CARTER, J. (specially concurring). I agree with the conclusion, but not in all that is said in the opinion.

(236 Ill. 612)

#### PEOPLE v. GLOWACKI.

(Supreme Court of Illinois. Dec. 2, 1908.)

INDICTMENT AND INFORMATION (§ 3\*)—OFFENSES PUNISHABLE BY INDICTMENT—CONSTITUTIONAL AND STATUTORY PROVISIONS—“FINE OR IMPRISONMENT OTHERWISE THAN IN THE PENITENTIARY.”

Const. art. 2, § 8, provides that no person shall be held to answer, unless on indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment otherwise than in the penitentiary, etc. Municipal Court act 1905 (Hurd's Rev. St. 1905, p. 635, c. 37) § 2, par. 3, as amended by Laws 1907, p. 227, provides that the Chicago municipal court shall have jurisdiction of all criminal cases in which the punishment is by fine or imprisonment otherwise than in the penitentiary, and section 27 declares that all criminal cases in the municipal court in which the punishment is by fine or imprisonment otherwise than in the penitentiary may be prosecuted by information. *Held*, that the words “fine or imprisonment otherwise than in the penitentiary” include every class of offense where the punishment is either by fine or jail sentence, or both, and hence it is only such offenses as are punishable either by fine or imprisonment in the penitentiary, or both by fine and imprisonment in the penitentiary, that must be prosecuted by indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 23; Dec. Dig. § 3.\*]

Error to Municipal Court of Chicago; John R. Newcomer, Judge.

John B. Glowacki was convicted of living in adultery, and he brings error. Affirmed.

Gallagher & Messner, for plaintiff in error. W. H. Stead, Atty. Gen., and John J. Healy, State's Atty. (J. Kent Greene, of counsel), for the People.

CARTER, J. An information was filed in the municipal court of Chicago June 20,

1908, charging plaintiff in error with unlawfully living and cohabiting in a state of adultery with one Helen Ratajczak. On the trial in that court the jury found plaintiff in error guilty, and he was sentenced to pay a fine of \$400 and costs, and to stand committed until such fine and costs were paid. To reverse that sentence this writ of error was sued out.

The sole question raised by plaintiff in error is that he could only be tried on the offense charged, upon an indictment by a grand jury, under section 8, art. 2, of the Constitution, which reads: “No person shall be held to answer for a criminal offense, unless on indictment of a grand jury, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army and navy, or in the militia, when in actual service in time of war or public danger: Provided, that the grand jury may be abolished by law in all cases.” The municipal court act, as passed in 1905, provided (Hurd's Rev. St. 1905, p. 635, c. 37, § 2, par. 3), that said court should have jurisdiction in “all criminal cases in which the punishment is by fine or imprisonment otherwise than in the penitentiary,” etc. This paragraph of said section 2 was amended in 1907 (Laws 1907, p. 227) by adding after the word “penitentiary” the words “and all other criminal cases which the laws in force from time to time may permit to be prosecuted otherwise than on indictment by a grand jury.” Section 27 of that act as it was originally passed and still stands provides that all criminal cases in the municipal court “in which the punishment is by fine or imprisonment otherwise than in the penitentiary” may be prosecuted by information. Section 11, Crim. Code (Hurd's Rev. St. 1905, p. 660, c. 38), provides that a person guilty of living in an open state of adultery “shall be fined not exceeding \$500, or confined in the county jail not exceeding one year.” Plaintiff in error contends that only such offenses as may be punished by fine only, or by imprisonment (otherwise than in the penitentiary) only, can be prosecuted upon information, and that an offense which may be punished in the alternative, either fine or imprisonment, otherwise than in the penitentiary, cannot be prosecuted upon information. In other words, he contends that the meaning of section 8, art. 2, of the Constitution is that there must be an indictment, except, first, in that class of cases where the offender can be punished only by fine; or, second, in that class of cases where the offender can be punished only by imprisonment “otherwise than in the penitentiary.” We do not think this is the meaning of that constitutional provision. A decision of this question requires only a construction of the Constitu-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion, as, plainly, under the provisions of the municipal court act (either as originally passed or as amended in 1907) the Legislature intended to give to that court full power to try upon information all criminal offenses that under said section 8, art. 2, of the Constitution could be tried without an indictment by the grand jury, the wording of both paragraph 3 of section 2 and paragraph 27, as above quoted, giving jurisdiction to that court to try on information without indictment, being in the identical language of said constitutional provision authorizing trial on information. The words of the Constitution granting this power, namely, "in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary," were intended, we think, to base the distinction between cases that could be tried on information and those which could only be tried on indictment of a grand jury upon the fact as to whether they were punishable by imprisonment in the penitentiary or whether the punishment was by imprisonment otherwise than in the penitentiary, or by fine, or both. The words "fine or imprisonment otherwise than in the penitentiary" include every class of offenses where the punishment is either by fine or jail sentence, or both. Manifestly, punishment by fine or imprisonment exists when it is either or both.

If the meaning of this constitutional provision were doubtful, then uniform, long-continued, and contemporaneous construction by public officials in the execution of the law would have great weight with the courts in deciding as to the proper construction. *Cook County v. Healy*, 222 Ill. 310, 73 N. E. 623; *Nye v. Foreman*, 215 Ill. 285, 74 N. E. 140. The legislative and executive departments of the state, as well as the courts, have construed that section of the Constitution as authorizing offenses, when the punishment is less than imprisonment in the penitentiary, whether it is by fine or imprisonment in the county jail, or both, to be tried on information, although the question was never squarely raised and passed on by the courts. The county court act of 1872 provided that that court should have "exclusive jurisdiction in all criminal cases and misdemeanors where the punishment is not imprisonment in the penitentiary or death," etc., and also provided that criminal offenses should be prosecuted in the said court either on affidavit of some competent witness or information of the state's attorney. *Laws 1871-72*, p. 326. The county court act as amended, revised, and re-enacted in 1874 retained the exact words as to jurisdiction in criminal offenses (1 *Starr & Orr. Stat.* [1896 Ed.] p. 1178), and also retained substantially the same provisions as to the right to prosecute such offenses on information (*Id.* p. 1189). The section of that act which provides for criminal jurisdiction

was again amended in 1877 (*Laws 1877*, p. 77), and the same language giving criminal jurisdiction to that court was retained. *Id.* p. 1178. In *Myers v. People*, 67 Ill. 503, this court in 1873 had before it a prosecution for selling liquor without a license, the defendant having been convicted in the county court. The judgment of the county court was affirmed, both in the circuit court and in this court. In *Swanson v. People*, 89 Ill. 589, an information had been filed in the county court for selling intoxicating liquor without a license. In *Parris v. People*, 76 Ill. 274, there was a prosecution in the county court for malicious mischief. *Gallagher v. People*, 120 Ill. 179, 11 N. E. 335, was a prosecution for selling intoxicating liquor to a person in the habit of getting intoxicated. Both this court and the Appellate Court affirmed the judgment of the county court. *Long v. People*, 135 Ill. 435, 25 N. E. 851, 10 L. R. A. 48, was a prosecution for assault with a deadly weapon. Here, again, the judgment of the county court was sustained by both the Appellate and Supreme Courts. All of these cases above referred to were prosecuted upon information, and the punishment for the offense in each was fine or imprisonment in the county jail, or both. In none of these cases in this court, nor in others of the same nature that have been decided by the Appellate Court, was the question of jurisdiction to try the offender by information raised or suggested, although it is worthy of note that in some of them the jurisdiction of the county court was questioned on other grounds, and it is very evident that, had the meaning of this section of the Constitution been clearly and obviously as contended for by counsel for plaintiff in error, it would surely have attracted the attention of counsel or of the courts. *Hankins v. People*, 106 Ill. 628. Moreover, in discussing the right of a person charged with an offense to waive a trial by jury, we have had occasion to construe the provision of the Constitution here under discussion. In *Brewster v. People*, 183 Ill. 143, 149, 55 N. E. 640, 641, we stated: "Section 8, by the use of the words 'in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary,' evidently refers to misdemeanors, and its plain meaning is that a person may be held to answer for a misdemeanor without indictment by a grand jury." Again, in *Paulsen v. People*, 195 Ill. 507, 516, 63 N. E. 144, 147, we stated: "Grand juries have not been abolished, and consequently no person can be held in this state to answer for a criminal offense which may be punished by imprisonment in the penitentiary, except upon the indictment of a grand jury. \* \* \* Said section 8, art. 2, of the Constitution permits the prosecution, otherwise than by indictment, of all violations of the criminal

laws which involve only punishment by fine or imprisonment in the common jail." The reasoning in these two cases is practically decisive against the plaintiff in error's contention. The Legislature, when it passed the municipal court act, and for nearly 40 years before, and the prosecuting officers, and all the courts for the same length of time have placed the same construction upon this constitutional provision. That its true intent is as heretofore set out, finds further support in the fact that under the common law all misdemeanors could be prosecuted upon information, and all offenses above that grade could only be prosecuted by indictment. 4 Blackstone, \*308-310; 1 Chitty on Crim. Law, \*845; 22 Cyc. 186. The cases of *State v. Yates*, 36 Neb. 287, 54 N. W. 429, *State v. Crowell*, 116 N. C. 1052, 21 S. E. 502, *Ex parte City Council*, 79 Ala. 275, and others, cited and relied on by plaintiff in error, are all clearly distinguishable from this case, as the wording of the various statutes or Constitutions therein construed is different from that here under discussion.

We find no fault with the plaintiff in error's contention that a penal statute cannot be extended by implication so as to bring within its operation a case not within its words. *Buck v. Danzenbacker*, 37 N. J. Law, 359, and other decisions of like import. But that rule does not apply here. The sole question is, What was the intention in the adoption of this constitutional provision? Equally in strict interpretation as in liberal the object is simply to ascertain the intent, disregarding captious objections or the demands of an exact grammatical propriety. *Bishop on Stat. Crimes* (3d Ed.) §§ 200, 212; 2 *Lewis' Sutherland on Statutory Const.* (2d Ed.) par. 361. The meaning we have herein given to the section of the Constitution in question is not an implied one, but can be fairly considered as expressed by the language used, and whatever doubt might arise as to its interpretation is settled by the long-continued and uniform construction that has been placed thereon.

We conclude, therefore, that under the Constitution and the municipal court act the municipal court of Chicago has jurisdiction to try on information all violations of criminal laws punishable by fine or by imprisonment otherwise than in the penitentiary, or by both fine and such imprisonment. If the offense is one that may be punished either by fine or by imprisonment in the penitentiary, or both by fine and imprisonment in the penitentiary, then it can only be prosecuted under an indictment. *Paulsen v. People*, supra.

The judgment of the municipal court will be affirmed.

Judgment affirmed.

(236 Ill. 514)

## PEOPLE v. HAGENOW.

(Supreme Court of Illinois. Oct. 28, 1908.

Rehearing Denied Dec. 3, 1908.)

### 1. CRIMINAL LAW (§ 370\*)—EVIDENCE—OTHER OFFENSES—SHOWING GUILTY KNOWLEDGE OR INTENT.

As a general rule, evidence of a distinct substantive offense cannot be admitted in support of another offense; but, where it is necessary to show guilty knowledge or a particular intent to establish the offense charged, proof of other acts of the same character as those charged is admissible.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 825-829; Dec. Dig. § 370.\*]

### 2. CRIMINAL LAW (§ 372\*)—"MURDER"—PROCURING ABORTION—EVIDENCE—CHARACTER AND BUSINESS OF ACCUSED.

In a prosecution for murder, under Cr. Code, § 3 (*Hurd's Rev. St.* 1905, c. 38, § 3), making it murder to produce an abortion or miscarriage on a pregnant woman unless done as necessary for the preservation of the mother's life, if the mother's death results therefrom, where accused claimed to be a regularly licensed physician, and it appeared that decedent was pregnant when she went to accused's house and miscarried there, because of a ruptured uterus, for which accused was responsible, and died from resultant peritonitis, to overcome the presumption that accused operated in good faith to save decedent's life, and to show that she must have known that decedent was pregnant, and that she operated upon her with the criminal intent to cause her to abort, evidence was admissible that accused had advertised to treat pregnant women, claiming to be an expert obstetrician with long experience and to know of a "new scientific painless method," whereby "no operation was necessary," etc.; that for 27 years she had been constantly engaged in causing abortions and miscarriages; that she kept a place for treatment of such cases; that she was surrounded by professional abortionists; and that she had caused the death of women by such operations within a few years prior to her indictment.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 833; Dec. Dig. § 372.\*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4632-4637; vol. 8, pp. 7726, 7727.]

### 3. CRIMINAL LAW (§ 370\*)—EVIDENCE—OTHER OFFENSES—PREJUDICIAL EFFECT.

Evidence of other similar offenses by accused being admissible to show her guilty knowledge and intent, and that she had the means and opportunity to commit the offense charged, was competent, though, when properly admitted, it might prejudice the jury against accused; since, if evidence is admissible under any issue or for any purpose, it should not be excluded.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 825-829; Dec. Dig. § 370.\*]

### 4. CRIMINAL LAW (§ 783\*)—INSTRUCTIONS—LIMITING EFFECT OF EVIDENCE.

It was proper to limit the evidence to its proper office by instruction.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1876; Dec. Dig. § 783.\*]

### 5. CRIMINAL LAW (§ 407\*)—EVIDENCE—ADMISSIONS—DYING DECLARATIONS.

In a prosecution for murder by performing an abortion resulting in the woman's death, the dying declaration of another woman suffering from the results of an abortion, which was prepared, signed, and read aloud in accused's presence several years previously, she making no denial of the facts stated, to the effect that

accused had produced the abortion, was admissible, not as a dying declaration, but as an admission of accused to show her connection with that woman's death.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 898, 899; Dec. Dig. § 407.\*]

**6. CRIMINAL LAW (§ 476\*)—EVIDENCE—EXPERT EVIDENCE—CAUSE OF WOUNDS—POST MORTEM EXAMINATION.**

In a prosecution for murder by performing an abortion resulting in the woman's death, the cause of decedent's death was a subject for opinion evidence of medical men, and evidence of physicians who had made a post mortem examination that decedent's uterus was punctured and lacerated, the top of it being torn or punched off, and that in their opinion the puncture and laceration were caused by forcing a hard substance through the uterus which had been inserted through the mouth of the womb during life, causing peritonitis, which was the direct cause of death, was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1062; Dec. Dig. § 476.\*]

**7. CRIMINAL LAW (§ 822\*)—INSTRUCTIONS—CONSTRUCTION OF CHARGE AS A WHOLE.**

In a prosecution for murder by performing an abortion resulting in the woman's death, instructions that if decedent died from an operation performed with intent to produce an abortion by accused, or by somebody under her direction, or if accused aided or abetted the operation, and it was not done as necessary to preserve decedent's life, accused was guilty of murder, and that if accused injured decedent, with intent to cause her to abort, and not as necessary to preserve her life, and the injury resulted in her death, accused was guilty of murder, if erroneous, as omitting from the facts necessary to a conviction the element that decedent was pregnant, were not prejudicial in view of another charge expressly making the establishment of decedent's pregnancy a prerequisite to a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1994; Dec. Dig. § 822.\*]

**8. CRIMINAL LAW (§ 822\*)—INSTRUCTIONS—CONSTRUCTION OF CHARGE AS A WHOLE.**

Though certain instructions be defective, it is sufficient if the charge as a whole presents the law with substantial correctness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1990; Dec. Dig. § 822.\*]

**9. CRIMINAL LAW (§ 798½\*)—INSTRUCTIONS—SUBMISSION OF FORM FOR VERDICT OF MANSLAUGHTER.**

In a murder case, where the jury might under the indictment have found accused guilty of manslaughter, and were so charged, but the evidence showed guilt of murder, if of any crime, it was not error to refuse to submit a form for a verdict of manslaughter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1801, 1938; Dec. Dig. § 798½.\*]

**10. CRIMINAL LAW (§ 720\*)—TRIAL—CONDUCT OF COUNSEL—SCOPE OF ARGUMENT.**

The state's attorney in his argument should confine himself to a discussion of the facts disclosed by the evidence, but may comment upon facts deducible from the testimony by direct proof or legitimate inference if they bear on the issues.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1670; Dec. Dig. § 720.\*]

**11. CRIMINAL LAW (§ 720\*)—TRIAL—CONDUCT OF COUNSEL—SCOPE OF ARGUMENT.**

On a trial for murder by performing an abortion resulting in the woman's death, where

there was evidence that accused had for years been a professional abortionist, and that deaths had resulted from her operations, it was not an abuse of the state's attorney's privilege of argument to state that accused had publicly and notoriously been engaged in the business of murder for years.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1670; Dec. Dig. § 720.\*]

**12. HOMICIDE (§ 235\*)—MURDER—EVIDENCE.**

Evidence held sufficient to support a conviction of murder by performing an abortion resulting in the woman's death.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 494; Dec. Dig. § 235.\*]

Scott, Farmer, and Vickers, JJ., dissenting.

Error to Criminal Court, Cook County; A. H. Chetlain, Judge.

Lucy Hagenow was convicted of murder by performing an abortion upon a woman, causing her death, and brings error. Affirmed.

John C. King, Joseph R. Burren, and James D. Power, for plaintiff in error. W. H. Stead, Atty. Gen., and John J. Healy, State's Atty. (James J. Barbour, of counsel), for the People.

HAND, J. The grand jury of Cook county on the 22d day of November, 1907, returned into the criminal court of Cook county an indictment against the plaintiff in error charging her with having caused the miscarriage of, or produced an abortion upon, Annie Horvatch, a woman pregnant with child, on the 4th day of May, 1907, and thereby causing her death. The plaintiff in error was arrested, and, having pleaded not guilty, was put upon trial before a jury and was convicted and sentenced to the penitentiary for the period of 20 years, and she has sued out this writ of error to review said judgment.

The indictment contained four counts. The first count, omitting the formal part, charged "that one Lucy Hagenow, otherwise called Louise Hagenow, otherwise called Ida Von Schultz, late of the county of Cook, on the fourth day of May, in the year of our Lord one thousand nine hundred and seven, in said county of Cook, in the state of Illinois aforesaid, in and upon the body of one Annie Horvatch, in the peace of the people of the said state of Illinois then and there being, unlawfully, feloniously, willfully, and of her malice aforethought, did make an assault, and that the said Lucy Hagenow a certain instrument, a more particular description of which is to the jurors unknown, which she, the said Lucy Hagenow, in the hand of her, the said Lucy Hagenow, then and there had and held, then and there unlawfully, feloniously, willfully, and of her malice aforethought did force, thrust, and insert into the private parts and womb of her, the said Annie Horvatch, she, the said Annie Horvatch, then and there being a woman then and there pregnant with child, with intent then and there to produce the miscarriage of her, the said Annie Horvatch, and that she, the said

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Lucy Hagenow, then and there by the said forcing, thrusting and inserting the said instrument, as aforesaid, into the private parts and womb of the said Annie Horvatic, unlawfully, feloniously, willfully, and of her malice aforethought, caused the miscarriage of her, the said Annie Horvatic, it not being then and there necessary to so then and there cause such miscarriage for the preservation of the life of her, the said Annie Horvatic, as she, the said Lucy Hagenow, then well knew, she, the said Lucy Hagenow, then and there well knowing that the use of said instrument as aforesaid, at the time aforesaid, in the manner aforesaid, would then and there produce such miscarriage; that by reason of said miscarriage in the manner and at the time aforesaid, the said Annie Horvatic, from the said fourth day of May, in the year of our Lord one thousand nine hundred and seven, until afterwards, to wit, the sixth day of May, in the year of our Lord one thousand, nine hundred and seven, in the county of Cook and state of Illinois aforesaid, did languish, and languishing did live, on which said sixth day of May, in the year of our Lord one thousand nine hundred and seven, in the county of Cook and state of Illinois aforesaid, she, the said Annie Horvatic, by reason of said miscarriage, died; and so the jurors aforesaid, upon their oaths aforesaid, do say that she, the said Lucy Hagenow, her, the said Annie Horvatic, in manner and form aforesaid, unlawfully, feloniously, willfully and of her malice aforethought did kill and murder, contrary to the statute and against the peace and dignity of the same people of the state of Illinois."

The second count is the same as the first count, except the word "abortion" is substituted in the second count at the several places therein where the word "miscarriage" occurs in the first count.

The third count, omitting the formal part, charged "that one Lucy Hagenow, otherwise called Louise Hagenow, otherwise called Ida Von Schultz, late of the county of Cook, on the fourth day of May, in the year of our Lord one thousand nine hundred and seven, in said county of Cook, in the state of Illinois aforesaid, in and upon the body of one Annie Horvatic, in the peace of the people of the state of Illinois then and there being, unlawfully, feloniously, willfully, and of her malice aforethought, did make an assault, and that she, the said Lucy Hagenow, in some way and manner and by some means and devices, a more particular description of which is to the jurors unknown, then and there unlawfully, feloniously, willfully, and of her malice aforethought did cause the abortion of her, the said Annie Horvatic, a woman pregnant with child then and there being; that it was not then and there necessary to so then and there cause such abortion for the preservation of the life of the said Annie Horvatic, as she, the said Lucy Hagenow, then and there well knew; that

she, the said Lucy Hagenow, then and there well knew that the use of those means and devices at the time aforesaid, in the manner aforesaid, would then and there produce such abortion; that by reason of such abortion so as aforesaid produced by the said Lucy Hagenow in the manner and at the time aforesaid, the said Annie Horvatic, from the said fourth day of May, in the year of our Lord one thousand nine hundred and seven, until afterwards, to wit, the sixth day of May, in the year of our Lord one thousand nine hundred and seven, in the county of Cook and state of Illinois aforesaid, did languish, and languishing did live, on which said sixth day of May, in the year of our Lord one thousand nine hundred and seven, in the county of Cook and state of Illinois aforesaid, she, the said Annie Horvatic, by reason of said abortion, died; and so the jurors aforesaid, upon their oaths aforesaid, do say that she, the said Lucy Hagenow, her, the said Annie Horvatic, in manner and form aforesaid, unlawfully, feloniously, willfully and of her malice aforethought did kill and murder, contrary to the statute and against the peace and dignity of the same people of the state of Illinois."

The fourth count is the same as the third, except the word "miscarriage" is substituted in the fourth count at the several places therein where the word "abortion" occurs in the third count.

The evidence shows: That on Thursday, the 2d day of May, 1907, Annie Horvatic, with her husband, Michael Horvatic, and three children of a former marriage, the oldest of whom was nine years, lived at 4816 Justine street, in the city of Chicago. That the said Annie Horvatic and Michael Horvatic were married on the 27th day of January, 1907. That on the 2d day of May said Annie Horvatic was in her usual health. That on that day she did the family washing and in the afternoon went by street car to a savings bank in South Chicago, some three miles distant from her home, and drew from her savings \$25 in cash. That at about 6:30 o'clock of the same evening Michael Horvatic, who testified through an interpreter, stated his wife said to him "to go with her, and not to be afraid." That he and his wife went by street car to 480 North Clark street, the home of the plaintiff in error, where they arrived late in the evening. That the plaintiff in error lived in the second flat above the street. That he did not know plaintiff in error, and his wife did not tell him her reasons for going to the home of plaintiff in error. That his wife took no clothing other than she had on her person. That he left his wife in the hall of the building in which plaintiff in error lived. That his wife said to him "to go home; I will stay here." That she told him "to take care of the children and to come and see her on Saturday." That he left his wife at the plaintiff in error's house and went home.

That on Friday afternoon he received the following letter from his wife: "Beloved Mike—I let you know everything is well. Slept very well. Take care of the children. Tell Fanny not to go outside unless she puts a cap and coat on her. If she won't, don't leave her out. You see how she is. You didn't have any coffee at home and you were mad this morning. I will take care you won't be angry. Don't be afraid. There won't be any serious happenings. Will be in the house that day until I go home. Come over Saturday afternoon as you said, and tell the children where you are going, so that they won't go away from the house. Tell them I will come back with you. Nothing else. With love and regards to the children. A. H. 480 North Clark street, care Dr. Hagenow, city." That on Saturday afternoon he went to the house of the plaintiff in error. That he found his wife sitting on the bed in a room in the house of the plaintiff in error. That she had on an undershirt, and her hips were covered by bedclothes. That she said she was not feeling well, and that she would remain until Monday. That he returned to his home. That on Sunday afternoon he was summoned by telephone to go to the house of the plaintiff in error. That he arrived at her house at 10 o'clock that night. That he found his wife in a different room. That she was in bed. That a doctor by the name of Rasmussen was present. That his wife was very sick. That his wife wanted a doctor from South Chicago to be called, but that the plaintiff in error said it was too late at night to call the doctor. That he remained until toward morning. That his wife was worse. That he went to the house of Mary Galavitch, who could speak English, and she went with him to the plaintiff in error's house. That, when they arrived, the plaintiff in error told them Annie Horvatic was dead. That she had died at 5 o'clock that morning. That the plaintiff in error gave them a card and directed them to an undertaker in the neighborhood to take charge of the body. That Michael Horvatic stated that he would prefer an undertaker whom he knew. That the plaintiff in error then sent them to the office of Dr. Rasmussen for a death certificate. That they called upon Rasmussen, and he gave them a certificate that Annie Horvatic died of pneumonia and bronchitis.

W. J. Freckleton, an undertaker, testified that he was sent by Michael Horvatic to 480 North Clark street for the remains of his wife; that he arrived about 5 o'clock in the afternoon of the 6th of May; that the plaintiff in error said she was running a private hospital; that he should wait until it was dark and take the body from the house through the alley; that he returned at 9 o'clock the same evening with an assistant; that he had difficulty in getting the body out of the building, as the hall and steps were narrow; that the plaintiff in error said

there was ample room; that her undertaker never had any trouble in getting bodies out the back way; that he took the remains to the South Side, and the body was interred.

It also appears that on the 13th of May the coroner of Cook county caused the remains of Annie Horvatic to be disinterred in the presence of her brother, John Sneller, and others who were present; that Dr. E. R. Le Count, a teacher in Rush Medical College, Dr. Warren J. Hunter, coroner's physician, and Dr. Rudolph W. Holmes, a graduate of Rush Medical College and a specialist in obstetrics and gynecology, made a post mortem examination. They found the vital organs of the body, such as the lungs, the heart, the spleen, and the stomach of Annie Horvatic to be in a healthy and normal condition. They also found that Annie Horvatic had been pregnant, but found no foetus. They found the uterus torn and lacerated, and gave it as their opinion that Annie Horvatic died from the effect of peritonitis, caused by the rupture and laceration of the uterus. They also agreed that it was not necessary to cause Annie Horvatic to abort or miscarry in order to save her life, and they each expressed the opinion she had been pregnant about three months at the time the injuries which they discovered were inflicted upon her, that such injuries were caused during life, and that she lived a few days after they were inflicted.

Plaintiff in error testified that Annie Horvatic came to her place on Thursday evening, May 2d, and that she died Monday morning, May 6th. She said she made an examination of her private parts upon the evening that she came and found her flowing, that Annie Horvatic told her that she had not "come around," and that she had been to see a doctor on the South Side and that he had brought her around. She testified she found no rupture of the uterus or other derangement of the private parts, other than an offensive flow therefrom; that she diagnosed the case as pneumonia, and insisted Annie Horvatic died of pneumonia and bronchitis. She states Annie Horvatic paid her \$15; that she called Dr. Rasmussen, who she admitted she knew had been charged by the public officials as an abortionist.

The state introduced in evidence several advertisements which the plaintiff admitted that she had caused to be published in the Chicago daily newspapers, samples of which are as follows: From the files of the Chicago Daily News of July 24 and July 22, 1890, reading as follows: "Dr. Louise Hagenow; licensed physician; expert; twenty-seven years; female diseases; a new scientific, painless method; no operation; good results; 330 East Division street, near Wells; 10 to 4, 7 to 8." Also from the Record-Herald of March 13, 1905, as follows: "Ida Von Schultz, 480 North Clark street; regular graduate; expert in obstetrics, female complaints, etc., and all difficult cases; twenty-

five years' experience; ladies call or write; near Division; telephone, Dearborn 2." And in the same column, from the Record-Herald of March 13, 1905, and right under that advertisement: "Dr. Lucy Hagenow, licensed physician; specialist in tumors, irregularities, etc.; new scientific, painless method; no operation; success guaranteed; twenty-eight years' experience; private sanitarium, 310 W. Madison." Also from the Record-Herald of March 5, 1905, and from the Chicago Examiner of March 13, 1905, as follows: "Dr. Lucy Hagenow, licensed physician; specialist; all women's troubles; new scientific, painless method; no operation; success guaranteed; twenty-eight years' experience; confinement home, 310 West Madison street."

The state, over the objection of the plaintiff in error, called Police Officer Frank Snyder, who testified, in substance, that on August, 31, 1899, the defendant, who was then known as Louise Hagenow, was brought into a room at St. Elizabeth's Hospital by two detectives. Marie Hecht was lying in bed in the room at the time. The witness wrote out a statement that Marie Hecht there dictated. Marie Hecht signed it, and after it had been read aloud Mrs. Hagenow went to the bedside of the girl, and said in German: "Is it as bad as this, my poor child?" The victim answered: "Yes; see what you have done!" Mrs. Hagenow said: "Why, you had a flow when you came to me, did you not?" Marie said: "I didn't have no flow." Mrs. Hagenow now said: "Yes; you did. Tell these people now you did have a flow." Marie said: "No; I didn't have a flow, and I won't tell the people that I had a flow." This conversation took place in German and the witness understood German. The witness stated that, on seeing the document, his recollection was refreshed as to what the conversation was and as to what he wrote down, and that the words in the document were uttered there in the presence of the defendant, Hagenow, as he had stated. He could not repeat the identical words without having the document before him. The court then allowed the statement to be read. Witness further testified that Marie Hecht is not now living; that he saw her dead in the morgue two days following the making of the statement; that right when the statement was signed Marie Hecht said: "That is the woman who performed the abortion." After the document was signed and the conversation related as having taken place in German, Louise Hagenow did not say anything more in the presence of Marie Hecht. This statement shows that for the sum of \$70 Dr. Hagenow performed an illegal operation for Marie Hecht.

In connection with the testimony of Officer Snyder, the court admitted in evidence the statement of Marie Hecht, the plaintiff in error, which, omitting the formal parts, is as follows: "I am 23 years old, and will be

24 years on the 10th day of November. I was born in Villason county, Luzerne, Switzerland, where my parents still reside. I left Germany four years ago. In January of this year I became acquainted with John Schockweiler, a young man about 20 years old, who is employed in a freight house on the South Side and resides at 140 Orleans street. I had sexual intercourse with him for about five or six times, and in the month of May I noticed I was pregnant, and on Thursday, at 12:30 p. m., August 24, 1899, I went of my own free will to visit Dr. Louise Hagenow, at 330 Division street. She laid me on a lounge and examined me, and after the examination she said she would relieve me of the child for \$75, and that she would take it from me with instruments. 'No,' I said, 'No; I cannot afford to pay you \$75 for the work; I'll give you \$70.' Then she agreed. I then gave her \$70. She first laid me on a lounge and began to use an instrument on me. During that time I suffered considerable pain. I remained on the lounge for about 20 minutes. Then the doctor made me get up and walk about the room. I was so weak I could not walk very long. Then I went and laid down on the bed. The doctor then came in and began to use instruments again. I felt as though I was being cut to pieces, and at about 5:30 p. m. she took the child away from me. I suffered great pain, and the following day, Friday, August 25th, I left and took a car for 941 North Clark street—a friend of mine named Spitzer—where I remained until Monday morning at ten o'clock, August 28th, when I left and was brought to the St. Elizabeth Hospital in a carriage. If I die I desire that all costs and expenses attending my funeral expenses shall be paid out of my savings, which amount to \$300, and which is in the Germania Safe Deposit Vaults, corner of Clark and Germania place. Mr. Gomme, my employer, still owes me \$76 for services rendered after all the aforesaid expenses are paid. I desire that the balance of my money be paid to my parents, John and Anne Hecht, of Villason county, Luzerne, Switzerland. I now see the woman standing at my bedside who performed the abortion."

The state, over the objection of the plaintiff in error, called Dr. A. M. Corwin, who testified, in substance, that between 10 and 15 years ago he was called to the office of Dr. Hagenow, at the corner of West Madison and Hoyne streets, about 8 o'clock in the evening. The defendant said to him at that time: "I am in trouble." The substance of what she said was that she was in trouble and needed aid. At that time her arms were bare to the elbows. Her arms and hands were bloody. She motioned Dr. Corwin to an adjoining room. There he found another woman, whose name he does not remember. There was a strong smell of ether in both rooms. He also saw a woman, apparently well nourished and healthy looking, in bed. A sheet

was covered over her. The ether was much stronger in that room than in the outer room. He took the sheet down, and saw a mass of intestines upon the bare thighs. Upon further examination, after calling another doctor on the telephone, they found that the intestines were protruding from the vagina through a large rent from the abdominal peritoneal cavity. The uterus to the sense of touch seemed normal. They at once replaced the intestines, which were protruding from the vaginal tract, and told Dr. Hagenow she ought to get the case to the hospital, because death would follow shortly. She agreed to do that. Also Sergeant of Police George W. Pearsall, who testified, in substance, that he knew plaintiff in error under the name of Ida Von Schultz in February, 1906. He saw her then at 480 North Clark street, second floor. There were signs in the front of the building, "Dr. Lucy Hagenow, Physician and Midwife," and "Dr. Ida Von Schultz, Physician and Midwife." Witness met defendant at the door, and asked if she was Dr. Hagenow. She said she was not. When asked who she was, she answered: "I am Dr. Ida Von Schultz." The witness took Dr. Hagenow to the Passavant Hospital about 5 o'clock on the afternoon of February 20, 1906, and brought her into the presence of Miss Lola M. Maddison, of Salt Lake City, who was a patient there and a very sick woman. Lola Maddison was in bed. Capt. Healy and the witness and the defendant were there. He asked Lola: "Do you know this woman?" She said: "Oh, yes; that is the doctor." The captain asked: "Is that the doctor who performed the abortion on you?" She said, "Yes." She was asked, "Where did she perform the abortion?" and answered, "In her office, on Clark street." Witness asked her if it was 480 North Clark street. She said, "Yes." Dr. Hagenow stepped up to the side of the bed, rubbed the girl's face with her hand, and said: "Don't talk too much, my girl. It won't do you any good." She then stooped over and whispered something to the girl, but the witness did not hear what it was. Also Mrs. Eva Herndon, a private investigator for the United States postal authorities, who testified, in substance, that she had a talk with Mrs. Hagenow at her home on January 22, 1907. "I asked her her charges for a married woman who was pregnant two months, and she said \$50, and she would take care of her during the time she was there, which would be something like eight days, and that she did her work by applications. That is about all the conversation." The witness further said that on January 15th she had seen the defendant, who at that time responded to the name of Ida Von Schultz, and at that time the witness asked her what her charges would be to take care of a young lady and board her who was two months pregnant. She said it would be \$35 if she only gave her the treatments and did not board her; that a great

many women imagined they were in that condition when they only had other female troubles; that she had a woman that morning who was in the same condition and was not pregnant. That is about the amount of the conversation at that time. On cross-examination the plaintiff in error admitted she was involved in the death of Hannah Carlson, who died from abortion.

The first contention made by the plaintiff in error is that the court erred in admitting evidence of plaintiff in error's connection with crimes not connected with the offense charged in the indictment. The law is well settled in this as it is in all jurisdictions where the common law is in force that as a general rule evidence of a distinct, substantive offense cannot be admitted in support of another offense. *Farris v. People*, 129 Ill. 521, 21 N. E. 821, 4 L. R. A. 582, 16 Am. St. Rep. 283; *Addison v. People*, 193 Ill. 405, 62 N. E. 235. This rule however, has certain well-settled exceptions, and, where it is necessary to show guilty knowledge or a particular intent in order to establish the offense charged in the indictment, proof of other acts of a defendant of the same character as those charged in the indictment may be submitted to the jury, as, for instance, where a defendant is charged with having in his possession or with uttering counterfeit bills or coin (*People v. Seaman*, 107 Mich. 348, 65 N. W. 203, 61 Am. St. Rep. 326), or with receiving stolen property (*Lipsey v. People*, 227 Ill. 364, 81 N. E. 348). Proof that the defendant had in his possession or passed other counterfeit bills or coin or had received into his possession other stolen property may be shown for the purpose of establishing guilty knowledge and intent on the part of the defendant, as it is the observation of all that an innocent man might readily have in his possession or pass a counterfeit bill or coin or receive into his possession stolen property. If, however, it was known a defendant repeatedly carried and passed spurious bills and coin, or repeatedly received into his possession stolen property, it would not be reasonable to presume he did so without knowledge that the money was counterfeit or the goods stolen. The question, therefore, in this case is narrowed to this: Does the case at bar fall within the general rule or does it come within the exception to that rule?

In some jurisdictions proof that the defendant had been guilty of causing criminal miscarriages or abortions upon other pregnant women than the one named in the indictment has been held proper upon a trial against the defendant upon an indictment of this character (*People v. Sessions*, 58 Mich. 594, 26 N. W. 291; *People v. Seaman*, supra), while in other jurisdictions it has been held that such proof is not competent (*Rosenweig v. People*, 68 Barb. [N. Y.] 634; *State v. Crofford*, 121 Iowa, 395, 96 N. W. 889), and while there is some conflict in the authori-

ties, and the question is not free from doubt, we think that the evidence is admissible. The statute under which the indictment is framed reads as follows: "Whoever, by means of any instrument, medicine, drug or other means whatever, causes any woman, pregnant with child, to abort or miscarry, or attempts to procure or produce an abortion or miscarriage, unless the same were done as necessary for the preservation of the mother's life, shall be imprisoned in the penitentiary not less than one year nor more than ten years; or if the death of the mother results therefrom, the person procuring or causing the abortion or miscarriage shall be guilty of murder." Cr. Code, § 3, p. 665 (Hurd's Rev. St. 1906, c. 38, § 3).

In *Beasley v. People*, 89 Ill. 571, it was held that it was necessary in an indictment under said statute to negative the fact that the miscarriage or abortion was necessary to save the mother's life. And in *Slattery v. People*, 76 Ill. 217, it was said that the statute was evidently aimed at the professional abortionist. If it is necessary to negative the fact that the miscarriage or abortion was caused or performed for the purpose of saving the mother's life, it is necessary by competent proof to establish that fact. The plaintiff in error claimed to be a regularly licensed physician, and the jury were justified in finding, from the testimony, that Annie Horvatic was pregnant when she went to the plaintiff in error's house, and that while there she miscarried or aborted by reason of her uterus being ruptured, which caused peritonitis, from the effect of which she died. Had the evidence shown that Annie Horvatic was the only pregnant woman whom the plaintiff in error had caused to miscarry or abort, it might not have been unreasonable to presume that she did so in good faith and for the purpose of saving the woman's life. If, however, it could be shown that the plaintiff in error advertised in the public press to treat women who were pregnant; that she stated in such advertisement that she had had long experience in the treatment of women who were pregnant; that she was an expert in obstetrics; that she had knowledge of a "new scientific, painless method"; that "no operation was necessary," etc., and it further appeared from the evidence that for 27 years the plaintiff in error had been constantly engaged in producing miscarriages and causing abortions upon pregnant women; that she kept a place for the treatment and care of women upon whom miscarriages and abortions had been caused and performed; that she was surrounded at her house by men and women engaged in the business of causing and producing criminal miscarriages and abortions, and that she had caused the death of several women upon whom she had caused miscarriages and produced abortions within a few years prior to her indictment for causing the death of Annie Horvatic—it would be clear,

we think, that the presumption that she caused Annie Horvatic to miscarry or abort to save her life would be greatly weakened and a criminal knowledge and intent on her part to cause Annie Horvatic to miscarry or abort would be shown. While the plaintiff in error denied that she caused Annie Horvatic to miscarry or abort, it is evident that she was responsible for the miscarriage or abortion which followed the arrival of Annie Horvatic at her place. It was therefore necessary that the proof show and the jury find, in order to convict the plaintiff in error, that the miscarriage or abortion which was caused or produced upon Annie Horvatic was not caused by plaintiff in error to save the woman's life; and, while the jury would have been justified in finding from the condition of the woman when she went to the plaintiff in error's place and the testimony of the physicians who made the post mortem examination that no cause existed for the causing of a miscarriage or the producing of an abortion upon Annie Horvatic to save her life, the state was not required to rely upon this class of testimony alone, but had the right to show, if it could, that the plaintiff in error was not carrying on a hospital in a legitimate way for the treatment of women who were pregnant, but that she was a professional abortionist, for the purpose of rebutting the presumption that she in good faith caused the miscarriage or produced an abortion upon Annie Horvatic to save her life, and for the purpose of showing that she must have known Annie Horvatic was pregnant, and that she operated upon her with the criminal knowledge and intent to cause her to miscarry or to abort; and, if such testimony was competent as a part of the state's case in chief, plaintiff in error could not render it incompetent by any defense to the indictment which she might seek to interpose. We think the view above expressed is fully sustained by this court in *Scott v. People*, 141 Ill. 195, 30 N. E. 329, *Hagenow v. People*, 188 Ill. 545, 59 N. E. 242, and *Clark v. People*, 224 Ill. 554, 79 N. E. 941, and by numerous text-writers and adjudicated cases. 1 *Ency. of Ev.* p. 54; *Underhill on Crim. Ev.* § 345; *Regina v. Dale*, 16 Cox's Crim. L. C. 703; *People v. Sessions*, supra; *People v. Seaman*, supra.

In the *Scott Case* the evidence tended to show that the defendant operated upon the prosecutrix with instruments three times—once about October 15th, and again just before November 15th, and again subsequent to November 15th—and the defendant contended that the court admitted in permitting proof of the three operations evidence of three distinct offenses. The court on page 213 of 141 Ill., page 833 of 30 N. E., said: "We think the testimony was competent. Acts of the defendant tending to show his knowledge of a woman's pregnancy and his intention to commit an abortion upon her

may be proved, whether they were prior or subsequent to the particular act charged in the indictment." In the Hagenow Case, on page 552 of 183 Ill., page 244 of 59 N. E., will be found the following advertisement: "Dr. Louise Hagenow, licensed physician; female irregularities; new scientific, painless method; good treatment; good results; expert, twenty-seven years; private home; 330 E. Division, near Wells"—which the defendant admitted she caused to be published in one of the daily papers in Chicago. This advertisement was set out in that part of the opinion which considers the question whether the evidence was sufficient to sustain the verdict, and the court apparently gave great force to its weight on the proposition that it showed guilty knowledge and guilty intent on the part of the defendant, and tended to establish that she did not commit the abortion upon Marie Hecht with a view to save her life. And in the Clark Case proof was introduced by a number of witnesses that at different times preceding the commission of the offense charged in the indictment the defendant, Ida Clark, had solicited the patronage of pregnant women and held herself out as being able and willing to commit abortions or commit miscarriages upon them by means of instruments and medicines. The court, on page 563 of 224 Ill., page 944 of 79 N. E., said: "On a trial for an offense such as charged in this indictment, intent is an essential ingredient, and it is competent to show the declarations of one on trial for procuring an abortion, to the effect that she was in the habit of performing or had solicited such work." The contention is made that the Clark Case differs upon its facts from the case at bar, and that what was said in that case should not be applied in this case. The evidence in that case was held admissible on the ground that it showed a willingness and ability upon the part of the defendant to perform the acts charged against her in the indictment, and that such evidence established, or tended to establish, guilty knowledge or intent upon the part of the defendant—and such was the object of the testimony to which objection is made in this case. Furthermore, the Clark Case cites with approval the case of *People v. Sessions*, 58 Mich. 594, 26 N. W. 291, which fully shows the view the court had in mind upon the question under discussion.

In the Sessions Case the testimony of four of the people's witnesses relating to the defendant's possession of instruments to produce an abortion and her use of them and her knowledge upon the subject, and that she had held herself out for the performance of such service, with the instruments, for hire, was given on the part of the prosecution. It consisted of conversations the defendant had with these four persons, extending through a period of four years previous to the death of Mrs. Peck, the woman whose death she caused, wherein the defendant

stated to one that she had the instruments with which to produce abortions, had herself got rid of a number of children, and showed her the instruments, at the same time saying to the witness if she wanted any help she could help her. To another she stated that she had committed abortions and could do it again; that she had the instruments to use in doing it. To another she stated her terms for performing such service, which she then proffered to the witness, who was in the family way, and told her she had the instruments for the purpose. This testimony was all objected to by counsel for the defendant. The court, in holding the testimony admissible, on page 601 of 58 Mich., page 295 of 26 N. W., said: "It is true, as claimed by him, that the general rule, as stated by Mr. Justice Christiancy in *People v. Jenness*, 5 Mich. 320, is well settled in this state. It is: 'That [in criminal cases] the commission of other, though similar, offenses by the defendant, cannot be proved for the purpose of showing that he was more likely to have committed the offense for which he is on trial, nor as corroborating the testimony relating to the commission of such principal offense.' *People v. Schweitzer*, 23 Mich. 301; *Lightfoot v. People*, 16 Mich. 507. And to the same effect are several cases in the state of New York. *Coleman v. People*, 55 N. Y. 81; *People v. Corbin*, 56 N. Y. 363, 15 Am. Rep. 427; *Copperman v. People*, 56 N. Y. 591. But we do not think the rule is infringed in this case. The testimony was offered only to show knowledge and intent and the possession of the necessary means to accomplish the act in her own chosen way; and for the purposes offered the testimony was competent. The tendency of the testimony was to prove facts within the issue. *People v. Doyle*, 21 Mich. 227; *People v. Marble*, 38 Mich. 128; *Commonwealth v. Briggs*, 5 Pick. (Mass.) 429; *Osborne v. People*, 2 Park. Cr. Rep. (N. Y.) 583; *Mason v. State*, 42 Ala. 537; *State v. Harrold*, 38 Mo. 496; *Brown v. Commonwealth*, 76 Pa. 319; *Weed v. People*, 56 N. Y. 628; *People v. Henssler*, 48 Mich. 49, 11 N. W. 804; *United States Life Ins. Co. v. Wright*, 33 Ohio St. 533; *Coleman v. People*, 55 N. Y. 81; *Commonwealth v. Shepard*, 1 Allen (Mass.) 575; *Commonwealth v. Price*, 10 Gray (Mass.) 472, 71 Am. Dec. 668; *People v. Clark*, 33 Mich. 112; *People v. Brewer*, 27 Mich. 134; *Boyce v. People*, 55 N. Y. 644. The testimony cannot be considered too remote when it appears that the respondent is shown, by her own statements, to have had the very instruments in her possession which it was claimed she used in producing the death of Mrs. Peck during the entire period covered by the testimony, and was offering her services to aid those who desired to commit the offense of abortion. The testimony was clearly warranted by the facts and circumstances appearing in the record, and no error was committed in receiving it. *People v. Niles*, 44 Mich. 607, 7 N. W. 192."

In *People v. Seaman*, supra, the defendant was charged, jointly with one Alice Lane, with having committed an abortion upon one Emily Hall, at the house of Alice Lane. Upon the trial a witness testified, on behalf of the state, that she gave birth to a child in the Lane house on Tuesday evening, January 29, 1895. Another witness testified that respondent operated upon her with instruments at the Lane house on January 23, 1895, and that she was four months gone at the time. Another witness testified that respondent operated upon her at the Lane house in June, 1894, and took from her a 3½-month foetus, and that she operated on her again in October, 1894, at the same place, and took away a foetus 6 weeks old. The court, in a very elaborate opinion by Judge McGrath, held this evidence competent. In the *Seaman* Case the defendant denied that he used any means upon Emily Hall to cause her to miscarry or abort, as the plaintiff in error denies in this case that she used any means upon Annie Horvatic to cause her to miscarry or abort, but claimed Emily Hall aborted or miscarried as the result of an ocean voyage, while the plaintiff in error claims Annie Horvatic aborted or miscarried in consequence of the criminal act of some doctor on the South Side before she came to her house. The only difference in the facts of the two cases is that the defendant in the *Seaman* Case admitted Emily Hall gave birth to a child while he was treating her, while the plaintiff in error claims Annie Horvatic miscarried or aborted before she came to her place. Counsel for plaintiff in error seek to draw a distinction between these cases. We are of the opinion, however, the cases cannot be differentiated. In the *Dale* Case the defendants were charged with attempting to cause the miscarriage of one Annie Elizabeth Smith by the use of a quill. It was said by counsel that the quill might have been used to open an abscess and the subsequent miscarriage been an accidental result, and it was held, to rebut any presumption that the miscarriage was accidental as a result of the use of the quill, it was admissible to prove that the defendants had caused, with a similar instrument, miscarriages upon other occasions upon other women.

The court, at the instance of the people, instructed the jury that the evidence hereinbefore referred to was proper to be considered by them solely for the purpose of determining the question whether the plaintiff in error had intent and guilty knowledge, and whether she had the means and opportunity to perform the operation and inflict the wounds in the private parts and body of Annie Horvatic, as alleged and claimed in this case. If the testimony was admissible for the purpose of showing guilty knowledge and intent on the part of the plaintiff in error and that she had the means and the opportunity to commit the offense, it was competent, regardless of the fact that it, when

properly admitted, might have the effect to prejudice the jury against the plaintiff in error. If evidence is admissible under any issue in a case or for any purpose, it should not be excluded. *Ruggles v. Gattton*, 50 Ill. 412. It is, however, a proper practice, as was done in this case, to limit such evidence, by an instruction, to its proper office in the case.

In *Baker v. People*, 105 Ill. 452, the plaintiff in error and one Eliza Graves were jointly indicted and convicted of attempting to procure and produce the miscarriage of Martha Van Antwerp. Baker alone sued out a writ of error. The evidence showed Baker was responsible for the unfortunate condition of Martha Van Antwerp; that he first gave her medicine with a view to cause her miscarriage; that he afterwards inserted into her private parts a wire with the purpose to cause her to miscarry; and that he afterwards took her to the home of Mrs. Graves, who operated upon her with instruments with a view to cause her miscarriage. The court held that three distinct offenses had been committed, and that the state, upon the trial, should have been required to elect for which offense it would prosecute, and it was incidentally said it would be error to admit evidence of the offenses other than the one upon which the prosecution was being carried on. In the case of *Scott v. People*, supra, the doctrine announced in the *Baker* Case was repudiated, and it was held, as we have seen, that evidence of the several attempts made in that case, three in number, was admissible. To the same effect are *Commonwealth v. Corkin*, 136 Mass. 429; *Lamb v. State*, 66 Md. 285, 7 Atl. 399; *King v. State*, 35 Tex. Cr. R. 472, 34 S. W. 282; *Sullivan v. State*, 121 Ga. 183, 48 S. E. 949. See, also, *Hughes on Crim. Law & Proc.* § 1934. The *Baker* Case is therefore no longer the law of this state.

After a most careful consideration of the question raised by the plaintiff in error as to the admissibility of this class of evidence in this case, we are constrained to hold that the court did not err in admitting the evidence of the plaintiff in error's connection with other offenses similar to the one with which she was charged and upon trial under this indictment; and, while the case of the plaintiff in error may have been prejudiced by the admission of such evidence, such fact, if true, is not the fault of the law, but the misfortune of the plaintiff in error in finding herself surrounded by the facts and circumstances upon her trial offered in proof, for which facts and circumstances she alone, and not the state, was responsible.

It is also urged that the court erred in admitting in evidence the dying declaration of Marie Hecht, and authorities are cited to the effect that a dying declaration is only admissible in evidence where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of

the declaration. The declaration signed by Marie Hecht was prepared, signed, and read aloud in the presence of the plaintiff in error, and she made no denial of the truth of the facts contained in the statement, and the statement was admitted in evidence, not as the dying declaration of Marie Hecht, but as the admission of the plaintiff in error for the purpose of showing the plaintiff in error's connection with the operation which caused the death of Marie Hecht. We do not think the court erred in admitting in evidence said statement.

It is also contended that the court erred in permitting the physicians who made the post mortem examination to give their opinion as to the cause of the punctures and lacerations found in the uterus of Annie Horvathich. The physicians discovered upon the post mortem examination that the uterus was punctured and lacerated, the top of the uterus being torn or punched off, and they, in effect, stated that they were of the opinion that said puncture, tear, and laceration were caused by some hard substance being forced through the uterus, which had been inserted through the mouth of the womb of Annie Horvathich during life, which caused peritonitis, from the effect of which Annie Horvathich died. The question which caused the death of Annie Horvathich was clearly a question for opinion evidence by medical men, and we think it was proper for the physicians who examined the uterus to state to the jury the conditions which they found, and, it appearing that it was ruptured, torn, and lacerated, how, in their opinion, such ruptures, tears, and lacerations were made. In *Village of Chatsworth v. Rowe*, 166 Ill. 114, on page 117, 46 N. E. 763, 764, it was said the physicians who examined the plaintiff's knee having testified that it could have been produced by a fall or an external injury: "If, from an examination, the physician was able to tell what was the cause of the injury, his opinion was competent for the jury in connection with other evidence." And in *Clark v. People*, supra, particular stress is laid upon the testimony of the physician who made the post mortem examination, to the effect that in his judgment the injury was produced with a blunt instrument. And in *City of Chicago v. Bork*, 227 Ill. 60, 81 N. E. 27, it was held proper for a physician to give it as his opinion that the diseased condition disclosed by the evidence was due to a physical injury, and that it was not error to ask what was the proper cause of the disordered physical condition from which the evidence showed appellee was suffering. And in *City of Chicago v. Didler*, 227 Ill. 571, 575, 81 N. E. 698, 700, it was said: "Appellant contends that the inquiry should be as to whether the injury might have produced the physical conditions, and not whether it did produce them. Expressions will be found in some cases tending to support that view, but the weight of authority in this state, as well as in other

jurisdictions, does not support appellant's contention." And in *Chicago Union Traction Co. v. Roberts*, 229 Ill. 481, 484, 82 N. E. 401, 402, it was said: "In this case the question was whether the appellee's condition was due to traumatism or other causes. It was a question for the jury to determine, but it was impossible for them to answer without hearing the opinions of physicians. These opinions did not invade the province of the jury. \* \* \* It is entirely immaterial whether the witness testified that the injury was the cause of the condition, or that the injury was sufficient to cause the condition or might have caused it. In any event, the testimony was merely the opinion of the witness. \* \* \* It still remained for the jury to determine the facts, and the opinion was nevertheless an opinion only, whether it states what did cause the condition or what might cause it."

The case of *Illinois Central Railroad Co. v. Smith*, 208 Ill. 608, 70 N. E. 628, is not in conflict with the foregoing cases. In that case the witnesses for the respective parties disagreed as to what caused the injury—that is, whether the foot of the plaintiff was crushed or punctured—and plaintiff sought to corroborate his testimony by calling physicians to state that it was punctured. Here there was no conflict as to the conditions or that they were caused otherwise than in the manner pointed out by the physicians. In *City of Chicago v. Didler*, supra, the authorities bearing upon this question are reviewed, and it was there held that in a case like this, where there is no conflict as to the condition of the injured parts, an expert medical witness may express his opinion as to the manner in which the injury was caused; that is, whether the conditions were caused by disease or by traumatism, such as by a gun-shot wound, a stab with a sharp instrument, like a dagger, or a blunt, hard instrument, like a sound or a stick. We are of the opinion the evidence of the physicians upon the question at issue was properly admitted.

It is further contended that the court erred in giving to the jury the people's sixteenth and seventeenth instructions, on the ground that they each omit in stating the facts which must be shown to entitle the state to a conviction the element that Annie Horvathich was pregnant. These instructions read as follows:

"(16) The court instructs you that if you shall find from the evidence in the case beyond a reasonable doubt that Annie Horvathich died from the result of an operation, and that the operation was performed with the intent to produce an abortion on her, and that the operation was performed by the defendant, Lucy Hagenow, otherwise called Louise Hagenow, otherwise called Ida Von Schultz, or by any person acting under the defendant's direction, or if the defendant aided, abetted, and encouraged the operation in any manner, and that the operation was not done

as necessary to preserve the life of Annie Horvatic, then in such case the court instructs you that, as a matter of law, the defendant is guilty of murder in manner and form as charged in the indictment.

"(17) The court instructs you that if you shall believe from the evidence in the case beyond a reasonable doubt that the defendant, Lucy Hagenow, otherwise called Louise Hagenow, otherwise called Ida Von Schultz, inflicted the injury alleged in the indictment in the private parts and body of Annie Horvatic, with an intent to cause Annie Horvatic to abort and miscarry, and not as necessary to preserve her life, and that such injury resulted in the death of Annie Horvatic, then in such case the court instructs you as a matter of law that the defendant is guilty of murder in manner and form as charged in the indictment."

If those instructions stood alone, there would be much force in the contention of the plaintiff in error; but when they are considered in connection with the other instructions given to the jury, we do not think they worked any harm to the plaintiff in error. The court by instruction 35 informed the jury "that, before the defendant in this case can be convicted, each one of the following propositions must be proven beyond a reasonable doubt: (1) That Annie Horvatic was pregnant; (2) that while Annie Horvatic was pregnant she aborted or miscarried; (3) that said abortion or miscarriage was produced by criminal means; (4) that said criminal means were employed by the defendant, or that she aided, abetted, and encouraged the employment of such means; (5) that said Annie Horvatic died as the result of said abortion and miscarriage. If the jury have a reasonable doubt of the truth of any of the foregoing propositions, they must find the defendant not guilty." By that instruction the court clearly informed the jury that they could not convict the plaintiff in error unless it had been established, beyond all reasonable doubt, that Annie Horvatic was pregnant. The instructions complained of did not direct the jury, in case they found the facts stated therein to be true, to find the plaintiff in error guilty. They merely stated that those facts, if proven, constituted the crime of murder. While one instruction may omit some needed qualification and appear to be misleading when considered alone, it may not be misleading or improper when considered with the other instructions, and it is sufficient if the instructions, taken as a whole, present the law to the jury with substantial correctness. *Toluca, Marquette & Northern Railway Co. v. Haws*, 194 Ill. 92, 62 N. E. 312. An instruction is to be read in connection with all the other instructions given in the case, and it is well settled that the instructions in a given case must be considered as a series, and if, when so considered, they fully and fairly instruct the jury as to every material fact in controversy, they will be con-

sidered as sufficient. *Fessenden v. Doane*, 188 Ill. 228, 58 N. E. 974. We think, therefore, the defect therein contained could be cured by other instructions, and that such defect was cured, and that the jury were not misled by the giving to them of the sixteenth and seventeenth instructions, to the prejudice of the plaintiff in error.

It is also urged that the court erred in refusing to give to the jury the form of a verdict for manslaughter. The jury had the power, under the indictment, to find the plaintiff in error guilty of manslaughter (*Earl v. People*, 73 Ill. 329), and they were so instructed. The evidence, however, clearly showed the plaintiff in error to be guilty of the crime of murder, if of any crime, and the court did not err in refusing to submit to the jury a form of verdict of manslaughter, and thereby invite the jury to find the plaintiff in error to be guilty of manslaughter when the evidence showed her to be guilty of murder if guilty of any crime. *Crowell v. People*, 190 Ill. 508, 60 N. E. 872; *Kyle v. People*, 215 Ill. 250, 74 N. E. 146. In the *Crowell Case*, on page 515 of 190 Ill., page 874 of 60 N. E., it was said: "Where one is indicted for an assault with intent to commit murder and the facts establish an assault of a lower grade, the jury may convict him of the lesser offense; but the law does not authorize or intend that a person guilty of an assault with intent to commit murder shall be found guilty of an assault of a lower grade, or that the jury shall be left free to do so regardless of the evidence. \* \* \* The law is that, if a defendant is guilty of an assault with intent to commit murder, he ought to be convicted by the jury of that offense. \* \* \* It is not designed that he should be found guilty of a lesser crime than an assault with intent to commit murder, upon proof, beyond a reasonable doubt, of an assault, with malice aforethought, of a character likely to cause death, or where the facts show a reckless or total disregard of human life." There was no error in the action of the trial court in declining to submit to the jury the form of verdict of manslaughter.

It is also insisted that the state's attorney exceeded his privilege in the argument to the jury, and in the cross-examination of the plaintiff in error as a witness, in this: that he stated to the jury the plaintiff in error had publicly and notoriously been engaged in the business of murder in the city of Chicago for a number of years, and urged the jury to send her to the penitentiary for her natural life, and that, upon the cross-examination of the plaintiff in error, he asked her if the pictures of the people who are dead (referring, apparently, to Marie Hecht and others) did not at times come to her mind. The state's attorney, in the argument to the jury, should confine himself to a discussion of the facts disclosed by the evidence. In *Crocker v. People*, 218 Ill. 287, 290, 72 N. E. 743, it

was said: "A gross abuse of the privilege of counsel to argue the facts and law of the case to a jury, if it prejudices the cause of the opposite party, would constitute good ground for a new trial; but arguments and statements of counsel based on the facts appearing in the proof, or on legitimate inferences deducible therefrom, do not transcend the bounds of legitimate debate and are not to be discountenanced by the courts. It is not improper for a prosecuting attorney to reflect unfavorably on defendant or denounce his wickedness, and even indulge in invective, if based upon evidence competent and pertinent to be decided by the jury. 2 Ency. of Pl. & Pr. 747. It is not improper for the prosecuting attorney to denounce a defendant to be a murderer in the trial of an indictment for murder, if there is testimony tending to support the truth of the charge. *State v. Griffin*, 87 Mo. 608. Whatever is deducible from the testimony by direct proof or legitimate inference from facts that are proven, and which bears upon the issue in a cause, must be a fair subject of comment by counsel, and, if such deductions or inferences tend to fix upon a defendant the wickedness and crime that are charged against him, it must be within the scope of proper and fair argument to denounce him accordingly." In the case at bar, while the state's attorney used strong language in the course of his oral argument, we cannot say that he was not justified in using the language he did in commenting upon the criminal conduct of the plaintiff in error, as disclosed by the evidence found in this record. Neither can we say that the questions propounded to the plaintiff in error upon cross-examination were improper, when the entire cross-examination of the plaintiff in error is taken into consideration.

It is finally urged that the verdict is not supported by the evidence. We have fully set forth the facts in this opinion disclosed by this record, and we feel justified in saying, without further discussion, that in our opinion they establish the guilt of defendant beyond all reasonable doubt.

We have given this record the patient examination which the importance of the case to the state and to the plaintiff in error demands, and have found no error therein which would justify this court in reversing the judgment of conviction rendered by the criminal court against the plaintiff in error.

The judgment of the criminal court will be affirmed.

Judgment affirmed.

SCOTT, J. (dissenting). In jurisdictions other than ours the question whether, upon a trial for murder where death results from abortion, evidence of a previous unlawful abortion or abortions committed by the defendants upon a woman or women other than the deceased may be admitted for the purpose of showing the unlawful intention of

the accused in doing the alleged acts charged by the indictment, is one upon which the adjudicated cases are in conflict. In our own state the proposition has been determined against the contention of the prosecution by the case of *Baker v. People*, 105 Ill. 452, which was a prosecution for attempted abortion. The precise point now under consideration was there involved. The court, after stating the general rule that in the trial of a party for one offense growing out of a particular transaction evidence of a substantive offense resulting from another and entirely separate transaction cannot be received, continued: "An exception to this rule is found in prosecutions for passing counterfeit money, and the like, where previous attempts to pass counterfeit money may be proved for the purpose of showing guilty knowledge, but the principle involved in this class of cases has no application to the case in hand." The majority regard the doctrine there enunciated as repudiated by the later case of *Scott v. People*, 141 Ill. 195, 30 N. E. 329. This seems to be a misapprehension. That prosecution was for an attempt to produce an abortion, and was against the father of the unborn child. Evidence was admitted tending to show that he had made what the defense regarded as three separate attempts to remove the same foetus. It was urged that it was improper to receive evidence of more than one attempt. This court, in disposing of this assignment, said: "Third, it is assigned as error that there was an improper admission of testimony. It is said that the court admitted testimony as to three distinct felonies. We think that the second and fourth counts charge but one offense. The same offense may be set out in several counts in different language. It is said that the use of the instruments on or about October 15th was one attempt and the use of them twice in the middle of November constituted two other attempts, and that proof of three different attempts was thus allowed to come in. Upon a careful examination of the record, we find the defendant's counsel allowed evidence of the use of the instruments at three different times to be admitted without objection; nor do we find that any motion was made to exclude any part of this testimony, nor was the court asked to put the people to their election. But we think the testimony was competent. Acts of the defendant tending to show his knowledge of a woman's pregnancy and his intention to commit an abortion upon her may be proved whether they were prior or subsequent to the particular act charged in the indictment. The three acts proven in this case were not unconnected, but were parts of one transaction. They all together constituted but one attempt to procure the same abortion. 'Where several felonies are connected together and form part of one entire transaction, then the one is evidence of the character of the other' *Lamb v. State*, 66 Md. 287, 7 Atl. 399. 'Whether it [the evi-

dence] was of acts which formed part of the principal transaction, or of acts of the defendant at other times, it tended to prove attempts of the defendant to procure the identical result, the intent to procure which constituted the gist of the offense charged.' *Commonwealth v. Corkin*, 138 Mass. 430."

The evidence was there held to be competent because "the three acts proven in this case were not unconnected but were parts of one transaction. They all together constituted but one attempt to procure the same abortion." How can it be said that this holding repudiates the doctrine of the *Baker Case*, when that doctrine is not mentioned, when the *Baker Case* is not alluded to, and when there is nothing whatever in the later case inconsistent with the earlier case or the doctrine thereof, and how can it be said that the *Scott Case* justifies the admission of evidence tending to show that the accused has committed criminal abortions upon women other than the deceased, when that decision is expressly placed upon the ground that the different acts there proven were all part of the same transaction, being designed to produce one and the same abortion? The majority opinion herein is the first departure from the law as stated in *Baker v. People*, *supra*.

It is true that the evidence in the case at bar very strongly indicates the guilt of plaintiff in error. The question for us is not whether she is guilty, but, conceding her guilt, can the judgment be affirmed without destroying one of the safeguards heretofore deemed necessary and proper in this state for the protection of persons charged with crime? To this the only answer must be a negative. If in every case where a revolting crime, such as this, has been committed, and where the evidence strongly indicates the guilt of the accused, we disregard a salutary rule adopted to prevent the conviction of innocent persons in order that affirmance may be had, this court will, in effect, become a court of first instance instead of a court of review, and our decisions will depend, not upon the question whether prejudicial error has intervened and whether the prisoner has enjoyed the fair and impartial trial guaranteed by the law, but upon our own conclusions in reference to the sufficiency of the evidence to show guilt. It is highly important that the guilty be punished, but it is far more important that barriers erected by the law and designed for the protection of the innocent should not be broken down by this court, even for the purpose of affirming the conviction of a person who appears from the evidence to be guilty. Laws established to prevent the conviction of innocent persons are not to be disregarded by us merely because we may believe, upon a consideration of all the evidence, that the accused in any particular case is guilty. It is true, as a general proposition, that where it appears from the evidence, beyond all reasonable doubt, that the prisoner was guilty and that an er-

ror occurring in the trial court was harmless, there should be no reversal. Error, where shown, however, is presumed harmful, and the burden is then upon the party seeking to avoid its effect to show that no injury resulted therefrom. In this particular case, even conceding the guilt of the accused, it cannot be said that the improper evidence was harmless. The jury could have fixed the defendant's term of imprisonment at any period not less than 14 years. They did fix it at 20 years. Can it be doubted that the testimony wrongfully admitted, tending to show that she was an old and hardened offender, who had repeatedly violated this particular law, added to the length of the sentence?

In *Farris v. People*, 129 Ill. 521, 21 N. E. 821, 4 L. R. A. 582, 16 Am. St. Rep. 283, a prosecution for murder, incompetent evidence calculated to arouse the passions and inflame the minds of the jury to the prejudice of the defendant was admitted, and in answer to the contention that the error was harmless this court said (page 533 of 129 Ill., page 824 of 21 N. E. [4 L. R. A. 582, 16 Am. St. Rep. 283]): "It is suggested, and pressed by way of argument, that, although the trial court may have erred in allowing this proof, yet, the case being so clearly made out by other evidence and the defense so utterly futile, the error should be held harmless. If the only punishment for the crime of murder in this state was death, the point would be entitled to weight. If it was within the province of the court to assume that the jury would have inflicted the death penalty because the proof of guilt justified it, or, if our decision was to affect this case alone, we might hesitate to order a reversal on this theory. The Legislature has seen fit to clothe juries with a wide discretion in fixing the punishment to be inflicted upon one convicted of murder. Every defendant on trial for that crime is entitled to the full benefit of the statute. When all else has failed him he has a right to stand before a jury unprejudiced by incompetent, irrelevant evidence, and appeal to them to spare his life. It is impossible for us to know what the jury in this case would have done but for the introduction of this incompetent evidence, much less is it our province to say what they should have done, and no opinion is expressed on that subject. We can only judge of the influence of such testimony upon the minds of the jury by experience and observation common to us all. Here was proof of a distinct felony—the disgusting and abhorrent facts attendant upon the commission of that most brutal and infamous crime given in detail. No one need be told that from that moment, if the evidence was believed, all feeling of commiseration and mercy toward the defendant must have fled the minds of the jury. There was left for him no possible escape from the death penalty. But, aside from all these considerations, we are required to settle a rule of evidence in criminal trials, not merely

with reference to this case, but in consideration of future consequences and other rights, and we cannot, from that consideration alone, hesitate to hold that there was such manifest and prejudicial error in the admission of evidence by the trial court in this case as must work a reversal of its judgment."

The majority opinion escapes the effect of this forceful reasoning only by overruling a decision which has stood unquestioned as the law of this state since 1883. Such a radical course should not in my judgment be taken merely to avoid a reversal of the judgment and a retrial of the prisoner. *Baker v. People*, supra, which has been approved in *Bishop v. People*, 194 Ill. 365, 62 N. E. 785, and in *Schultz v. People*, 210 Ill. 198, 71 N. E. 405, should be followed instead. Moreover, this case is akin to the *Farris Case* in another respect. The evidence in question was wholly and entirely unnecessary, and that being true, as was said in the case just referred to, "it may well be doubted whether testimony so strongly calculated to prejudice the jury against the defendant should have been admitted even though it tended to prove a motive, such proof not being necessary to the case."

The insistence of the prosecutor that proof of previous unlawful abortions produced by the accused was necessary for the purpose of showing that the abortion in question was not committed as necessary for the preservation of the mother's life was apparently a mere subterfuge, made use of for the purpose of introducing incompetent proof that would seriously prejudice the cause of the accused. The evidence showed plainly that the deceased was a strong woman and in good health when she placed herself in the hands of plaintiff in error. She had previously borne three children. The three physicians who conducted the post mortem testified that it was not necessary to cause her to abort or miscarry in order to save her life. This established the fact that the abortion was not necessary for the preservation of the life of the mother, which is all that is necessary to satisfy the statute in that regard (*Beasley v. People*, 89 Ill. 571), and as it was not contended on the part of the defense that any such necessity existed, but, on the other hand, that the accused had not committed the abortion for any purpose, there was no reasonable excuse for the admission of this highly prejudicial evidence to negative the exception contained in the statute, even had such evidence not been otherwise objectionable.

There is set out in the majority opinion the greater part of a dying declaration made by

Marie Hecht, deceased, which was admitted in evidence, and which tended to show that her death was caused by an abortion committed upon her by plaintiff in error. The first portion of the statement so admitted was in the words following: "I, Marie Hecht, now lying dangerously ill at the St. Elizabeth's Hospital, and believing I am about to die, make this, my ante mortem statement." These words immediately preceded the language which is found in the majority opinion and which is there quoted from the same declaration. The admission of the statement is justified by the majority on the theory that plaintiff in error made no denial of the truth thereof when it was read in her presence at the time it was signed by Marie Hecht. In addition to a general objection to the admission of this dying declaration, the plaintiff in error, after the declaration was admitted in evidence, moved to strike out the portion thereof which I have quoted, and this motion was denied. I think it was improper to admit the dying declaration for any purpose; but, in any event, the portion thereof at which the motion was aimed should not have gone to the jury. It was undoubtedly regarded by the jury as adding weight to the declaration, and it does not remove this difficulty that the jury may have been otherwise advised by proof that Marie Hecht was, at the time of making the statement, near unto death. The words just quoted were particularly prejudicial, because the jury were thereby informed that the statement was made by Marie Hecht when she knew that she was confronted by certain and immediate death; and they would be more inclined to regard her statement as true than they would if it did not appear to them that she knew she was about to die at the time she made it. It cannot be contended that these words had anything to do with any implied admission made by the plaintiff in error, or that they threw any light upon or gave any force or significance to her silence at the time she heard the declaration read.

I am also of opinion that the sixteenth and seventeenth instructions given at the request of the people were fatally defective, and that the words of the prosecutor in cross-examination and his remarks in argument were of that intemperate and improper character which forbids affirmance.

The judgment should be reversed, and the cause remanded for a new trial.

FARMER and VICKERS, JJ. We concur in the foregoing dissenting opinion of Mr. Justice SCOTT.

(236 Ill. 544)

**SCOTT v. LUMAGHI.**(Supreme Court of Illinois. Oct. 26, 1908.  
Rehearing Denied Dec. 4, 1908.)**1. FRAUDULENT CONVEYANCES (§ 301\*)—SUFFICIENCY OF EVIDENCE.**

Evidence held to show that a conveyance by a corporation of the corporate assets was with fraudulent intent as to creditors on the part of the grantee.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 904-907; Dec. Dig. § 301.\*]

**2. FRAUDULENT CONVEYANCES (§ 65\*)—EVIDENCE.**

It is not necessary in order to impeach a transaction as fraudulent to creditors that the evidence should show a specific intent to defraud the particular creditor attacking the transaction.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 162; Dec. Dig. § 65.\*]

**3. APPEAL AND ERROR (§ 1078\*)—ASSIGNMENTS OF ERROR—WAIVER.**

Assignments of error not urged in appellants' brief will be considered as waived.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

Farmer and Hand, JJ., dissenting.

Appeal from Appellate Court, First District, on Error to Superior Court, Cook County; Theodore Brentano, Judge.

Action by Nathaniel J. Scott against Joseph D. Lumaghi. From a judgment of the Appellate Court for the First District, affirming a judgment of the circuit court in favor of plaintiff, defendant appeals. Affirmed.

See, also, 85 N. E. 244.

B. H. Canby and Alex. W. Hope, for appellant. A. D. Gash, for appellee.

**VICKERS, J.** This is an action of assumpsit, brought by the appellee Nathaniel J. Scott against the Great Western Coal & Coke Company for commissions claimed by Scott for the purchase of coal from the St. Louis & Big Muddy Coal Company. Scott sued out an attachment in aid of his suit, and caused certain corporations, firms, and individuals to be summoned as garnishees, which he claimed were indebted to the Great Western Coal & Coke Company. The defendant below pleaded the general issue, and upon a trial a judgment was rendered in favor of the plaintiff, against the Great Western Coal & Coke Company, for \$1,229.54. From this judgment the Great Western Coal & Coke Company has not appealed, and that judgment is in no way involved at this time. Joseph D. Lumaghi filed an interplea, in which he claimed that he was the owner of all the property, of every kind and character, including book accounts, and all other bills receivable, that had formerly belonged to the Great Western Coal & Coke Company. In his interplea Lumaghi set up in detail the manner in which his claim to the assets of

the corporation originated. The plaintiff below, Scott, filed a replication to the interplea, in which he denied that Lumaghi was the owner of the property attached and debts garnisheed, and charged that if any assignment or transfer of the assets of the Great Western Coal & Coke Company had been made, the same was made in fraud of the rights of the plaintiff below and other creditors of the Great Western Coal & Coke Company. The issue thus made up on the interplea was tried by jury in the circuit court of Cook county, which court, after overruling a motion for a new trial, pronounced judgment upon a verdict found against the interpleader. Lumaghi appealed to the Appellate Court for the First District, where the judgment of the circuit court was affirmed, and he has prosecuted a further appeal to this court. At the close of the evidence in the trial court appellant requested the court to direct a verdict in his favor. The ruling of the court in refusing to direct such verdict is the only error assigned which is open for consideration in this court. We will examine the evidence briefly to ascertain whether there is any evidence fairly tending to support the verdict of the jury.

The great Western Coal & Coke Company had a capital stock of \$20,000. Appellant was a director in the company and its treasurer, and owned one-fourth of its capital stock. His brother, Louis F. Lumaghi, also owned \$5,000 of the capital stock, and was a director. On March 25, 1905, Adolph Enders obtained a judgment against the Great Western Coal & Coke Company, in the superior court of Cook county, for \$12,850. The Great Western had its principal office in Chicago. After the Enders judgment was obtained, and while the motion for a new trial was pending, and within a few days after the verdict of the jury was rendered in the Enders Case, the directors of the Great Western closed up the office of the company in Chicago, and shipped all of its books of account and tangible assets to St. Louis, Mo., and located them in a building in which appellant and his brother have offices. Appellant made a pretended sale of his \$5,000 in stock for \$5, and his brother, Louis, sold his stock for \$1, and they both resigned as directors, or attempted to do so. Subsequently Enders filed a creditor's bill against the Great Western and others, including appellant. A receiver was appointed by the court under the creditor's bill, and an order was made requiring the assets of the coal company to be returned to Chicago. Appellant took an assignment of the Enders judgment, and also received a transfer of all the property, of every kind and character, of the Great Western Coal & Coke Company. The Enders judgment was assigned first to Moses, an attorney who had been connected with the litigation, and he assigned the judgment to ap-

pellant. Moses testifies that he received \$9,300 of the money which he paid Enders from appellant, and \$4,000 he received from the Great Western Coal & Coke Company, through A. W. Underwood, an attorney.

Appellant contends that, having succeeded to the Enders judgment by assignment, he is entitled to all the rights, remedies, and priorities that existed in favor of Enders, and that his right to receive the assets of the company in payment of this judgment cannot be questioned by other creditors of the Great Western Coal & Coke Company. Undoubtedly this contention would have much force in it if the transaction was bona fide and free from any purpose to hinder and delay other creditors of the Great Western Coal & Coke Company. The question is not so much the form which the transaction assumes as it is the intent and purpose that actuated the parties to an alleged fraudulent contract. The circumstances that all of the visible assets of the corporation were sent to a foreign state to appellant before he had either procured the assignment of the judgment or a transfer of the assets is a badge of fraud. No reasonable explanation is attempted why the Great Western Coal & Coke Company, an Illinois corporation, sent all of its books and property, of every kind that was movable, out of the state while a motion for a new trial was pending against it in a case wherein a large verdict had been rendered. The further fact that appellant disposed of \$5,000 of stock for five dollars and resigned his position as director of the corporation before he took the assignment of this judgment and received a transfer of the property of the Great Western, would indicate that he was seeking to dissolve his fiduciary relation to the company so that the contemplated assignment and transfer might have a more secure basis.

If the transaction by which appellant succeeded to the assignment of the Enders judgment and the assets of the Great Western Coal & Coke Company was in good faith, why should the transfer have been made first to Moses, the attorney, and then by Moses to the appellant? Appellant claims to have furnished all of the money except \$4,000 used by Moses in paying Enders for the assignment of the judgment. Under these circumstances, the usual and ordinary course would have been to have the assignment made direct to appellant. Moses was merely an agent of appellant and the Great Western Coal Company in taking this assignment. He had no beneficial interest in the judgment or the assets of the corporation, and the fact that the property passed through his hands to appellant does not present any different legal aspects than if the transfer had been made direct to appellant in the first instance.

Without rehearing at length the cross-examination of appellant as the same appears in the additional abstract, it is sufficient to say that the explanation made by

him of his connection with this transaction in some respects, and his failure to explain other important facts, when he had an opportunity to do so in answer to pertinent questions put to him, tends rather to weaken the claim set up by appellant that he was a purchaser in good faith of the assets of this corporation. It is not controverted that \$4,000 of the money that was paid to Enders by Moses was the money of the Great Western Coal & Coke Company. If we may assume that the tangible assets of the company in the hands of the receiver were worth no more than the face of the Enders judgment, and the corporation furnished \$4,000 of the money which was paid on that judgment to secure the release of the assets and the discharge of the receiver, it follows that at least to the extent of \$4,000 the assets in the hands of appellant would be subject to the claims of other creditors.

It is not necessary, in order to impeach a transaction as being fraudulent against the rights of creditors, that the evidence should show a specific intent to defraud the particular creditor who may attack the transaction. In the case before us it may be conceded that the evidentiary facts which tend to prove a fraudulent intent have reference to the Enders judgment. Yet if a fraudulent scheme was conceived for the purpose of defrauding Enders out of his judgment, evidence proving such purpose would be equally available to any other existing creditor who might attack the validity of such transaction.

In our opinion there is evidence strongly tending to prove that appellant was not a purchaser in good faith of the assets of the Great Western Coal & Coke Company, and that for this reason the trial court did not err in submitting the case to the jury.

Errors are assigned upon the giving and refusal of instructions and upon the rulings of the court in the admission and exclusion of testimony, but none of these assignments are urged in appellant's brief and must therefore be considered as being waived.

Finding no error in the record, the judgment of the Appellate Court for the First District is affirmed.

Judgment affirmed.

FARMER and HAND, JJ. (dissenting). We do not concur in the opinion of the court. The Enders judgment was a valid judgment. It was assigned to Moses, and that was a bona fide transaction. The property of the Great Western Coal & Coke Company was thereafter assigned by it to Moses to apply on the judgment, and this transaction was approved and confirmed by order of the court in which the receivership proceedings were pending and the receiver directed to deliver the property to Moses. Afterwards appellant paid Moses some \$9,000, or a little more, for the property, and it was transferred by Moses to him. At that time appellee

had no interest in or lien upon the property. The record does not show that the property was worth any more than appellant paid for it, and is barren of any evidence tending to impeach the good faith of the transaction. In our opinion the judgment should have been reversed.

(236 Ill. 576.)

**BOND et al. v. MOORE et al.  
CURTIS v. SAME.**

(Supreme Court of Illinois. Oct. 26, 1908. Rehearing Denied Dec. 8, 1908.)

**1. WILLS (§ 440\*)—CONSTRUCTION—TESTATOR'S INTENTION.**

The object of construing a will is to ascertain testator's intention expressed therein; his intention, which by inference may be presumed to have existed in his mind, not controlling.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. § 440.\*]

**2. WILLS (§ 449\*)—CONSTRUCTION—PROPERTY DISPOSED OF—PRESUMPTION.**

A testator is presumed to intend to dispose of all of his estate, and a reasonable construction will be adopted, consistent with the will, so as to dispose of the entire estate; but, where no intention is shown as to part of his property, it must be regarded as intestate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 965; Dec. Dig. § 449.\*]

**3. WILLS (§ 478\*)—CONSTRUCTION—IMPLIED DEVISES.**

Implied devises will only be given effect in cases of such clear necessity that from the will itself there can be no reasonable doubt as to testator's intention; no such devise being inferable from absolute silence of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 960; Dec. Dig. § 478.\*]

**4. WILLS (§ 486\*)—TESTATOR'S KNOWLEDGE—PRESUMPTIONS.**

Testatrix, having devised a life estate to her son, is presumed to know the fact that he was her only heir, and that, as such, all her property would descend to him after termination of the life estate, unless she disposed of it by her will.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 486.\*]

**5. WILLS (§ 452\*)—CONSTRUCTION—DISINHERITANCE.**

Clear words are necessary to disinherit; and, even when the intent is clear, the heir will take, unless the property is devised to some one else.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 968-970; Dec. Dig. § 452.\*]

**6. WILLS (§ 595\*)—CONSTRUCTION—ESTATES DEVISED.**

Testatrix gave all her property to her only son and heir for life, with authority to sell or exchange the land and invest the proceeds as he deemed best, and provided that, on his death without children, the remainder should go to her nearest relatives. When the will was made, the son was unmarried and without children, but otherwise at testatrix's death. *Held*, that such relatives took a contingent remainder; that the devise was within the rule that, where there is a gift to one for life, with remainder to testator's next of kin, and the life tenant is the sole next of kin, the remainder will be considered as given to the persons answering the description at the termination of the life estate; that there was no implied devise of a remainder to his

children; that the reversion descended to him as heir at law; and that his deed to petitioner merged the life estate in the reversion, and destroyed the contingent remainder to testatrix's other relatives, vesting the fee-simple title in petitioner.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1800; Dec. Dig. § 595.\*]

**7. REMAINDERS (§ 9\*)—CONVEYANCE TO REMAINDERMAN—EFFECT.**

Conveyance of a life estate to the remainderman merges the particular estate in the fee.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 6; Dec. Dig. § 9.\*]

**8. REMAINDERS (§ 10\*)—"CONTINGENT REMAINDERS"—DISTINCTION.**

A remainder requires a particular estate to support it, and a "contingent remainder" must vest during continuance of the particular estate, or so instanti that it determines; and, if the particular estate terminates before the event upon which the contingent remainder is to vest occurs, the remainder is defeated, whether the preceding estate reaches its natural termination or is ended prematurely by merger, forfeiture, or otherwise.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 7; Dec. Dig. § 10.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1503-1506; vol. 8, p. 7615; vol. 7, pp. 6070-6072; vol. 8, p. 7784.]

**9. REMAINDERS (§ 10\*)—CONTINGENT REMAINDERS—DISTINCTION.**

A life tenant, with subsequent contingent remainder, might make a tortious conveyance by deed of feoffment with livery of seisin, and thus forfeit his life estate to destroy the contingent remainders, and upon reconveyance of the tortious title would hold it free from the contingent remainders.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 7; Dec. Dig. § 10.\*]

**10. REMAINDERS (§ 9\*)—CONTINGENT REMAINDERS—DESTRUCTION.**

An exception to the rule that, when a life estate and the next vested estate in remainder or reversion meets in the same person, notwithstanding intervening contingent remainders, the particular estate will merge in the reversion or remainder arises where the particular creation of the estate and the remainder or reversion occur at the same time and by the same instrument.

[Ed. Note.—For other cases, see Remainders Cent. Dig. § 10; Dec. Dig. § 9.\*]

Carter, Hand, and Farmer, JJ., dissenting.

Appeal from Circuit Court, Cook County; G. A. Carpenter, Judge.

Petitions by W. A. Bond and others and by Lester Curtis against Sally Palmer Curtis Moore and others, to register land titles. From decrees dismissing the petitions, petitioners appeal, and the appeals were consolidated. Reversed and remanded.

Horace K. Tenney and Albert M. Kales, for appellants. John S. Huey, for appellees.

DUNN, J. Sarah Walker died testate in 1883, seised of the west quarter of lot 2, in block 32, known as No. 205 Lake street, and of the west quarter of lot 8, in block 16, known as No. 103 South Water street, both in the original town of Chicago. The second clause of her will, which was executed September 25, 1876, was as follows: "I give,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

bequeath and devise all of my estate, real and personal, unto my son, Lester Curtis, during his lifetime, and authorize him to sell or exchange any or all of my real estate, and to invest the proceeds thereof as in his judgment he may think best; but should he die without children, then the estate, or so much of it as may remain after his reasonable expenses for living, etc., shall go to my nearest relatives, in such proportions as the law in such cases does provide." Lester Curtis was the only heir of the testatrix. He was unmarried at the date of the will, but at the time of the death of the testatrix he was married and had two children. Immediately after his mother's death he entered into possession of the premises, and has ever since continued in possession of them. In February, 1908, he conveyed them to William A. Bond, by deeds reciting the second clause of the will of Sarah Walker that under it Lester Curtis took a life estate, and that he was also entitled, by descent, to a legal reversion of the fee pending the event of his dying without children, and the taking effect in possession, in that event, of the gift to the testatrix's nearest relatives, and that it was the intention of the grantor to convey the life estate and the reversion in fee, so that the life estate should merge in the fee and be extinguished and prematurely destroyed, and the grantee be vested at once with a legal estate in fee in possession, and that any contingent future interest in the nearest relatives should be destroyed. On February 13, 1908, William A. Bond executed a declaration of trust in favor of Lester Curtis for the premises at No. 103 South Water street in fee, and on February 24, 1908, together with his wife, by special warranty deed conveyed the premises at No. 205 Lake street to Lester Curtis. On February 26, 1908, Bond, claiming the fee as trustee, filed his application to have the title to the premises at No. 103 South Water street registered under the Torrens act, and Curtis filed a separate application for the registration of the title to the premises at No. 205 Lake street. The two daughters of Curtis were made parties defendant, as were also various nieces and nephews of Sarah Walker, her next of kin. Mary Isabel Curtis, one of the daughters, assented to the petition, but the appellee Sally Palmer Curtis Moore, the other daughter, filed an answer, denying that Lester Curtis and Bond were the owners of the fee, and alleging that she and her sister were the owners of the fee in remainder, subject to the life estate. The answers of the nieces and nephews alleged that, next to the daughters, they were the nearest relatives of Sarah Walker, and in case of the death of the two daughters without issue before the death of their father, such of the nieces and nephews as should survive Lester Curtis would be entitled to the fee. The causes were referred to an examiner, who found that the petitioners were the owners of the

fee and entitled to have their titles registered; but upon objection the reports were disapproved, and decrees were entered dismissing the applications, but without prejudice to the rights of the petitioners in an estate less than the fee. The appeals, prosecuted separately to this court, have been consolidated.

The principal question arising upon the construction of the second clause of Sarah Walker's will is whether or not there was a devise, by implication, of the remainder in fee to the children of Lester Curtis, by reason of the gift over to the nearest relatives of Sarah Walker should he die without children. The appellees contend that under this clause the daughters of Lester Curtis took a vested remainder in fee, subject to his life estate, while the appellants contend that no remainder was given, by implication, to the children of Lester Curtis, but that the reversion in fee descended to Lester Curtis, as sole heir at law of his mother, pending the happening of the events upon which the estate given over to the nearest relatives depended, and that upon the conveyance of the life estate and the reversion to Bond the life estate merged in the reversion, and the contingent remainder to the nearest relatives was destroyed because of this termination of the particular estate before the happening of the event upon which the contingent remainder depended. The object of the construction of wills is to ascertain the intention expressed by the testator. The intention sought is not that which by inference may be presumed to have existed in the mind of the testator, but that which by the words used in the will he has expressed. *Engelthaler v. Engelthaler*, 196 Ill. 230, 63 N. E. 669; *Williams v. Williams*, 189 Ill. 500, 59 N. E. 966; *Bingel v. Volz*, 142 Ill. 214, 31 N. E. 13, 16 L. R. A. 321, 34 Am. St. Rep. 64. It will be presumed that it was the intention of the testator to dispose of his entire estate, and not to die intestate as to any portion thereof. Any reasonable construction will be adopted, consistent with the terms of the will, so as to dispose of the entire estate; but, where no intention is shown by the will as to the disposition of a part of the testator's property, it must be regarded as intestate. *Minkler v. Simons*, 172 Ill. 323, 50 N. E. 176; *Craw v. Craw*, 210 Ill. 246, 71 N. E. 450. Devises by implication have been recognized, but they can only be given effect in cases of such clear necessity that from the will itself no reasonable doubt of the intention can exist. Probabilities as to the testator's intentions cannot be weighed, but the implication must be so strong that an intention contrary to that imputed to the testator cannot be supposed to have existed in his mind. *Barlow v. Barnard*, 51 N. J. Eq. 620, 28 Atl. 597; *Brown v. Quintard*, 177 N. Y. 75, 69 N. E. 225. It must be such as to leave no hesitation in the mind of the court, and permit no other reasonable inference. *Connor v. Gardner*, 230 Ill. 258, 82 N.

E. 640. Moreover, a gift by implication must be founded upon some expression in the will. It cannot be inferred from an absolute silence on the subject. In *re Reinhardt*, 74 Cal. 365, 16 Pac. 13; *Nickerson v. Bowly*, 8 Metc. (Mass.) 424; *O'Hearn v. O'Hearn*, 114 Wis. 423, 90 N. W. 450, 58 L. R. A. 105.

The estate given to Lester Curtis by the will is expressly limited to his life. Should he die without children, the remainder is disposed of. The will says nothing as to the disposition of the remainder should Lester Curtis have children. Appellees contend that the gift over, in default of children, implies a gift to the children should any be born. This question has arisen in the English courts, and a series of decisions has established the rule there that a devise to one for life, with a remainder over if he dies without issue, does not, of itself give an estate, by implication, to his issue. *Greene v. Ward*, 1 Russ. 262; *Sparks v. Restal*, 24 Beav. 218; *Ranelagh v. Ranelagh*, 12 Beav. 200; *Neighbour v. Thurlow*, 28 Beav. 33; In *re Hayton's Trusts*, 4 N. R. 55; *Seymour v. Kilbee*, 3 L. R. Ir. 33; In *re Rawlin's Trusts*, 45 Ch. Div. 299; *Scale v. Rawlins* [1892] L. R. A. C. 342. Such is stated to be the rule of law in *Page on Wills*, 554, and 2 *Redfield on Wills* (3d Ed.) 204. In the case of *Neighbour v. Thurlow*, *supra*, it was said: "The court will give the most liberal construction to the words of a testator in order to carry out his intention, but it is contrary to every principle to introduce words into a distinct bequest in order to make the will more reasonable, or to supply a gift which is not to be found in the will. It is settled that, where there is a gift to A. for life, and, if he die without leaving issue, to B., it does not create an implied gift to the children of A. Though it is natural enough to suppose that some words may have been omitted, still the answer is that the testator has not inserted them, and the court cannot do so for them." In *Seymour v. Kilbee*, *supra*, it was said that "no such gift [to children] can be implied from the gift over only, and it could only be supported by some other matters existing in the will raising an inference in favor of the issue. I can find nothing of the kind in this will. It does not contain a single word favoring the implication of an interest in the issue beyond the mere gifts over." Where in a will there is a gift to A. for life, with a gift over "on the death of A. without leaving children," those words are not, by themselves, without assistance from other parts of the will, sufficient to create a gift, by implication, to the children. In *re Rawlin's Trusts*, *supra*. The same principle was followed in the cases of *Brown v. Quintard*, *supra*, and *Barlow v. Barnard*, *supra*. In the former case the testator directed the division of his residuary estate into four parts, one of which was to be given to one of his children, with certain deductions on account of advancements. The testator had four

children but no disposition was made of the other three parts of the residuary estate. The court held that there was not a devise by implication, citing a number of cases illustrating the inflexibility of the rule that to uphold a devise by implication there must be so strong a probability of the testator's intention that the contrary cannot be supposed. Opposed to the English decisions above cited is the case of *Ex parte Rogers*, 2 Madd. 49, in deciding which the Vice Chancellor refers to *Crowder v. Cowles*, 2 Ves. Jr. 449, *Wainwright v. Wainwright*, 3 Ves. Jr. 558, and *Harman v. Dickenson*, 1 Bro. C. C. 91. The decision in *Ex parte Rogers* was, however, overruled by the Court of Appeals, and its authority is denied in *Dowling v. Dowling*, L. R. 1 Ch. App. 612, reversing the order of the Vice Chancellor in L. R. 1 Eq. 441. It was disregarded in the cases heretofore cited, all of which were decided subsequent to it.

We are referred to a number of cases as supporting the claim of appellees that a remainder is devised to the children of Lester Curtis by implication, and it is contended that the decisions of all the American courts of last resort in which a like question was involved sustain appellees' position. The cases specially pressed upon our attention are *Anderson v. Messinger*, 146 Fed. 929, 77 C. O. A. 179, 7 L. R. A. (N. S.) 1094, *Wetter v. Hydraulic Cotton Press Co.*, 75 Ga. 540, *Shaw v. Hoard*, 18 Ohio St. 227, *White v. Holton*, 23 N. J. Law, 330, and *Carr v. Green*, 2 McCord (S. C.) 75. In each one of the first three of the cases above cited the language of the will which devises the property to the first taker imports a devise in fee simple and not a life estate. It is expressly so stated in the opinion in *Anderson v. Messinger*. In that case, after the devise of the fee to the testator's two sons, the qualifying clause provides: "If either of my sons die without lineal descendants, the one surviving shall take his estate above bequeathed, and if the survivor die without lineal descendants" then the devise over follows. This devise of a fee, with the provision that upon the death of the devisee without lineal descendants or without issue the property shall go to another, created a fee, variously called a qualified, conditional, base, or determinable fee, in the first devisee, with an executory devise in favor of those who are to take upon the determination of such base fee by the happening of the condition by which it is limited. *Friedman v. Steiner*, 107 Ill. 125; *Smith v. Kimball*, 153 Ill. 368, 38 N. E. 1029; *Fifer v. Allen*, 228 Ill. 507, 81 N. E. 1105. If the event marked out as a boundary to the time of the continuance of the estate becomes impossible, the estate then ceases to be determinable, and changes into a single and absolute fee; but until that time the estate is in the grantee. The case of *Anderson v. Messinger* arose in the state of Ohio, where the effect of such a devise has been held by the Supreme Court

to be the same as in this state. *Platt v. Sinton*, 37 Ohio St. 353; *Niles v. Gray*, 12 Ohio St. 320; *Collins v. Collins*, 40 Ohio St. 353. In this case there was an express devise of the fee determinable upon the happening of the death of both of the sons without issue. There was, therefore, no room for implication.

The court to a large extent founded its decision upon another of the cases cited by appellees—*Shaw v. Hoard*, supra. In that case the language of the will was as follows: "I give and bequeath unto my said wife and daughter all the real estate of which I may be seised at the time of my death, to each one-half. On the death of either my wife or daughter, then the survivor shall have the property left them by me; and if both die without leaving any heirs of their body, then and in that case said property shall be given to my wife's brother, David Campbell." The first sentence would give a fee to the wife and daughter, to each one-half, if it were not controlled by the first clause of the second sentence, which reduces the estate devised by the first to a life estate in the one dying first; but there is no limitation on the estate given to the survivor, and she therefore took a fee determinable upon the death of both the wife and daughter without issue. The wife died, leaving a daughter by a subsequent marriage. Thereupon the daughter, the other devisee, became the owner in fee of all the property, and upon her death the daughter of the second marriage, her half-sister and only heir, inherited the estate. The Supreme Court of Ohio arrived at the same result, but it was done by disregarding the express devise of the fee and implying a gift to the issue as a purchaser, thus reducing the fee to a life estate and giving a remainder to the daughter of the wife by implication. This case is inconsistent with the earlier case of *Niles v. Gray*, 12 Ohio St. 320, and is, in effect, overruled by the later cases of *Carter v. Reddish*, 32 Ohio St. 1, *Platt v. Sinton*, 37 Ohio St. 353, and *Collins v. Collins*, 40 Ohio St. 353.

In *Platt v. Sinton*, just cited, the devise was to Lucinda Frances Platt of all of the testator's property of every description, and it was further provided that in case she should die without leaving any legitimate heir of her body the property should go to certain nephews and nieces of the testator. It was held that Lucinda Frances Platt took all the estate of the testator, subject to be defeated upon the happening of the contingency named in the will, and that until such contingency happened the fee was vested in her and her grantees. In the case of *Wetter v. Hydraulic Cotton Press Co.*, supra, the devise was to the testatrix's daughter, "to have and to hold the same and her heirs forever." A subsequent clause provided that, if the daughter should depart this life leaving no issue or lineal heirs, the estate should go over. This, at common law, was a devise to

the daughter in fee simple, and the subsequent clause merely added a condition upon which the estate should be terminated and the property pass to the subsequent takers. The court, however, disregarding the express devise of the fee, held that there was a gift, by implication, to the issue as purchasers, and that the daughter took only a life estate, with the remainder to her children in fee. We cannot follow these cases or regard them as authority. In each there is an express devise of the fee. In each a subsequent clause imposes a condition, upon the happening of which the estate in fee is to terminate and another is to take its place. This we have always held to constitute a determinable fee, subject to an executory devise to the subsequent takers. It leaves no room for implication. The fact that the event upon which the estate is to terminate is the death without issue of the first taker cannot affect the estate granted or give the issue any interest in the devise.

The case of *White v. Holton*, supra, appears to support appellees' contention, though the construction there was not based entirely on the gift over, but to some extent on the other provisions of the will. This case does not go into the authorities, and the court contents itself with a very brief statement of its conclusions. In *Bellstein v. Bellstein*, 194 Pa. 152, 45 Atl. 73, 75 Am. St. Rep. 602, it is held that in a devise over in case of the death of a devisee for life "without leaving a family" there is a necessary implication, in the contingency of her leaving a family, that the estate is to go to them. It is said that "this is practically assumed, without question, in the long line of cases on the subject which are carefully reviewed in *Seybert v. Hibbert*, 5 Pa. Super. Ct. 537." This is true. At a very early period this principle was assumed in Pennsylvania without discussion, and the courts have followed it down to the latest decisions, merely referring to their prior adjudications. In *Lytle v. Beveridge*, 58 N. Y. 592, the court, after distinguishing the words used there, "legitimate heirs," as not being the equivalent of "issue," or "issue of the body," as imputing an indefinite limitation, held that their use did not enlarge the life estate given to the first taker into a fee, but that such estate was limited to a life estate, and that upon the happening of the contingency the estate did not descend as an inheritance, but the remainder over took effect. It is true that in argument the court said that the law would imply a devise to the children of the first taker if any had survived him; but no such decision was made or was involved in the case, and the implication seems less necessary there than in the later case of *Brown v. Quintard*, supra, where the court held there was no devise by implication.

The case of *Carr v. Green*, supra, sustains appellees' contention, but that case is not, and never was, the acknowledged law in

South Carolina. It was decided by the Court of Appeals in Equity in May, 1822. In May, 1821, the Court of Appeals at Law, having this same will before it for consideration, had arrived at a precisely opposite result. *Carr v. Jeannerett*, 2 McCord, 66. Thus the rights of the parties depended upon the court in which the proceedings for their determination were brought. In 1824 these two courts were abolished and a Court of Appeals was established having final appellate jurisdiction in all cases. In 1825 a case involving the same will as the two former cases was brought to the Court of Appeals. The reasoning of the former cases and the decisions upon which they were based were carefully reviewed, and the Court of Appeals, after an elaborate examination of the authorities and consideration of the principles involved, held that under the devise to the testator's grandsons, with a devise over in default of issue, there was no devise to the issue by implication and that an estate is never implied to issue as purchasers. *Carr v. Porter*, 1 McCord, Eq. 60. This principle has since been recognized as the law by the courts of South Carolina. In *Manigault v. Deas*, Bailey, Eq. 298, it is held that issue cannot take as purchasers, by implication, from a valid limitation over in the event of the death without leaving issue, where there is no direct gift to the issue. So, also, it is held in *McLure v. Young*, 3 Rich. Eq. 559, and *Addison v. Addison*, 9 Rich. Eq. 58.

In this state the cases of *King v. King*, 163 Ill. 273, 48 N. E. 582, and *Orr v. Yates*, 200 Ill. 222, 70 N. E. 731, are relied upon by appellees. In the former case the testator's scheme of distribution involved the division of his estate into five equal parts, and the giving of one portion to each living child, and one portion to the representatives of each deceased child. A trust was created as to one share, to be held for a grandson of the testator and his family, with a gift over in case of the death of the grandson's wife, and of his leaving no children surviving him. It was the clear intention of the testator, in setting apart the grandson's portion to him and his family, to provide for the children also, and that, if any part of the property held by the trustees remained after the death of the grandson and his wife, it should go to the children. It was held that such was the plain intention of the testator on the face of the will, and the court refers to the case of *Kinsella v. Caffrey*, 11 Irish Ch. 154, in which case, also, the remainder was sustained, and in which the rule of law was stated to be that, "if there is a bequest to a parent for life, and, if he die without having or leaving children, to B., if the parent dies leaving children, they are not entitled by implication." What was said in the case of *Orr v. Yates* as to the succession of the issue of Mary Maria Yates was beyond the question under consideration, and the question where the fee would go in

case of her death leaving issue was expressly left undetermined. In the case of *Stisser v. Stisser*, 235 Ill. 207, 85 N. E. 240, the testator, after devising a life estate in separate tracts of land to each of three children, directed that, in case of the death of either without issue, the land should revert equally to the legal heirs of the other children. He then added the statement, "it being the will of the testator that the title to the properties under sections 4, 5 and 6 herein shall rest and abide in the hands of the legal heirs of the lawful heirs of the testator hereto." The context thus clearly indicated the intention of the testator that the title should pass to the issue of the children. A devise for life, with a gift over on the death of the life tenant without issue, is not, of itself, sufficient to create a gift, by implication, to the children of the life tenant. Such implication can only arise when supported by some other matter appearing in the will raising an inference in favor of the children.

When we undertake by construction to arrive at Mrs. Walker's intention in regard to the disposition of her property at her son's death in case he should happen to leave children, we are left entirely without aid from the will itself. It is a case for which she has not provided, whether unintentionally or purposely we have no means of determining. We may speculate or conjecture as to what may have been in her mind, but we can find no indication in the will itself to enable us to say that she intended her son's children to take the remainder. It is clear that the testatrix intended her son to have the use and benefit of the property during his lifetime, with a certain power of disposition. It is clear that she intended, if he died without children, that her nearest relatives at the time of his death should have what was left of the property. It is equally clear that it is impossible to determine her intention as to the disposition of the property if he had children. She had confidence in him, and did not refuse to give him the fee, and limit his interest to a life estate, because she feared he would squander the property; for she made him executor of her will without bond, and authorized him alone, and not in conjunction with his coexecutor, to sell the real estate. She is presumed to have known that her son was her only heir, and that, as such, the property would all descend to him after the termination of the life estate, unless she disposed of it by her will. She may have believed that he would use the property for the benefit of his children, should he have any. She knew the property would naturally descend to them as his heirs. The children yet to be born might be deserving or not deserving. Circumstances, as developed by the future, might make an unequal division of the property among the children just and proper, or a diversion of a part of it in another direction desira-

ble. It may be that, upon a consideration of all the circumstances of the situation, the testatrix wished to leave to the discretion of her son the disposition of her property, except in the one event of his dying without children. The will shows that in such contingency she wished to control the disposition of such part of the property as might remain after his reasonable expenses for living were satisfied, and she did so by directing it to go to her nearest relatives. There is no word in the will indicating a desire to interfere with the statutory disposition of the property in the alternative of her son's death having children. She may have desired him to have the use of the property during his life, and, in case of his having children, the power to dispose of it as he might in his own discretion think best for the interest of his family, but have also wished the property, in case he had no children, to go to her relatives. It is possible that the testatrix, in case of her son's death having children, desired them to take the property directly from her, but the will expresses no such wish. It is equally consistent with the will that she desired her son to inherit the fee in such event. Being content with the statutory rule of descent, she made no provision to the contrary.

It may be said that it will be presumed that the testatrix intended to dispose of her entire estate, and that the will should be so construed, unless this presumption is rebutted by its provisions. It is true that any reasonable construction of a will, consistent with its terms, will be adopted so as to give it effect to dispose of all the testator's property, and not to leave a part intestate, but this rule cannot be carried to the extent of inserting provisions in the will which the testator failed to insert. Clear words are necessary to disinherit an heir; and, even where the intention is clearly manifested, the heir will take, unless the testator devises the property to some one else. *Parsons v. Millar*, 189 Ill. 107, 59 N. E. 606; *Lawrence v. Smith*, 163 Ill. 149, 45 N. E. 259. The court cannot presume a will for a testatrix on mere speculation as to what might have been her intention. It is the intention of the testatrix only so far as she has communicated that intention by her will which is to govern the descent of her estate. The omission to make any gift, in the one case, may have been the intention of the testator as fully as the gift over in the alternative.

The limitation of the estate to the nearest relatives of the testatrix should Lester Curtis die without children is a contingent remainder. Since Lester Curtis was himself the nearest relative of the testatrix at the time of her death, the devise comes within the rule that, where there is a gift to one for life, with remainder to the testator's next of kin, and the life tenant is the sole next of kin at the death of the testator, the remainder will be considered as given to

the persons answering the description at the termination of the estate for life. *Johnson v. Askey*, 190 Ill. 58, 60 N. E. 76. Both the event upon which the estate in remainder is to come into possession, the death without children of Lester Curtis, and the persons who may at that time be entitled, as the nearest relatives of Sarah Walker, to take the estate, are uncertain, and the remainder is therefore contingent. Until its vesting, or the determination of the impossibility of its vesting, the reversion in fee descended to Lester Curtis as the heir. *Peterson v. Jackson*, 196 Ill. 40, 63 N. E. 643; *Harrison v. Weatherby*, 180 Ill. 418, 54 N. E. 237; *Pinkney v. Weaver*, 216 Ill. 185, 74 N. E. 714.

It is contended by appellants that, by the conveyance to William A. Bond of the life estate devised to Lester Curtis, and of the remainder in fee inherited by him, the life estate became merged in the fee, and the contingent remainder to the nearest relatives was destroyed. The effect of a conveyance of his estate, by a life tenant, to the remainderman is to cause the destruction of the particular estate, which becomes merged in the fee. *Field v. Peeples*, 180 Ill. 376, 54 N. E. 304; 2 *Blackstone's Com.* 177; 4 *Kent's Com.* 100. Every remainder requires a particular estate to support it, and a contingent remainder must vest during the continuance of the particular estate, or eo instanti that it determines. 2 *Blackstone's Com.* 168. If the particular estate comes to an end before the event upon the happening of which the contingent remainder is to take effect occurs, the remainder is defeated; and this is so whether the preceding estate reaches its natural termination or is brought to a premature end by merger, forfeiture, or otherwise. "Unless a contingent remainder becomes vested on or before the determination of the preceding vested estate, it can never come into possession; it has perished. It makes no difference whether the preceding estates have ended by reaching the limit originally imposed upon them, or whether they have been cut short by merger, forfeiture, or otherwise. *Gray on Perpetuities*, § 10." *Madison v. Larmon*, 170 Ill. 65, 48 N. E. 556, 62 Am. St. Rep. 358. "Contingent remainders may be defeated by destroying or determining the particular estate upon which they depend before the contingency happens whereby they become vested. Therefore, where there is tenant for life, with divers remainders in contingency, he may, not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life estate before any of those remainders vest, the consequence of which is that he utterly defeats them all." 2 *Blackstone's Com.* 171. So a tenant for life, with subsequent contingent remainders, might make a tortious conveyance by deed of feoffment with livery of seisin, and thus forfeit his life estate for the express purpose of destroying the contingent remain-

ders, and upon reconveyance of the tortious title would hold it free from the contingent remainders. It was to prevent contingent remainders from being defeated by such premature determination or destruction of the preceding estate that the device was invented of interposing trustees to preserve contingent remainders having a legal estate to support the remainders until the happening of the contingency. When the estate for life and the next vested estate in remainder or reversion meet in the same person, notwithstanding intervening contingent remainders, the particular estate will merge in the reversion or remainder, and the contingent remainders will be destroyed. A qualification of this rule exists where the creation of the particular estate and the remainder or reversion occur at the same time and by the same instrument. *Fearne on Contingent Remainders*, §§ 816-824; 3 *Preston on Conveyancing* (3d Ed.) 399; 2 *Washburn on Real Property* (6th Ed.) 553, para. 1597, 1598; *Williams on Real Property*, 233.

In *Egerton v. Messey*, 3 Q. B. (N. S.) 338, the devise was to Eunice Highfield for life, remainder, in default of issue of Eunice, to Peter Highfield in fee, residuary devise to Eunice in fee. After the death of the testatrix, Eunice, by lease and release, conveyed to Peter Jackson in fee, and after her death without issue the question of title arose between those claiming under Peter Jackson and those claiming under Peter Highfield. It was held that under the residuary devise the reversion in fee went to Eunice Highfield; that the life estate did not merge in it so long as both remained in the devisee, but that upon her conveyance of both estates to Peter Jackson the life estate merged in the fee, and that the contingent remainder of Peter Highfield was destroyed. The same question arose in *Bennett v. Morris*, 5 Rawle (Pa.) 9, and a similar question in *Craig v. Warner*, 5 Mackey (D. C.) 460, 60 Am. Rep. 381, and were similarly decided. In *Faber v. Police*, 10 S. C. 378, and *McElwee v. Wheeler*, Id. 392, the devise was for life, with contingent remainders over, the life tenant being the sole heir of the testator. The devisees made deeds of feoffment with livery of seisin, and their grantees reconveyed to the grantors. It was held that, the common law not having been modified in South Carolina at the time, the effect of the deeds was to destroy the life estates and perfect the absolute title in the life tenants. *Redfern v. Middleton*, Rice (S. C.) 459. The case of *Frazer v. Supervisors of Peoria County*, 74 Ill. 282, is cited as sustaining the proposition that the court will not permit a contingent remainder to be destroyed contrary to the will of a testator or grantor. A deed was made to an unmarried woman and the heirs of her body. She reconveyed before having issue, and it was held that the contingent remainder to her children was not thereby destroyed. The question there dis-

cussed was the effect of section 6 of the statute of conveyances, which modifies estates tail so as to give the first taker a life estate, with the remainder in fee simple absolute to the next. The doctrine of merger, which has just been considered, did not apply to estates tail under the statute de donis, which were an exception to the rule. Such estates were protected and preserved from merger by the operation and construction given to the statute de donis for the express purpose of preventing the particular tenant from thus barring and destroying the estate tail. 2 *Blackstone's Com.* 177, 178. It was held in *Frazer v. Supervisors of Peoria County* that the General Assembly did not intend to restore the common law as it stood before the adoption of the statute de donis, and leave the donee with power to alien the estate and repurchase, and thus cut off both the remainder and reversion, but did intend that the person who should first take from the tenant in tail should take a fee simple absolute, without any power in the donee to dock the remainder, or any reversion in the donor except on failure of issue. The case deals with an estate tail only under our statute, and is a case of statutory construction only, having nothing to do with the general question of the destruction of contingent remainders.

Our conclusion is that the language of the will does not warrant the implication of a devise of the remainder to the children of Lester Curtis; that the reversion descended to Lester Curtis, as heir at law; that by his deed to William A. Bond the life estate merged in the reversion, and the contingent remainder to the nearest relatives of the testatrix was destroyed; and that the appellants hold the title to the premises involved in the respective causes in fee simple.

The decrees are reversed, and the causes remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

CARTER, J. (dissenting). I do not concur in the foregoing opinion. The conclusion reached is manifestly contrary to the plain intent of the testatrix as expressed in the will. The paramount rule in construing wills is to ascertain the intention of the testator and to give to such intent effect, if consistent with the rules of law. *Bradsby v. Wallace*, 202 Ill. 239, 66 N. E. 1088. This is the first and great rule in the interpretation of wills, and to it all other rules must bend. *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322; *Wardner v. Baptist Memorial Board*, 232 Ill. 606, 83 N. E. 1077. This will provides that the son shall have a life estate, with the right to control, manage, sell, or exchange the property and to reinvest the proceeds as he may think best; but he can only use of the proceeds that which is required for his reasonable expenses for living. It is further provided that if the son should die "without

children" the remainder shall go to testatrix's nearest relatives. When she was disposing of her property she had these grandchildren in mind, and must have intended them to take something or nothing. Clearly she intended them to take something. And what could this be but the intermediate estate? *Dowling v. Dowling*, L. R. 1 Eq. Cas. 441. If reasonably possible, a will will be so construed as to dispose of the entire estate of the testator. *Scofield v. Olcott*, 120 Ill. 362, 11 N. E. 851; *Craw v. Craw*, 210 Ill. 246, 71 N. E. 450. By this will the testatrix intended to dispose of all her property, the son taking a life interest in the entire estate. She did not mean to give the remainder to the residuary legatees unless her son died without children. The phrases "die without children" and "die without issue" have been construed by this court to mean without having had children or issue. *Field v. Peeples*, 180 Ill. 876, 54 N. E. 304. If the son had children, to whom did the testatrix mean that the remainder should go? Why did she mention these grandchildren, if she did not mean them to take this remainder? *Ex parte Rogers*, 2 Madd. 576. By necessary implication the children of the son of testatrix should be considered as entitled thereto.

An estate may pass by mere implication without any express words, "and in general, where any implications are allowed, they must be such as are necessary or at least highly probable. \* \* \* A will is construed \* \* \* and expounded rather on its own particular circumstances than by any general rules of positive law." 2 Blackstone's Com. 381. If the testator's meaning cannot be clearly ascertained, we are at liberty, and for the sake of certainty in the possession and transmission of, estates generally required, to apply such rules of construction as have by long usage been approved and used. *Anderson v. Messinger*, 146 Fed. 929, 77 C. C. A. 179, 7 L. R. A. (N. S.) 1094. The doctrine that the intent of a testator must be the guiding and controlling rule of interpretation requires, not unfrequently, as was said in *Lytte v. Beveridge*, 58 N. Y. 592, "a disregard of the usual technical meaning of words and phrases, and, when necessary, such technical meaning must yield to the evident intent of the testator." It was further said in that case: "Rules of construction are resorted to as helps or aids in arriving at the intent of a testator, and ought not to be followed when they lead to results subversive of such intent. There is no rigid rule of law to the effect that words shall only be used in one certain sense, or requiring courts to give language the same interpretation and effect under all circumstances and in every connection. The infinite variety of circumstances that may occur, distinguishing one case from another, in the use of the same words and phrases, renders it impossible to give an absolute and unbending rule for the interpretation of language applicable to all

cases." The rule that the intention of the testator must govern is so strong that in seeking for such intention, courts are not restrained by unbending technical rules, but may adopt the most liberal construction without much regard to the grammatical structure of the sentences or the precise definition of the words used. These instruments are sometimes made in extremis and often drawn by unskillful persons. They are therefore entitled to great indulgence and are treated with greater liberality than any other legal instruments. It frequently happens, in reading a loose and carelessly written will, that the meaning of the testator is perfectly obvious, and yet it may be difficult to explain such meaning by any strict rules of interpretation. *Ferson v. Dodge*, 40 Mass. 287. The implication that can be followed in construing a will must rest upon a legal inference and not upon bare conjecture. *Ferson v. Dodge*, supra; *O'Hara on Interpretation of Wills*, p. 166, c. 14. An estate by implication must be apparent on the face of the will and for the purpose of carrying into effect the manifest intention of the testator. *Carr v. Porter*, 1 McCord, Eq. (S. C.) \*61.

The devise to these grandchildren of the testatrix arises by implication, founded upon expressions in the will from which such an intention on the part of the testatrix is inferred. *Connor v. Gardner*, 230 Ill. 258, 82 N. E. 640, 15 L. R. A. (N. S.) 73, and note. The common understanding of the language of the will would convey the meaning that if the son died without children the remainder must go to the other relatives of the testatrix; but just as plainly the meaning is conveyed that in the other alternative—that is, if the son should leave children—it was intended that these children should take this remainder. The familiar rule of construction that the inclusion of one alternative is the exclusion of another, or vice versa, would tend to confirm this conclusion. *Anderson v. Messinger*, supra. Not only would this be the meaning given to these words by the ordinary layman, but the lawyer would almost certainly say, as a matter of first impression, that such a construction of the will carried out the plain intent of the testatrix. The construction placed upon this will by the majority opinion of the court would not readily suggest itself on the first reading of the will and certainly was not intended by the testatrix. It is a construction that must be searched for. Does it not require a strained and unnatural meaning to be placed upon the words of the will? Rules of law should not be permitted to thus defeat the intention of the testatrix, unless they have been long established and upheld by the great weight of authority. It may be admitted that it is "essential to the security of property that a rule should be adhered to when settled, whatever doubt there may be as to the grounds upon which it originally stood" (*Ram on Legal Judgment*, p. 230); that it is extremely dan-

gerous to shake the authority of decided cases. Beal on Cardinal Rules of Legal Interpretation, p. 20). I find no such settled rule, however, upholding the construction placed upon this will by the majority opinion of the court. The precise question here under consideration has never been passed upon by this court; but, as will be shown hereafter, cases have been decided by this court in which this question has been discussed, and the reasoning in those cases fairly tends to uphold the construction contended for in this dissent. It is conceded that the decisions in the English courts tend to uphold the conclusion of the opinion; but it is evident, from a study of the English authorities, that they are not all in harmony on this question, and that the rule on this subject has been changed by the modern decisions of those courts. *Anderson v. Messinger*, supra. The great weight of authority in this country is opposed to the rule of construction laid down in the majority opinion of the court.

It has been held in the English courts that while American decisions will be entitled to great respect yet they cannot be treated as controlling or placed on the same footing as the decisions of their own courts. Beal on Cardinal Rules of Legal Interpretation, p. 47. It has been rightly said that the English decisions are only "quasi authority" in this country. Ram on Legal Judgment, p. 293. The law of this state requires that the common law of England, so far as the same is applicable and of a general nature, shall be the rule of decision in this state unless repealed by legislative authority. *Hurd's St.* 1908, p. 485. The English cases since the Revolution are not regarded as authority. Upon disputed doctrines in our courts they are entitled to respectful consideration; but where the question relates to the construction or effect of written documents they have no greater weight than may be due to the reasons given in their support. *Andrews v. Durant*, 11 N. Y. 35, 62 Am. Dec. 55. To the same effect are *Cathcart v. Robinson*, 5 Pet. 264, 8 L. Ed. 120, and *Koontz v. Nabb*, 16 Md. 549. No decisions have been cited in the opinion of the court that were decided previous to the American Revolution. The earliest of the English decisions cited is *Green v. Ward*, 1 Russ. 262, which was decided in 1826, and the latest, *Scale v. Rawlins*, A. C. 342, in 1892. One of the earliest decisions in this country is *Carr v. Green*, 2 McCord (S. C.) 75, in which the highest chancery court of that state decided, in 1822, after a review of many of the English authorities, that the words of the will, "The rest and residue of my estate to be divided between my grandsons at the age of twenty-one years, but should they die leaving no lawful issue" then the whole to go to others, manifested a plain intention of the testator to provide distinctly "for the issue of his grandsons, if they should leave any, and if the common sense of the community should be consulted on it there

would not, probably, be found one man that would hesitate in deciding that this must have been the intention of the testator." It appears that the court, in deciding this, was in conflict with some of the other courts of that state, and, when a law was passed creating a new Court of Appeals, that court, in 1825, reviewed the same facts in the case of *Carr v. Porter*, supra, reversing, in effect, the earlier decision in *Carr v. Green*, supra. From that day to this the American courts, so far as my attention has been called to them, have given to similar words in wills the construction contended for in *Carr v. Green*, supra.

In *White v. Holton*, 23 N. J. Law, 330, the will provided that, in case "of the decease of my son Eli before the expiration of said lease, then the house and lot called Oak Island, together with its appurtenances, shall descend to my son Andrew and his heirs and assigns forever." In discussing that provision of the will that court said (page 334): "In the present case the devise over is to Andrew, one of the six children of the testator, on the contingency of Eli's dying before the expiration of the lease referred to in the former part of the will. It is not a limitation over to the heirs at law, but to one of the heirs at law. If Eli cannot take this property by implication in case he lived beyond the expiration of the lease, the question is, What was to become of it, according to the intention of the testator? He did not mean to die intestate in regard to it, for in addition to his declaration, in the introductory part of the will, that he means to dispose of such things as God has blessed him with, he makes distinct mention of these very premises. He did not mean that his heirs general should take it, for he gave it in distinct terms to his son Andrew on a certain contingency which did not happen, and, on the same reasoning, it is clear to my mind he did not mean that it should be sold by his executors. I cannot resist the conviction that the intention of the testator, as gathered from the whole will, was to devise these premises to Eli in case he survived the lease, and that he takes an estate in them by necessary implication."

In *Anderson v. Messinger*, supra, the United States Court of Appeals had under consideration the words in a will, "If either of my sons die without lineal descendants the one surviving shall take his estate above bequeathed, and if the survivor dies without lineal descendants, then one-half, both of the decedent's original portion as well as one-half of the portion taken by survivorship, shall go to my brother Peter, the other half to such of my brothers and sisters as may be living at the time of the death of such surviving son," and decided that, in case there were lineal descendants, the testator intended to prefer them, rather than the collateral branches of his family—that this was clear by implication.

In *Shaw v. Hoard*, 18 Ohio St. 227, in construing the following words in a will: "On the death of either my wife or daughter then the survivor shall have all the property left them by me, and if both die without leaving any heirs of their body, then in that case said property shall be given to my wife's brother David Campbell"—that court held that by fair implication the testator intended to give the property to the issue of his wife and daughter after their decease, if they left issue surviving them.

In *Lytle v. Beveridge*, supra, the Court of Appeals of New York, in construing in a will the following: "I allow my son Joseph to possess by devise of will the farm I now live on [describing it], with all the rights and privileges thereunto belonging, as fully and freely as if I had made him lawful conveyance by full covenant during his natural life, but if he leaves no legitimate heirs, then in that case the property according to my will I allow to revert back to my son David, his heirs or assigns forever, without hindrance of any person whatsoever, as fully and freely as if I had given him a lawful conveyance"—stated that from the above-quoted words the law would imply a devise in fee to the children of Joseph living at the time of his death, and thus give effect to the intent to provide for them in case there should be any such children.

In *Wetter v. United Hydraulic Cotton Press Co.*, 75 Ga. 540, a will gave to a daughter, after she arrived at the age of 21, the estate of the testatrix, but provided that "if said daughter should depart this life leaving no issue or lineal heirs, that the whole of the estate herein bequeathed should go and belong to my mother and sister, as tenants in common, and their heirs forever," etc. The court, in construing the will, said that nothing was expressly said as to what effect the existence of the children of the daughter was to have on the course of the property, but the only contingency upon which other persons—in the one case the mother and sister, and in the other the next of kin to testatrix—can take was the death of the daughter "without issue or lineal heirs," and continued: "The inference or implication seems to us plainly to be that if there were such issue lineal or heirs left by the daughter the property should go to them."

Practically to the same effect as the American decisions just referred to are *In re Moore's Estate*, 11 Misc. Rep. 436, 33 N. Y. Supp. 419, *Bentley v. Kaufman*, 12 Phila. (Pa.) 435, and *In re McAlpin's Estate*, 211 Pa. 26, 60 Atl. 321. Rood on Wills (section 495) also tends to support the same conclusion, where certain English authorities are cited supporting the text, as does also 1 Spence's *Equitable Jurisdiction*, p. 530.

It will be noted that in most, if not all, of the cases just cited there was in the first instance, by the terms of the will, a devise in fee to a certain person, which devise in

fee was cut down to a life estate by later provisions of the will. The reasoning of the majority opinion would necessarily be much stronger in support of the construction that is contended for in that opinion as to such a wording than it would where the will plainly states, as it does here, that in the first instance the first taker is only to have a life estate. In discussing this question, Jarman, in his work on Wills (volume 1, 6 Bigelow's Am. Ed. \*525), says: "And even where the language of the will necessarily confines the interest of the parent to his life, the children will not generally be held to take by implication. It is extremely probable that the testator intended a benefit to them. But *si voluit non dixit*. But it seems to me that in such a case the court will lay hold of slight circumstances to raise a gift in the children, and thereby avoid imputing to the testator so extraordinary an intention as that the devisee or legatee over is to become entitled if the first taker have no child, but that the property is not to go to the child, if there be one, or its parents." Evidently this eminent author thought the English courts had gone further than they ought in holding that a devise by implication should not arise by words similar to those contained in this will. It will be noted that he said it is extremely probable that the testator intended a benefit to them, and that the construction contended for in the majority opinion imputes to the testator an extraordinary intention.

The latest authority that has been called to my attention is *Bellstein v. Bellstein*, 194 Pa. 152, 45 Atl. 73, 75 Am. St. Rep. 692, and decided in 1899. That decision is precisely in point. In construing the following language of a will: "It is my desire that my daughter, Gertie Bellstein, shall receive the income of my property \* \* \* as long as she lives, but should she die without leaving a family," then the remainder to the testator's brothers and sisters, that court held (page 154 of 194 Pa., page 74 of 45 Atl. [75 Am. St. Rep. 692]): "The devise over in case Gertie should die 'without leaving a family' is an implied devise to her family if she should leave one. It is only if she does not that the devise over is to take effect, and there is a necessary implication that in the other unexpressed contingency of her leaving a family the estate is to go to them. This is practically assumed without question in the long line of cases on the subject"—citing authorities. That the construction here contended for was generally understood to be proper by the courts of this country is very clear from Washburn on Real Property, vol. 1 (6th Ed.) § 192, where that author says: "An instance of an estate tail by construction, where there is no direct limitation to the heirs of the donee's body, would be an estate to A., with a proviso that if he shall die without heirs of his body the estate shall revert to the donor or go over to

one in remainder. Here, it will be perceived, there was no direct limitation to the heirs of A., and it is too plain for doubt that the donor intended the heirs of his body should take it at his decease; for he gives it over, or reserves it, in case he has no such heirs, and only in that contingency."

It may be conceded, as stated in the majority opinion, that some of the decisions of the American courts just cited did not all have under consideration the exact question in this case, and it may also be conceded, as suggested, that, on some other questions as to the construction of wills, rules of law are laid down in some of those decisions not in harmony with the decisions of this court; but the reasoning in these cases, whether the question under consideration was the exact one in this case or a kindred question, tends strongly to uphold the construction contended for in this dissent. Moreover, as I have stated, the decisions in our own court, while not decisive, are strongly persuasive, and the profession, in reading them, would naturally conclude that this court was inclined to follow the American rather than the English authorities on this subject.

In *Schaefer v. Schaefer*, 141 Ill. 337, 31 N. E. 136, the will under consideration provided: "I do bequeath to my beloved daughter, \* \* \* the following property [describing it] in trust for her sole use and benefit, and of her children, and their children thereafter. But in the event that my daughter \* \* \* should die and leave no children as heirs to the within mentioned property, then it is my will and desire that all of said property shall go to my brother, Jeremiah Coughly, \* \* \* and to his heirs and assigns." This court, through the late Justice Baker, in construing this will, stated (page 344 of 141 Ill. and page 137 of 31 N. E.): "Further evidence of the intention to give said children the remainder in fee is amply afforded by the provision that, if appellee 'should die and leave no children, \* \* \* then \* \* \* said property shall go to my brother, Jeremiah Coughly, \* \* \* and his heirs and assigns forever.' The necessary implication from this language is that, if there were children of appellee, then primarily the property should go to them and to their heirs and assigns, forever." The holding in that case that the children were entitled to the remainder did not rest alone upon the clause of the will last quoted; but it is manifest, from the last sentence quoted from Judge Baker's opinion, that the court then had no doubt that a devise would necessarily be implied from language such as is contained in the will here in question.

In *King v. King*, 168 Ill. 273, 48 N. E. 582, where the question as to devises by implication was exhaustively presented in the briefs, the will there under consideration provided: "It is my will that in the event of the death of the wife of said William Jones King, and of his leaving no children surviv-

ing him, that then, and in such case, the said trustees, after the death of said William Jones King, shall convey and transfer to my children and their descendants all the estate, both real and personal, then in their hands or remaining undisposed of," etc. In construing this will this court stated (page 286 of 168 Ill. and page 580 of 48 N. E.): "We think the intention of the testator was that the estate should go to the issue of William Jones King, if he left any." It is true that in that case there were other provisions of the will which tended to uphold the same conclusion, and the court did not rest its opinion solely upon the intention of the testator as drawn from the words quoted.

In *Orr v. Yates*, 209 Ill. 222, 70 N. E. 731, the will provided that the testatrix devised to Jefferson Orr, trustee, certain described land, "constituting what is commonly known and called the 'Putz farm,' to have and to hold in trust for the sole use and benefit of Mary Maria Yates, for and during her natural life, and in the event of the death of the said Mary Maria Yates without child or children or descendants of child, then to have and to hold for the sole use and benefit of Lydia Yates, my wife, if she shall be living during her natural life, and at the death of Lydia Yates, my wife, and Mary Maria Yates, my daughter (if said Mary Maria Yates dies without child or descendants of child), the fee to the said last described tract of land known as the Putz place shall be equally divided between by brothers and sisters and their heirs and assigns," etc. In discussing the will this court said, speaking by Mr. Justice Wilkin (page 238 of 209 Ill. and page 736 of 70 N. E.): "The only uncertainty is as to what shall be done with the trust property in case Mary Maria Yates dies leaving issue. Will it go to such issue in fee, or will it fall back into the estate as intestate property and descend to the heirs of William H. Yates? Our opinion is that it will vest in the issue of Mary Maria Yates. That seems to be the fair inference from the language used. If she dies without issue, then the trust continues during the life of Lydia Yates, and the fee vests in the brothers and sisters. If Mary Maria Yates dies leaving issue, that is clearly the end of the trust, and it seems to be the intention of the testator that the fee shall vest in her issue. This construction is in harmony with the rule of law that where a party disposes of his estate the presumption is that he intended to dispose of all of it, and the courts will so construe the will as to leave no part of the estate as intestate property."

While it is conceded that in none of these three cases did the decision turn upon wording precisely like the one in the will here under consideration, yet I am confident that the profession generally adopted the view that in those decisions (and others of a similar nature where the reasoning is not quite so strong or clear) the construction insisted up-

on in this dissent was intended to be laid down. In note 2 to section 207 of Kales on Future Interests that author says: "Gift to issue of first taker raised by implication from gift over if life tenant leaves no issue"—citing *Orr v. Yates*, supra, and other Illinois cases.

In the recent case of *Stisser v. Stisser*, 235 Ill. 207, 85 N. E. 240, this court construed the following words of the will: "It is my will that should either of the above named children [naming them] die without issue," then and in that case the property shall be disposed of in a certain way, and stated (page 210 of 235 Ill. and page 241 of 85 N. E.): "We think under said clause the remainder, after the death of either of said life tenants, in the property described in said clauses 4, 5, and 6, was devised, by necessary implication, to the issue of the respective life tenants, if they had issue." This statement may be considered dictum, as the question was not necessary for the decision of the case or exhaustively discussed in the briefs; still the reasoning there, in connection with the former decisions of this court, might almost be held judicial dictum, as distinguished from mere obiter dictum, and as that rule was laid down by this court, speaking by the late Justice Wilkin, in *Law v. Grommes*, 158 Ill. 492, 41 N. E. 1080.

The decided weight of American authority is against the construction of the will upheld by the majority opinion of the court. If the English and American authorities are in conflict, surely the American courts ought to follow the American decisions rather than the English, unless sound reasoning and principle require the following of the English authorities; but when not only the American authorities are substantially, if not entirely, unanimous on the question, but also the reasoning in the decisions of our own court tends to support the construction given to this will by the chancellor in the court below, then before this court should hold to the contrary we ought to be convinced that the rule of the American decisions is not sound in principle and is manifestly mischievous in its results. This court has time and again laid down the doctrine that the intention of the testator as stated in the will must control when not against public policy or public law. It is the courts' duty to construe wills as they find them, and not to make them. *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315. But courts may, in effect, make wills for parties by giving them a mistaken interpretation. While the doctrine of implication must be resorted to cautiously in the construction of wills, the court should not hesitate to resort to that doctrine when thus only can the manifest intention of the testator be carried out. Does not the construction given to the words by the majority opinion rest to a far greater extent on conjecture than does the construction given by the trial

court? The testatrix, without question, intended that her son should only have a life estate in her property, with the right to control and manage it and with the right to use sufficient of the proceeds for his support and comfort; but is it not a most violent inference that she intended that if he had children he should have a fee-simple title instead of a life interest? The intention of a testator "is to be collected from the whole will taken together. Every word is to have its effect and every word is to be taken according to the natural and common import." *Theilsson v. Woodford*, 4 Ves. 329. The rule just quoted from this early English authority has always been followed in this court. Applying it in this case, and giving to the words of this will their natural and common meaning, it should be held that the intermediate estate in remainder was intended to go to the grandchildren of the testatrix, if any such were born to her son. To give the estate to such issue leaves none of it intestate and will do no violence to the language of the will, but will carry into effect the purpose of the testatrix clearly implied from the language she has used in that instrument.

The only justification, it seems to me, for construing the will in accordance with the rule laid down in the opinion of the court is the decisions of the English courts during the past century. Those courts seem to apply fixed rules to the construction of devises to an extent not generally adopted in this country. *Anderson v. Messinger*, supra. In following their decisions on this question, are we not adopting an arbitrary rule for its own sake, rather than to carry out the intent of the will, thus defeating instead of promoting, justice? By so doing are we not imputing to the testatrix the "extraordinary intention" (1 *Jarman*, supra) that other and more distant relatives are to become entitled to the remainder if the son has no children, but that the remainder is not to go to these children, if any there be? Is it not "too plain for doubt" (1 *Washburn*, supra) that the testatrix intended these grandchildren to take this remainder?

HAND and FARMER, JJ. We concur in the dissenting opinion of Mr. Justice CARTER.

(171 Ind. 317)

CRAIG v. STATE. (No. 21,800.)

(Supreme Court of Indiana. Dec. 8, 1908.)

1. ROBBERY (§ 23\*)—ASSAULT WITH INTENT TO ROB—EVIDENCE—ADMISSIBILITY.

On a trial for assault with intent to rob, evidence that there was on the night of the assault and had been for a long time prior thereto \$200 to \$300 in money in the house of accused was incompetent to rebut the inference that accused attempted to rob one of his money.

[Ed. Note.—For other cases, see *Robbery*, Dec. Dig. § 23.\*]

**2. ROBBERY (§ 24\*)—ASSAULT WITH INTENT TO ROB—EVIDENCE—SUFFICIENCY.**

On a trial for assault and battery with intent to rob, evidence held to identify accused as the person who committed the offense.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 34; Dec. Dig. § 24.\*]

**3. CRIMINAL LAW (§ 1159\*)—VERDICT—CONCLUSIVENESS.**

A verdict supported by evidence will not be disturbed on appeal on the ground alone that the evidence is weak.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8075; Dec. Dig. § 1159.\*]

**4. CRIMINAL LAW (§ 566\*)—EVIDENCE—IDENTIFICATION OF ACCUSED.**

The identification of one charged with crime need not be established directly, but may be established by circumstantial evidence satisfying the jury beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1273; Dec. Dig. § 566.\*]

**5. CRIMINAL LAW (§ 448\*)—EVIDENCE—OPINIONS—IDENTIFICATION OF ACCUSED.**

A witness may testify that he is of the opinion that accused is the one who committed the crime charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1043; Dec. Dig. § 448.\*]

**6. CRIMINAL LAW (§ 466\*)—OPINION EVIDENCE—CROSS-EXAMINATION OF WITNESS.**

A witness testifying to his opinion that accused was the person who committed an assault may be cross-examined as to his means of knowledge or the facts on which his opinion is based.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1057; Dec. Dig. § 466.\*]

**7. CRIMINAL LAW (§ 1158\*)—APPEAL—QUESTIONS OF FACT—WEIGHT OF EVIDENCE—QUESTION FOR JURY.**

The weight to be given to the testimony of a witness that he is of the opinion that accused is the person who committed the offense charged is for the jury or court trying the case.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1158.\*]

Appeal from Circuit Court, Pike County; R. M. Milburn, Judge.

Elisha Craig was convicted of assault and battery with intent to rob, and he appeals. Affirmed.

Wilson & Brumfield, for appellant. James Bingham, Atty. Gen., A. G. Cavins, E. M. White, and W. E. Thompson, for the State.

JORDAN, C. J. The state prosecuted appellant upon the charge of having committed an assault and battery upon John Hammond with the intent to commit the crime of robbery. Trial by jury; verdict returned, finding him guilty as charged in the affidavit, and that he was 45 years of age. Over his motion for a new trial, he was sentenced by the court to be imprisoned in the Indiana state prison for a term of 2 to 14 years and to pay a fine of \$25. From this judgment, he appeals and assigns error in overruling his motion for a new trial.

At the trial Serelda Craig, the wife of appellant, was called as a witness in his behalf. She was asked by counsel the following question: "Was there any money about your

house [meaning the home of appellant] at that time [meaning the night on which the assault was made]? Answer: Yes." To this question the state objected, and thereupon appellant's counsel offered to show that the witness was the wife of the defendant; that on the night of the assault in question, and for a long time prior thereto, there had been in the house of the defendant from \$200 to \$300 in money; that he knew that this money was there at the time the assault was committed. To this offer to prove the court sustained the objections of the state, to which defendant excepted. His counsel insist that the court erred in denying him the right to prove the facts which he offered to prove by the witness relative to the money as stated in the offer. As to whom the money which was about the house belonged, the record does not disclose. The contention, however, is advanced by appellant's counsel that it would be unreasonable to assert or contend that appellant assaulted Hammond, the prosecuting witness, for the purpose of robbing him of his money, when at the same time he could have gone to his own home and obtained money which was in his house. Or, in other words, they argue that the evidence as offered was competent to rebut any inference that might be drawn that appellant was attempting to rob Hammond of his money. It is certainly manifest that the evidence in dispute was wholly incompetent for the purpose for which it was offered. In fact, so far as the record discloses, it was not legitimate evidence in the case in behalf of appellant for any purpose.

The next and final contention of appellant's counsel is that the verdict of the jury is not sustained by the evidence. Appellant positively denied that he was guilty of the crime charged against him. The evidence given by him and also that of his wife is contradictory and in conflict with that which was given by witnesses who testified in behalf of the state. To an extent the evidence against the accused is circumstantial. That which is most favorable to the state may be said to establish the following facts: On February 6, 1908, and prior thereto, appellant and his wife resided in the rear end of a one-story building situated on the corner of Ninth and Main Streets, in the town of Petersburg, Pike county, Ind. The front part of this building was occupied by appellant as a barber shop. John Hammond, the prosecuting witness, a man 62 years old, occupied as an office the room adjoining appellant's barber shop. In this office he transacted the business of a fire and life insurance agent, and also was the secretary of and collector for two building and loan associations. He collected the dues from the members of the two associations. These dues were generally paid to him at his office on Thursday night of each week, between the hours of 7 and 9 o'clock.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

On Thursday evening, February 6, 1908, after having completed his business, he closed his office at 9 o'clock and left for his home, about four blocks distant. There was some moonlight at that time. When he left his office, he had about his person checks and money to the amount of \$200 which he had collected that night. Upon leaving his office, he passed the barber shop of appellant. The latter was not in the shop at the time. When Hammond had reached an alley crossing near his own home, he heard some one approaching from the rear, and, upon turning to see who the person was, he was confronted by a large man who immediately assaulted him with a large piece of rubber hose, striking him over the head with the hose. He testified at the trial that he thought at the time of the assault his assailant was "Lish Craig," the defendant. He had seen Craig on the same evening, about 6 o'clock, and he was wearing a soft slouched hat. This hat corresponded with the one worn by the person who made the assault. During the assault Hammond grabbed his assailant, who continued to strike him during the struggle which took place between them. The blows which he received cut a hole through his hat and lacerated his head. He bled freely from the wounds which he received upon the head, and was so injured that his head was in a bad condition for about three weeks. Hammond testified at the trial that, when he grabbed his assailant, he hallooed as loud as he could; that during the struggle his assailant broke loose and ran away, falling to get any of the money which he had about his person. A man who was a witness at the trial testified that, as he was passing down the street on the side opposite to the place where the assault was committed, his attention was attracted by the outcry of some person, and thereupon he crossed over the street, and found Hammond standing at his own gate, bleeding freely from wounds received about the head. Before the witness arrived where Hammond was standing, the assailant had made his escape, and was not recognized by the witness. The assault, as shown by the evidence, took place about 10 minutes after 9 o'clock at the place heretofore mentioned, in Petersburg, Pike county, Ind. Prior to its commission appellant frequently came into Hammond's office, and would say to him: "You are getting considerable money. How much have you collected to-day?" No one but appellant ever inquired of Hammond in regard to the amount of money he was collecting. A witness for the state testified that he saw appellant in the afternoon of the day on which the assault was committed, and he was wearing a soft hat. On the evening of the same day, about 8 o'clock, this witness saw a man near the mouth of the alley back of Fleming's stable. From what the witness could see of the man in the alley he thought it was appellant. This was the same alley

at the crossing of which the assault was committed.

Appellant and one John T. Burton had formerly served a prison sentence together in the state's prison. Burton testified at the trial that some three or four days before the assault appellant came to him in Petersburg and said: "How would you like to get some money? I know where we can get it dead easy." Burton, in reply said: "I would rather die in the street than do anything like that." Appellant then said to him: "Don't give me away, or don't say anything about it." The day Craig was arrested on the charge in question Burton was passing a tin shop in which Craig was at the time. He called to Burton, and they both went back to a coal shed and had a talk. Craig there requested Burton to say that the talk or conversation which they had about getting the money was not at Petersburg, but at Bridgeport, another town.

There was also evidence given in regard to appellant's conduct and manner the day after the assault tending to show his guilt. On the day following the commission of the offense he claimed that he had gone to bed at 8 o'clock on the previous night. There was evidence on the trial, however, to show that on the night of the assault he was seen in his shop as late as 10 o'clock. In the afternoon of the day following the assault he changed the soft hat which he usually wore and put on a stiff hat. He mutilated his old one by cutting off the brim. Other circumstances disclosed by the evidence tending to point to his guilt might be stated, but we deem this unnecessary. The evidence fully sustains the verdict of the jury. The weight and credit to be given to it was a matter wholly within the province of the jury. The settled rule in this jurisdiction is that in a case in which there is, as in this, evidence to support the judgment of the lower court upon every material point, it will not be disturbed on appeal upon the question of the weight of the evidence, or, in other words, the judgment will not be reversed on the ground alone that the evidence in the case may appear to be weak or unsatisfactory. *Lee v. State*, 156 Ind. 541, 60 N. E. 299; *Deal v. State*, 140 Ind. 354, 39 N. E. 930; *Shular v. State*, 160 Ind. 300, 66 N. E. 746; *Larkin v. State*, 163 Ind. 375, 71 N. E. 959; *Williams v. State*, 165 Ind. 472, 75 N. E. 875, 2 L. R. A. (N. S.) 248.

In this appeal there is no controversy in regard to the commission of the offense. The material question over which there may be said to be any room for controversy under the evidence is in respect to the identity of the person perpetrating the assault in question. Counsel argue that no witness positively identified appellant as the man who committed the crime. In addition, however, to the circumstances pointing to appellant as the perpetrator of the offense, Hammond, the

prosecuting witness, testified, as previously shown, that at the time he was assaulted he thought Craig, the appellant, was the assailant. Parker, another witness, testified that on the night the offense was committed, about an hour prior thereto, he saw a man in the alley near the point where the assault was made. This witness testified that at the time he saw this man in the alley he thought he was Craig. As a general rule, a wide range is given to evidence upon the question of the identity of the accused person with the guilty party. Generally speaking, the identification of the person charged with the commission of the offense is not required to be established by direct or positive evidence. The witness, upon his examination, may testify that he believes or is of the opinion that the accused is the person who committed the crime. His means of knowledge, however, or the facts upon which he bases his belief or opinion, in respect to the identity of the accused, may be thoroughly tested or disclosed upon cross-examination. The weight or degree to be given to the testimony of such witness or witnesses is a matter for the determination of the jury or court trying the case. *People v. Rolfe*, 61 Cal. 540; *State v. Powers*, 130 Mo. 475, 32 S. W. 984; *State v. Cushenberry*, 157 Mo. 163, 56 S. W. 737, and authorities cited; 12 Cyc. p. 392, clause "e," and cases there cited; *Wharton on Criminal Evidence* (9th Ed.) § 459; *Gillet's Indirect Collateral Evidence*, §§ 199, 213. It is not essential, in order to sustain the conviction of appellant, that he should have been identified at the trial as the guilty person by positive or direct evidence. It was sufficient if his identification as such person was established by circumstantial evidence which satisfied the jury upon that question beyond a reasonable doubt. The record presents no error.

Judgment affirmed.

(171 Ind. 379)

In re CARNEY'S ESTATE.

MYERS v. CARNEY. (No. 21,372.)

(Supreme Court of Indiana. Dec. 11, 1908.)

1. WILLS (§ 629\*)—VESTED OR CONTINGENT ESTATES—CONSTRUCTION—REMAINDERS.

The law favors the vesting of remainders absolutely rather than contingently, and at the earliest possible period, and presumes that words of postponement relate to the beginning of the enjoyment, and not to the vesting of the estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1461, 1462; Dec. Dig. § 629.\*]

2. WILLS (§ 471\*)—CONSTRUCTION.

When an interest or estate has been given in clear terms in one clause of a will, such interest or estate cannot be taken away or cut down by a subsequent clause which is not equally decisive of the testator's intention.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 989; Dec. Dig. § 471.\*]

3. WILLS (§ 449\*)—CONSTRUCTION—CONSTRUCTION AGAINST INTESTACY.

No presumption of an intention to die intestate as to any part of his property is allowable when the words of a testator's will may fairly carry the whole, and any construction which will result in partial intestacy is to be avoided.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 985; Dec. Dig. § 449.\*]

4. WILLS (§ 634\*)—CONSTRUCTION—ESTATES ACQUIRED.

Testator gave his property to his wife for life or during widowhood, and provided that, on her death or remarriage, his estate should be distributed to the heirs of a decedent, to a grandchild, and to children, further providing that the portion to be paid to the heirs of the decedent should not be paid until they arrived at the age of 21, and, if either should die before reaching 21, the portion of the one so dying should be paid to the survivors except his children should take, and that, if testator's grandson or either of the living children should die before distribution, his or her portion should descend as intestate property. *Held*, that the remainders vested immediately on testator's death, and that, on the death intestate of a daughter prior to the death of the widow, her interest descended to her husband as her only heir at law.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 634.\*]

Appeal from Circuit Court, Jennings County; F. M. Thompson, Judge.

Proceedings for the settlement of the final report of Henry Carney, Jr., executor of the will of Henry Carney, Sr., deceased. From a judgment adjudging that James W. Myers, executor of Elizabeth Myers, deceased, had no interest in the estate, said Myers appeals. Transferred from the Appellate Court under the provisions of Burns' Ann. St. 1906, § 1394, subd. 2. Reversed, with directions.

For prior report, see 84 N. E. 506.

Batchelor & Son and Howe & Batchelor, for appellant. Willard New, John Overmeyer, Burt New, and F. B. Littleton, for appellee.

MONTGOMERY, J. This appeal is from a judgment overruling appellant's exceptions to, and approving, the final report of appellee as executor of the will of Henry Carney, Sr., deceased. A solution of the question at issue requires a construction of the will of said decedent, which was executed January 1, 1883. That part of the will necessary to an understanding of the point involved reads as follows:

"In the name of the Benevolent Father of all, I Henry Carney, Sen., of the county of Jennings and state of Indiana, make and publish the following as my last will and testament.

"First. I bequeath and will to my wife, Nancy Carney, all of the real estate of which I die the owner, to have and to hold so long as she continue to be my widow, until her death therefor and during her natural life.

"Second. When my said wife shall cease to be my widow either by marriage or death,

it is my will that my real estate shall be sold and the proceeds thereof distributed as follows, to-wit: To the children and heirs of John Carney, deceased, named as follows: Anna Carney, Cora Carney, James F. Carney, John R. Carney and Henry R. Carney, the one-eighth of the proceeds of said real estate. To the child of Lucy Barnum, deceased, to-wit: Everett Barnum, the one-eighth of the proceeds of the sale of the real estate; to Mary McNeelan, Elizabeth Myers, Thomas B. Carney, Sarah Hendricks, Henry Carney, Jr., and Emma Carney, each the undivided one-eighth of the proceeds of the sale of the said real estate.

"Third. As to the personal estate of which I may die possessed, including notes and accounts and choses in action of every kind, I will and bequeath the same to my wife so long as she continues to be my widow and if she does not marry then during her natural life coupled with the power to sell and dispose of the same absolutely in her discretion and with the further power to purchase other property with the proceeds thereof to be held by her in the same way and with the same power of disposition and at the marriage of my said wife or at her death whatever remains of my personal estate or that which has been purchased because and through the proceeds thereof, the same shall be sold and the proceeds divided as I have herein provided for the division of the proceeds arising from the sale of my real estate.

"Fourth. The portion to be paid to the heirs of John Carney hereinbefore provided shall not be paid to them until they arrive and become twenty-one years of age; that is, each shall be paid his or her part as he or she shall become twenty-one, if at that time the real and personal property shall have been sold and the proceeds collected as hereinbefore provided, if either one of the said heirs of the said John Carney shall die before reaching twenty-one years of age or before distribution, his or her portion as the case may be, shall be paid to the survivors except he or she have children, in which case the portion that would come to the parent shall go to such children.

"Fifth. If my grandson, Everett Barnum, or either one of my living children shall die before the distribution of my estate as hereinbefore provided, his or her portion shall descend as provided by law where a person dies intestate."

The six legatees, other than grandchildren, named in item 2 of the will were children of the testator, and at the time of his death his wife, children, and grandchildren named in the will were living and constituted all his heirs at law. At the time the will was made, and also at the testator's death, all his living children were married and had a child or children living, except Emma Carney. Three of the children have died since the testator's death. Elizabeth Myers died

June 16, 1894, leaving appellant, her husband, as her only heir at law, her only child, Elmer, having died June 6, 1887, subsequent to the death of testator. Mary J. McNeelan died in the year 1886 or 1887, leaving a husband and four children surviving her. Sarah J. Hendricks died during the year 1893, leaving a husband and three children surviving her. The wife of the testator, Nancy Carney, remained a widow until her death, which occurred January 26, 1905. Elizabeth Myers having died, intestate, before the death of her mother and before distribution of the estate, the immediate question for decision is whether the share bequeathed to her by this will, being under \$1,000 in amount and value, descended to appellant as her sole heir or went in accordance with the laws of descent to the heirs at law of the testator.

Appellee's contention is that the will in controversy gave the testator's wife an estate for life or during widowhood, with remainder to the beneficiaries named, but contingent upon their living until the time fixed for distribution; and, in case of the death of any legatee before distribution, his or her share lapsed and passed from the testator to his heirs under the laws of descent; that, Elizabeth Myers having died before distribution, the undivided one-eighth of the estate devised and bequeathed to her was thereby divested, and descended to the heirs of the testator in accordance with the laws of descent. Appellant's contention is that, upon the death of the testator, an absolute estate in fee vested in the beneficiaries named, the enjoyment of which only was postponed until the death or marriage of the life tenant, and a sale of the estate and distribution of the proceeds; that Elizabeth Myers, having survived the testator, took a vested interest, which upon her subsequent death went to her heirs under the laws of descent, and, having died intestate, her undivided one-eighth part of the estate descended to her husband James W. Myers as her only heir at law. The estate given to the children of John Carney, deceased, is subject to certain special provisions, about which there is no controversy. The dispute grows out of the proper interpretation of the fifth item of the will in connection with its other provisions; appellant's insistence being that, in case of the death of any one of the beneficiaries referred to before distribution, his or her portion descends to his or her heirs, and appellee claiming that, in case of such death, the portion of the estate intended for such beneficiary should descend from the testator to his heirs. Opposing counsel agree upon many of the cardinal rules of construction, yet disagree widely, as stated, in their conclusions as to the meaning of this will.

It is conceded that the law favors the vesting of remainders absolutely rather than contingently, and at the earliest possible period, and presumes that words of postpone-

ment relate to the beginning of the enjoyment, and not to the vesting of the estate. *Campbell v. Bradford*, 166 Ind. 451, 77 N. E. 849; *Taylor v. Stephens*, 165 Ind. 200, 74 N. E. 980; *Gingrich v. Gingrich*, 146 Ind. 227, 45 N. E. 101; *Moore v. Hare*, 144 Ind. 573, 43 N. E. 870; *Tindall v. Miller*, 143 Ind. 337, 41 N. E. 535; *Fowler et al. v. Duhme*, 143 Ind. 257, 42 N. E. 623; *Boling v. Miller*, 133 Ind. 602, 33 N. E. 354; *Borgner v. Brown*, 133 Ind. 391, 33 N. E. 92; *Wright v. Charley*, 129 Ind. 257, 28 N. E. 706; *Hellman v. Hellman*, 129 Ind. 59, 28 N. E. 310; *Bruce v. Bissell*, 119 Ind. 525, 22 N. E. 4, 12 Am. St. Rep. 436; *Amos v. Amos*, 117 Ind. 19, 19 N. E. 539; *Hoover v. Hoover*, 116 Ind. 498, 19 N. E. 468; *Davidson v. Hutchins*, 112 Ind. 322, 13 N. E. 106; *Davidson v. Bates*, 111 Ind. 391, 12 N. E. 687; *Harris v. Carpenter*, 109 Ind. 540, 10 N. E. 422; *Davidson v. Koehler*, 76 Ind. 398; *Miller v. Keegan*, 14 Ind. 502. It is also a familiar principle that, when an interest or estate has been given in clear terms in one clause of a will, such interest or estate cannot be taken away or cut down by a subsequent clause which is not equally clear and decisive of the testator's intention. *Stimson v. Roundtree*, 106 Ind. 169, 78 N. E. 331, 80 N. E. 149; *Snodgrass v. Brandenburg*, 164 Ind. 59, 71 N. E. 137, 72 N. E. 1030; *Langman v. Marbe*, 156 Ind. 330, 58 N. E. 191; *Lumpkin v. Rodgers*, 155 Ind. 285, 58 N. E. 72; *Rusk v. Zuck*, 147 Ind. 388, 45 N. E. 601, 46 N. E. 674; *Mulvane v. Rude*, 146 Ind. 476, 45 N. E. 659; *Orth et al. v. Orth*, 145 Ind. 184, 42 N. E. 277, 44 N. E. 17, 32 L. R. A. 298, 57 Am. St. Rep. 185; *Rodgers v. Winkelspeck*, 143 Ind. 373, 42 N. E. 746; *Fowler v. Duhme*, 143 Ind. 257, 42 N. E. 623; *Mitchell v. Mitchell*, 143 Ind. 113, 42 N. E. 465; *Ross v. Ross*, 135 Ind. 367, 35 N. E. 9; *O'Boyle v. Thomas*, 116 Ind. 243, 19 N. E. 112; *Allen v. Craycraft*, 109 Ind. 473, 9 N. E. 919, 53 Am. Rep. 425; *Hochstedler v. Hochstedler*, 108 Ind. 506, 9 N. E. 467; *Bailey v. Sanger*, 108 Ind. 264, 9 N. E. 159. No presumption of an intention to die intestate as to any part of his property is allowable when the words of a testator's will may fairly carry the whole; and any construction which will result in partial intestacy is to be avoided unless the language of the will compels such interpretation. *Murphy v. Brown*, 159 Ind. 106, 62 N. E. 275; *Korf v. Gerichs*, 145 Ind. 134, 44 N. E. 24; *Borgner v. Brown*, 133 Ind. 391, 33 N. E. 92; *Mills v. Franklin*, 128 Ind. 444, 28 N. E. 60; *Morgan v. McNeeley*, 126 Ind. 537, 28 N. E. 395; *Roy v. Rowe*, 90 Ind. 54; *Spurgeon v. Scheible*, 43 Ind. 216; *Cate v. Cranor*, 30 Ind. 292. These rules of construction are founded upon substantial grounds, and have been established to serve as aids in determining the true intention of the testator in doubtful cases, but not to overthrow such intention if it sufficiently appears without such aids. The second and third items of this will gave to Elizabeth

Myers without condition or qualification an undivided one-eighth of the testator's property upon the death or marriage of his widow. It is quite clear that under these provisions, and in the absence of the fifth clause of the will, she would have been vested at once upon the death of her father with a remainder in fee and absolute, which upon her death would have descended to her heirs. Item 4 is not in dispute, and affords no light upon the controverted question, since it concerns only the children of John Carney, deceased, postponing the enjoyment of their legacies until they severally become twenty-one years of age, and providing that, in case of the death of any child without descendants, the survivors should take the whole. If the will is construed in accordance with appellee's views, it suspends the vesting of the remainder until final distribution of the estate, destroys the absolute title given by items 2 and 3 by the doubtful words of clause 5, and renders the testator intestate as to three-eighths of his property. This holding would violate the three familiar and well-settled rules above mentioned, governing the construction of wills, and in our opinion would subvert the intention of the testator. The construction contended for by appellant, and with which we agree, effects a vesting of the remainder immediately upon the death of the testator, makes testamentary disposition of the entire estate, and harmonizes the fifth with the second and third clauses of the will.

It is argued by appellee's counsel that the testator's dominant purpose was to withhold all his estate from his sons-in-law and daughters-in-law. Nothing in the will as it appears to us compels this view. In our opinion his paramount desire was to make ample provision for his wife by giving her the benefit of his entire estate so long as she remained his widow and unmarried and needed support, and upon her remarriage, in which event her maintenance would be devolved upon another, or death, the property was to be divided equally among his children living at the time of his death and the descendants of such as were dead substantially as the law of descents would have cast it. If Henry Carney, Sr., had died intestate, when he did die, neither the widow of his deceased son nor the surviving husband of his deceased daughter would have directly inherited any part of his estate, and in the nature of probabilities would scarcely have outlived their children and inherited through them. The making of a will was accordingly not reasonably necessary to keep his property substantially in the blood of his descendants. At the time of the execution of this will and the death of the testator, Elizabeth Myers had a son, Sarah Hendricks, two children, and Mary McNeelan, four children, all living. We have seen that provision was made for the children of his son and daughter who had previously died, and,

in the absence of any light from the will, we are unable to conceive that the testator's intention was that the inheritance of his other grandchildren should depend upon the mere chance as to whether their mother should die the day before or the day after final distribution of his estate. If appellee's construction of this will were correct, the children of Mrs. Hendricks and of Mrs. McNeelan would not with the surviving husband take the legacy intended for their mother, but, instead, inheriting per stirpes as heirs of their grandfather, the testator, would get only the one-eighth part thereof. This plan of distribution would be inequitable and out of harmony with that equal division of his estate among his children and the descendants of those who had died, which we think was the manifest desire of the testator. It is our conclusion, therefore, that the descent in case of death before distribution intended by item five of the will was to be from the legatees to their heirs, and not from the testator to his heirs; that Elizabeth Myers under the will took a vested interest in an undivided one-eighth of the testator's estate immediately upon his death; and that upon her subsequent death, intestate, leaving her husband, James W. Myers, as her only heir at law, such interest descended to him.

The order and judgment of the court overruling appellant's exceptions to and approving the final report of appellee as executor of the will of Henry Carney, Sr., deceased, is reversed, with directions to sustain appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

(171 Ind. 384)

ROCKER et al. v. METZGER et al.  
(No. 21,127.)

(Supreme Court of Indiana. Dec. 10, 1908.)

1. COURTS (§ 93\*)—RULES OF DECISION—RULES OF PROPERTY.

The rule that where a testator, leaving neither child nor parent, devises his real estate to his wife for life with remainder to others, and the wife elects to take under the statute, the wife takes in fee under Act May 14, 1852, §§ 17, 27 (Rev. St. 1881, §§ 2483, 2491; Burns' Ann. St. 1901, §§ 2840, 2842; Burns' Ann. St. 1908, §§ 3014, 3029), a third of the land owned by testator, and under section 28 of the act (Rev. St. 1881, § 2490; Burns' Ann. St. 1901, § 2851; Burns' Ann. St. 1908, § 3028) she takes as heir the remaining two-thirds for her life because not disposed of by will, is a rule of property, since it has existed for 40 years, during which time it has been frequently affirmed and the court will not overrule it, though convinced that the decision is incorrect.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 89-93; Dec. Dig. § 93.\*]

2. WILLS (§ 487\*)—CONSTRUCTION—PRESUMPTIONS.

The court will presume that a testator made his will with knowledge of the law as declared by the Supreme Court more than 40

years before, and frequently affirmed by subsequent decisions.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 487.\*]

Appeal from Probate Court, Marion County; M. W. A. Walker, Judge.

Action by Albert E. Metzger, executor of Frederick Beck, deceased, and others, against Margaretha Rocker and others to obtain an order to sell real estate to pay debts of the estate. From a judgment granting the relief, defendants appeal. Affirmed.

Weaver & Young, for appellants. Means & Buenting and Lucius B. Swift, for appellees.

MONKS, J. This was a proceeding, brought by appellee Metzger, executor of the last will of Frederick Beck, deceased, against the widow of said testator and his devisees to obtain an order to sell his real estate to pay the liabilities of said estate. It appears from the record that said Frederick Beck died testate in Marion county in the year 1906, that he left no father or mother nor any descendants surviving him, that his only heir was Margaretha Beck, his widow. A sister and the children of a deceased sister survived him. Said testator devised to his widow all his real estate during her life, and gave all his personal property "to be her own absolutely forever." "At the death of his wife" he devised to a daughter of his widow, by a former husband, his "homestead property to be hers absolutely." "At the death of his wife" he directed that all of his real estate, except said homestead, be sold and conveyed by his executor, and that all money received by his executor from his real estate and from all sources, after paying necessary debts and expenses, be divided among five persons named therein. Maria Kabel, who was to receive one-fourth of said money under said last clause, died before the testator, leaving as her only heirs her three sisters. The widow of said testator on December 28, 1906, within one year after said will was admitted to probate, properly filed her election in writing, renouncing her rights under said will and taking under the statute. Appellants filed an answer to said petition, objecting to said sale, and alleging "that the widow had accepted the provisions of said will, and was thereby estopped from renouncing the same, and that the election alleged to have been filed in the clerk's office was void, and that she was not as widow entitled to the \$500 from the estate," under section 2786, Burns' Ann. St. 1908 (section 2424, Burns' Ann. St. 1901). The court below found and adjudged: That "the widow had properly elected to take under the law, and not under the provisions of said will, and that by reason of said election, as widow, she is entitled to the undivided one-third in fee simple of all of the real estate owned by said tes-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tator at the time of his death, and also the sum of \$500 allowed her as widow by section 2786, Burns' Ann. St. 1908 (section 2424, Burns' Ann. St. 1901), and that, by reason of said election to take under the law, the estate of said testator remains and is undevisee during the life of said widow, and that the share of one-fourth devised to Maria Kabel, to have been paid at the death of the widow, has lapsed on account of her death before the death of the testator, she not being a descendant of the testator and the same remains and is undevisee. *Maxwell v. Featherston*, 83 Ind. 339. That said widow is the sole and only heir of said testator, and as such heir she is entitled to all of said life estate and all of the share devised to said Maria Kabel. That the personal property is insufficient to pay the liabilities of said estate and ordered that the undevisee estate during the life of the widow in all the lands owned by the testator at the time of his death or so much thereof as may be necessary be sold to pay the liabilities of said estate." Appellants filed a motion for a new trial, which was overruled. The only error assigned is that the court erred in overruling appellant's motion for a new trial.

The only causes assigned for a new trial and not waived are: (1) The decision of the court is not sustained by sufficient evidence. (2) The decision of the court is contrary to law. Counsel for the appellants contend that when the widow, as in this case, "renounced a life estate and took under the statute one-third in fee simple in all the real estate of which her husband died the owner, she thereby disappointed the devisees of the fee, and they will be given the life estate in the undivided two-thirds of said real estate from the time of such renunciation; that the widow's renunciation terminated her life estate and appellants took at once the same as if the widow was dead"—citing 2 Jarman on Wills (Am. Notes Ed.) page 7, note 5; Jarman on Wills (6th Ed. by Biglow) pp. 568, 569, 536, 537; Fox v. Rumery, 68 Me. 121; Jennings v. Jennings, 21 Ohio St. 56, 80, 81, and authorities cited. "That, under this rule, the deceased died testate as to all his property except the lapsed devise to Maria Kabel, and the court therefore erred in not ordering said lapsed devise sold to pay debts, as required by section 3125, Burns' Ann. St. 1908 (section 2739, Burns' Ann. St. 1901), which provides that, when a testator left undevisee real estate, the same must be first sold to pay debts before devised real estate can be sold, instead of said life estate which was not left undevisee by his will."

Counsel for appellants concede, however, that to sustain their contention that said life estate in said real estate was devised, and not undevisee as held by the court below, and the contention that, by the election of the widow, they were entitled to the possession and enjoyment of the estate devised to them the same as if the widow were dead,

we must overrule *Rusing v. Rusing* (1865) 25 Ind. 63, *Dale v. Bartley* (1877) 58 Ind. 101, and *Morris v. Morris* (1839) 119 Ind. 341, 21 N. E. 918. Said cases hold where a testator, who dies leaving no child and no father or mother, devises his real estate to his widow during her life and at her death to other persons named, that if the widow elects to take under the statute, and not under the will, she is entitled to one-third of the land owned by her husband at the time of his death in fee simple under sections 17 and 27 of the act approved May 14, 1852 (1 Rev. St. 1852, p. 248, being sections 3014, 3029, Burns' Ann. St. 1908; sections 2640, 2652, Burns' Ann. St. 1901; sections 2483, 2491, Rev. St. 1881), and that, as the other two-thirds of said real estate during the life of the widow was not disposed of by the will and was therefore undevisee, she took as heir under section 26 of said act, being section 3028, Burns' Ann. St. 1908 (section 2651, Burns' Ann. St. 1901; section 2490, Rev. St. 1881), which provides that "if a husband or wife dies intestate, leaving no child, or father or mother, the whole of his or her property, real and personal, shall go to the survivor"; that said section 26 should be construed as if it provided that, "if a husband or wife die leaving an estate undevisee and leaving no child and no father or mother, the whole of such undevisee estate shall descend to the survivor"; that the word "intestate" refers to the property, and not the decedent. This construction of said section 26 was approved and followed in *Lindsay v. Lindsay*, 47 Ind. 283; *Waugh v. Riley*, 68 Ind. 482; *Wilson v. Moore*, 86 Ind. 244, 248, 249; *Hauk v. McComas*, 98 Ind. 460, 464, 465; *Thomas v. Thomas*, 108 Ind. 578, 9 N. E. 457; *Collins v. Collins*, 126 Ind. 559, 25 N. E. 704, 28 N. E. 190.

In *Cool v. Cool*, 54 Ind. 225, decided at the November term, 1876, the court followed and approved *Rusing v. Rusing*, supra, and held that where a testator, who dies leaving no child and no father or mother, devises his real estate to his wife so long as she remains his widow, and directs that after the death of his wife that his property shall be divided among the children of his brothers and sisters, and his widow takes under the law and not under the will, that, by such election not to take under the will, the estate during her life was not disposed of by the will, but was undevisee, and went to her as heir under said section 26, supra. In *Hauk v. McComas*, 98 Ind. 460, decided in 1884, the testator devised to each of his three sons 40 acres of land, and to his widow 77.62 acres of land during her life, and, after her death, the same was to be equally divided between his three daughters. The widow elected to take under the law, and not under the will. The daughters claimed that the widow after her election to take under the law owned the undivided one-third and the daughters the remainder of said 77.62 acres, with the right of immediate

possession and enjoyment. The court held that in this claim the daughters were mistaken; that, when the widow elected to take under the law, she became entitled to an undivided one-third of each 40-acre tract, and an undivided one-third of the 77.62-acre tract; that the daughters did not become the owners of the residue of the last-named tract; that the widow's election did not accelerate the possession or enjoyment of the estate devised to them, nor enable them to take it before her death (citing *Rusing v. Rusing*, 25 Ind. 63, and *Cool v. Cool*, 54 Ind. 225); that the widow's election to take under the law was a rejection of the life estate under the will and consequently no disposition was made of such estate by the will (citing *Dale v. Bartley*, 58 Ind. 101; *Wilson v. Moore*, 86 Ind. 244); that the undivided two-thirds of said 77.62 acres during the life of the widow being undivided on account of her said election descended under the statute of descent to the three sons and three daughters of the testator as his heirs; and that said daughters took said undivided two-thirds in fee simple under the will, and were entitled to the possession and enjoyment thereof after the death of the widow. See, also, *Armstrong v. Bereman*, 13 Ind. 422. This has been the rule in cases like the one before us since the decision of *Rusing v. Rusing*, supra, in 1865, a period of more than 40 years. During said period said rule has been approved and reaffirmed by many decisions of this court as above shown. Wills have been made and title to real estate acquired by purchase upon the faith of, and in reliance upon, the rule thus established, and the same has therefore become a rule of property. For this reason, even if we were convinced that said decisions were incorrect, we should be unwilling to overrule them as appellants ask us to do. *Board v. Allman*, 142 Ind. 573, 592, 42 N. E. 206, 39 L. R. A. 58; *Hines v. Driver*, 80 Ind. 339; *Grubbs v. State*, 24 Ind. 295; *Harrow v. Myers*, 29 Ind. 468; *Rockhill v. Nelson*, 24 Ind. 422. We must presume that the testator in this case made his will with a knowledge of said rule, and in the light of the meaning of the words used therein. *Taylor v. Stephens*, 165 Ind. 200, 204, 74 N. E. 980. After a careful examination of the evidence, we cannot say that the finding of the court, as to any of the issues, including the validity of the widow's election and her right to the \$500 allowed to a widow by the statute, was not sustained by sufficient evidence, or that the same was contrary to law. It is proper to suggest that the transcript shows the court below ordered the sale "of the undivided estate during the life of the widow in all the lands owned by the testator at the time of his death." The order should have been for the sale of "the undivided estate during the life of the widow in the undivided two-thirds of all the lands owned by the tes-

tator at the time of his death," because she took the undivided one-third thereof in fee simple under sections 17 and 27, supra, free from all demands of creditors.

Finding no error of which appellants have any right to complain, the judgment is affirmed.

(171 Ind. 307)

**CLEVELAND, C., C. & ST. L. RY. CO. v. PERKINS. (No. 21,107.)**

(Supreme Court of Indiana. Dec. 8, 1908.)

**1. MASTER AND SERVANT (§ 102\*)—MASTER'S LIABILITY FOR INJURIES TO SERVANT—TOOLS, MACHINERY, APPLIANCES, AND PLACES FOR WORK.**

Masters owe their servants the duty of providing them a reasonably safe place to work, and of exercising ordinary care to keep such place reasonably safe, and are liable for a negligent breach of such duty resulting in injury to a servant while exercising due care by reason of defects in the works, tools, machinery, etc.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 173, 174; Dec. Dig. § 102.\*]

**2. MASTER AND SERVANT (§ 153\*)—MASTER'S LIABILITY FOR INJURIES TO SERVANT—WARNING AND INSTRUCTING SERVANT.**

A master need not warn and instruct employees, who are under no disability, of dangers patent to persons of ordinary intelligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 310; Dec. Dig. § 155.\*]

**3. MASTER AND SERVANT (§ 219\*)—MASTER'S LIABILITY FOR INJURIES TO SERVANT—RISKS ASSUMED BY SERVANT—OBVIOUS DANGERS.**

A servant assumes the risk of injury from obvious dangers incidental to the work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 610-624; Dec. Dig. § 219.\*]

**4. PLEADING (§ 17\*)—FORM AND ALLEGATIONS IN GENERAL.**

Facts material and necessary to constitute the cause of action declared on must be directly averred, and no essential element should be shown by way of recital or be left to inference.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 38, 350; Dec. Dig. § 17.\*]

**5. PLEADING (§ 214\*)—DEMURRER.**

Only inferences necessarily arising from facts alleged will be indulged in determining the sufficiency of a pleading against a demurrer.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 526½; Dec. Dig. § 214.\*]

**6. NEGLIGENCE (§ 111\*)—ACTIONS—PLEADING.**

In common-law actions founded on negligence, the negligence relied on must be charged in terms, or facts must be averred sufficient to compel the inference of such negligence as will constitute the proximate cause of the injuries sustained.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 182; Dec. Dig. § 111.\*]

**7. MASTER AND SERVANT (§ 258\*)—INJURIES TO SERVANT—NEGLIGENCE—COMPLAINT—SUFFICIENCY.**

In a brakeman's action for injury through being caught between the side of a car and a shed beside the track, an allegation that the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

shed was so close to the track that an ordinary freight car passing thereby approximated the same "within a few inches" was too indefinite to compel the inference of negligence in the maintenance of the shed as it stood.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 258.\*]

**8. MASTER AND SERVANT (§ 256\*)—INJURIES TO SERVANT—PLEADINGS.**

The complaint in a servant's action for injuries must show that plaintiff was acting within the scope of his employment when the injury occurred.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 258.\*]

**9. APPEAL AND ERROR (§ 1031\*)—HARMLESS ERROR—DEMURRERS.**

A judgment for plaintiff must be reversed when a demurrer has been overruled to an insufficient paragraph of the complaint, unless it affirmatively appears from the record that the verdict or finding rests exclusively on a good paragraph.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4039; Dec. Dig. § 1031.\*]

Appeal from Circuit Court, Benton County; J. F. Saunderson, Judge.

Action by Emery Perkins against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

Benjamin Crane, Charles M. McCabe, and Charles M. Snyder, for appellant. A. C. Harris and Fraser & Isham, for appellee.

MONTGOMERY, J. Appellee recovered a judgment on account of personal injuries received while in appellant's service. The complaint consisted of two paragraphs, and was answered by a general denial. Demurrers to each paragraph of complaint, on the ground that the facts therein contained were insufficient to constitute a cause of action, were overruled, and these rulings have been assigned as errors. The first paragraph of complaint, omitting the caption, prayer, and signature, is as follows: "The plaintiff complains of the defendant, and in complaining says: That by reason of the wrongs and injuries hereinafter alleged, the defendant became, and now is, indebted to the plaintiff in the sum of \$25,000, for that, whereas, on and before the 19th day of December, 1904, the plaintiff was employed by the defendant as his master and engaged on and before said day in the service of the defendant as a servant under a contract of employment, whereby the defendant employed and the plaintiff served as a brakeman on a freight train of the defendant, by which the defendant acted as a railway corporation and transported commerce, as a common carrier, for hire, by its said freight train, over and upon a railroad track and right of way of it in and through Benton county, Ind. That the defendant on said day had occupied and possessed a right of way and a railroad track in and through Benton county, Ind.,

more than 100 feet wide at the place hereinafter mentioned, which said right of way was occupied on said day by main, side, and passing tracks, and by a structure, substantial and heavy, erected on its right of way in close proximity to its sidetrack, in the town of Fowler, Benton county, Ind. That said building was constructed of heavy timbers, framework, lumber, and the like, and used to store coal. That said building so closely occupied the right of way up to the side track as that an ordinary freight car passing thereby approximated the same within a few inches. That said building had long before said 19th day of December so occupied the right of way of the defendant, and the proximity of it to the track was on said day and long before well known to the defendant. That on said day the plaintiff was about 20 years of age, of perfect physical and mental development and strength, but having had no experience in the dangers, hazards, and duties of a railway brakeman, except what he had acquired in the previous six months as rear brakeman on the freight train of the defendant. That, when he was employed by the defendant, the defendant contracted and agreed with him, before he entered upon the discharge of his duties as brakeman, to give him notice in writing of all dangerous places, overhanging or nearby structures, which would in any wise add to the hazard of his duties. That in a pretended compliance with said contract the defendant gave to plaintiff written description of many structures that overhung and closely approximated its track, but wholly failed and neglected in said writing or otherwise to give him any notice of the existence of said structure at said town of Fowler. That, when the plaintiff went into the employment of the defendant, he was wholly unfamiliar with railroads, and relied wholly upon the representation of said defendant that the writing delivered to him would contain notice of all the dangerous places along its track. That the plaintiff had no notice, knowledge, or suspicion that said building approximated the track in the manner and form heretofore alleged, or in any other wise, so as to hazard the life or limb of the employees of the road. Neither had the plaintiff any opportunity to judge of the proximity of said buildings to said track until the wrongs and injuries hereinafter complained of. That on said 19th day of December, 1904, in the nighttime, the plaintiff came to the town of Fowler on a freight train of the defendant, consisting of many freight cars, an engine, tender, and coach, for the accommodation of the crew, which said train was manned, operated, and controlled in the manner following; that is to say: The principal, his master, was present, operating and directing the movement, management, and doings of said engine and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cars, and controlling, directing, and working the crew thereof, to wit: The engineer, fireman, front brakeman, and this plaintiff, in the person of the conductor, who had, as vice principal, absolute control and authority over all the servants, ways, and means of the defendant by which it transported the commerce in said train. That among other of the cars on said train was one freight car, equipped with brakes, that could be, and were, set and released by a shaft extending from the machinery of said car and the brake down by the wheels and under the body of the car, which said shaft extended upward above the car, and was equipped with a wheel, which, on being turned one way, so operated said shaft and the chains, wheels, and the like articulated thereto, as that the brake was thereby set; and by turning said wheel in the opposite direction the brakes were released. That the only means of reaching the top or roof of said car where said wheel was situate was by a ladder which extended from top to bottom on the side of said car. That on said 19th day of December, 1904, the said defendant, for the convenience of itself, determined to put said car in and stop the same on the side track at the town of Fowler, in the doing of which said car would necessarily pass, with the ladder of it, within six inches of said structure. That the plaintiff was standing on the ground, in a place of perfect safety, when he was ordered by his master to go up the ladder of said car, and at a point designated to set the brake and stop said car. That when upon the ladder, on his way to discharge the duty imposed upon him by his master, the defendant, by other order and direction to the engineer, put said car in motion, and ran the same passed and along by said structure, in the darkness, and thus and thereby caught the plaintiff between its said car and said structure and broke his leg, and the foot of him being caught and held between said ladder and said structure the bones of his foot and the tendons and muscles thereof were twisted, broken, and thrown out, and, as the car passed, the plaintiff was thrown therefrom and cast under the wheels of the car, three of his ribs being broken thereby, his leg lost, and his skull fractured. That the plaintiff was wholly without fault, and he was not negligent either in going upon said car or in the doings that brought about his injuries; but that the said injuries to plaintiff wholly resulted from the negligence and want of care of the defendant and the breach of its duty toward him. That, by reason of the injuries received by the plaintiff as aforesaid, he is rendered incapable of earning money and has suffered, and will continue to suffer, great pain and anguish of mind."

Appellee's learned counsel concede that the complaint is founded upon the common-law obligations and duties of a master to his

servant, as embodied in clause 1 of section 8017 of Burns' Annotated Statutes of 1908. It is an elementary principle that masters owe their servants the duty of providing them a reasonably safe place in which to work, and of exercising ordinary care to keep such place in reasonably safe condition during the employment; and for a negligent breach of this duty resulting in injury to a servant while in the exercise of due care by reason of any defect in the condition of its ways, works, plant, tools, and machinery the master will be held liable. The law imposes no duty on the master to warn and instruct employes under no disabilities of dangers which are patent to persons of ordinary intelligence, but one who undertakes to do work which exposes him to such obvious dangers assumes the risk of injury. Appellant's counsel assail the first paragraph of complaint with a volley of criticisms, many of them purely technical, but some of which are substantial and fatal to its sufficiency in law. A well-settled rule of pleading requires that facts material and necessary to constitute the cause of action declared upon be directly averred, and that no essential element be shown by way of recital or be left to inference. Only inferences necessarily arising from facts alleged will be indulged in determining the sufficiency of a pleading when tested by demurrer. Chicago, etc., Ry. Co. v. McCandish, 167 Ind. 648, 79 N. E. 903; La Porte, etc., Co. v. Sullender, 165 Ind. 290, 75 N. E. 277; Pittsburgh, etc., Co. v. Peck, 165 Ind. 537, 76 N. E. 163; Greenfield Gas Co. v. Trees, 165 Ind. 209, 75 N. E. 2; Malott v. Sample, 164 Ind. 645, 74 N. E. 245; Robertson v. Ford, 164 Ind. 638, 74 N. E. 1; McElwaine-Richards Co. v. Wall, 159 Ind. 557, 65 N. E. 753. It will be observed, first, that no act or omission of appellant's is characterized as negligent, and that word appears only in the disconnected and isolated conclusion toward the end of the pleading, "that the said injuries to plaintiff wholly resulted from the negligence and want of care of the defendant and the breach of its duty toward him." The principle has been frequently announced and enforced in common-law actions founded upon negligence that the negligence relied upon must be charged in terms, or facts must be averred sufficient to compel the inference of such negligence as will constitute the proximate cause of the injuries sustained. Cumberland, etc., Co. v. Pierson (Ind.) 84 N. E. 1088; Pittsburgh, etc., Ry. Co. v. Schepman (Ind.) 84 N. E. 988; La Porte, etc., Co. v. Sullender, 165 Ind. 290, 75 N. E. 277; Pennsylvania Co. v. Marlon, 104 Ind. 239, 3 N. E. 874.

It is charged that in connection with the contract of hiring appellant agreed to give appellee "notice in writing of all dangerous places, overhanging or nearby structures, which would in any wise add to the hazard of his duties," and that appellant failed to

give appellee notice in writing or otherwise of the structure with which he collided. The duties and hazards of appellee's employment are not alleged either specifically or generally, nor is it charged even in general terms that the situation of the coal shed as described was a nearby structure which necessarily added to the hazard of appellee's duties. It is averred merely "that said building so closely occupied the right of way up to the side track as that an ordinary freight car passing thereby approximated the same within a few inches." The specification "a few inches" is too indefinite to compel the inference of negligence in the maintenance of this coal shed as it stood. The allegation may be true, and yet appellee could have passed the shed with safety by the exercise of due care. This court in analogous cases has concisely defined the standard of measuring actionable negligence in the following words: "It would seem that the correct standard by which the negligence of the railroad company ought to be measured when the action is for an injury or death to one of its trainmen arising out of its alleged negligence in erecting or maintaining a chute in too close proximity to its track is that it must be, when so erected and maintained, dangerous and unsafe to persons operating its trains when they are exercising, under the particular circumstances, ordinary care." *New York, etc., R. Co. v. Ostman*, 146 Ind. 452, 460, 45 N. E. 651; *Pennsylvania Co. v. Finney*, 145 Ind. 551, 42 N. E. 816. In the absence of any showing as to appellee's duties, and any averment that this structure as described necessarily added to the hazards of his employment, or that it was negligently constructed or negligently maintained by appellant in dangerous proximity to the track, we cannot infer that appellant was under obligation to notify appellee of the situation of this building and of the consequent danger therefrom, and must hold this paragraph of complaint insufficient. It is alleged that the location of the building with reference to the track was well known to appellant; but, since it was not charged that the building was unnecessarily maintained at such specific proximity as to imperil the safety of employes, or was negligently maintained in the position described, such knowledge on the part of the company would not necessarily make it culpable for a failure to remove the structure or to notify appellee of its situation. Want of notice or knowledge of danger from the building and of its nearness to the track on the part of appellee is alleged, but that he knew of its existence and general situation is not denied, nor is any time specified when he was without such notice or knowledge, and reference may have been made to the time of entering into appellant's service as well as to the time of receiving his injury. This allegation as a matter of good pleading should be made more specific, and, when so done, would ordinarily dispense with the next following,

which alleges in general terms that appellee had no opportunity to judge of the proximity of the building to the track until the happening of the occurrences of which he complains, *Baltimore, etc., R. Co. v. Roberts*, 161 Ind. 1, 67 N. E. 530; *Pennsylvania Co. v. Brush*, 130 Ind. 847, 28 N. E. 615; *Ohio, etc., Ry. Co. v. Percy*, 128 Ind. 197, 27 N. E. 479; *Parke County Coal Co. v. Barth*, 5 Ind. App. 159, 31 N. E. 585.

A complaint in the class of cases to which this belongs must show that the person injured was acting within the scope of his employment at the time the injury was sustained. Appellee's complaint is at least subject to criticism in this respect. An attempt is made to show that he was acting upon orders, but the averment is that he was standing on the ground "when he was ordered by his master to go up the ladder of said car, and, at a point designated, to set the brake and stop said car." A similar expression was recently condemned by this court as not a proper allegation of fact, but a mere recital. *Southern Ry. Co. v. Elliott*, 170 Ind. —, 82 N. E. 1051.

The second paragraph of complaint, as we view it, is not based upon clause 2 of section 8017 of Burns' Annotated Statutes of 1908, as claimed by appellant's counsel, but is founded upon the common-law liability. This paragraph alleges the facts affirmatively and with much detail, and avoids the defects which are found in the first paragraph, and which we have already considered. This paragraph was sufficient to repel appellant's demurrer thereto for want of facts, and no error was committed in overruling the same. In the case of *Lake Erie, etc., R. Co. v. McFall*, 165 Ind. 574, 583, 76 N. E. 400, 403, this court said: "Where a material error has found its way into a cause, the presumption must be, in the absence of a clear showing to the contrary, that the judgment was in some degree a product of such error." The rule has been long settled in this state that a judgment in favor of a plaintiff must be reversed where a demurrer has been overruled to an insufficient paragraph of complaint, unless it affirmatively appears from the record that the verdict or finding rests exclusively upon a good paragraph or paragraphs. *Lake Shore, etc., R. Co. v. Barnes*, 166 Ind. 7, 76 N. E. 629, 3 L. R. A. (N. S.) 778; *Baltimore, etc., R. Co. v. Jones*, 158 Ind. 87, 62 N. E. 994; *Cincinnati, etc., R. Co. v. Darling*, 130 Ind. 376, 30 N. E. 416; *Ryan v. Hurley*, 119 Ind. 115, 21 N. E. 463; *Belt, etc., R. Co. v. Mann*, 107 Ind. 89, 7 N. E. 893; *Walker v. Heller*, 104 Ind. 327, 3 N. E. 114; *Rowe v. Peabody*, 102 Ind. 198, 1 N. E. 353; *City of Logansport v. La Rose et al.*, 99 Ind. 117; *Lang v. Oppenheim*, 96 Ind. 47; *Ethel v. Batchelder*, 90 Ind. 520; *Pennsylvania Co. v. Holderman*, 69 Ind. 18; *Cook v. Hopkins*, 66 Ind. 208; *Evansville, etc., Co. v. Wildman*, 63 Ind. 370; *Schafer et al. v. State ex rel.*, 49 Ind. 460; *Bailey v. Troxell*, 43 Ind. 432; *Peery v.*

Greensburgh, etc., Co., 43 Ind. 321; Wolf v. Schofield, 38 Ind. 175. It cannot be ascertained and declared from this record that the trial proceeded and the verdict and judgment rested wholly and exclusively upon the second paragraph of complaint. The error in overruling appellant's demurrer to the first paragraph must accordingly be presumed to have been harmful. Other alleged errors occurring upon the trial need not be now considered, as they may not again occur.

The judgment is reversed, with directions to sustain appellant's demurrer to the first paragraph of complaint, and for further proceedings.

(171 Ind. 349)

STATE ex rel. WHITE v. SCOTT. (No. 21,298.)

(Supreme Court of Indiana. Dec. 9, 1908.)

**1. PLEADING (§ 49\*)—COMPLAINT—THEORY OF CASE.**

Plaintiff, in stating his cause of action on two distinct theories in the same paragraph of complaint, can proceed on only one, and must, in order to prevail, establish his right of recovery on the theory adopted.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 107; Dec. Dig. § 49.\*]

**2. PLEADING (§ 49\*)—COMPLAINT—THEORY OF CASE.**

The theory on which a complaint rests the case is to be determined by the general tenor and character of the pleading; that is, the one most apparent and clearly outlined by the leading averments is to be adopted.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 107, 108; Dec. Dig. § 49.\*]

**3. APPEAL AND ERROR (§ 1012\*)—FINDINGS OF TRIAL COURT—THEORY OF CASE.**

The statement in the findings of fact that relator has proceeded on the theory that he was elected to office on a certain day is not binding on the Appellate Court; it not appearing from the general tenor of the information, or from the character of evidence introduced in support of it, that the parties acquiesced in that theory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3990; Dec. Dig. § 1012.\*]

**4. QUO WARRANTO (§ 62\*)—THEORY OF CASE.**

The theory of the trial below in quo warranto, will be held to be the right to the office arising from the election of July 3d, the leading averment of the information, the evidence offered, the special finding, and the judgment clearly relating to the state of facts as they existed at the time of the election on that day, though the information, before its allegations as to such election (a special election, because of a vacancy, at which relator received all the votes), alleged that, at the election for the office in the preceding month, W., an ineligible person, received a majority of the votes, and that relator, having received a minority of the votes, was elected because of W.'s ineligibility; it clearly appearing from the subsequent averments that neither W. nor relator asserted any right through such election, but treated it as nugatory.

[Ed. Note.—For other cases, see Quo Warranto, Dec. Dig. § 62.\*]

**5. SCHOOLS AND SCHOOL DISTRICTS (§ 48\*)—ELECTION OF SUPERINTENDENT—TIME.**

Under Burns' Ann. St. 1908, § 6376, providing that the township trustees shall meet on the first Monday of June, and elect a county superintendent of schools, not limiting the power to elect to the day named, the trustees are not deprived of the power, or relieved of the duty, to elect on a later day, by failure to make a valid election on the day specified.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 48.\*]

**6. SCHOOLS AND SCHOOL DISTRICTS (§ 48\*)—ELECTION OF SUPERINTENDENT—VACANCY.**

Whether or not there be a technical vacancy, within Burns' Ann. St. 1908, § 6376, providing that the township trustees shall meet on a certain day, and elect a county superintendent, and, a vacancy occurring, they shall meet and fill it, where the election held on the specified day was nugatory, because of the person receiving the majority of the votes being ineligible, is immaterial. It is the duty of the trustees in either case to elect a superintendent, though the one elected for the previous term is holding the office till his successor shall be chosen and shall qualify.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 48.\*]

**7. SCHOOLS AND SCHOOL DISTRICTS (§ 48\*)—ELECTION OF SUPERINTENDENT—NOTICE.**

Under Burns' Ann. St. 1908, § 6376, providing that the township trustees shall meet on a certain day and elect a county superintendent, and, a vacancy occurring, they, on notice from the auditor, shall meet and fill it, the trustees have power, without notice from the auditor, to hold an election where their election on the specified day was nugatory.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 48.\*]

**8. DOMICILE (§ 4\*)—"CHANGE OF DOMICILE."**

While residence is largely a matter of intention, mere intention to change from one place to another, and making a trip of investigation, is not enough; but one must determine on some definite place to which to remove, and take some affirmative step toward transferring his personal effects, or toward settling himself in the new place.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 6-23; Dec. Dig. § 4.\*]

For other definitions, see Words and Phrases, vol. 8, p. 7599.]

**9. DOMICILE (§ 8\*)—PRESUMPTION OF CONTINUANCE.**

A residence once shown is presumed to continue at the same place till it is clearly shown to have changed.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 36; Dec. Dig. § 8.\*]

**10. SCHOOLS AND SCHOOL DISTRICTS (§ 48\*)—ELECTION OF SUPERINTENDENT—RECORD.**

Burns' Ann. St. 1908, § 6376, providing that the county auditor shall be clerk at an election by township trustees of a county school superintendent, and that he "shall keep a record of such election in a book kept for that purpose," is merely directory; so that the fact of election may be shown by a record entered in another book, or, in the absence of any record, by parol.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 48.\*]

Appeal from Circuit Court, Clark County; H. C. Montgomery, Judge.

Quo warranto by the state, on the relation of Roy L. White, against Levi H. Scott.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

From an adverse judgment, relator appeals. Reversed and remanded for new trial.

Alexander Dowling and Geo. H. Hester, for appellant. Charles W. Smith, Geo. H. Voight, and Walter V. Bulleit, for appellee.

**HADLEY, J.** This is a quo warranto proceeding, instituted on the relation of Roy L. White, to determine the title to the office of county superintendent of schools. The relator alleges in his information that, on the first Monday in June, to wit, on the 3d day of June, 1907, he was duly elected to the office of superintendent of the schools of Floyd county; also alleges that the defendant was his predecessor in said office, and that his term of office expired, by limitation, on said June 3d; that the relator was qualified and eligible to hold the office, and had made a demand upon defendant for the office, books, and papers belonging thereto, and had been refused; that there are five townships and five trustees in Floyd county; that all of the trustees were present at the meeting, and three of them voted for Melbert Williams, and two of them for the relator; that Williams was not then, and never was, eligible to hold the office of superintendent, because he did not then, and never did, hold a three years, a life, or a professional license, as required by the statute; that Williams did not attempt to assume or qualify for said office; that on July 3, 1907, upon notice given by the auditor, the five trustees again met at the auditor's office, and elected the relator as county superintendent by a unanimous vote; that relator qualified as such superintendent by giving bond and taking the oath of office, and has since then performed the duties of the office, except as prevented from so doing by defendant, as stated. The answer was a general denial. There was a special finding of facts and conclusions of law thereon in favor of the defendant, and, the relator's motion for a new trial having been overruled, he appeals.

It is disclosed by the special finding that the defendant, Scott, was elected and qualified as county superintendent on the first Monday of June, 1903, for the term of four years, and until his successor was elected and qualified; that Floyd county is divided into five townships, and on the first Monday in June, to wit, on the 3d day of June, 1907, the five trustees of the county met at the auditor's office to elect a county superintendent. Three of said trustees voted for Melbert R. Williams, and the remaining two for the relator, and then adjourned sine die. Williams was not then, and never was, eligible to hold the office of county superintendent. The three trustees who voted for Williams did so in good faith, believing him eligible. Williams did not qualify, or make any claim to the office. On June 18th the auditor notified the five trustees to meet at his office on July 3, 1907, to elect a superintendent.

In compliance with the notice the trustees met and held an election. The relator received notice that he had been elected to said office, and on July 10, 1907, he filed with the auditor of said county his official bond as such superintendent, approved by the auditor, and took the oath of office, since which time he has claimed the right to perform the duties of said office, and before the commencement of this action demanded of the defendant the possession of the books, papers, and other property belonging to said office, which was refused. It is also found that, after June 3, 1907, the relator, being unmarried and without a family, left the state of Indiana and went to the Southwest, with the intention of permanently leaving the state of Indiana, and did thereby lose his citizenship in Floyd county, and became a nonresident of the state until his return on July 8, 1907. It is further found "that there was no vacancy in said office on the 3d day of July, 1907, nor at any time, before or since. That on the 3d day of July, 1907, said five trustees assembled at 10 o'clock a. m. at the auditor's office of Floyd county, for the purpose of electing a county superintendent of schools to fill said alleged vacancy; that the evidence does not show the result of said pretended election."

The court stated its conclusions of law upon the foregoing facts as follows: "(1) There was no valid election of county superintendent of schools of Floyd county, Ind., on the first Monday of June, 1907. (2) There was no vacancy in said office at the time the auditor of said county notified said trustees to assemble on the 3d day of July, 1907, and said notice was not authorized by law. (3) There was no vacancy in said office on the 3d day of July, 1907, and said trustees had no authority to meet on said day to elect a county superintendent of schools for said Floyd county, and all the acts of said trustees at said meeting were without authority of law. (4) That the relator was not, on the 3d day of July, 1907, eligible to hold the office of county superintendent of schools for said Floyd county, by reason of the fact that he was then a nonresident of the state of Indiana. (5) That the defendant, Levi H. Scott, was on the first Monday of June, 1907, and has ever since been, the duly elected, qualified, and acting county superintendent of schools for Floyd county, Ind. (6) That the relator, Roy L. White, is not entitled to said office, and that he recover nothing by reason of the action. (7) That the defendant recover of the relator his costs herein laid out and expended."

There was a separate exception to each of the conclusions of law. That the action has been well brought to test the title to the office of county superintendent, is not called in question.

A demurrer to the information for insufficiency of facts was overruled, but no com-

plaint of the ruling is made in the court. It is, however, earnestly insisted that the complaint is double, and proceeds upon the theory that the relator was elected to the office of superintendent on the first Monday, to wit, on June 3, 1907, and not on July 3, 1907. We concede the rule contended for by appellee that, if the plaintiff states his cause of action, upon two distinct theories, in the same paragraph of complaint, he can proceed only upon one, and must establish his right of recovery under the theory adopted, or fall in his action. *Holderman v. Miller*, 102 Ind. 356, 1 N. E. 719, and cases cited; 21 Enc. of P. & P. p. 650. But the theory upon which the case rests must be determined by the court from the general tenor and character of the pleading; that is, upon the theory that is most apparent and clearly outlined by the leading averments. *Western Union v. Reed*, 96 Ind. 195, 198; *Jones, Treas., v. Cullen*, 142 Ind. 335, 341, 40 N. E. 124; *Railroad Co. v. State*, 166 Ind. 219, 229, 76 N. E. 980, 117 Am. St. Rep. 370. The court states, among his findings, "that the relator has proceeded upon the theory that he was elected to said office on the first Monday of June, 1907." But it not appearing from the general tenor of the information, or from the character of the evidence introduced in support of the complaint, that the parties acquiesced in that theory, we are not bound by it on appeal. 21 Enc. of P. & P. p. 664, and authorities collated. And we are not satisfied that the honorable trial court correctly apprehended the theory upon which the information was drawn and presented. It is averred that, at the election on the first Monday of June, one Williams, an ineligible person, received a majority of the votes cast, and while it is also alleged that the relator, having received a minority of the votes, was elected superintendent by reason of Williams' ineligibility, yet it clearly appears, from what is subsequently averred, that neither Williams nor the relator asserted any rights by virtue of said election, but in all respects treated it as nugatory. It is shown that the trustees again assembled on July 3d for the purpose of electing a county superintendent. The relator, with others, impliedly acknowledging thereby that he had not been previously elected to said office, submitted his name, was elected, so declared by the trustees, and in less than a week had filed his bond with the auditor, taken the oath of office, and entered upon the discharge of the duties of the office, except as prevented by the defendant—all of which, upon the trial, the relator offered to prove. Under the general scope of these averments, and the conduct of the relator at the trial, it is clear that he counted on the election of July 3d as giving him a right to the office, and not upon the abortive election of June 3d. Besides the facts found, and the conclusions of law as stated thereon, are inconsistent with the theory adopted by the trial court. If the relator relied up-

on the action of the trustees on June 3d for his election to the office, then all his subsequent averments, concerning the action of the trustees on July 3d, were mere surplusage, and a finding of the court upon such averments would be as futile as the averments themselves.

The first conclusion of law is that "there was no valid election of county superintendent on the first Monday of June, 1907." If that was a fact, and the relator based his claim to the office on the validity of his election on that day, then he had no cause of action, and the case was properly at an end. But the court goes on and finds that, several days after June 3d, the relator left Floyd county for the Southwest, with the intention of permanently leaving the state of Indiana and becoming a nonresident (an unlikely performance, if the relator then understood, or was claiming, that he had been elected to an office he had so recently sought). The finding, further proceeds that afterward, upon notice so to do by the auditor, the trustees again met at the auditor's office, on July 3d, for the purpose of electing a county superintendent; that the relator was notified that he was on said date elected to said office, and he did, on July 10th appear and file his approved bond, and take the oath of office as such superintendent, and concerning these facts, the court, by his fourth conclusion, in effect, states that the relator is not entitled to the office, not because of his failure to be elected thereto, but because he was not, on July 3d, a resident of the state of Indiana. The special finding and conclusions of law come to this: There was no election of anybody on June 3, 1907, and the relator, by subsequently going to the Southwest, had become ineligible to fill the office to which he was elected on July 3d by being then a nonresident of the state. In other words, the leading averments of the complaint, the evidence offered, the finding and the judgment, clearly relate to the state of facts as they existed at the time of the election of July 3d; and such, we think, was the theory of the trial below. There was no demurrer for misjoinder, nor motion to separate. Allegations concerning the events of the first Monday in June, the date fixed by statute for the election of county superintendent, were proper, if not necessary, as matter of inducement, to exhibit a justification for the election on July 3d. If such allegations go beyond requirements, and state redundant and surplus matter, the court will not attach importance to such surplusage when assailed for the first time after trial.

Section 6376, Burns' Ann. St. 1908 (section 5900, Burns' Ann. St. 1901; Acts 1899, p. 240, c. 143), provides that the township trustees of each county shall meet at the auditor's office on the first Monday of June, at 10 o'clock a. m., and every four years thereafter, and elect, by ballot, a county superintendent, and where a vacancy occurs in the office, the

trustees, on three days' notice from the auditor, shall assemble at the auditor's office, on the day designated in the notice, and fill such vacancy by ballot for the unexpired term. Under this statute had the trustees' authority of law to meet and elect a county superintendent on July 3d, the term of office of the incumbent having expired on the first Monday of the preceding June? Concerning this question, we said in a recent case: "For the most excellent reason, it seems to be held by the courts everywhere that, when a duty is imposed by statute upon public officers which affects the rights or duties of others, and the time of its performance designated, the officers will not be relieved of the duty by their failure to perform on the date specified, unless the language of the statute is such that the designated time must be accepted as a limitation of the officers' power. In the absence of limitation the prescribed time of performance will be regarded as directory only, and the duty to perform a continuing one." *Hendershot v. State*, 162 Ind. 69, 72, 69 N. E. 679. The same rule has been repeatedly affirmed by this court, and should be considered the settled rule of construction in such cases. *Wampler v. State*, 148 Ind. 557, 47 N. E. 1068, 88 L. R. A. 829; *Landes v. State*, 160 Ind. 479, 486, 67 N. E. 189; *Morrison v. Railroad Co.*, 166 Ind. 511, 521, 76 N. E. 901; *Feathergill v. State*, 83 Ind. App. 686, 72 N. E. 181. In the statute there are no negative words, and no words limiting the power to elect a superintendent to the first Monday in June, and so the statute very clearly comes within the operation of the above rule.

Appellee also insists that there was no vacancy in the office of superintendent on July 3d, for the reason that he was elected, under the statute, for four years, and until his successor was elected and qualified, and, the trustees having failed to elect a successor on the first Monday of June, he was entitled to hold over till the next statutory period for an election, to wit, the first Monday of June, 1911. This is wholly untenable. It makes no difference whether we do, or do not, call it a vacancy. Appellee was then holding the office, not by virtue of an election, but only for a temporary period, provided by law as a means of preventing a suspension of public business, while a successor was being chosen and qualified. His right to hold the office ceased the moment a qualified successor presented himself to assume it. The attempted election of June 3d having proved fruitless, the duty of the trustees to elect remained unperformed and continuing, and no failure or delays lessened the obligation to perform, and to do so without unnecessary delay. As soon as the result of the June 3d effort was known to the county auditor, it became his duty to notify the trustees to assemble for the purpose of accomplishing an election, as was done in this case. If the auditor should have neglected to give such notice, this would

have furnished the trustees no justification in the postponement of an election, if, from another reliable source, they had learned that their act of June 3d had failed. What the trustees may have been compelled to do after notice, they may voluntarily do without notice.

The insufficiency of the evidence to support the finding that the relator was, on July 3, 1907, a nonresident of the state of Indiana, is assigned as the eleventh reason for a new trial. The finding referred to is in these words: "That several days after the 3d day of June, 1907, the relator, who was then an unmarried man, with no family, and was boarding in said Floyd county, left said county and state, and went to the Southwest, with the intention of permanently leaving the state of Indiana, and said White did then and there leave the state of Indiana and lose his citizenship and residence therein. From the time he left, in June, 1907, until he returned, July 8, 1907, he was not a resident of the state of Indiana." Upon this finding of fact the court stated as its conclusion of law that the relator was not, on July 3, 1907, ineligible to the office in question, for the reason that he was not then a resident of the state of Indiana. The question of residence is largely one of intention. A mere intention, however, to change from one place to another is not sufficient. To effectuate a change of residence the intent to remove must be unequivocally formed, and a fixed settlement at another place resolved, and either accomplished, or its establishment entered upon, with no present intention of returning to the former place, or of departing from the latter. Intention and action must coexist. *Pedigo v. Grimes*, 113 Ind. 148, 153, 13 N. E. 700, and authorities cited; *Culbertson v. Board*, 52 Ind. 361; *Green v. Simon*, 17 Ind. App. 300, 46 N. E. 693. See, also, *Fry's Election Case*, 71 Pa. 302, 10 Am. Rep. 698. We said in a recent case that "the purpose to change a residence, unaccompanied by actual removal or change of abode, does not constitute a change of domicile." *Eel River, etc., Co. v. State*, 155 Ind. 433, 447, 57 N. E. 388. To the same effect see *Penfield v. Railroad Co.*, 134 U. S. 358, 10 Sup. Ct. 566, 33 L. Ed. 940, and 24 Am. & Eng. Enc. p. 697, and cases collated. An unsettled, or indefinite, or floating intention, as it is sometimes called, to establish a permanent home or residence in some undetermined locality does not affect the actual residence. So it may be here said that a journey into another state or territory for inspection, accompanied with an intent to permanently remove to such other state if a satisfactory place is found, does not amount to a change of residence until an approved location has been not only discovered and chosen, but some affirmative step taken in the transfer of personal effects from the former to the latter place, as the only and bona fide home. Where a residence is once shown, it is

presumed to continue at the same place until it is clearly shown to have been changed.

The evidence touching the relator's residence, in substance, follows: The relator testified that on June 3d he was unmarried. His residence was with his father, in Georgetown township, Floyd county, Ind. On June 18th he left Floyd county, and went first to Santa Fé, then to Albuquerque, then to Secora, N. M. "I arrived at the latter place about June 23d. From Secora I went to Kansas City, and then to Oberlin, Kan., and then to Danbury, Neb., where I arrived about June 30th. I stayed there about a week, and left for Floyd county on the 7th of July, and arrived on the 9th. I learned of the action taken by the trustees of Floyd county on July 3d from a dispatch received from home, I think, about July 6th. My trip West was a pleasure trip. When I left Floyd county for the Southwest, it was not my intention to leave permanently." Appellee testified: "I had two conversations with Mr. White (the relator) in reference to his going to the West or Southwest. The first was after, but in the same week of, the June election, at the courthouse in New Albany. He then asked me to give him a letter of recommendation, and said he was going to the Southwest, and thought a letter of recommendation from me might help to secure him a position. Upon my promise to give him the letter, he said any time within the next few days would do. My other conversation with him was on the courthouse steps in the latter part of the week in which Mr. White left. In this conversation, I asked him if he would be with us next year in the schools. He said, 'No, I am going to the Southwest to locate and make it my home.'" James Scott, a brother of appellee, testified that 10 or 12 days after the June election he had a conversation with the relator in New Albany. The latter said he was going to the Southwest. "I said, 'Are you just going on a pleasure trip?' He said, 'No; I am going to locate permanently.' I think he said he was going to Arizona, but I am not sure." Ralph Scott, nephew of the appellee, also testified that the relator said to him, in a conversation held between them in New Albany, that "he intended to make a location in the Southwest; that he thought the chance for advancement was better there than here." In rebuttal the relator denied the conversations testified to by James and Ralph Scott, and affirmed that what he did say to both was that he was going out there, but did not say he was going to locate there permanently. "My only intention was to go on a prospecting trip, to ascertain the conditions, particularly relative to school work in the Southwest." In a concrete form, the testimony may be thus expressed: In effect, the relator testified that he left Floyd county for the Southwest on a prospecting trip, to

examine into the conditions, particularly as they related to schools in that section, but with no fixed intention to locate there permanently. As against this, the sum of the defendant's evidence was that the relator, in three separate conversations concerning his contemplated journey to the Southwest, stated, first, "I am going to the Southwest to make it my home"; second, "I am not going to the Southwest on a pleasure trip, but to make it my home"; and third, "I am going to make a location in the Southwest." We cannot weigh the evidence, and hence must assume that the relator made all the statements attributed to him by appellee and his relatives. But what if he did? They fall far short of establishing a residence in the Southwest within the rules of the law. It is an old saying in such cases that every man has a residence somewhere, and that he does not lose the one he has until he has gained one in another place. On the same point this court, in *Culbertson v. Board*, 52 Ind. 361, 370, quotes approvingly from *Sears v. City of Boston*, 1 Metc. (Mass.) 250, the following: "The general rule, and for practical purposes, a fixed rule, is that a man must have a habitation somewhere. He can have but one, and therefore, in order to lose one, he must acquire another. This is the test, the practical test. One of the fixed rules on the subject is this: That a purpose to change, unaccompanied by actual removal or change of residence, does not constitute a change of domicile. The fact and intent must concur. He must remove, without the intention of going back. The question here is whether he can abandon one without acquiring another, and we think it has always been held that he cannot. If he goes into another state and returns for his family, his personal presence there, concurring with the intent, may fix his domicile there. But if he has not previously removed to the other state, he has not acquired a domicile there, or lost one here." We are directed to no evidence that established, or tends to establish, all the essential elements of a change of residence from Floyd county, Ind. Where was the new home? In Missouri, Kansas, Nebraska, or New Mexico? The relator left the state of Indiana on the 18th of June, traveled many hundred miles, visited and inspected school conditions in six cities and towns, situate in four different states and territories of the Southwest, and was back in Floyd county in 21 days. Which of the six cities, or other place, under the evidence before us did the relator select as his permanent home? What did he do towards transferring his personal effects, or towards settling himself in the new place? These are material matters. It was incumbent upon appellant to overcome the presumption of the relator's continued residence in Indiana, yet the record does not present us with a shad-

ow of evidence upon these points. Therefore the fourteenth finding of fact is not sustained by sufficient evidence, and the fourth conclusion of law is erroneous.

The court's thirteenth finding of fact is that "the evidence does not show the result of said pretended election (July 3d)." The probable reason for the paucity of evidence is found in appellant's bill of exception, and in his sixteenth reason for a new trial. After showing that the minutes of the township trustees, in the election of a county superintendent in Floyd county, were recorded in the county commissioners' record, and no other, and that the minutes of the trustees, in their election of July 3d, were spread of record in volume 9 of said commissioners' record, the relator then offered in evidence certain pages of said record, which show in elaborate detail the various proceedings of the trustees on July 3d that resulted in the election of the relator, and the formal declaration of said election, by the trustees, "for and during the unexpired part of the present term." To the introduction of which the appellee, among other reasons, objected, on the ground that said record was illegal because entered in the commissioners' record, and not in a volume or record kept for that purpose. The court sustained the objection. This was error. We are aware that section 6376, *supra*, provides that the county auditor shall be clerk at an election by the trustees, and that he "shall keep a record of such election in a book kept for that purpose." But the statute is clearly directory. It has been a rule in this state for more than 50 years that a record is but the evidence of the fact recorded. The fact ordinarily exists independent of the record, and when there is no provision that it shall be provable only by the record, the same, upon failure of the record, may be established by parol. So in this case, if there had been no record at all, the want of it would not have invalidated the election, and the same might have been proved by parol evidence. *Ross v. City of Madison*, 1 Ind. 281, 48 Am. Rep. 361; *Halstead v. Board*, 56 Ind. 363, 375; *State v. Hauser*, 63 Ind. 155, 183; *White v. State*, 69 Ind. 273, 277. In the *Ross* Case it is said, at page 284 of 1 Ind.: "But if, owing to the imperfect and careless manner in which the records were kept, there was no written evidence in existence to prove clearly that the work was done by the authority of the council, the plaintiff had a right to prove that fact by parol testimony." We also quote from page 182 of 63 Ind., of the *Hauser* Case, the following: "The minutes of the common council are only evidence of their proceedings and actions; but, if no minutes or record of the acts of the common council have been kept, these facts may be proved by parol evidence, like any other facts." It is said in the

*White* Case, at page 277 of 69 Ind.: "In the absence of any statutory provision to the effect that the election of the trustees of the church can only be proved by written evidence, the fact of such election may be proved by parol evidence."

There are other subsidiary questions presented that are left undecided, as they will probably not arise again.

The judgment is reversed, and the cause remanded, with instructions to grant appellant a new trial, and for further proceedings not inconsistent with this opinion.

(172 Ind. 402)

INDIANAPOLIS & W. RY. CO. v. HILL  
et al. (No. 21,160.)<sup>1</sup>

(Supreme Court of Indiana. Dec. 10, 1908.)

1. APPEAL AND ERROR (§ 757\*)—RECORD—  
CONTENTS—ORIGINAL COMPLAINT—BRIEFS.

Where, on appeal, no error was predicated on the original complaint filed in condemnation proceedings, such complaint was not a necessary part of the record required to be set out in appellant's brief.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 757.\*]

2. EXCEPTIONS, BILL OF (§ 41\*)—FILING—  
TIME.

Where a bill of exceptions contained a statement of the trial judge that it was presented to him within the time for filing the same, and it was taken under advisement and was subsequently approved, signed, and filed by the judge, after the time for filing had expired, appellant could not, under *Burns' Ann. St. 1908*, § 680, be deprived of the benefit thereof.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 66; Dec. Dig. § 41.\*]

3. APPEAL AND ERROR (§ 511\*)—BILL OF EX-  
CEPTIONS—FILING—TIME—MARGINAL NOTA-  
TIONS.

A statement by the judge over his signature on the margin of the bill of exceptions, disclosing the time of its presentation, cannot be considered to show that it was presented, but was not filed in time, owing to the delay of the judge.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 511.\*]

4. EMINENT DOMAIN (§ 93\*)—DAMAGES—AS-  
SESSMENT—SPECULATIVE DAMAGES.

Under *Burns' Ann. St. 1908*, § 934, prescribing a rule for assessing damages in condemnation proceedings, it was error to permit an allowance for any increased danger from the operation of petitioner's railroad over the land sought to be taken, and for any other facts shown by the evidence that might be either annoying or hurtful to the defendant, necessarily caused by the permanent operation of the railroad over the land appropriated; such injuries being too remote and speculative.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 237, 238; Dec. Dig. § 93.\*]

5. EMINENT DOMAIN (§ 262\*)—CONDEMNATION  
PROCEEDINGS—APPEAL—HARMLESS ERROR—  
INSTRUCTIONS.

Where, in condemnation proceedings, the damages allowed were double the amount awarded by the appraisers, and there was a conflict between the witnesses who testified for petitioners and defendant as to the damages sustained, an erroneous instruction permitting the re-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
<sup>1</sup> Rehearing denied.

covery of remote and speculative damages was not harmless.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 262.\*]

**6. EMINENT DOMAIN (§ 262\*)—CONDEMNATION PROCEEDINGS — PROVINCE OF APPELLATE COURT.**

Where the damages in proceedings to condemn land were unliquidated and the evidence as to the amount thereof was conflicting, the Supreme Court on appeal could not interpose its judgment as to the correctness of the assessment.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 262.\*]

Appeal from Circuit Court, Hendricks County; T. J. Cofer, Judge.

Condemnation proceedings by the Indianapolis & Western Railway Company against Charles B. Hill and others. From an award in favor of defendant Hill, petitioner appeals. Reversed, with instructions.

Otis E. Gulley, W. H. Latta, and L. H. Oberreich, for appellant. Geo. W. Brill and Geo. C. Harvey, for appellee.

JORDAN, C. J. Appellant, an incorporated interurban railway company, filed on July 23, 1906, its complaint in the office of the clerk of the Hendricks circuit court, thereby seeking to condemn and appropriate certain real estate situated in Hendricks county, Ind., for the use of the right of way of its railroad. Numerous landowners whose lands were affected were made parties defendant. Among these were Charles B. Hill and Emma Alice Hill, his wife, appellees in this appeal. The condemnation proceedings were instituted under an act of the Legislature concerning proceedings in the exercise of eminent domain. Acts 1905, p. 59, c. 48; section 8700 et seq., Burns' Ann. St. 1908. Such action was had in court as resulted in an interlocutory order being entered appointing appraisers to assess damages to the several property owners for the lands sought to be taken. On August 17, 1906, the appraisers made their award and report, and filed the same in the office of the clerk of the Hendricks circuit court. They awarded damages to Charles B. Hill for his real estate appropriated to the amount stated in their report. On August 21, 1907, said Hill, under section 8 of the statute in question, filed in the office of the clerk of the Hendricks circuit court his written exceptions to the award of damages made to him. On the 27th of the same month appellant company also filed its written exceptions to damages awarded by the appraisers to certain landowners other than Hill. On January 31, 1907, the issues as raised and tendered upon the written exceptions filed and presented by appellee Charles B. Hill were by the agreement of the parties herein submitted to a jury for trial. The trial of the cause appears to have been continued from day to day until the introduction of evidence by each of

the parties was completed. Thereupon the jury was instructed by the court, and subsequently returned the following verdict: "We, the jury, find for the defendant, Charles B. Hill, and assess his damages at \$1,125.00. Simon Hadley, Foreman." Appellant moved for a new trial, assigning in the motion the grounds prescribed by our Civil Code, among which was excessive damages, also error of the court in giving and refusing certain instructions and rulings upon motions relative to certain evidence, etc. This motion was denied, and 90 days were granted for filing bills of exception. Judgment was rendered in favor of appellee Charles B. Hill upon the verdict of the jury. From this judgment appellant company appeals, and assigns that the court erred in overruling its motion for a new trial.

Counsel for appellee insist that appellant has failed to comply with the rules of this court, first, in not setting out in its brief the original complaint filed for the condemnation of the property and the appointment of appraisers; second, in not setting out in its entirety instruction No. 8. They further insist that the bill of exceptions embracing the evidence was not properly made a part of the record. The first objection is without merit. No error in this appeal is predicated upon the original complaint filed for the appropriation of the land. Under the circumstances, therefore, this complaint is not such a part of the record as is necessary to present any of the errors upon which appellee relies. Consequently, under the rules of this court, it is not required to be set out in appellant's brief. In appellant's brief we find that instruction 8 is fully set out therein. Therefore there is no foundation whatever for appellee's second contention.

Equally unsupported is the third insistence. It is true that the record discloses that the bill of exceptions containing the evidence was filed after the time granted by the court had expired, but it is shown by a statement of the trial judge in the bill itself that it was presented to him on June 6, 1907, which was within the time allowed by the court and was taken under advisement by him, and, as is disclosed, was subsequently approved, signed, and filed by him. The delay of the trial judge in signing and filing the bill would not deprive appellant of the benefit thereof in this appeal. Section 660, Burns' Ann. St. 1908.

In addition to the statement in the bill of exceptions in respect to the time of its presentation to the judge, the same statement appears on the margin of the bill over the signature of the trial judge. It is this latter statement apparently which appellee's counsel claim does not comply with the statute. We concur in their contention. Under the repeated decisions of this court, a statement on the margin of a bill of exceptions, dis-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

closing the time of its presentation, is not within the requirements of the statute. *Ayres v. Armstrong*, 142 Ind. 263, 41 N. E. 522. It is the statement in the bill itself to which we give consideration, and not to that which appears upon the margin thereof. The bill of exceptions is properly in the record.

Some other minor criticisms are interposed in respect to the record and the failure of appellant to observe the rules of this court. These, however, are not sustained.

The court on its own motion gave to the jury a series of instructions relative to the assessment of damages arising out of the appropriation of lands in controversy. This was the only issue in the case. Among these was the following charge, numbered 3: "If you find for the defendant, it will then be your duty to determine and assess his damages. In the event you find for the defendant, then the measure of his damages is the difference between the market value of the defendant's land, described in the complaint, before the appropriation of the particular part thereof sought to be taken and the location and construction of the interurban railroad thereon in the manner proposed by the plaintiff, and the market value thereof after the appropriation and the location and construction of the railroad thereon in the manner proposed by the plaintiff, as shown by the evidence, if so shown, not considering any benefits to said land on account of the construction of said road. In determining this difference of value, if there be any difference, you may take into consideration the value of the land actually appropriated and the decrease in the value of the residue of the land. In determining this decrease in value, if any of the residue, you may take into consideration, as shown by the evidence, if so shown, all present and prospective decrease in the value of the residue of the defendant's said real estate that will naturally and reasonably be caused by the location, construction, and operation of the railroad in the manner proposed by the plaintiff, and, in determining such decrease in value, if any, you may take into consideration, as shown by the evidence, if so shown, how and in what manner, if at all, the defendant's said lands will be divided and cut up by the use of the land appropriated in the manner proposed; how passage from one part of said land to the public highway will be interrupted, if at all, by such use of said part of said land; *the increased danger, if any, that may be incurred; and any other facts or things, if shown by the evidence, that may be either annoying or hurtful to the defendant*, and which will necessarily be caused by the permanent location and operation of a railroad over the particular land appropriated." (Our italics.) Appellant's counsel criticize as erroneous that part of the above instruction embraced in italics. They argue that any danger which might be incurred from the location and operation of appellant's railroad over the land in controversy is too

remote and speculative to afford a basis for a proper assessment of damages. They further insist that the court also erred in advising the jury by this instruction that in assessing the damages it might take into consideration "any other facts or things which may be annoying or hurtful to the defendants." That portion of the charge included in italics is manifestly wrong. Thereby the jury was given the liberty to take into consideration a class of damages of the nature or character of imaginary or speculative, or such as the occurrence of which would be quite remote. It is well settled that this class of damages cannot be regarded or taken into consideration in the assessment of damages in condemnation proceedings. *Indianapolis, etc., Tr. Co. v. Larrabee*, 168 Ind. 237, 80 N. E. 413, 10 L. R. A. (N. S.) 1003, and cases there cited; *Toledo, etc., Int. R. Co. v. Wagner* (at last term, No. 21,167) 85 N. E. 1025; 2 Elliott on Railroads (2d Ed.) § 993.

In the *Larrabee Case*, supra, an instruction of like import as the one herein in controversy was condemned as erroneous. In the *Wagner Case*, supra, which was a condemnation proceeding, a charge of the court advised the jury in a general manner that in determining the amount of damages to be assessed for land taken for a right of way it might consider the inconveniences and annoyances, if any, resulting from the appropriation of the real estate. This charge was held to be erroneous and the judgment was reversed. The court in passing upon the question in that appeal said: "In considering the decrease in value of the residue, the jury would necessarily have to take into account all the inconveniences and other prejudicial facts that were produced by the appropriation, and that went to the depreciation of the value of the remaining land, and, when the jury had added the full sum of the diminished value to the full value of the parcel taken, it had then arrived at the amount for which the verdict should have been returned. The jury had no right to go further, and consider 'inconveniences and annoyances' as entitling the defendants to additional damage. \* \* \*

We have held that danger arising from the proper operation of a railroad to the 'occupants of the farm and stock thereon' is not a proper element of damage, because too remote and speculative to admit of admeasurement. *Traction Co. v. Larrabee*, 168 Ind. 237, 240, 80 N. E. 413, 10 L. R. A. (N. S.) 1003. So with annoyances, when they relate to mental conditions created by the operation of a railroad, the damage rests so completely on mere surmise and conjecture, as to forbid consideration by the courts." It was annoyances upon which this court in that case laid stress and held that they were not a proper element of damages because too remote and speculative. But in the instruction herein involved the court, as elements of damages, included not only increased danger, but "any other facts or things which may be annoying

or hurtful to the defendant." Section 6, p. 62, c. 48, Act 1905 (section 934, Burns' Ann. St. 1908), in a general way prescribes a rule or basis for assessing damages in a proceeding, under the statute, to condemn property. Under this provision of the statute there is no warrant for assessing speculative damages such as were authorized by the court to be awarded by the charge in question. Counsel for appellee do not attempt to justify the instruction in dispute, but assert that an examination of the evidence will show that the assessment of damages was correct, and that, therefore, the instruction in question was harmless. The damages allowed by the jury appear to be more than double the amount awarded by the appraisers, and there is quite a conflict between the witnesses who testified in favor of appellant upon the question of damages and those who testified in favor of appellee. In this condition of the record there is nothing to disclose to this court that the charge as asserted by appellee was harmless. Again, upon another view, the damages in the case are unliquidated, and we cannot, upon the evidence, interpose our judgment in regard to the correctness of the assessment thereof. *Monongahela River, etc., Co. v. Hardsaw*, 169 Ind. 147, 81 N. E. 492.

Other rulings of the court relative to giving and refusing instructions are complained of by appellant's counsel. These, in part at least, are determined by our decision upon the charge in controversy, and the other rulings which can be said to be left undecided possibly will not arise again upon another trial. Therefore we pass them without consideration.

For the error of the court in giving instruction No. 3, the judgment below is reversed, with instructions to the court to grant appellant a new trial.

HADLEY, J., not participating.

(171 Ind. 323)

FIRST NAT. BANK OF PEORIA et al. v.  
FARMERS' & MERCHANTS' NAT.  
BANK OF WABASH et al.<sup>1</sup>  
(No. 21,282.)

(Supreme Court of Indiana. Dec. 9, 1908.)<sup>1</sup>

1. APPEAL AND ERROR (§ 913\*)—REVIEW—PRESUMPTIONS—PARTIES.

Where it appears that a party to an action was actively defending and prosecuting in his capacity as a trustee, though made a defendant to some of the complaints in his personal capacity, it will be assumed that it is in his trust, rather than in his personal, capacity, that he describes himself as appellant.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 913.\*]

2. APPEAL AND ERROR (§ 328\*)—PARTIES.

Where a cause was tried on the theory that the cestui que trust and trustee in a trust deed

or mortgage were the cross-complainants in the cross-complaint filed on behalf of the cestui que trust, the parties will be held to this theory on appeal, and such cross-complainants were not only properly joined as appellants, but the fact that they had filed a cross-complaint, which was in a sense an original action, changed the general rule as to the making of co-parties, and it was sufficient to make all other parties appellees who were interested in maintaining the judgment or who had a standing from which to appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 323.\*]

3. JUDGMENT (§ 530\*)—PARTIES.

Notwithstanding that, in a mortgage foreclosure suit, the question of the adjustment of the rights of the parties to the record in the original suit interested in the mortgaged premises was so involved that further process was not necessary to authorize such adjustment on the filing of cross-complaints, it does not follow that such persons are parties to the judgment rendered.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 530.\*]

4. APPEARANCE (§ 5\*)—RECORD.

The usual entry by the clerk, "Now come the parties," etc., presumably relates to the parties already appearing.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 17; Dec. Dig. § 5.\*]

5. APPEAL AND ERROR (§ 914\*)—REVIEW—PRESUMPTIONS.

As a trial without an issue, where not waived, would be at least erroneous, it will not unnecessarily be assumed that parties not answering a cross-complaint or defaulted for a failure to do so were in court for the purpose of trial on such complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3603-3698; Dec. Dig. § 914.\*]

6. APPEAL AND ERROR (§ 336\*)—PARTIES—APPELLEES.

Making too many appellees does not afford ground of objection to the jurisdiction of the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 336.\*]

7. EVIDENCE (§ 264\*)—ADMISSIONS—ORAL STATEMENTS.

A statement by the trustee under a trust deed or mortgage, in a conversation with the representative of attachment creditors, in response to a reference by such representative to the attachment suit and seizure thereunder, a fact which it was suggested to the trustee that he knew, "Yes, and when we took our trust deed we thought we were getting a good title and would only be subject to judgments of record," did not amount to an admission by the trustee that he had notice of the attachment lien when the mortgage was taken.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 264.\*]

8. EVIDENCE (§ 243\*)—ADMISSIONS BY AGENT AS TO PAST TRANSACTIONS.

A trustee under a trust deed or mortgage, as an agent, is not empowered to admit the rights of his principal away by his references to a past transaction.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 908-915; Dec. Dig. § 243.\*]

9. EVIDENCE (§ 251\*)—ADMISSIONS—TRUSTEE.

A trustee under a trust deed or mortgage is not authorized to make an admission in derogation

<sup>1</sup> Former opinion (84 N. E. 1077) modified and withdrawn.

<sup>2</sup> For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion of the trust, since as trustee he has but a technical interest, and the real and beneficial interest is in the cestui que trust.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 983; Dec. Dig. § 251.\*]

**10. APPEAL AND ERROR (§ 595\*)—RECORD—NECESSITY OF BILL OF EXCEPTIONS.**

A co-appellant may show error by a bill of exceptions filed by his co-party.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 595.\*]

**11. ATTACHMENT (§ 171\*)—NOTICE OF SEIZURE.**

Code, § 74 (Burns' Ann. St. 1908, § 330), providing that where a sheriff shall seize real estate by virtue of any writ of attachment, or shall levy thereon by virtue of any execution issued to him from any court other than the court of the county in which he is sheriff, he shall, at the time of making the seizure or levy, file a written notice thereof to be recorded in the lis pendens record, requires the sheriff to file a notice of seizure under an attachment as well where the real estate is situate in the county wherein the action in which the attachment is issued is pending as where the action is pending in another county.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 171.\*]

**12. STATUTES (§ 189\*)—CONSTRUCTION—GRAMMATICAL AND RHETORICAL USAGE.**

Considerations of grammatical and rhetorical usage are not always controlling in construing a statute, where an intent in conflict therewith is disclosed, but are not unimportant and may influence a doubtful case, and where there is nothing out of accord therewith, either in the particular language or the general intent, they are of controlling force.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 268; Dec. Dig. § 189.\*]

**13. ATTACHMENT (§ 171\*)—NOTICE OF SEIZURE.**

The fact that Act March 14, 1877 (Acts 1877, p. 54, c. 24), entitled "An act to provide for giving notice of pending suits, attachments, levies, and liens in certain cases," related solely to actions and proceedings affecting the title to real estate or interests therein, furnishes a sufficient explanation for the qualifying words "in certain cases," and the same do not evince an intent in conflict with the view that a notice of seizure under attachment is required to be filed in an action commenced in the county where the real estate attached is situate, as well as where commenced in a county where the real estate is not situate, on the ground that the act was not intended to cover all cases.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 171.\*]

**14. ATTACHMENT (§ 171\*)—NOTICE OF SEIZURE.**

The objection that Code, § 74 (Burns' Ann. St. 1908, § 330), if construed to require a notice of attachment of real estate to be filed in an action commenced in the county where the real estate attached is situate as well as where commenced in a county where the real estate is not situate, is in conflict with Burns' Ann. St. 1908, § 956, providing that an order of attachment binds defendant's property in the county subject to execution and becomes a lien thereon from the time of its delivery to the sheriff in the same manner as an execution, and the further objection that property levied on is in custodia legis, and not subject to mortgage, are answered by Code, § 79 (Burns' Ann. St. 1908, § 335), providing that, until a proper notice has been filed, the seizure of real estate under an attachment and the levy thereon under execution in the cases mentioned in section 74 shall not operate as constructive notice of the seizure or of

the levy, nor have any effect as against bona fide purchasers or incumbrancers.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 171.\*]

**15. STATUTES (§ 188\*)—CONSTRUCTION.**

Where the intention can be ascertained from the language of an enactment, the court will not regard itself as bound to follow the words last used.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266-281; Dec. Dig. § 188.\*]

**16. MORTGAGES (§ 25\*) — CONSIDERATION — FORBEARANCE.**

A trust deed or mortgage, given in consideration of an indebtedness, and an agreement to extend the time of payment for one year, and providing for the payment of interest quarterly in advance, in default of which the whole principal sum and interest, at the option of the cestui que trust, to become immediately due and payable, was based on a new and sufficient consideration, and it cannot be successfully claimed that the fact that the interest was not paid at once in advance made any difference, for by the agreement the cestui que trust had placed itself in the power of mortgagors to compel it, by due performance, to forbear.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 37; Dec. Dig. § 25.\*]

**17. CONTRACTS (§ 53\*)—CONSIDERATION.**

Where parties agree on a consideration, and it is of indeterminate value, the courts will not substitute their judgment for that of the parties, but will uphold the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 231; Dec. Dig. § 53.\*]

**18. ESTOPPEL (§ 116\*)—BURDEN OF PROOF.**

The burden is on parties who would rely on the fruits of an election to treat a mortgage as invalid to show a course of conduct inconsistent with a right asserted under it.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 306; Dec. Dig. § 116.\*]

**19. MORTGAGES (§ 154\*) — MORTGAGEES AS BONA FIDE PURCHASERS—NOTICE.**

Circumstances which are merely equivocal will not charge an incumbrancer with the duty of making inquiry.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 347-349; Dec. Dig. § 154.\*]

**20. APPEAL AND ERROR (§ 841\*)—REVIEW—QUESTIONS OF FACT.**

Where the evidence in the record is all one way, its effect becomes a matter of law, and the court will weigh it, even in favor of the right of appellant to recover.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3315; Dec. Dig. § 841.\*]

Appeal from Circuit Court, Starke County; George Burson, Special Judge.

Action by the Burlington Savings Bank against Charles A. Jamison and others, in which the Farmers' & Merchants' National Bank of Wabash and others, defendants, filed a cross-complaint against plaintiff and codefendants, the First National Bank of Peoria, Ill., and others. From a judgment adjudging the rights of the parties, the First National Bank of Peoria, Ill., and others appealed to the Appellate Court; whence the cause was transferred to the Supreme Court, under Burns' Ann. St. 1908, § 1394, subd. 2. Reversed, and new trial ordered. Petition for rehearing denied.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

For opinion in Appellate Court, see 82 N. E. 1013.

F. L. Dukes, C. H. Peters, R. D. Peters, and R. W. McBride, for appellants. H. R. Robbins, Pentecost, Boyd & Jullan, and Sayre & Hunter, for appellees.

GILLETT, C. J. This suit is the outgrowth of one brought by the Burlington Savings Bank of Burlington, Vt., to foreclose a mortgage on certain real estate in Starke county. Three cross-complaints were filed. The first was filed by certain creditors who had recovered a judgment in attachment in Pulaski county against the owner of the equity of redemption, in which action a writ of attachment had been levied on said lands while the action was pending in Starke county. It is sought by said cross-complaint to have said judgment declared a senior lien on said real estate as against all other interests and liens. The second cross-complaint was filed by Seth W. Freeman to foreclose a trust deed on said lands, and the third cross-complaint, under which appellants claim, was to establish as a senior lien on said lands, as against all other interests and liens, a trust deed executed to Charles R. Wheeler, as trustee. Process issued on the original complaint, and after the filing of the first cross-complaint the record shows that the original plaintiff filed answer to said cross-complaint. The record then shows a default as to certain defendants, and that all defendants not defaulted appeared and filed answers. The answers (except of the plaintiff) are not on file, and we construe said defaults and the appearances and other answers as relating to the original action. A submission was entered, and a decree foreclosing the plaintiffs' mortgage followed. This decree was entered "without prejudice to the interest of the complainant Charles R. Wheeler and the First National Bank of Peoria, Ill., to file answer by cross-complaint" by the first day of the next term of court. On said day, Seth W. Freeman filed his cross-complaint, and subsequently, after defaulting certain defendants thereto and other defendants filing answers, which defaults and answers we construe as relating to said second cross-complaint, the latter cause was submitted, and the plaintiff therein obtained a decree of foreclosure. After this foreclosure, and after a number of entries resetting the case for trial, the record states that: "Now again come the parties by counsel and the defendant the First National Bank of Peoria, Ill., files answer to the cross-complaint, in these words, to wit." The answer which follows states that: "Comes now the defendants in the above-entitled action, Charles R. Wheeler, trustee for the First National Bank of Peoria, and for answer to the cross-complaint of its codefendant, the Farmers' & Merchants' National Bank of Wabash, Ind.," and other mentioned defendants, says, etc. Then follows an entry that "said defendant

also files cross-complaint herein making all codefendants defendants hereto, in these words, to wit." It is not stated in the body of this complaint who files it, although from some of its averments it would appear that Wheeler, trustee, was the plaintiff. An answer of general denial was filed by parties who claim under said attachment judgment, and it is then recited that: "This cause, being at issue as to the priority of liens, by agreement is submitted to the court for trial." There is a general finding that all of the allegations of the cross-complaint of the attaching creditors are true, and the particular facts concerning the proceedings in attachment and the Pulaski county judgment are then set forth, including the name of the defendant (a defendant below), the date that said judgment became a lien, and there is also a finding for the First National Bank of Peoria, Ill. (sic), that its judgment is a lien, but is subsequent and junior to the judgment liens of the attachment creditors. The record states that "the cross-complainants, the First National Bank of Peoria, and Charles R. Wheeler, trustee, object and except" to the finding. The most that we can deduce from the judgment proper is that the described judgments of said attaching creditors are each liens on certain real estate, and are prior and superior liens to the mortgage of the "First National Bank of Peoria, Peoria, Ill.," which is described as to date, etc., and that said mortgage is a lien on the lands therein described, but is a subsequent and junior lien to the judgments in attachment. A motion for a new trial was filed by "the cross-complainant, the First National Bank of Peoria, Peoria, Ill., Charles R. Wheeler, trustee in the above-entitled cause," assigning, among other causes: (1) That the decision of the court is not sustained by sufficient evidence; and (3) that the decision of the court is contrary to law. The bill of exceptions which was afterwards filed recites that "the cause, being at issue, is submitted for trial upon the issues joined." There is in the record an admission, hereinafter more particularly referred to, to the effect that the trust deed "was issued to the cross-complainants," and so far as we have perceived the whole controversy upon the trial related to the question of priority as between said mortgage and said attachment.

The pleadings and record were very carelessly prepared in the court below, and, as the questions thereby presented for the most part relate to our jurisdiction, we have been prompted to examine the transcript critically.

Error is assigned by the First National Bank of Peoria, Ill., and Charles R. Wheeler, trustee, for the First National Bank of Peoria, Ill. The proceedings sufficiently show that the latter was actively prosecuting in his capacity as a trustee, and therefore it will be assumed that it is in his trust, rather than in his personal, capacity, that he describes himself as appellant. *Beers v. Shan-*

non, 73 N. Y. 292; Hallett v. Harrower, 33 Barb. (N. Y.) 537. It may also be suggested that these appellants, although two in number, really represent but one interest; that of said bank.

It is argued that certain parties defendant who were defaulted, among them the owner of the equity of redemption and one of the makers of the mortgage under which appellants claim, should have been made parties appellant. We have set out enough of the record above to show that the cause was tried on the theory that said Illinois bank and Wheeler, trustee, were the cross-complainants in the cross-complaint filed on the bank's behalf, and to this theory the parties will be held on appeal. *Jones v. Thompson*, 12 Cal. 191. This being the theory below, said cross-complainants were not only properly joined as appellants, but the fact that it may be thus assumed that they had filed the cross-complaint, which was in a sense an original action, changed the general rule as to the making of co-parties, and it was sufficient to make all other parties appellees, who were interested in maintaining the judgment, or who had a standing to appeal therefrom. See *Elliott's App. Proc.* § 156.

The question arises, however, whether certain persons who were parties defendant to the original action or parties in some capacity to some of the cross-complaints, and are not parties here, should have been made appellees. Since it was sought in the original suit to procure a decretal order for the sale of the equity of redemption, the question of the adjustment of the rights of parties to the record having interests in the mortgaged premises, was so involved that further process was not necessary to authorize such adjustment, upon the filing of cross-complaints. *Clements v. Davis*, 155 Ind. 624, 57 N. E. 905. It does not, however, follow from this premise that such persons are parties to the judgment appealed from. Although technically in court, they ought to have been ruled to answer. *Buchanan v. Berkshire, etc., Co.*, 96 Ind. 510. The failure to answer was not an admission of the allegations against them (*Purple v. Farrington*, 119 Ind. 164, 21 N. E. 543, 4 L. R. A. 535), and while it is true that the making of an issue might be waived by going to trial without one, yet to this end it ought to have been shown that there was such an appearance subsequently as to authorize the conclusion that there was a waiver. The usual entry by the clerk, "Now come the parties," etc., presumably relates to parties already appearing. See *Fee v. State ex rel.*, 74 Ind. 66; 2 Ency. of Pl. & Pr. 600. As a trial without an issue, where not waived, would be at least erroneous, it will not unnecessarily be assumed that parties not answering a cross-complaint or defaulted for a failure to do so were in court for the purposes of a trial on such complaint. Apart from this, how-

ever, we think it must be affirmed that the judgment in question settled only questions as between appellants and the attaching creditors. It does not in terms declare for or against the right of any one else, and the prior entry, wherein it is recited that the cause, being at issue as to the priority of liens, is submitted, etc., shows that the contest related to a matter wherein issues had been framed. This is made even more apparent by the bill of exceptions. It is true that the original plaintiff, the Burlington Savings Bank of Burlington, Vt., joined issue on the first cross-complaint; but it has been made an appellee, and has joined in error, and presumably has obtained such relief as it sought in its prior decree of foreclosure. In these circumstances, we think that the only question of jurisdiction remaining open is whether all of the attaching creditors are made appellees and are in court. The assignment of error names as appellees, among others, the Farmers' & Merchants' National Bank of Wabash, Ind., the First National Bank of Wabash, Ind., the Citizens' State Bank of Huntington, Ind., John M. Curtner, Thomas F. Payne, Abner T. Bowen, Joseph E. Ruffing, John D. Wilson, Frank P. Atkinson, John T. Gee, Joseph Been, William J. Atkinson, William M. Atkinson, and Cornelius J. McGreevy. This follows the names of the attaching creditors as set out in the judgment proper, except that the Huntington bank, apparently by the misprision of the clerk, is there named as the "Citizens' National Bank of Huntington, Ind.," and that William Atkinson is therein named without any middle initial. There was a Frank R. Atkinson named as a cross-complainant in the cross-complaint of said attaching creditors; but, in view of the judgment, we conclude that this was a misnomer. We therefore perceive no defect of parties appellee. Making too many appellees does not afford ground of objection. A brief has been filed on behalf of the Wabash banks and Curtner and Payne, and a further brief has been filed on behalf of the firm of A. T. Bowen & Co., which firm seems to include all of the remaining attaching creditors except the Huntington bank. There is a return of service upon the Citizens' Bank of Huntington, Ind., which we assume is the Citizens' State Bank of Huntington, Ind. It therefore appears, so far as we perceive, that jurisdiction of this appeal exists, and we therefore proceed to its disposition.

The evidence shows that the attaching creditors claim under a judgment in attachment of the Pulaski circuit court rendered May 9, 1904. The action originated in Starke county, and prior to the change of the venue an attachment had been levied on lands in said county belonging to Charles A. Jamison. An admission shows that the sheriff's notice of his pendens was filed and recorded February 20, 1904. On the 12th day of December, 1903, said Jamison and wife execut-

ed to C. R. Wheeler and his successors in trust a trust deed or mortgage (subject to liens already of record) covering all or a part of the lands levied on under said writ. The mortgage sets out the existence of an indebtedness, evidenced by overdue notes, with one possible exception, in which the note was payable on demand, in an amount approximating \$64,500. According to the recitals of the mortgage, all of said notes, with one exception, were signed by C. A. Jamison and one A. W. Jamison. The remaining note, according to the mortgage, was signed by C. A. Jamison. The mortgage recites that "the consideration for the making of this deed of trust is the notes aforesaid, and an agreement upon the part of the said First National Bank of Peoria to extend the time for the payment of said several notes for a period of one year from the maturity of them severally, with an agreement on the part of the makers of said notes to pay the interest thereon during said period of extension quarterly in advance." Provision was made that, in case of default in the payment of the several promissory notes at the time and in the manner stipulated in the mortgage, or of any part of said notes, or of the interest thereon, as in said mortgage stipulated, the whole principal sum and interest should thereupon, at the option of the legal holder or holders of the notes, become immediately due and payable, and that there should be authority to foreclose, etc., in that event. There is an admission of record: "That the mortgage or trust deed was issued to the cross-complainants by the defendants Jamison & Jamison, for a bona fide indebtedness on December 12, 1903; that the mortgage was recorded in Starke county, Ind., on the 8th day of January, A. D. 1904, at eleven o'clock a. m.; that the mortgage was duly and legally executed and properly acknowledged."

It appears from the testimony of Wheeler, the trustee, who was a vice president and director of the Illinois bank, and who seemingly conducted the transaction by which the mortgage was taken, that it was given for additional security; that he had no notice or knowledge of attachment proceedings in the Starke circuit court, affecting the land described in the mortgage, until after the 8th day of January, 1904; that he supposed there was a good title to the land, from what Jamison said; that he simply took the statement of Jamison, and made no inquiry in the clerk's office or sheriff's office of Starke county; that he knew that a portion of the land was mortgaged, and he did not suppose that he was getting a first mortgage; that Jamison made a general statement of his indebtedness, but he said nothing about the attachments, and did not mention some of his mortgages or certain of the debts he owed. There was further evidence which, to give it the strongest construction in favor of appellees, may be said to show that Wheeler's

knowledge of Jamison's circumstances was such as fairly to lead him to believe that a crisis had been reached in Jamison's financial affairs, and that, if he was not already insolvent, he soon would be.

Mr. Hunter, who represented certain of said attachment creditors, testified to a conversation he had with Mr. Wheeler in 1905, relative to an adjustment. The witness detailed at length matters that were talked over relative to Jamison's circumstances at and prior to the making of the mortgage; but, aside from the light, if any, that Hunter's evidence threw on that subject, it may be said that the only statement of his testimony which it might be claimed has any significance was to the effect that in the course of the conversation the witness made some reference to their attachment suit in Starke county, and to the levy on all of Jamison's real and personal property, a fact which it was suggested to Wheeler that he knew, to which he responded: "Yes, and when we took our trust deed we thought we were getting a good title, and would only be subject to judgments of record." At the outset of Wheeler's testimony, there appears to be some conflict between him and Hunter as to whether the attachments were talked about; Wheeler claiming that the talk was about the judgments. On cross-examination, however, the witness admitted that there might have been some talk about the levy of the attachment and of the attaching creditors having priority; but he denied the statement attributed to him by Hunter.

We do not think that Hunter's testimony went far enough to amount to evidence of an admission upon the part of Wheeler that he had notice or knowledge of the existence of the attachment lien when the mortgage was taken, and we may further add that as an agent he was not empowered to admit the rights of his principal away by his references to a past transaction. *Blair-Baker Horse Co. v. First National Bank*, 164 Ind. 77, 72 N. E. 1027. Professor Greenleaf says that: "The declaration of an agent, to bind his principal, must be made during the continuance of the agency in regard to a transaction then depending et dum ferveat opus." 1 Greenleaf on Evidence, § 118. In *Packet Co. v. Clough*, 20 Wall. (U. S.) 528, 22 L. Ed. 406, the Supreme Court of the United States said: "A close attention to this rule, which is of universal acceptance, will solve almost every difficulty. But an act done by an agent cannot be varied, qualified, or explained by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation, or an isolated act done, at a later period. The reason is that the agent to do the act is not authorized to narrate what he has done, or how he has done it, and his declaration is no part of the res gestæ." We may further add that in our opinion Wheeler was not authorized to

make an admission of a past transaction, although he was a trustee under the deed of trust and a party to this action. As a trustee he had but a technical interest. The real and beneficial interest was in the bank which he represented, and, the courts of this country having broken away from the idea that a trustee is to be treated as an owner, it is our view that his naked admissions ought not to be received in derogation of the trust which he represents. 1 Elliott on Evidence, § 662; Graham v. Lockhart, 8 Ala. 9; Thompson v. Drake, 32 Ala. 99; Fargason v. Edrington, 49 Ark. 207, 4 S. W. 763; Sargeant v. Sargeant, 18 Vt. 371; Eltelgeorge v. Mutual, etc., Asso., 69 Mo. 52.

Two objections are made to our consideration of the testimony as set out in the bill of exceptions: (1) That Wheeler, trustee, has not filed a bill of exceptions, and (2) that the evidence should not be regarded as in the record because certain pleadings and papers claimed to be embraced in a transcript of the proceedings of the Pulaski circuit court are set out by a mere "insert." To these propositions we make answer: (1) That as it has been held that a party may take advantage of his adversary's bill of exceptions (Benefiel v. Aughe, 93 Ind. 401), there certainly can be no objection to a co-appellant manifesting the fact of error by a bill of exceptions filed by his co-party; and (2) that as it may fairly be assumed that the transcript read in evidence did not in fact contain the original pleadings and papers, there is nothing to contradict the certificate of the judge that the bill contains all the evidence given in the cause.

The leading question in the case is whether, in view of the fact that the writ of attachment was levied while the attachment proceeding was pending in Starke county, where the lands were situate, it was the duty of the attaching creditors, by reason of the provisions of section 74 of the Code (section 330, Burns' Ann. St. 1908), to have the sheriff file a notice of the levy in the lis pendens record. The section in question (punctuated as it appears in the act of 1881 [Laws 1881, p. 253, c. 38] and in the enrolled act of that session) is as follows: "Whenever any sheriff or coroner of any county in this state, shall seize upon any real estate or interest therein, by virtue of any writ of attachment, or shall levy upon any such real estate or interest therein, by virtue of any execution issued to him from any court other than the court of the county in which he is sheriff or coroner, he shall at the time of making the seizure or levy, file with the clerk of the circuit court of his county, a written notice, setting forth the names of the parties to the proceedings upon which the writ of attachment or execution is founded, and a description of the land seized, or levied upon," etc.

Before considering the construction of the particular language of the above section, we

may properly advert to some general principles which have a bearing upon the question. It was a rule of the common law, recognized as essential to the administration of justice, that the status quo of suits, which were being duly prosecuted, without collusion, that directly affected the title to property, should not be disturbed by the intervention of a purchaser or incumbrancer. Murray v. Ballou, 1 Johns. Ch. (N. Y.) 566; 25 Cyc. 1449-1458; 21 Am. & Eng. Ency. of Law (2d Ed.) 594, 605. The same general principle underlies suits in attachment, although it is probably the law that where a levy is required the imputation of notice does not arise until the levy is made. The hardship of the doctrine of lis pendens has been often noted, especially where the notice was constructive; but the rule was maintained on the ground that the general convenience required it. Murray v. Ballou, supra; 25 Cyc. 1452; Anderson's Law Dictionary, title "Lis Pendens," and authorities cited; note to Stout v. Philippi Mfg. Co. (W. Va.) as reported in 56 Am. St. Rep. 843, 855. The idea of providing for a public record which should be notice to prospective purchasers of pending actions was suggested as early as the year 1685 (Anonymous, 1 Vernon, 318), and after the enactment in the state of New York of a statute upon the subject, limited, however, to suits in equity, a number of states enacted notice of pendency statutes, applying for the most part to actions and suits concerning real property. Relative to these enactments it is said, in 21 Am. & Eng. Ency. of Law (2d Ed.) 613: "The statutes are designed to remedy the hardship of the pre-existing law, which often operates unjustly, and the inconvenience of having to examine all suits pending in the several courts to ascertain whether any of them relate to or affect a particular tract of real estate." The act of March 14, 1877 (Sp. Acts 1877, p. 54, c. 24), relative to notice of lis pendens, formed the basis for the Code provisions upon that subject in the Acts of 1881 (Laws 1881, p. 252, c. 38, § 73), and these enactments, although they have been broadened in some particulars since, evince a careful effort on the part of the General Assembly to make provision for the giving of notice of the pendency of actions concerning real estate in, so far as now occurs to us, practically every case affecting the title to real estate wherein other records of the county, with which a proposed purchaser is charged with constructive notice, such as deed, mortgage, and judgment records, do not furnish the needed information of the right which is asserted. The legislation is evidently remedial, and considering the old law, the mischief, and the provisions of the section in controversy, it is evident that the statute should be broadly construed to make the remedy effectual. 2 Lewis' Sutherland, Statutory Construction, § 533. Comparing section 74, supra, with the one which immediately precedes it,

no good reason can be suggested which would have prompted the Legislature to ameliorate the common law concerning *lis pendens* as applied to actions brought in the county where the real estate was situate, where the records did not charge the purchasers with constructive knowledge, while it still continued the old rule as to actions in attachment brought in the same county, since the latter proceeding might just as effectually destroy the purchaser's claim of title as the former. We therefore approach the construction of the language of the section in question with the observation that the court should be disposed to construe it broadly to advance the remedy and in such a manner as to impute a consistent intent to the Legislature.

We first observe that, in referring to writs of attachment, a word of universality is used, since the statute refers to "any" writ of attachment. We next note that the section distinguishes between seizures by writs of attachment and levies by virtue of executions (see section 79 of the Code [section 335, Burns' Ann. St. 1908], which also brings out this idea). Following the word "attachment," as it first occurs in the section, is a comma. The separation between what precedes and that which follows is further accentuated by the disjunctive "or." Moreover, there is no comma after the word "execution," as it first occurs in the section, and therefore the words "by virtue of any execution issued to him from any court other than the court of the county in which he is sheriff or coroner" is left as an entire phrase. As a matter of strict grammatical construction, the descriptive words in the latter part of the phrase should, in the absence of punctuation, be referred to their last antecedent, "execution," and had the intent been, by means of punctuation, to bring out a meaning which would refer these qualifying words to more than their immediate antecedent, a comma should have been inserted after said word. *Seller v. State ex rel.*, 160 Ind. 605, 622, 85 N. E. 922, 66 N. E. 946, 67 N. E. 448. Considerations of grammatical and rhetorical usage are not controlling where an intent in conflict therewith is disclosed; but they are not unimportant, and may influence a doubtful case, while in such a case as this, where there is nothing out of accord therewith, either in the particular language or in the general intent which broad considerations of the act disclose, they are of controlling force.

Counsel for appellees call attention to the title of the act of 1877 as evincing an intent in conflict with the view that a notice of *lis pendens* should be given of the institution of a proceeding in attachment commenced in the county where the lands are situate. The title is "An act to provide for giving notice of pending suits, attachments, levies and liens in certain cases," and from this it is argued that the act was not intended to cover all cases. Manifestly not, and the fact

that the act related solely to actions and proceedings affecting the title to real property or interests therein furnishes a sufficient explanation for the qualifying words of the title.

Again, it is argued that the construction which we have indicated should be given to the statute brings it into conflict with section 956, Burns' Ann. St. 1908, which provides that "an order of attachment binds the defendant's property in the county subject to execution, and becomes a lien thereon from the time of its delivery to the sheriff in the same manner as an execution," and it is argued, in the same connection, that property levied upon is in *custodia legis*. If counsel are correct in the contention that there is any conflict between the statutes referred to, they must be prepared to go further and concede that the provision for notice, which they must necessarily admit applies to executions from other counties, is in conflict with the provisions of the Code concerning executions from other counties, since section 731, Burns' Ann. St. 1908, provides that "an execution against property issued to another county shall bind the real estate of the defendant from the time of the levy." It seems to us, however, that section 79 of the Code (section 335, Burns' Ann. St. 1908) answers both of the suggested objections, since it is there provided that "until the proper notices required by this act have been filed with the county clerk, the bringing of suits for the purposes mentioned in section 73, and the seizure of real estate under attachments, and the levy thereon under execution, in the cases mentioned in section 74 shall not operate as constructive notice of the pendency of such suits, or of the seizure of or levy upon such real estate, nor have any force or effect as against bona fide purchasers or incumbrancers of the same." This section limits the common-law doctrine concerning *lis pendens* (*Pennington v. Martin*, 146 Ind. 635, 45 N. E. 1111), and the last clause operates to annul as against bona fide purchasers and incumbrancers the effect of a seizure or levy where notice thereof is not given in the *lis pendens* record. Where the intention can be ascertained from the language of an enactment, the court will not regard itself as bound to follow the words last used. *Arnett v. State*, 168 Ind. 180, 80 N. E. 153, 8 L. R. A. (N. S.) 1192. Our conclusion is that, if the Illinois bank is a bona fide incumbrancer, the levy of the attachment, while it may have been effectual for some purposes, was destitute of force against the bank. Having held that the Illinois bank might as against the levy of the attachment acquire a paramount right, the question arises whether the evidence shows that it was a bona fide incumbrancer. There can be no doubt that the provisions of the mortgage, since they are found in a dispositive writing, evidence the mutual agreements of the parties thereto. The stipulation was

for a definite period of extension of what we may assume to be overdue paper, upon the consideration that the makers of the notes would pay the interest thereon quarterly in advance, and also upon the implied consideration that the mortgagors would by the mortgage secure the payment of the debt. The bank's agreement constituted a new and sufficient consideration for the giving of the security. It cannot be successfully claimed that the fact that the interest was not at once paid in advance made any difference, for by the agreement the bank had placed itself in the power of the debtors to compel it, by the due execution of the contemporaneous agreement, to forbear. With the execution of the mortgage and contemporaneous agreement, the situation of the parties changed, and whether the owner of the land afterwards kept his covenant, or not, it cannot be said that the bank had not yielded a consideration of value to procure the securing of the debt. This may be put upon the principle that where parties agree upon a consideration, and it is one of indeterminate value, the courts will not substitute their judgment for that of the contracting parties, but will uphold the contract. *Price v. Jones*, 105 Ind. 543, 5 N. E. 683, 55 Am. Rep. 230; *Fleetwood v. Dorsey Machine Co.*, 95 Ind. 491; *Wolford v. Powers*, 85 Ind. 294, 44 Am. Rep. 16.

Appellees' counsel make the point that the evidence does not show that A. W. Jamison, a co-maker of a number of the notes, actually agreed to pay the interest in advance, as recited in the mortgage. If the contract was invalid for any reason growing out of the failure of A. W. Jamison to consent to the covenant to pay, it is evident that no one but the bank can take advantage of it, and as the mortgage executed appears valid upon its face, and as it appears that the bank is asserting rights under it, we deem it clear that the burden is on those who would rely on the fruits of an election to treat the contract as invalid to show a course of conduct inconsistent with the asserted right. See *Talbot v. Talbot*, 23 N. Y. 17; *Kain v. Rinker*, 1 Ind. App. 86, 27 N. E. 328. Our conclusion is that the evidence prima facie established the fact that appellant bank was an incumbrancer for a valuable consideration.

The question next arises: On whom was the burden of proving a want of notice? It would seem that the evidence of Wheeler went about as far as could, in the circumstances, be reasonably expected to prove that there was no actual notice, and to require appellants to go further and prove that there was no constructive notice would be calling on them to prove an impossible negative.

Counsel for appellees urge that the circumstances shown by the evidence charged the mortgagee with constructive notice of the levy. We disagree with appellees' counsel as to the legal effect of the facts and circumstances shown by the evidence. They might,

in many particulars, have been materially stronger than they were, and yet they would not have justified a finding in favor of the attaching creditors. As applied to this case, we think we may adopt the apt test suggested in *United States v. Detroit Timber, etc., Co.*, 181 Fed. 668, 67 C. C. A. 1, that: "What makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell." Circumstances which are merely equivocal will not charge a purchaser or incumbrancer with the duty of making inquiry. 23 Am. & Eng. Ency. of Law (2d Ed.) 497. Mere knowledge of the grantor's insolvency has been held insufficient to this end in fraudulent conveyance cases. See 20 Cyc. 484; 14 Am. & Eng. Ency. of Law (2d Ed.) 291; *Sellers v. Hayes*, 163 Ind. 422, 72 N. E. 119. It must not be forgotten that appellant bank, as a creditor, had a right, so far as the state laws were concerned, to be diligent in getting security. Merely outrunning other creditors was not a legal wrong, and, there being nothing further in the case than circumstances calculated to suggest that possibly other creditors had been active too, we hold that the bank was not obliged to delay until, by the obtaining of an abstract or by other means, it could ascertain the condition of the title. By such a course it might have lost all opportunity to get security, and legal fairness to other creditors did not lay any such burden on its conscience that it might not on the facts set forth in the record, without inquiry, step into the place of the favored creditor.

Where the evidence in the record is all one way, its effect becomes a matter of law, and the court will weigh it, even in favor of the right of an appellant to recover. *Riley v. Boyer*, 76 Ind. 152; *Ewbank's Manual*, § 46. It appears to us that in this case error is well assigned.

Judgment reversed, and a new trial ordered.

#### On Rehearing.

In their brief in support of the petition of the appellees seeking a rehearing herein, counsel principally argue that there was no consideration for the execution of the mortgage, since under the terms thereof appellant bank was authorized, upon default in the payment in advance of interest according to the stipulation, to exercise the option to declare the whole sum immediately due and payable. Granting, for the sake of argument, that appellant could, in the circumstances, have proceeded to collect its debt without delay after the execution of the mortgage, it does not follow that it was not a bona fide incumbrancer. It is true that the mere receiving of the mortgage as a security for overdue paper was not sufficient to that end, yet, if appellant advanced any new consideration to procure the conveyance, it thereby became, so far as consideration was concerned, a bona fide incumbrancer. *Busenbarke v.*

Ramey, 53 Ind. 499; Gilchrist v. Gough, 63 Ind. 576, 30 Am. Rep. 250. The question in such a case, to borrow from the language used in the leading case of Basset v. Nosworthy, Finch, 102, "is not whether the consideration be adequate, but whether it be valuable." Putting the strongest construction upon the language which provided, for the exercise of the option to declare the debt due for nonpayment of the interest in advance, it nevertheless follows that appellant has yielded a consideration; for, although, as it turned out, appellant may have become entitled to sue immediately after the execution of the mortgage, yet the contract relative to time had a basis for a legal operation, since during the passing of the very interval or moment on which the claim of a default might have been predicated appellant had, by its agreement, put itself in a situation wherein the debtor was empowered, by the payment of the interest, at least to render appellant liable in damages, should it bring an action, as on a covenant not to sue. See *Trayser v. Trustees*, 39 Ind. 556; *Ayers v. Hamilton*, 131 Ind. 98, 30 N. E. 895. It therefore follows that the provision for delay constituted a consideration, and, however strongly the idea might be enforced that the promise of delay and the promise to pay the interest were strictly mutual or dependent covenants, yet the giving of the former constituted a consideration for the mortgage, since by the immediate performance of the condition the debtor, by force of the contract, might have gained a benefit which he would not otherwise have been entitled to. Appellant was not bound to yield this privilege, and, having done so, it cannot be said that the mortgage is without consideration. Indeed, it strikes us as a wholly unwarranted view that the matter of nonperformance by the debtor, upon whom performance was devolved, could in any case have anything to do with the question whether there was a consideration for a conditional promise which such party could have availed himself of, even within the shortest interval of time after the execution of the agreement. Speaking in the concrete, appellant, by the accepting of the mortgage, put it in the power of Jamison, by immediately paying the interest as stipulated, to make available to himself the covenant for delay, according to its legal effect, during the first three months. In arguing the question, counsel seem to fail to distinguish between the concluding of the contract and the performance of its engagements. Appellant and Jamison were two different persons, and, the contract having been concluded, the former is not to be charged with the derelictions

of the latter in respect to performance. Appellant yielded a right in respect to the enforcement of the debt, and, having been granted an estate by way of mortgage in consideration thereof, the grant was not subject to be defeated by the failure of the debtor, over whom appellant had no control, immediately to perform the condition upon which the right was granted.

On another ground it may be said that the proof was sufficient to show that appellant was in a situation to claim the rights of a bona fide incumbrancer. So far as the lien of an attachment is concerned, the plaintiff thereunder can be awarded no greater right than the statute gives him. See *Gimble v. Stolte*, 59 Ind. 446; *Houston v. Houston*, 67 Ind. 276. By failing to give a notice of lis pendens, the attachment creditors left the title in such condition that, by the provisions of the statute, the debtor had power effectively to mortgage the property to a bona fide incumbrancer, and thereby to displace the other liens. Having by such neglect left their debtor with such power, it may be said that they are claiming under him in respect to the character of the transaction, and that if, as between appellant and Jamison, appellant yielded a consideration, such creditors cannot impeach the transaction on the ground of a want of consideration. It was declared in *Durland v. Pitcairn*, 51 Ind. 426, citing *Broom's Legal Maxims*, that "it is an elementary rule that he who prevents a thing being done shall not avail himself of the nonperformance he has occasioned." So it was said by *Elliott, J.*, in *Elkhart, etc., Co. v. Ellis*, 113 Ind. 215, 15 N. E. 249, that "it would be a flagrant violation of right to permit the grantor of an estate upon a condition subsequent to defeat the estate by wrongfully preventing the performance of the condition, and the law is not subject to the reproach of permitting such a thing to be done." The principle declared in the cases cited is applicable here. As the attachment creditors, by their neglect, left their debtor with power to convey under the law, it is clear that, if a contract was made relative to an extension of time which was sufficient between the parties to constitute a new consideration, such creditors should be concluded, in the matter of consideration, by what concluded him, and that it is no answer for them to assert that, after the making of the mortgage, which rested upon a sufficient consideration, he turned his back upon the transaction and walked away.

We have carefully considered all of the grounds on which a rehearing is sought, and are of opinion that the petition therefor should be overruled. It is so ordered.

(42 Ind. A. 562)

**BIVENS et al. v. HENDERSON.** (No. 6,578.)  
(Appellate Court of Indiana, Division No. 2.  
Nov. 24, 1908.)

**1. APPEAL AND ERROR (§ 1040\*) — REVIEW — HARMLESS ERROR—SUSTAINING DEMURRER.**

Where a general denial was filed, and under it all defenses could be made that would be admissible under paragraphs of the answer to which a demurrer was sustained, error, if any, in sustaining the demurrer was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4098; Dec. Dig. § 1040.\*]

**2. APPEAL AND ERROR (§ 750\*)—ASSIGNMENTS OF ERROR—SCOPE.**

Where, after a trial in one court, defendants' motion for a new trial for cause was overruled, and afterwards the motion for a new trial, as matter of right, was sustained, and the venue transferred to another court, where judgment was rendered against them, and their motion for a new trial for cause overruled, and an appeal taken from the judgment, an assignment of error that the court erred in averring defendants' motion for a new trial, without specifying which motion was complained of, presents for review the ruling upon the motion for new trial in that trial which resulted in the judgment from which the appeal was taken.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 750.\*]

**3. EXCEPTIONS, BILL OF (§ 40\*) — TIME FOR FILING — EXTENSION — APPLICATION — NOTICE—NECESSITY.**

Act April 15, 1905 (Acts 1905, p. 45, c. 40), provides that when time has been given to file a bill of exceptions containing the evidence, the judge in vacation may, on a proper showing under oath, grant a reasonable extension of time, etc. *Held*, that the application is not an adversary proceeding, and no notice to the adverse party, nor sworn petition setting forth the facts, is required, nor is it necessary that the bill of exceptions be submitted for inspection of the adverse party.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 59; Dec. Dig. § 40.\*]

**4. APPEAL AND ERROR (§ 985\*)—REVIEW—DISCRETION OF COURT—EXTENSION OF TIME FOR FILING BILLS OF EXCEPTIONS.**

Extension of time for filing bills of exceptions lies in the discretion of the court, and is not reviewable in the absence of abuse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3891; Dec. Dig. § 985.\*]

**5. APPEAL AND ERROR (§ 937\*) — PRESUMPTIONS — EXTENSION OF TIME FOR FILING BILLS OF EXCEPTIONS—PROPER SHOWING.**

Where the record shows that the judge granted an extension of time for the filing of a bill of exceptions, and that no unreasonable time was given, it will be presumed that a proper showing was made.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 937.\*]

**6. JUDGMENT (§ 12\*)—ESSENTIALS—JUDGMENT AFTER DEATH OF PLAINTIFF.**

Where plaintiff, in an action to quiet title to land, died pending the action, and before judgment, the judgment was a nullity, both for and against all who claim under him.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 15-20; Dec. Dig. § 12.\*]

**7. TAXATION (§ 796\*)—ACTIONS TO TRY TITLE—TAX DEEDS—RIGHT TO ATTACK.**

In ejectment, where a defendant claims title through a tax deed, plaintiff is not confined, in his attack on the validity of the deed, to the grounds specified in Burns' Ann. St. 1901, §

8639, requiring certain proof, by one claiming land adversely to a person holding under a tax deed, in order to defeat it.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 796.\*]

**8. TAXATION (§ 628\*) — DELINQUENT TAXES — RETURN — VERIFICATION—STATUTORY PROVISIONS.**

Under Burns' Ann. St. 1901, § 8571, providing that the county treasurer shall cause a list to be made of delinquent taxes, with the amount due from each, which shall be certified as correct by the auditor, and, if he can find no personal property, within the county, of delinquents not paying on personal demand made by the treasurer or deputy, he shall make opposite their names on the list a special return setting forth the fact, does not require the treasurer's return to be verified by his oath, and applies only to resident delinquents.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1281; Dec. Dig. § 628.\*]

**9. TAXATION (§ 628\*) — DELINQUENT TAXES — RETURN OF TREASURER — VERIFICATION — STATUTORY PROVISIONS.**

Burns' Ann. St. 1901, § 8572, providing that county auditors shall not be authorized to credit the county treasurer with uncollected delinquent taxes, unless he shows by a proper return, verified by oath or affirmation, that he has diligently sought for, and been unable to find, personal property from which to collect them, does not require verification to make the return valid, but only requires it to be verified upon settlement with the auditor.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1281; Dec. Dig. § 628.\*]

**10. TAXATION (§ 789\*) — TAX DEEDS—PROBATIVE FORCE—STATUTORY PROVISIONS.**

Under the express provisions of Burns' Ann. St. 1901, § 8624, a tax deed is prima facie evidence of the regularity of the sale and all prior proceedings, and of a valid title in the grantee; and the burden of proving defects in the proceedings which would void the deed for the purpose of conveying title is on the party assailing it.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1556-1560; Dec. Dig. § 789.\*]

Appeal from Circuit Court, Shelby County; Wm. M. Sparks, Judge.

Ejectment by William E. Henderson against Absent Bivens and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded for a new trial.

Wm. V. Rooker, for appellants. Clarke & Clarke and Wray & Campbell, for appellee.

**RABB, J.** Appellee brought an action in ejectment in the court below, against appellants. Appellants' demurrer to the complaint was overruled. An answer of general denial, together with several paragraphs setting up special matters of defense, was filed. Appellee's demurrer to the special paragraphs of answer was sustained, and exceptions reserved; the cause submitted to a jury for trial, and a general verdict returned in favor of appellee, together with answers to interrogatories returned by the jury. Appellants' motion for a new trial was overruled, and judgment rendered in appellee's favor on the verdict. The errors assigned by each appellant severally call in question the action of the court

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in overruling appellants' demurrer to the complaint, in sustaining the demurrers to the second, third, and fourth paragraphs of appellee's answer, and in overruling appellants' motion for a new trial. The cause was begun in the Marion superior court, where a trial was had, a new trial granted, and the venue of the cause then changed to the Shelby circuit court, and there the trial had, which resulted in the judgment from which this appeal was taken.

It is insisted that the complaint is bad, for the reason that its averments show that the plaintiff and defendants are tenants in common of the premises described in the complaint, and that, in actions in ejectment by one tenant in common against a co-tenant, it is essential that the complaint aver, either that the defendant denied the plaintiff's right, or did some act amounting to such denial. The averments of the complaint are that the plaintiff is the owner in fee simple, as a tenant in common, of the undivided one-fifteenth of the premises described, and that he is entitled to the possession of all the premises, and that the defendant holds possession without right. There is no averment that the plaintiff and defendants are co-tenants, nor do the facts averred show any such relations between them. On the contrary, it is averred that the defendant holds possession "without right." The complaint does not proceed upon the theory that it is an action by one tenant in common against a co-tenant, but on the theory that the defendants are trespassers, and in possession without right against all of the owners, and is a suit by one of several co-tenants against such trespasser. The complaint is in substantial compliance with section 1100, Burns' Ann. St. 1908, and no error was committed in overruling the demurrer thereto. The general denial was filed to the complaint. Under this pleading all defenses that would be admissible under the paragraphs of answer, to which the court sustained appellee's demurrer, could be made, and therefore no available error intervened in the rulings on such demurrer.

It is earnestly insisted by appellee that no question is presented to this court upon appellants' assignment of error; that the court below erred in overruling appellants' motion for a new trial, for the reason that the record discloses that the cause originated in the Marion superior court; was there tried, and a verdict returned in favor of appellee, and appellants' motion for a new trial for cause overruled by that court, and judgment rendered on the verdict. Subsequently appellants' motion for a new trial as a matter of right was sustained, the judgment set aside, and a new trial granted, and the venue of the cause transferred to the Shelby circuit court, where the cause was tried, a verdict returned in favor of appellee, appellants' motion for a new trial for cause filed and over-

ruled by that court, and judgment rendered on the verdict, from which judgment this appeal was taken, and that the assignment of error in question fails to specify the rulings of which court, and on which particular motion for a new trial the appellants complain. This assignment properly calls in question the ruling of the court upon the motion for a new trial of that trial which resulted in the judgment from which the appeal is taken. No other trial had anything whatever to do with the judgment of the court and the ruling complained of. We think the assignment properly presents to this court the ruling of the court below upon appellants' motion for a new trial.

Criticism is made, too, of the form of the motion for a new trial; but we think the averments are sufficiently formal to present the questions raised, and the assignment of error is a sufficient assignment by each defendant, and properly presents the question as to whether or not there was error in the ruling on the motion for a new trial against the appellant McGruder.

It is earnestly insisted by appellee that the bill of exceptions contained in the record is not properly a part of the record, for the reason that the same was not signed by the judge or presented to him within the time allowed by the court for the presentation of such bill of exceptions. The cause was tried at the December term, 1905, of the Shelby circuit court, and a verdict rendered at that term of court. Motion for a new trial, being afterwards made, was at the March term of the court overruled, and during that term judgment was rendered in favor of appellee upon the verdict, and on the 21st day of April, being the 36th judicial day of the March term of the court, the appellants were granted 90 days in which to file their bill of exceptions. The bill of exceptions in the transcript was not filed within the 90 days, but on the 6th day of July, 1906, after the close of the March term at which the time had been granted, they filed their bill of exceptions; and, during the session of the May term, 1906, of said court there appears this record, after entitling the cause: "Come now the parties, and the defendant Thomas McGruder now requests of the court an extension of time of 80 days in which to file his bill of exceptions, and the court, being fully advised in the premises, grants said request, and considers and adjudges that said defendant be, and he is, hereby granted 80 days additional, beginning July 20, 1906, in which to file his bill of exceptions." The bill of exceptions in question was filed within the additional 80 days so given by the court. But it is contended that no notice was given the parties of the application for the extension of time within which to file the bill of exceptions, and that it was not made upon any sworn petition setting forth the facts required to appear in order to authorize the granting of

such petition, and that the order was made in the absence, and without the knowledge, of the appellee. It is the theory of the appellee that, before the court, or judge in vacation is empowered to extend the time within which a bill of exceptions may be filed, a verified petition must be filed, showing that the failure of the party presenting the bill to present it within the time granted was due to the inability or failure of the court reporter to prepare and furnish a transcript of the evidence, as provided in Act April 15, 1905 (Acts 1905, p. 45, c. 40). In this view we cannot concur. The statute in question provides that "whenever time has been given in which to file any bill of exceptions, the court, if in session, or the judge thereof in vacation, may, on a proper showing, under oath, either in term time or vacation, grant a reasonable extension of time to file the bill of exceptions containing the evidence, providing the failure to tender such bill of exceptions is due to the inability or failure of the court reporter to prepare and furnish a transcript of the evidence."

We do not understand from this statute that any notice is required to be given an adverse party. It is not in fact an adversary proceeding. The statute does not require a petition in writing to be presented either to the court or judge. It does require that the person making the application for the extension of time shall make a proper showing, under oath. This can be done as well by the sworn testimony, taken orally, of the parties as by a written verified petition. It is a matter addressed to the discretion of the court. The judge of the court must be satisfied that the facts existed justifying the extension of time, and there is no reason why a notice should be given to the adverse party, or that the bill of exceptions should be submitted for his inspection. The statute providing for the filing of bills of exception does not require that they be submitted to the adverse party. The judge of the court is responsible for the granting of time. If his discretion is abused, that fact might be presented. We take it that a judge or court will have no right, under the statute, to grant parties an unreasonable time, but when the record discloses that an application for additional time was made to the court or to the judge, and that it was granted, and that no unreasonable time was given, it will be presumed, in favor of the action of the judge or court, that a proper showing was made.

Among the reasons assigned for a new trial were that the evidence was insufficient to sustain the verdict of the jury, and that the court erred in giving certain instructions to the jury. There was introduced in evidence the record of a judgment in an action brought in the Marion superior court by one Charles Mathews, joined with William and Henry Guy, against the appellant McGruder, to quiet their title to the premises described

in the complaint, rendered prior to the commencement of this suit, and in which it was adjudged (1) that appellant McGruder had a valid lien on the premises for the taxes, penalty, interest, and costs for which the land had been sold at the tax sale, upon which a tax deed was made, and under which tax deed the appellant claimed title; and (2) that the plaintiffs in that case, Mathews and the Guys, take nothing by their suit. The appellee claims title under Mathews by a conveyance made subsequent to the judgment. Both appellant and appellee assert that this judgment concludes his adversary, appellant contending that it adjudicates the question of title against Mathews, and that appellee, being in privity of title with him, is therefore equally concluded, while appellee contends that the question of Mathews' title was not adjudicated in that proceeding, but that the rights of the appellant under his tax deed were, and that it was conclusively determined that he had but a lien on the premises, and not the title. A fact, however, appears, without dispute or controversy in the evidence in the case, that is fatal to both contentions. It is shown that the said Charles Mathews died while the proceedings resulting in the judgment were pending, and long before the rendition of the judgment relied on, and the same was therefore an absolute nullity, both for and against all who claim under him. The appellant McGruder claims title under a tax deed made on the 13th day of February, 1893, by the auditor of Marion county to one Halton, upon the sale of the premises for delinquent taxes for the years 1889 and 1890. Aside from the adjudication above referred to, the only attack made by appellee upon the appellant's title under his tax deed was proof that the treasurer of Marion county failed to verify his return of the said taxes as delinquent, by his oath or affirmation, it being appellee's contention that sections 8571, 8572, Burns' Ann. St. 1901, being the same as sections 6427, 6428, Rev. St. 1881, require that the treasurer's return of the delinquent taxes shall be so verified. The appellant meets this with the contention (1) that no question of the validity of the tax title acquired by the grantee in the deed can be raised, except as provided in section 8639, Burns' Ann. St. 1901, being the same as section 6495, Rev. St. 1881; and (2) that these provisions of the law do not apply to the case, for the reason that the owners of the premises were nonresidents of the state at the time. Appellant's first contention has been settled adversely to him by the decision of the Supreme Court in the case of Skelton v. Sharp, 161 Ind. 383, 67 N. E. 535. With reference to the second contention there was evidence in the case from which the jury might find, and they did in fact find, by their answers to interrogatories, that at the time the taxes on the premises became delinquent for the

years 1889 and 1890, the owners of the premises were nonresidents of the state. The provisions of the sections of the statute, the noncompliance with which by the county treasurer are relied upon to defeat appellant's tax deed, are as follows:

"Sec. 8571. After the third Monday of April, the treasurer shall cause a list to be made of the delinquents, with the amount due from each, and with a separate column headed 'Return,' which list shall be certified as correct by the auditor. He shall then proceed with such list, \* \* \* and call in person or by deputy upon every person named in the duplicate who is delinquent, and who resides in the county, and he shall make demand for the amount of such delinquent taxes \* \* \* of each resident delinquent to pay such taxes, and if the taxes \* \* \* are not paid on such demand, he shall proceed immediately to levy upon sufficient personal property of such delinquent to pay such taxes, \* \* \* and to sell the same. When he can find no personal property of such delinquent within the county, upon which to levy, after diligent search, he shall make opposite the name of said person on said list, in the column marked 'Return,' a special return, setting forth the fact, \* \* \* which return shall be prima facie evidence of the facts therein presented."

Section 8572 provides as follows: "County auditors shall not be authorized to credit the treasurer with any uncollected delinquency for which he claims credit, unless such treasurer shall show by a proper return, as above provided, verified by his oath or affirmation, that he has diligently sought for, and been unable to find any personal property from which to collect such taxes."

It will be observed that the first section of the statute quoted does not require the return of the treasurer of the delinquent taxes to be verified by his oath, and it is this section that governs the proceedings in the collection of the taxes. Section 8572 relates, not to the collection of the taxes, but to the settlement of the treasurer with the county auditor; and it will also be observed that the first section, by its clear and express terms, can apply only to resident delinquents.

The court instructed the jury, over the appellant's objection, as follows: "Instruction 11. Where a defendant relies upon a tax deed as evidence of title in himself, and to defeat an ejectment action against him by one holding a record title to the premises from the United States government, it must be shown that all the requirements of the statutes relating to the sale of lands for delinquent taxes upon which said deed was issued have been complied with; and, if any one of the provisions of law requiring such sales of land for taxes has not been complied

with by the proper officers, then I instruct you that such tax deed is invalid, and ineffectual to convey title, and your verdict should be for the plaintiff." The twelfth instruction, given by the court over appellant's objection, is as follows: "Instruction 12. If you find from the evidence that the real estate described in the complaint was sold for taxes for the years 1889 and 1890, and if you further find from the evidence that at the time such sale was made there was no return, duly verified by the county treasurer, on file with the county auditor, showing the lands and lots delinquent for unpaid taxes, and that the county treasurer had diligently sought for and has been unable to find any personal property from which to collect such taxes, or that, having made a levy, he was enjoined or otherwise prevented from making a sale or collection by a court of competent jurisdiction, then I instruct you that the law regulating the sale of land for taxes was not complied with, and such sale was invalid, and the deed executed thereon is ineffectual to convey title, but confers on the holder thereof only a lien on the premises, and your verdict should be for the plaintiff." These instructions were both clearly erroneous. Under the statutes in force when the tax sale and deed in question were made, governing the probative effect of the tax deed, they are prima facie evidence of the regularity of the sale, and of all prior proceedings, and of a valid title in the grantee, and casts the onus of proof of any defect in the proceedings, which would render the deed void for the purpose of conveying title, on the party assailing the deed. Section 8624, Burns' Ann. St. 1901; section 6480, Rev. St. 1881; *Richard v. Carrie*, 145 Ind. 49, 43 N. E. 949; *May v. Dobbins*, 166 Ind. 331, 77 N. E. 353; *Brown v. Reeves*, 31 Ind. App. 517, 68 N. E. 604. From instruction No. 11 given by the court, the jury must necessarily have understood that the burden of proving every step necessary to render the tax sale valid was upon the holder of the tax deed; and they necessarily understood from instruction No. 12 that, regardless of the question as to whether the owners of the property returned for delinquent taxes were residents of the county or state, or otherwise, the failure of the county treasurer to verify his return of the delinquent tax voided the tax deed for the purpose of conveying title. As above stated, this provision of the law could, at most, apply only in cases where the delinquent taxpayer was a resident of the county. We do not decide that such failure would, in any event, affect the title of one who purchased at a tax sale.

For these errors of the court the cause must be reversed.

Cause reversed, with instructions to the court below to grant a new trial.

(42 Ind. A. 585)

**CHICAGO, I. & L. RY. CO. v. SANDERS.**  
(No. 6,572.)(Appellate Court of Indiana, Division No. 2:  
Dec. 9, 1908.)**1. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.**

Where plaintiff's foreman directed him to alight from a moving train, and in doing so plaintiff was injured, whether the foreman's order was negligence was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1041; Dec. Dig. § 286.\*]

**2. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**

Where plaintiff alighted from a moving train as directed by his foreman, whether plaintiff was negligent in obeying the foreman's order was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1129; Dec. Dig. § 289.\*]

**3. MASTER AND SERVANT (§ 222\*)—ORDER FROM SUPERIOR—PRESUMPTION OF DANGER.**

The rule that, when an employé receives a specific order, he may rely on the presumption that he will not be ordered into danger, does not apply when all the facts are known to him and the danger is obvious.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 649; Dec. Dig. § 222.\*]

**4. MASTER AND SERVANT (§ 222\*)—INJURIES TO SERVANT—NEGLIGENCE OF FOREMAN.**

Where the danger of alighting from a moving train was equally obvious to both plaintiff and his foreman at the time plaintiff was ordered to alight and was injured, either both plaintiff and his foreman were negligent, or neither was negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 649; Dec. Dig. § 222.\*]

Appeal from Circuit Court, Orange County; Thos. B. Buskirk, Judge.

Action by John Sanders against the Chicago, Indianapolis & Louisville Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

El. C. Field and H. R. Kurrie, for appellant. Hottel, Cauble & Hottel, for appellee.

**ROBY, J.** Action for recovery of damages by appellee, who was in appellant's service as a sectionman, on account of injuries received by him in leaving a moving train in obedience to the order of the section foreman. The case was tried without a jury, a special finding of facts made, with conclusions of law, and judgment thereon for \$1,000. The finding of fact shows that appellee went along appellant's railway and did certain work under the order of the foreman, and was by him ordered to get upon a designated train with the rest of the section gang to return home; that, when the train neared Norris, the place where the sectionmen were to get off, the conductor asked the foreman if he must stop the train to let the men off. The foreman said, "No; we will get off," saying "Get off, boys." At this time

the train was running six or eight miles an hour. In obedience to said order, the sectionmen, including appellee and the foreman, got off the train. The appellee came in contact with a stone wall built to protect the grade from the flow of water, and was injured. It was found that appellee did not know the condition of the right of way, that the order given by the foreman was negligent, that the injury to appellee was caused thereby, and that he was in the exercise of care.

Whether the order to leave the moving train was or was not negligent under all the circumstances was a question of fact. *Harris v. Pittsburg, etc., R. Co.*, 32 Ind. App. 600, 602, 70 N. E. 407. Whether appellee in obeying it was or was not negligent was also a question of fact. *Pittsburg, etc., R. Co. v. Miller*, 33 Ind. App. 128, 70 N. E. 1006. Both of these issues are found against appellant. In other words, it is found that the foreman was negligent in giving the order, and that the employé was not negligent in obeying it. Some ground of distinction is furnished by the further findings to the effect that the foreman was, and the appellee was not, familiar with the conditions. The conclusions of law upon facts which show such a distinction cannot be said to be erroneous, but by the motion for a new trial the sufficiency of the evidence to sustain the findings is presented. The only witness examined by either party was the plaintiff. He testified in part as follows: "The train was going something like six or eight miles per hour when I got off. \* \* \* At this place the right of way along the side of the track was rough. There is a rock wall between the ditch and the ties. I got off on the same side as you find the wall. \* \* \* It is just a narrow place about two feet wide. \* \* \* I thought I could get off safely, or I would not have undertaken it. I was careful in getting off. I fell so quick I did not know just how it happened." The employé who receives a specific order may rely upon the presumption that he will not be ordered into danger, but such presumption does not apply when all the facts are known to him and the danger is perfectly obvious. *Shaver v. Home Tel. Co.*, 36 Ind. App. 233, 237, 75 N. E. 288, 114 Am. St. Rep. 373; *Ch.*, etc., *R. Co. v. Tackett*, 33 Ind. App. 379, 71 N. E. 524. The appellee had equal opportunity with the foreman for knowing whether it was safe to alight from the moving train at that place. The conditions were open and obvious, the train was moving slowly, and appellee's judgment at the time was that it was safe to get off or he "wouldn't have undertaken it." There is nothing in the evidence justifying a finding of negligence on the part of the foreman and at the same time of freedom from negligence by the appellee. Their opportunities to determine the fact were at least equal. The conditions

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

were open and observable. Appellee was entirely capable of forming an intelligent judgment, and acted upon such judgment, so that the deduction that both were negligent or that neither was unavoidable. The finding is not therefore supported by the evidence.

Judgment reversed, and a new trial ordered.

(42 Ind. A. 588)

**CLEVELAND, C., O. & ST. L. RY. CO.  
v. BEALE (No. 6,477.)**

(Appellate Court of Indiana, Division No. 2  
Dec. 9, 1908.)

**1. APPEAL AND ERROR (§ 1078\*)—QUESTIONS REVIEWABLE—WAIVER.**

Reasons for a new trial not discussed by appellant are waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

**2. MASTER AND SERVANT (§ 124\*)—MASTER'S LIABILITY FOR INJURIES TO SERVANT—MASTER'S DUTY TO FURNISH SAFE TOOLS AND APPLIANCES.**

The duty of furnishing safe tools and appliances with which an employé is to do the work is on the employer, and is continuing, and, while an employé is presumed to see apparent defects, he is not required to search for hidden defects, a higher degree of care in the matter of inspection resting on the master than on the employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.\*]

**3. MASTER AND SERVANT (§ 276\*)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE.**

In an employé's action for injuries through the breaking of a defective rope, evidence held to support a verdict for plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 276.\*]

**4. APPEAL AND ERROR (§ 1039\*)—HARMLESS ERROR—THEORY OF CASE.**

Though, in an employé's action for injuries, the theory of the complaint was that the negligence of defendant consisted in furnishing a rotten rope, the trial of the case on the theory that the rope became defective after use was not prejudicial to defendant; there being no evidence of any examination of the rope until after the accident, nor of any change in its appearance from the time it was first seen by any of the witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1039.\*]

**5. MASTER AND SERVANT (§ 231\*)—INJURIES TO SERVANT.**

A common laborer could rely on the soundness of ropes furnished by the master for the work, in the absence of obvious defects.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 675-677; Dec. Dig. § 231.\*]

**6. MASTER AND SERVANT (§ 187\*)—VICE PRINCIPAL.**

Where, in the temporary absence of a foreman in charge of work, he directed a common laborer, who was receiving wages as such, to act in his place, it did not make of him a vice principal.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 187.\*]

Appeal from Circuit Court, Ripley County; F. M. Thompson, Judge.

Action by John L. Beale against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Thos. S. Cravens and John O. Cravens, for appellant. Jas. H. Connelly, for appellee.

COMSTOCK, J. Appellee sued for damages for injuries received by him, while an employé of appellant, in working on the construction of a bridge over appellant's railroad tracks, alleged to have been caused by a rotten guy rope. A demurrer for want of facts was overruled to the first paragraph of the complaint, and an answer of general denial filed thereto. The second paragraph was withdrawn. Upon the issues thus formed the cause was submitted to a jury for trial, and a verdict was returned in favor of appellee for \$1,100. Appellant asks a reversal alone upon the action of the court in overruling its motion for a new trial. The reasons for a new trial which are discussed are: That the verdict is not sustained by sufficient evidence, is contrary to the law and the evidence; that the court erred in giving each of several instructions, and in refusing to give certain other instructions requested by appellant. Other reasons set out are waived by appellant's failure to discuss them.

At the time of the accident, appellant corporation was engaged in constructing a bridge about 45 feet high over a highway crossing. In its erection pulleys with ropes, blocks and fall were all the apparatus used. A high pole 25 feet long was used as a gin pole. Three guy ropes were attached to the top of the pole. These ropes were furnished by appellant from a tool car. They were of manilla, seven-eighths of an inch in thickness; were the only ropes at the place of work; were the kind of ropes generally used in raising bents. While attempting to raise a bent to the second story, one of the guy ropes broke, and one corner of the bent fell down, striking another guy rope, which in turn struck appellee, knocking him from his position to the ground, a distance of 23 feet, causing the injuries for which he sues. The rope broke about 18 inches from the top of the gin pole. The bent was on the same level at which appellee was standing when he was struck, one end resting on a prop about 6 feet high. The rope was not new. It had been used in rolling sewer pipe, and thus became muddy, but it appeared to be sound, looked like the other two guy ropes. It had been used the week of the accident in the erection of the bridge, and appellee was present each time it was attached during that week. He had been engaged in erecting bridges for about two years, and on the work in question about one week.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Cooper was foreman of the gang engaged in the work. At times he was absent, and then under his direction appellee acted as temporary foreman. The accident occurred at 1 o'clock p. m. Cooper left the place at 11 o'clock a. m. He was not present when the rope broke. Before going, he directed the hands to put the gin pole up. Appellee was in the proper place in which to do the work. The foreman had never made an examination of the rope. Appellee did not examine the rope to see its condition; had seen it used in raising timbers on that bridge, but never looked at it specially; knew that it was used generally in raising bents; did not know that it was defective. In brief the evidence shows that appellee was injured while in the line of his duty, in a place where it was proper for him to be acting, under instructions from his superior, by reason of the breaking of the defective rope furnished for the particular use to which it was put. In view of appellee's own testimony, the jury was justified in finding that he had not assumed the risk. Reasonably the duty of furnishing safe tools and appliances with which an employé is to do the work assigned him is upon the employer, and is continuing. An employé is presumed to see defects that are apparent, but he is not required to search for hidden defects. A higher degree of care in the matter of inspection rests upon the employer than upon the employé. *Parry Mfg. Co. v. Eaton* (Ind. App.) 83 N. E. 513, 514. There appears to have been no examination of the rope, or any of the ropes used prior to the accident. The uses to which they had been put was well calculated to weaken them. From the circumstances the jury might well have found appellant negligent. Under the statute foreman Cooper was a vice principal, and not a fellow servant of appellee. This action is brought under subdivision 1, section 7083, Burns' Ann. St. 1901. That the rope furnished was defective is shown conclusively. Had it been sound when furnished, and provision made for its displacement when weakened by use, appellant would have discharged its duty. *Parry Mfg. Co. v. Eaton*, supra.

The point is made, on behalf of the appellant, that the theory of the complaint is that the negligence consisted in furnishing for use a rope which was rotten, when the case was tried on the theory that the rope became defective after its use. In view of the evidence, if this claim is well founded, appellant could not have been prejudiced because there is no evidence of any examination of the rope until after the accident, nor of any change in its appearance from the time it was first seen by any of the witnesses. When the foreman Cooper left the work and directed appellee what to do, the ropes had already been furnished, no others were provided, appellee had the right, in the absence of obvious defects,

to rely upon their soundness. The temporary absence of the foreman did not transform appellee, a common laborer, receiving only the wages of a common laborer, to the position of vice principal.

The verdict is not without support of evidence, and the instructions considered together correctly state the law; and, in view of the evidence, there was no prejudicial error in the refusal of the court to give those requested.

Judgment affirmed.

(45 Ind. App. 89)

MELLETTTE v. INDIANAPOLIS NORTHERN TRACTION CO. et al. (No. 6,187).<sup>1</sup>  
(Appellate Court of Indiana, Division No. 1.  
Dec. 8, 1908.)

1. TRIAL (§ 359\*)—VERDICT—SPECIAL INTERROGATORIES—FINDINGS INCONSISTENT WITH GENERAL VERDICT.

Though a general verdict for plaintiff found every well-pleaded fact in the complaint to be true, yet answers to special interrogatories contradicting an averment in the complaint will be taken as true notwithstanding the general verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 857-860; Dec. Dig. § 359.\*]

2. MASTER AND SERVANT (§ 219\*)—INJURIES TO SERVANT—ASSUMED RISK—OBVIOUS DANGERS.

A servant must use his senses to observe and avoid obvious dangers, and must take cognizance of natural laws.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 612; Dec. Dig. § 219.\*]

3. MASTER AND SERVANT (§ 205\*)—INJURIES TO SERVANT—ASSUMED RISK—HIDDEN DANGERS.

A servant need not search for hidden defects or dangers, that being the master's duty, and he may rely on the master's superior knowledge in the performance of such duties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 547; Dec. Dig. § 205.\*]

4. MASTER AND SERVANT (§ 219\*)—INJURIES TO SERVANT—RISKS ASSUMED—OBVIOUS DANGERS—SUPERIOR KNOWLEDGE OF MASTER.

Where a servant was injured by slipping on a bridge timber, which, as well as the other objects around him, was covered with sleet and ice, such dangers being obvious to every one of ordinary intelligence, the master's knowledge thereof could not be superior to the servant's, and the servant could not rely on the master's superior knowledge of the conditions, but assumed the risk of injury therefrom.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610, 611, 614; Dec. Dig. § 219.\*]

5. MASTER AND SERVANT (§ 219\*)—INJURIES TO SERVANT—RISKS ASSUMED—LATENT DANGERS.

Where conditions surrounding the work are not complex, but easily comprehended, an employé with knowledge thereof is bound to know the dangers incident thereto, and, if he continues work with such knowledge, he assumes the risk of injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610, 611, 614; Dec. Dig. § 219.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup> Rehearing denied. Transfer to Supreme Court denied.

**6. MASTER AND SERVANT (§ 222\*)—ASSUMED RISKS—COMPLIANCE WITH COMMANDS—APPARENT DANGERS.**

Where a servant is ordered to go in a dangerous place and perform a dangerous task, or use a dangerous tool at a particular time or in a particular manner, he may obey the order without assuming the risk or quitting the employment, unless the danger is so apparent that a prudent man would not assume it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 648-651; Dec. Dig. § 222.\*]

**7. MASTER AND SERVANT (§ 222\*)—INJURY TO SERVANT—RISKS ASSUMED—COMMANDS OF MASTER—CHOICE BY SERVANT OF DANGEROUS WORK.**

Where a servant was injured by falling from a bridge timber while attempting to place it on a trestle, because of ice and snow thereon, an order directing the servant to proceed with the work of constructing the bridge was not a specific direction to go upon the trestle at all, but could have been construed as an order to do any other work about the bridge that could have been done with safety, so that the servant was not justified in attempting the obviously dangerous work of placing the timbers when covered with ice.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 222.\*]

**8. MASTER AND SERVANT (§ 297\*)—INJURIES TO SERVANT—ACTIONS—FINDINGS—CONSTRUCTION.**

In a servant's action for injuries while placing a bridge timber, where the jury answered "Yes" to special interrogatories as to whether plaintiff and his men were ordered to go on top of a trestle that morning and place the timbers, and found that the specific order was to "go ahead and push the work on the trestle," and other interrogatories showed that plaintiff was directed to keep working at the trestle and push the work, the answers, taken together, did not find that an order was given to do any specified work at a certain time, but that it was only a general order to do the work in plaintiff's discretion.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 297.\*]

**9. TRIAL (§ 355\*)—FINDINGS—FINDINGS OF EVIDENTIARY FACTS.**

Findings in answer to a special interrogatory whether a servant was ordered to place timbers on a trestle, that the order was to "go ahead and push the work on the trestle on the island," was not a finding of an evidentiary fact, and setting out the order verbatim in the finding did not make it so.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 848; Dec. Dig. § 355.\*]

Appeal from Circuit Court, Cass County; John S. Lairy, Judge.

Action by Peter Mellette against the Indianapolis Northern Traction Company and others. From a judgment for defendants notwithstanding the general verdict for plaintiff, plaintiff appealed. Affirmed.

M. Winfield and Geo. A. Gamble, for appellant. J. A. Van Asdol, McConnell, Jenkins, Jenkins & Stuart, and Myers & Yarlott, for appellees.

HADLEY, J. Appellant sued appellees for injuries received while engaged in work as their employé. Trial was had and a general verdict returned for appellant, together with

answers to interrogatories. Upon motion judgment was rendered for appellees upon the answers to interrogatories notwithstanding the general verdict. The only question we shall consider is this ruling of the court below.

The complaint is in two paragraphs, each of which states the facts to be that appellant was employed as a bridge foreman in the construction of bridges for appellees; that at the time of the injuries complained of appellant, with a crew of men, was constructing a bridge and trestle which were about 30 feet high; that on the 14th day of January, 1904, while said bridge and trestle were in process of construction, the weather became very cold, and much rain had fallen the day before, on account of which the ground at the place where said trestle and the timber and tools used in the construction thereof became frozen and covered with ice, causing the premises and all of the timbers and tools and appliances used in the construction of said bridge to be and remain in a slippery condition, rendering it difficult to be upon and about said bridge and trestle and to handle the timbers and put them in position, causing such tools and appliances to be difficult to handle, altogether causing it to be hazardous to work upon said bridge and trestle and in placing the heavy timbers and other materials in proper position, which unsafe and hazardous condition was unknown to appellant and could not be seen by appellant, as the ice and slippery condition was hidden from view and concealed by a heavy fall of snow; that the attention of appellees was called to said unsafe condition, and that it was hazardous, on that account, for appellant and his crew working with him in said construction to work in and about the construction of said bridge and trestle at that time; that appellees ordered and directed that appellant and his crew proceed in the work of constructing said bridge and trestle-work; that said order and direction was a careless and negligent order, in that, as aforesaid, it was dangerous to appellant and others working with him to be in and about said bridge using the tools and appliances and placing the heavy timbers in position; that while working in obedience to said order on said 14th day of January, and while in the line of his duty he was standing upon said bridge and upon a timber that was being moved by one of the men working with him, said timber, by reason of the slippery condition, slipped and fell and precipitated him to the ground 30 feet below, whereby he was injured; that said co-employés were working upon said bridge under the instructions of said appellees; that said order and instructions were negligent and careless, in that appellees should have ordered and instructed the men to suspend work until the ice and said slippery condition

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

had been removed; that said acts of said co-employés were in obedience to said instructions, and not otherwise, and by reason of said acts appellant was thrown off the bridge and injured; that said injuries were received directly and on account of the acts of said co-employés while thus engaged in the construction of said bridge, acting in strict obedience to the orders of said appellees. The amended third paragraph contains substantially the same averments, except that it did not aver that appellant had no knowledge of the icy and slippery condition, but it averred that said icy and slippery condition was hidden from view by the snow, and also that appellant obeyed said order and instructions of the appellees without knowing and appreciating the dangers and hazards in prosecuting the work under the conditions as existed at that time, and that the order recited in the first paragraph was a careless and negligent order.

The answers to the interrogatories show that appellant had been in the employ of appellees as foreman of a crew of bridge carpenters engaged in the construction of bridges continuously since June, 1903; that he had charge of the construction of the trestle where the injury was sustained, the men under him, the manner of doing the work, and the method of handling the timber in constructing the same; that prior to January 14, 1904, the date of the injury, said employés working with appellant and under his direction hoisted and stacked on top of said trestle dimension lumber and stringers; that at the time said lumber and stringers were so hoisted they were covered with ice; that there was a slight rainfall followed with sleet and snow and severe cold on the afternoon and night of January 13, 1904; that appellant, with other members of his crew, was working in the locality of said trestle on January 13th, and each of them on said January 13th knew of said rainfall, sleet, and snow; that said rain, sleet, and snow covered the timbers, stringers, and trestle, and rendered them icy and slippery; that said icy and slippery condition of said trestle and timbers rendered it dangerous for men to work thereon on the morning of January 14th; that the icy, slippery, and dangerous condition of the trestle and timbers was produced solely by a change in weather conditions which prevailed on the afternoon and night of January 13th; that on the morning of January 14th the thermometer indicated zero weather; that on said morning two of the employés, before going to work on the trestle, notified appellant that it was not safe, but was dangerous, to work on the same; that the workmen, under the orders of appellant, swept the snow off the trestle before attempting to put the stringers in position; that appellant a short time before his injury went up on top of the trestle; that, when he reached the top of the trestle, the men were engaged in shifting a stringer into

position; that said stringer at the time was covered with ice; that appellant, upon reaching the top of the trestle, took his position on the stringer that was being shifted into position, and his injury was caused by said stringer slipping and falling; that the icy and slippery condition of the trestle and timbers thereon were open and obvious, and any one possessing good eyesight, standing on the top of said trestle, could readily have observed these conditions on the morning prior to appellant's said injury after the snow was removed; that appellant and appellees had equal opportunity of knowing the icy and slippery condition of the timbers and trestle, and appellant had as much information touching the condition of said timbers and trestle on said morning, and every opportunity of knowing of such conditions on said morning and the liability of said timbers to slip and fall as appellees had; that Hugh Bronson, a timekeeper and supply man of appellees, delivered to appellant on the morning of January 14th an order as follows: "There are no new orders. The old order still stands. Go ahead and push the work on the trestle on the island"—that said Hugh Bronson had been in the habit prior to the said 14th of January of bringing out the orders from the headquarters of the appellees as to what the appellant and the men under him should do on each day; that appellant had never constructed trestle-work in midwinter before; that the laying of stringers on said trestle on said morning was attended with extraordinary hazard; that appellant had not been upon the trestle on the morning of the 14th of January before the time he was injured, and had been upon the trestle before the injury less than a minute. The rules governing the force and effect of the answers to interrogatories, when interposed as a nullification of the general verdict, are so well established and the authorities so numerous and well known that it would be unprofitable to restate or recite them here. By the general verdict in this case every material well-pleaded fact of the complaint was found to be true. But, if the answer to an interrogatory contradicts an averment of the complaint, such answer must be taken as the correct expression of the jury.

The basis of appellant's suit is that the dangerous condition of the place of work was a latent or hidden one, and appellees by a special, negligent order directed appellant into the danger. It is shown by the complaint and answers to the interrogatories that the injury was caused by the icy and slippery condition of the timbers and tools; that this dangerous condition was occasioned by the inclement weather, and by no act of omission or commission of appellees; that appellant knew of the rain, sleet, snow, and the low temperature; and that appellant knew that, when the timbers were hoisted to the top of the trestle, they were covered with ice. The master is not required to be

the eyes and ears of the servant, but the servant must use the senses with which he is endowed by nature (Day v. Cleveland, etc., Ry. Co., 137 Ind. 206, 36 N. E. 854; Griffin v. Ohio, etc., Ry. Co., 124 Ind. 328, 24 N. E. 888, and cases cited); and he must take cognizance of the laws of nature (Fay v. Chicago, etc., R. Co., 72 Minn. 192, 75 N. W. 15; L. & N. R. Co. v. Kemper, 147 Ind. 561, 47 N. E. 214). It is the employé's duty to observe what is obvious and may be readily seen or known. He is not required to inspect or search for hidden defects or dangers. That is the master's duty, and he has the right to rely upon the master's performance. He has also the right to rely upon the master's superior knowledge as to these matters. *H. Rumely Co. v. Myer* (Ind. App.) 82 N. E. 97. But in the case before us it was as well known to the appellant as to the appellees that rain and sleet followed by zero temperature would cover timber, tools, and appliances, as well as everything else exposed to it, with ice, and that such materials when so covered were liable to slip and slide when handled. These are the results of the laws of nature, known to every one of ordinary intelligence. As to these matters the master could have no superior knowledge to appellant, and the latter had no right to rely upon it. If the ice was thereafter covered with snow, it could not be said to be hidden or latent to one who had knowledge of the sequence of the weather conditions and changes. But, aside from this, the jury found that the icy, slippery, and dangerous condition of the timbers on the trestle was open and obvious; that one possessing good eyesight could readily observe this condition when the snow was removed. The snow was removed when he stepped upon the trestle. The ice was under him, around, and about him everywhere. He could not look for a footing without seeing it. It required no peering inspection or search to reveal it. The most casual glance would discover it as fully and completely as an hour's examination. At that moment he had all of the knowledge of the conditions that the master could have had, and with this knowledge he proceeded with the work. The general rule is that where, as here, the conditions are not complex and the circumstances such as to be easily comprehended, an employé who knows the facts and conditions and circumstances is bound and conclusively presumed to know the dangers arising therefrom, and if, after such knowledge, he continues in such work, he is held to have assumed the risks thereby incurred, and, if he is thereby injured, the master is not liable. *H. Rumely Co. v. Myer*, supra; *Kane v. St. L., etc., Ry. Co.*, 112 Mo. App. 650, 87 S. W. 571; *Shea v. Kansas City, etc., Ry. Co.*, 76 Mo. App. 29; *Murphy v. Grand Trunk Ry. Co.*, 73 N. H. 18, 58 Atl. 835; *English v. Chicago, etc., Ry. Co.* (C. C.) 24 Fed. 906; *Shaver v. Home Telephone Co.*, 36 Ind. App.

283, 75 N. E. 283, 114 Am. St. Rep. 373; *Jenney Electric Light & Power Co. v. Murphy*, 115 Ind. 596, 18 N. E. 30; *Louisville, etc., Ry. Co. v. Sanford*, Adm'x, 117 Ind. 263, 19 N. E. 770; *Louisville, etc., Ry. Co. v. Kemper*, supra; *Fay v. Chicago, etc., Ry. Co.*, supra. It is not the case of a servant compelled to act in an emergency. There was nothing to prevent him from exercising calm, deliberate judgment. He was the foreman in full charge of the men and the work. His orders were to go ahead with the work on the island. The particular place and manner and method of the work were left to him.

It is urged that, since he suffered the injury in less than a minute after he reached the top of the trestle, he had no time to observe conditions and determine what to do. As we have seen, it took no time to observe conditions, and that he took no time to deliberate upon his course of action was no fault of appellees. As a limitation to the general rule above mentioned, it is the law that where the master commands the servant to go into a dangerous place and perform a dangerous task, or use a defective tool, at a particular time in a particular way, leaving the latter no discretion as to the time or manner of his performance, the servant may rely upon the command of the master at the master's risk and not be put to the alternative of either quitting the employment or encountering danger at his own risk, unless the danger is so glaring and extreme as to be apparent to any one, and one that a prudent man would not encounter. *English v. Chicago, etc., Ry. Co.*, supra. *Jenney Electric L. & P. Co. v. Murphy*, supra, where the court say: "Where an employer commands his employé, whom he assumes to direct, to use a defective implement in a particular way, leaving the latter no discretion as to the time or manner of its use, the employé may rely upon the superior knowledge and experience of the employer, unless the defect is so glaring and extreme as to make the danger of using the utensil apparent to any one. On the other hand, when an employé has within his own control the manner of using an obviously defective tool, and the means of securing safety, if he chooses to employ them, if he neglects the means of security to himself, he elects to take the risk. In such a case it cannot in reason be said that the employé has acted upon the confidence reposed in the employer, and that he is, therefore, entitled to remuneration."

It is insisted by the appellant that his case comes within the rule of special direction. But his complaint does not support this theory. The averment of the complaint upon this point is "that defendants ordered and directed that plaintiff and his crew proceed in the work of constructing said bridge and trestle-work. This order is of the broadest general character. There is no attempt, by other averments, to show that this order either by its terms or by implication was a spe-

cific direction to appellant on that morning to go upon the trestle and place the stringers in position. It was not a direction to go upon the trestle at all. It could as well have been construed as a direction to accumulate and prepare the timbers upon the ground or do any other work that might be done with safety. But it is urged that the jury by its answers to interrogatories found that the order on that morning was a specific direction to go upon the trestle and place the stringers in position. Three interrogatories were submitted to the jury as to what the order was that was given to appellant on the morning of the injury. Two of them asked if the order, in substance, was that plaintiff and the men under him should proceed that morning on the top of the trestle and put the stringers in position, to which the jury answered "Yes." The other asked the jury to set out the order in full, which the jury did as follows: "There are no new orders. The old orders still stand. Go ahead and push the work on the trestle on the island." Other interrogatories showed that some two or three days before the accident one Horace D. Hanford had said to appellant in reply to appellant's request for orders as to other work: "No; you keep on at that work. I want you to get it done as quick as possible. I want you to hurry it up. Keep working at the trestle on the island. Push the work." It is urged against the interrogatory that sets out the order that it is the finding of an evidentiary fact. We do not so construe it. The fact that a certain order was given was averred, and whether such an order was given was a fact to be found, and setting out the order in totidem verbis, where the language is clear and unambiguous, is surely as much a finding of fact as to set out the substance or its import which involves a conclusion. The order, therefore, as averred and found by the jury, was not an order to do a specific thing at a specified time and in a specified manner. It was a general order to perform a general work in a manner to be chosen by the appellant. It did not preclude him from exercising his own discretion, the character of the work and the manner and method of doing it was left to him, and, when he went upon the trestle and with full knowledge of the conditions directed the moving of the stringers and took his position on the stringer that was being moved, knowing it was covered with ice, he assumed all the risks attendant upon the kind of work and the manner and method of doing it.

It is also suggested that appellees were negligent in not warning appellant of the danger, and ordering him to cease work. As we have already seen, the danger was open and obvious. The master is not required to warn the servant of a danger that is open and obvious to the senses and can be appreciated and understood by any one of ordinary

intelligence. *Foster v. Bemis Bag Co.*, 163 Ind. 351, 71 N. E. 953; *Atlas Engine Works v. Randall*, 100 Ind. 293, 50 Am. Rep. 798; *Whitcomb v. Standard Oil Co.*, 153 Ind. 513, 55 N. E. 440; *Labatt's Master & Servant*, § 238.

For the foregoing reasons, the judgment is affirmed.

(45 Ind. App. 513)

**HAMPTON v. MURPHY.** (No. 6,238.)<sup>1</sup>  
(Appellate Court of Indiana, Division No. 1  
Dec. 8, 1908.)

**1. EXECUTORS AND ADMINISTRATORS (§ 336\*)—  
MANAGEMENT OF ESTATE—SALE OF REAL  
ESTATE—PETITION—SUFFICIENCY.**

A petition by an administrator for leave to sell real estate *held* to aver facts sufficient to authorize the sale under Burns' Ann. St. 1903, § 2854, prescribing the contents of a petition to sell real estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1387-1392; Dec. Dig. § 336.\*]

**2. DESCENT AND DISTRIBUTION (§ 126\*)—  
DEBTS OF INTESTATE—LIABILITY OF SUR-  
VIVING HUSBAND.**

Under Burns' Ann. St. 1903, § 8016, providing that, where a wife dies intestate leaving a widower, one-third of her estate shall descend to him, subject to its proportion of the debts of the wife contracted before marriage, the widower takes one-third absolutely, except where he has waived his right by agreement or estopped himself from any claim to it, and his third is not subject to the payment of the general debts of the wife.

[Ed. Note.—For other cases, see *Descent and Distribution*, Dec. Dig. § 126.\*]

**3. DESCENT AND DISTRIBUTION (§ 62\*)—  
RIGHTS OF SURVIVING HUSBAND—ESTOPPEL.**

A husband who joined his wife in executing a mortgage on her real estate is estopped from denying the jurisdiction of the probate court to order the sale of the mortgaged premises, if necessary to discharge the mortgage lien, and the court may order a sale of all the mortgaged land if necessary to pay the debt, and the husband is not entitled to the proceeds on the land not selling for sufficient to discharge the liens.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 186; Dec. Dig. § 62.\*]

**4. EXECUTORS AND ADMINISTRATORS (§ 376\*)—  
SALES—VALIDITY—ESTOPPEL.**

A widower participated in the administrator's sale of his wife's real estate, incumbered by a mortgage in which he had joined, and tried to induce a person to raise a bid. He procured the appointment of the administrator, permitted the petition to sell the real estate to go by default, receipted to the administrator for the surplus of the proceeds arising from the sale of other real estate described in the petition, and sold under the same order and terms as the real estate embraced in the mortgage. *Held*, that he was estopped from challenging the validity of the sale of the mortgaged real estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1540; Dec. Dig. § 376.\*]

**5. EXECUTORS AND ADMINISTRATORS (§ 380\*)—  
SALES—SUIT TO SET ASIDE—LIMITATIONS.**

Under Burns' Ann. St. 1903, § 293, providing that an action for the recovery of real

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup> Rehearing denied, 88 N. E. 876. Petition to transfer to Supreme Court denied.

property sold by an administrator on a judgment directing the sale must be brought within five years after the confirmation of the sale, an action by a widower to recover a third of his wife's land, or quiet title thereto, is barred after the expiration of five years from the confirmation of the sale of the real estate by the probate court, though the sale is void.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1553; Dec. Dig. § 380.\*]

Appeal from Circuit Court, Marshall County; Harry Bernetha, Judge.

Action by Stephen K. Hampton against William H. Murphy. From a judgment for defendant, plaintiff appeals. Affirmed.

H. A. Logan, for appellant. W. B. Hess, Samuel Parker, and E. C. Martindale, for appellee.

WATSON, C. J. This action was brought by appellant in three paragraphs. The first was to quiet title to a one-third interest he claimed in and to 80 acres of land in Marshall county, Ind. The second was for the partition of said real estate, for the appointment of a commissioner to sell said land, and for accounting of rents by appellee. The third paragraph alleged, in addition to the averments of the second paragraph, that on the 21st day of September, 1896, Emeline Hampton, appellant's wife, departed this life intestate, leaving surviving her this appellant, her husband; that on the 1st day of March, 1899, Henry B. Hall was appointed administrator of her estate, and on June 3, 1899, as such administrator filed his petition to sell decedent's real estate to pay the debts thereof, and on August 7, 1899, sold said 80 acres of real estate to William M. Patterson; that appellant's interest in said real estate was not ordered or directed to be sold by the court, and was not sold by virtue of said sale; that appellant was the owner in fee of the undivided one-third of said real estate; that the appellee had been in possession of said real estate for six years last past and had had the use, rents, and profits thereof, which amounted to and are of the value of \$1,200; that his share thereof would amount to \$400, praying that he be declared the owner of one-third of said real estate, that the same be ordered sold by the commissioner, and demanding an accounting of the rents and profits for said period of six years. To this complaint appellee filed his answer in four paragraphs:

First. General denial.

Second. Alleging that Emeline Hampton departed this life on the 21st day of September, 1896, the owner of the real estate described in plaintiff's complaint, together with other lands situated in said Marshall county, Ind., and leaving surviving her as her heirs at law Stephen K. Hampton, widower, appellant herein, William A., Harrison L., and Maud E. Hampton; that on the 23d day

of August, 1896, said decedent, together with her husband, executed to William M. Patterson a mortgage upon the said real estate described in plaintiff's complaint to secure a note of even date therewith for \$1,775, executed by said decedent to said Patterson; that said mortgage was duly recorded on the 10th day of September, 1896, in Mortgage Record 25, p. 87, of the Mortgage Records of Marshall County, Ind.; that on the 15th day of June, 1896, said decedent and her husband executed a mortgage to the People's Loan & Saving Association of Warsaw, Ind., on which there was due and unpaid at the time of her death the sum of \$350, which mortgage was duly recorded in mortgage record of Marshall county, Ind.; that the whole of the personal estate of said decedent did not exceed in value \$87.37; that on the 2d day of March, 1899, said Stephen K. Hampton filed with the clerk of Marshall circuit court a relinquishment of his right as the widower of said decedent to administer upon her estate, and requested that Henry B. Hall be appointed as such administrator, and thereupon, on said day, said Hall was duly appointed and qualified as such administrator, and caused the personal estate to be inventoried and appraised, which amounted to \$87.37; that on the 24th day of May, 1899, William Patterson filed his note and mortgage as a claim against said estate, the amount claimed to be due thereon at that time being \$1,880; that there was also due on the People's Loan & Savings Association a mortgage the sum of \$375, and taxes on real estate described in that mortgage which were unpaid the sum of \$21; that the cost of administration on said estate paid and allowed by said court amounted to \$223.36; that on the 3d day of June, 1899, said administrator filed his petition in the clerk's office of Marshall county, Ind., asking an order to sell the real estate embraced in both mortgages to pay said mortgages, taxes, debts, and liabilities of said estate; that Stephen K. Hampton, William A., Harrison L., and Maud E. Hampton, William Patterson, and the People's Loan & Savings Association were made party defendants to said petition. All of said defendants were duly served by the sheriff of Marshall county with notices thereof, except William M. Patterson and the loan association, who waived issuing of notice and appeared to said petition and filed answers thereto; that said Stephen K. and William A. Hampton each failed to appear either by person or attorney and were duly defaulted, and said Harrison L. and Maud E. appeared by guardian ad litem, who filed answer to said petition for and on behalf of said minors; that said administrator asked that he be granted an order by said court to sell said real estate described in said petition to pay the debts and liabilities, and that the same be sold free from all liens and in-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cumbrances thereon; that upon the hearing thereof the court found that said William M. Patterson held a mortgage on the said 80 acres of real estate on which there was due on the 21st day of June, 1899, \$1,888.45; that there was the further sum of \$81, taxes and penalties, due on said real estate due on a tax certificate held by Julia E. Thompson; that the People's Loan & Savings Association held a lien on a house and lot embraced in their mortgage. The court ordered and adjudged all of said real estate described in said petition to be sold as prayed for therein and the liens and mortgages of said Patterson and the People's Loan & Savings Association attached to and follow the funds arising from such sales; that all of said real estate was duly sold according to the order of the court after due notice of the time, place, and terms of said sale as required by law; that appellant, Stephen K. Hampton, counselled, advised, and consented that his interest as widower of said decedent in and to the real estate described in the petition by order of court be sold, and agreeing to take his interest therein out of the proceeds of said sales after the payment of said mortgages, taxes, and other just and proper claims; that said 80 acres on the 7th day of August, 1899, was duly sold to William M. Patterson, who bid \$1,987.84, which was the highest and best bid thereof; that said Patterson afterwards for value assigned said certificate so issued to him by said administrator to this appellee, William H. Murphy; that afterwards, to wit, on the 1st day of November, 1899, said administrator, by order of the court, executed a deed to said 80 acres of land to said Murphy, who thereupon took immediate possession thereof by virtue of his said deed, and has ever since been in open, notorious, uninterrupted, and exclusive possession thereof; that the amount realized from said sale of 80 acres of land was not sufficient to pay and satisfy in full the Patterson mortgage thereon and the tax certificate held by Julia E. Thompson; that the said Stephen K. Hampton afterwards receipted to said administrator in full for his interest in and to the personal estate and the surplus from the sale of the real estate other than the 80 acres described in the petition after the payment of the savings association's mortgage, taxes, and cost.

The third paragraph of answer alleged substantially the same facts as are alleged in the second paragraph, except setting out the receipt of Stephen K. Hampton to Henry B. Hall, administrator, which is as follows: "Rec'd Nov. 8, 1899 of Henry B. Hall, administrator of the estate of Emeline Hampton, deceased, the sum of three hundred twenty one and 31/100 dollars in full of my share of the personal property and real estate of said estate which has been sold by said administrator as the surviving husband of said decedent. (\$321.31) Stephen K. Hampton."

The fourth paragraph, in addition to the facts alleged in the second and third in the prayer, demanded that appellant ought not to maintain this action for the reason that the cause of action did not accrue five years before the bringing of this action. Appellee also filed cross-complaint in two paragraphs to quiet title to said real estate. Demurrers were filed to the second, third, and fourth paragraphs of answer and also to the second paragraph of appellee's cross-complaint, which averred substantially the same facts as alleged in the second, third and fourth paragraphs of answer. The court overruled each of these demurrers. The cause was then put to issue by general denials. The errors assigned are the overruling of the demurrers to the second, third, and fourth paragraphs of answer and the second paragraph of cross-complaint, and the overruling of the motion for new trial. The appellant says that the decision of this case is controlled by the facts as to whether or not the petition by the administrator was sufficient to confer jurisdiction on the court to order the appellant's land as widower of said decedent sold. The petition filed by the administrator making Stephen K. Hampton, William A. Hampton, Morris L., and Maude E. Hampton, William M. Patterson, and the People's Loan & Savings Association party defendants averred the following:

First. That the personal estate of said decedent amounted to \$87.37, as shown by the inventory and appraisement on file in said estate.

Second. That the indebtedness of said estate that have come to the knowledge of the administrator, including taxes and mortgages, amounted to \$2,500.

Third. That the personal property would be insufficient to pay the taxes, debts, and expenses of the administration, aside from the liens on the real estate.

Fourth. That there was filed and pending against the estate a claim of William M. Patterson on his note secured by mortgage for \$1,775.

Fifth. That there was outstanding a tax certificate on said real estate the sum of \$80.

Sixth. That William M. Patterson held a mortgage executed by decedent and her husband against the real estate in controversy to secure the payment of the said \$1,775, which mortgage was recorded in Mortgage Record 25, p. 87, of the Mortgage Records of Marshall County, Ind.

Seventh. That the People's Loan & Savings Association held a mortgage executed by decedent and husband to secure the sum of \$500, which mortgage was recorded in Mortgage Record 28, p. 239, of the Mortgage Records of Marshall County, Ind., alleging that both of said mortgages were due.

Eight. That the probable value of the 80 acres which is the subject of this controversy was \$2,400.

Ninth. That the probable value of the house and lot set forth in said petition was \$1,000.

Tenth. Setting forth a description of the real estate asked to be sold of which decedent died seized.

Eleventh. Alleging that said decedent died intestate, leaving surviving her Stephen K. Hampton, widower, William A. Harrison L., and Maude E. Hampton, children.

Twelfth. Praying that an order be granted him as said administrator to sell said real estate to pay the debts and liabilities, and that the same be sold free of all liens and incumbrances thereon.

Thirteenth. The court thereupon ordered all the land sold embraced in the petition, free from all liens, and the liens of said mortgages immediately attach to and follow the funds arising from the sale of real estate covered by said mortgages, respectively, to the extent of the amount due on each thereof.

The petition by the administrator to sell the real estate of the decedent averred facts sufficient to substantially comply with section 2854, Burns' Ann. St. 1908. The answers, as well as the cross-complaint, aver the execution of the note and mortgage by decedent, and that the appellant joined her in the execution of the mortgage to William M. Patterson. Not until he had joined her in the execution of the mortgage did it become valid. Section 3018, Burns' Ann. St. 1908, provides that, if a wife died testate or intestate leaving a widower, one-third of her real estate shall descend to him, subject, however, to its proportion of the debts of the wife contracted before marriage. It is not therefore subject to the payment of the general debts of the deceased wife. He takes the one-third under the statute absolute, and his right cannot be molested, except in case where he has waived it by agreement or has estopped himself from any claim to it. *Roach v. White*, 94 Ind. 510; *O'Harra v. Stone*, 48 Ind. 417. If the husband has joined his wife in the execution of a mortgage upon her real estate, he is estopped from denying the jurisdiction of the probate court to order all the real estate sold thus mortgaged, if necessary to pay and discharge the mortgage lien. *Kempe v. Belknap*, 15 Ind. App. 77, 43 N. E. 891; *Pearson v. Kepner et al.*, 29 Ind. App. 92, 63 N. E. 88; *Herbert v. Ruperts et al.*, 31 Ind. App. 553, 68 N. E. 598. The third paragraph avers more than acquiescence or standing by. It charges, and the evidence supports the paragraph, that the appellant participated in the sale of the real estate; that he said, "unless the Patterson bid was raised, he would not get a cent," and tried to induce the party to raise the Patterson bid. He procured the appointment of the administrator, permitted the petition to sell the real estate to go by default, recaptured to the administrator for the surplus of the proceeds arising from the sale of other real estate described in the peti-

tion, and sold under the same order, terms, and conditions as the real estate was sold embraced in the Patterson mortgage. He is therefore estopped from challenging the validity of the proceedings or sale of the real estate. *Pepper et al. v. Zahnsinger et al.*, 94 Ind. 88; *Smock v. Reichwine*, 117 Ind. 194, 19 N. E. 776; *Lewis, Adm'r, v. Hufty*, 150 Ind. 108, 111, 49 N. E. 944; *Armstrong v. Hufty*, 156 Ind. 606, 55 N. E. 443, 60 N. E. 1080. In the case of *Lewis, Adm'r, v. Watkins*, supra, the court said: "If, however, the widow consents to such sale by the administrator under order of the court and afterwards receives her share of the purchase money, she would be estopped from disputing the validity of the sale." There is neither reason nor equity for a different rule to be applied to a widower who has joined in the execution of the mortgage with his wife upon her land, as to the power of the court to order the whole of the real estate sold embraced therein upon a proper petition, than applied to a widow who has joined her husband in the execution of a mortgage on his real estate. It must be borne in mind that the 80 acres which was embraced in the mortgage did not sell for sufficient sum to pay and discharge the liens thereon, and until these liens, one the taxes and the other the Patterson mortgage, were paid in full, the appellant could have no right in the proceeds from the sale of the land. Having signed the mortgage, the court had the power to order the whole of the land embraced therein sold, if necessary to pay and satisfy the mortgage lien.

It is earnestly insisted that this action cannot be maintained for the reason that more than five years having elapsed from the confirmation of the sale of the real estate by the probate court and the commencement of this action. That titles to real estate are protected under subdivision 4 of section 295, Burns' Ann. St. 1908, has been uniformly held in actions to recover real property by a party to the proceedings. As in this case, the appellant's right to recover one-third of the 80 acres of land or quiet the title thereto is barred after the expiration of five years from the confirmation of said sale by the probate court, under said clause, and this is true, even though the sale be void. *Vancleave v. Milliken*, 13 Ind. 105; *Vail v. Halton*, 14 Ind. 344; *White v. Clawson*, 79 Ind. 188, and cases cited; *Davison v. Bates*, 111 Ind. 391, 12 N. E. 687; *Palmerton v. Hoop*, 131 Ind. 23, 30 N. E. 874; *Hawley v. Zelgerly*, 135 Ind. 248, 34 N. E. 219; *Fisher v. Bush*, 133 Ind. 315, 32 N. E. 924; *Armstrong v. Hufty*, 156 Ind. 606, 55 N. E. 443, 60 N. E. 1080; *Axton v. Carter*, 141 Ind. 672, 39 N. E. 546; *Barton v. Kimmerly*, 165 Ind. 609, 76 N. E. 250, 112 Am. St. Rep. 252. It was said in *Fisher v. Bush*, supra, at page 319 of 133 Ind., at page 925 of 32 N. E.: "The action is to recover real estate sold by an administrator under an order of court, specially directing the sale, and the time for the bringing of the action is limited

by the fourth subdivision of section 296, Rev. St. 1881 (section 295, Burns' Ann. St. 1908). It has been held that such actions are barred in five years, though the sale be absolutely void."

We find no error in the record. The judgment is therefore affirmed.

(42 Ind. App. 580)

**POSEY TP., FRANKLIN COUNTY, v.  
SENOUR. (No. 6,507.)**

(Appellate Court of Indiana, Division No. 2.  
Dec. 8, 1908.)

**1. TOWNS (§ 1\*)—"TOWNSHIP"—NATURE AND FORM.**

"Townships" are the lowest grade of municipal corporations, being created for specific purposes, and endowed with limited powers and liabilities, acting through officers duly authorized by the law for that purpose.

[Ed. Note.—For other cases, see Towns, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7032-7035.]

**2. HIGHWAYS (§ 95\*)—OFFICERS—TOWNSHIP TRUSTEE—RIGHTS.**

The only officer authorized to bind a township as a corporation by contract is the township trustee, and his powers are limited to those conferred by statute, expressly or by necessary implication.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 309-312; Dec. Dig. § 95.\*]

**3. TOWNS (§ 37\*)—TOWNSHIPS—ROAD SUPERVISORS.**

The duties of road supervisors are confined to the territorial limits of the township, and they do not represent the township as a corporation, nor have they power to bind the town by contract for any purpose.

[Ed. Note.—For other cases, see Towns, Cent. Dig. §§ 70, 71; Dec. Dig. § 37.\*]

**4. HIGHWAYS (§ 95\*)—TOWN SUPERVISORS.**

The duties of town supervisors relate, not to township property or business, but to the public highways within the township, which belong, not to the township, but to the general public.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 95.\*]

**5. HIGHWAYS (§ 163\*)—TOWNSHIP LIABILITY.**

The township has no such interest in, power over, or liability for, the public highways through it as cities and towns over their streets and alleys, as the law imposes no duty and no liability on a township as a corporate body with reference to such highways, except that it is required to pay damages assessed in specified cases.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 163.\*]

**6. EMINENT DOMAIN (§ 2\*)—IMPROVEMENT OF HIGHWAY—APPROPRIATION OF MATERIAL.**

The right of township supervisors to enter on land and appropriate material for the repair of highways is the right of eminent domain, as to which the supervisor represents the state, and not the township.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 2.\*]

**7. EMINENT DOMAIN (§ 267\*)—REMEDIES OF OWNER.**

Where township supervisors, in the exercise of the state's right of eminent domain, entered on land, and appropriated material for

the repair of highways, the township was not liable for the damages sustained, nor could it be sued on a quantum meruit; the landowner's remedy being limited to an assessment of damages, as provided by Burns' Ann. St. 1906, § 7775.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 718; Dec. Dig. § 267.\*]

**8. EMINENT DOMAIN (§ 269\*) — REPAIRING HIGHWAY — APPROPRIATION OF MATERIAL — REMEDY OF OWNER.**

Burns' Ann. St. 1908, § 7775, provides that township supervisors, having made demand and given notice of intention, may enter on land and take material for the repair of highways, the damages to be assessed by the supervisors and two disinterested persons, etc. *Held*, that the provisions as to demand and notice were exclusively for the landowner's benefit, which he could waive, so that the supervisors' failure to make a demand and give notice was no defense to the landowner's claim for an assessment, but that the provisions requiring assessment were mandatory.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 269.\*]

**9. EMINENT DOMAIN (§ 269\*) — REPAIR OF HIGHWAY—TAKING MATERIAL—DAMAGES—ASSESSMENT—DUTY TO MAKE—REMEDY OF LANDOWNER.**

Where a township supervisor neglects or refuses to assess damages for materials taken for the repair of highways, as required by Burns' Ann. St. 1908, § 7775, he may be compelled to perform that duty by proper proceeding.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 269.\*]

Appeal from Circuit Court, Franklin County; George L. Gray, Judge.

Action by Frank H. Senour against Posey Township of Franklin County. Judgment for plaintiff, and defendant appeals. Reversed, with instructions.

Bracken & Kidney, for appellant. A. J. Ross and F. M. Alexander, for appellee.

**RABB, J.** The questions to be determined in this appeal arise out of the following state of facts shown by the pleading and the agreed statement of facts appearing in the record: Certain road supervisors of the appellant township, without formal demand upon the owners of the land, or notice to them of an intention to make such appropriation, entered upon the lands of the appellee and his assignors, and took therefrom stone and gravel of the aggregate value of \$166.44, as assessed by the court, and appropriated the same to the making of proper and necessary repairs of the adjacent highways in said township. The entry was made, and the stone and gravel taken with the knowledge, and presumably the consent, of the owners of the land. Suitable material to make such repairs could not be found within the highways in the township. No assessment of the damages done in the taking of such stone and gravel by the supervisor and two disinterested persons was made, as required by the provisions of section 6830, Burns' Ann. St. 1901, being section 7775, Burns' Ann. St.

1908, but the supervisor gave to the owners of the land orders on the township trustee for the value of the stone and gravel, as fixed by the supervisor himself and accepted by the landowners. The appellee was himself the trustee of the township at the time. The other owners of land affected presented their orders to him, and demanded payment. None of the orders were paid because of a lack of funds in the hands of the trustee to be used for such purpose. A demand was thereafter made in due form by the trustee upon the township advisory board for an appropriation of funds of the township, to be used in the payment of said claims. They refused to make such appropriation. The orders and claims of the other landowners affected were by them afterwards assigned to appellee, and he brought this action to recover from the township. No funds were in the trustee's hands at the time of said appropriation, or at the time demand was made for the payment of said claims, with which to pay the same, nor was the matter of creating a liability against the township, on account of the appropriation of said materials, ever presented to or authorized by the township advisory board. Appellant contends that no liability on the part of the township exists, for two reasons: (1) That the only remedy of the landowner for damages on account of the appropriation of road material from his premises by a road supervisor is the one given by the statute; (2) that the supervisor had no power to create a liability against the township without the authority of the township advisory board.

In response to the first point made by appellant against his claim, appellee contends that, inasmuch as the township received the benefit of the material, and is using it on its highways, the law will not permit it to refuse payment to the owner; that it was not appellee's duty to give notice and make demand, and cause the assessment to be made by the supervisor and two disinterested persons; that such duty belonged to the appellant's officer, for whose acts and omissions it is sought to hold the appellant responsible. It is argued that to admit of appellant's defense on this ground would be permitting the appellant to take advantage of its own neglect of duty, its own wrong; and, it having received the benefit of appellee's property, it is liable on the quantum meruit for its value.

In response to the second point made by appellant against the claim, it is insisted that the township reform law does not apply to the case. Townships are the lowest grade of municipal corporations. They are created for certain specific purposes, and endowed with very limited powers and liabilities. They act, like other corporations, through officers duly authorized by law for that purpose, and the only officer authorized by law to bind the township as a corporation by con-

tract is the township trustee, and his powers in this respect are limited to those expressly, and by necessary implication, conferred upon him by statute. *Mitchelltree Sc. Tp. v. Hall*, 163 Ind. 667, 72 N. E. 641, and cases there cited. While road supervisors are elected at township elections, and their duties are confined within the territorial limits of the township, and he is commonly designated a township officer, yet he is in no sense a representative of the township as a body corporate. He has no authority to bind the township by any kind of a contract, express or implied, for any purpose. His duties relate, not to township property or township business, but to the public highways that are within the limits of the township. These highways are not township property. The township does not own them, and has no control over them, as it does schoolhouses, school furniture, road tools, etc., that are the property of the township. The highways belong to the general public. The township had no such interest in, power over, or liability for, the public highways passing through it that cities and towns possess and are subject to, over the streets and alleys within their limits. The law imposes upon certain township officers certain duties with reference to the highways within the township, but it imposes no duty and no liability whatever upon the township as a corporate body with reference thereto, except it is required to pay damages assessed in certain cases. The right given by the law to the supervisors to enter upon land and to do certain acts, and appropriate certain material for the repair of the highways, is the right to exercise the sovereign power of eminent domain, and in the exercise of this power he represents, not the township, but the state, and his acts have none of the elements of a contract. The right of eminent domain is an inherent right of sovereignty, and, but for the limitations placed upon its exercise by the Constitution, the state might appropriate the property of the citizen to the public use without compensation. The right, however, is guaranteed to the citizen, by both the state and national Constitution, that his property shall not be taken for public use without just compensation, and it is in conformity with this constitutional guaranty that the statute has provided a way in which, when the citizen's private property is taken by the supervisor for the public use, compensation shall be made therefor. But aside from this provision of the law, directing the manner in which compensation is to be made, a township is no more liable for the damages done in taking property of the citizen by the road supervisor for use upon the public highways than is the state. The township has received nothing for which it could be sued on the quantum meruit which presumes a contract to exist, by which the defendant impliedly agreed to pay for a benefit which he has received.

This case is clearly to be distinguished from the case of *Clark Sc. Tp. v. Home, etc.*, 20 Ind. App. 543, 51 N. E. 107, and the numerous cases there cited. There is, however, no merit in the contention of appellant that there could be no right of recovery because of the failure of the supervisor to make demand upon the owner of the land, and to give notice of his intention to enter upon the land for the purposes contemplated by the statute. These provisions of the statute with reference to demand and notice were intended exclusively for the benefit of the owner of the land, and they are such as he might waive. *Tomba v. Rochester, etc.*, 18 Barb. (N. Y.) 585; *Beecher v. Dacey*, 45 Mich. 108, 7 N. W. 689; *Phyfe v. Elmer*, 45 N. Y. 104. But he could not waive the requirement that the damages be assessed by the supervisor and two disinterested persons under oath, and substitute therefor his agreement with the supervisor as to the damage done. This is the remedy given him by law, and to this he is confined. He has no election of remedies. If the supervisor neglects or refuses to perform his duty in the matter, he is not remediless. The officer can be compelled to perform his duty in a proper proceeding for that purpose. If the proper assessment of damages had been made by the supervisor, as contemplated by law, and appellee's action were based upon such assessment, then the second question discussed by counsel would be presented by the record, but this not being the case, the question does not properly arise for our decision.

The judgment of the court below is reversed, with instructions to sustain appellant's demurrer to the complaint.

#### LIGHT v. SCHNECK'S ESTATE. (No. 6,593.)<sup>1</sup>

(Appellate Court of Indiana, Division No. 2.  
Dec. 8, 1908.)

#### 1. APPEAL AND ERROR (§ 722\*)—ASSIGNMENT OF ERROR—PARTIES—SUFFICIENCY.

An assignment of error on appeal from a judgment rejecting a claim against the estate of a decedent, entitled name of claimant "v. The Estate of," followed by the name of decedent, and the word "deceased" and the name of the administrator, and the word "administrator," is sufficient to confer jurisdiction, though an assignment of error entitled merely "The Estate of" followed by the name of decedent, and the word "deceased," or merely naming the administrator followed by the word "administrator," without designating his relation to the estate, is insufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2992; Dec. Dig. § 722.\*]

#### 2. TRIAL (§ 397\*)—FINDINGS OF FACT—CONCLUSIONS.

Where, in proceedings to establish a claim against the estate of a decedent for labor performed under a special contract, the controversy depended on whether the contract had been made and the court found the existence of

a contract between claimant and a corporation of which decedent was president, and for which he had acted in making the contract, but did not find that the contract sued on was made, the conclusion rejecting the claim was proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 945; Dec. Dig. § 397.\*]

#### 3. TRIAL (§ 397\*)—FINDINGS—ABSENCE OF FINDING—EFFECT.

The absence of a finding of a fact in favor of a party having the burden of proof is equivalent to a finding against him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 945; Dec. Dig. § 397.\*]

#### 4. TRIAL (§ 391\*)—FINDINGS—DETERMINATION OF CONTROVERSY.

Where, in a proceeding to establish a claim against the estate of decedent for labor performed under a special contract, there was evidence establishing the contract, and evidence to the contrary, it was error to fail to find directly on issue of the existence of the contract.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 914; Dec. Dig. § 391.\*]

#### 5. TRIAL (§ 395\*)—FINDINGS—SUFFICIENCY.

Where the evidence on an issue is conflicting, the setting out of the evidence in whole or in part in the finding is not equivalent to a finding on the issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 981; Dec. Dig. § 395.\*]

Appeal from Circuit Court, Jackson County; J. M. Lewis, Judge.

Proceedings by Robert C. Light to establish a claim against the estate of Louis Schneck, deceased. From a judgment rejecting the claim, complainant appeals. Reversed, and new trial ordered.

Spencer & Brill and Wood & Jones, for appellant. George H. Voigt and T. M. Honan, for appellee.

ROBY, J. The appellant, Robert C. Light, filed a claim against the estate of Louis Schneck, deceased, in the sum of \$1,000 for work and labor performed for said Louis Schneck during his lifetime under a special contract. The claim went on the trial docket. No special answer was filed. The cause was tried by the court without a jury, a special finding of facts made and conclusions of law stated thereon in favor of appellee, to which conclusions appellant excepted. He also filed a motion for a new trial, which was overruled, and judgment rendered in accordance with the conclusions from which the appeal is taken; error being properly assigned, presenting for review the rulings indicated.

At this point it becomes necessary to determine whether the appeal can be entertained. The assignment of error is entitled "Robert C. Light v. The Estate of Louis Schneck, Deceased, Benjamin F. Schneck, Administrator." An assignment of errors entitled "The Estate of Louis Schneck, Deceased," would not be sufficient to confer jurisdiction. *Dallam v. Estate of Stockwell*, 33 Ind. App. 620, 71 N. E. 911, and cases cited. An assignment naming "Benjamin F. Schneck, Administrator," "without a further averment or design-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

<sup>1</sup> Superseded by opinion 91 N. E. 863.

nation showing his relation to the \* \* \* estate of some deceased person" would likewise be insufficient. *Whisler v. Whisler*, 162 Ind. 136, 67 N. E. 984, 70 N. E. 152. But an assignment entitled "Robert C. Light v. Benjamin F. Schneck, Administrator of the Estate of Louis Schneck, Deceased," would exactly meet the requirements of the law. The appellee is properly named, and the estate of which he is administrator is designated. This is sufficient. If grammatical accuracy requires that the terms of the sentence be transposed, it may be considered as done.

The determination of the controversy depends primarily upon whether a contract was executed as alleged. There are nine special findings of fact made by the court, the effect of which is to establish the making of a contract between appellant and the Jeffersonville, New Albany & Scottsburg Rapid Transit Company, the terms thereof and a partial performance by appellant. Louis Schneck was president of said corporation and acted for it in making such contract. There is no finding as to whether the contract sued upon was or was not made. It is not found that the contract set out is the contract sued upon. It is entirely possible that the contract sued upon and the contract found were both made. The appellant had the burden, and the absence of a finding is equivalent to a finding against him. Under the facts found the exceptions to the conclusions are not well taken. There was evidence tending to establish the existence of a contract as alleged. There was evidence from which a contrary conclusion might be deduced. The setting out of this evidence in whole or in part in the finding was not equivalent to a finding. *Hasselman v. Japanese Development Company*, 2 Ind. App. 180, 191, 27 N. E. 318, 28 N. E. 207.

The parties are entitled to a direct decision of the facts involved, and, for the reason that the findings do not cover all the issues in the case, the judgment is reversed and the cause remanded, with instructions to sustain appellant's motion for a new trial.

**SCHOLZ v. SCHNECK'S ESTATE.** (No. 6,594.)<sup>1</sup>

(Appellate Court of Indiana, Division No. 2.  
Dec. 8, 1908.)

Appeal from Circuit Court, Jackson County; J. M. Lewis, Judge.

Proceedings by Frederick J. Scholz to establish a claim against the estate of Louis Schneck, deceased. From a judgment disallowing the claim, claimant appeals. Reversed, and new trial ordered.

Spencer & Brill, Wood & Jones, and Robinson & Stilwell, for appellant. Geo. H. Voigt and T. M. Honan, for appellee.

ROBY, J. This is a companion case to *Light v. Estate of Louis Schneck, Deceased*, Benjamin

F. Schneck, Administrator (No. 6,593) 86 N. E. 442, the same evidence being considered in both cases. The only difference is made by the following findings:

"(4) That at the time said Schneck entered into said contract with the said Scholz he was acting as president of said corporation for and on behalf of said corporation and said Scholz was acting for himself.

"(5) That at the time the said Scholz entered into said contract with the said Schneck he the said Scholz believed that the said Schneck was acting for himself in the matter."

Whether this finding is sufficient to establish a valid contract between the Jeffersonville, New Albany & Scottsburg Rapid Transit Company and claimant need not be determined; that not being in issue herein. Whether the belief of claimant that he was contracting with the decedent individually was so induced as to render the decedent liable for the contract so made does not appear, and as in *Light v. Estate of Schneck*, supra, there is no finding as to whether contract between decedent and claimant did or did not exist.

The judgment is reversed and the cause remanded, with instructions to sustain appellant's motion for a new trial.

(42 Ind. App. 603)

**HERNLY v. PIERCE et al.** (No. 6,860.)

(Appellate Court of Indiana, Division No. 1.  
Dec. 10, 1908.)

**1. APPEAL AND ERROR (§ 323\*)—RIGHT OF REVIEW—VACATION APPEAL.**

In a vacation appeal, one of the judgment defendants may appeal by making all co-parties parties to the appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1798-1804; Dec. Dig. § 323.\*]

**2. APPEAL AND ERROR (§ 334\*)—PARTIES—DEATH BEFORE PERFECTING APPEAL—PERSONS REQUIRED TO BE SUBSTITUTED.**

A personal money judgment against a defendant in foreclosure proceedings is an obligation against his estate after his death, and, where he died after judgment in a proceeding to modify the original judgment, but before the perfecting of an appeal from the judgment therein, his personal representative, and not his heirs, should have been substituted as a party to the appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1855-1857; Dec. Dig. § 334.\*]

Appeal from Superior Court, Madison County; O. M. Greenlee, Judge.

Action by Elias A. Pierce and others against Mary C. Hernly and others, in which defendant Hernly moved for the modification of a judgment for plaintiffs. The motion was denied, and she appeals. Appeal dismissed.

Walker & Foster and Ellis & Call, for appellant. Kittinger & Diven, for appellees.

HADLEY, J. This was a proceeding to modify a judgment in the court below. The judgment thus sought to be modified was rendered in a suit on notes and foreclosure of mortgages in favor of appellee Pierce against his coappellees and appellant and Lemuel J. Hernly. The judgment against Lemuel J. Hernly was only a personal money

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup> Rehearing granted, 88 N. E. 633. Superseded by opinion in Supreme Court, 91 N. E. 730.

judgment. He neither had nor claimed any title to the land involved. All parties to the original suit were parties to the proceeding to modify and judgment thereunder. It appears that since the judgment appealed from was rendered, and prior to perfecting the appeal, Lemuel J. Hernly died intestate, leaving appellant and appellees, except Pierce, Day, and May, as his only heirs. Appellee Pierce has moved to dismiss this appeal, for the reason that the personal representative of Lemuel J. Hernly is not made a party. This is a vacation appeal. In such an appeal one of the judgment defendants may appeal by making all co-parties to the appeal. The obligation of the judgment was against Hernly's estate, and not against his heirs, and his personal representative should have been made a party to this appeal. *Sohl v. Evans*, 29 Ind. App. 634, 62 N. E. 84; *Western U. Tel. Co. v. Adams*, Adm'x, 28 Ind. App. 420, 63 N. E. 125.

Appeal dismissed.

**AMERICAN CAR & FOUNDRY CO. v.  
INZER.** (No. 6,170).<sup>1</sup>

(Appellate Court of Indiana, Division No. 2  
Dec. 8, 1908.)

**1. APPEAL AND ERROR (§ 763\*)—REVIEW—QUESTIONS NOT RAISED IN BRIEF.**

Under Appellate Court Rule 22 (65 N. E. v), providing that no point not contained in appellant's original brief can be raised afterwards, a question cannot be raised by filing additional citations of authority.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3098; Dec. Dig. § 763.\*]

**2. MASTER AND SERVANT (§ 179\*)—EMPLOYEE'S LIABILITY ACT—APPLICABILITY—TEST.**

Whether the employer's liability act (*Burns' Ann. St. 1901, § 7083*) is applicable to a given employer must be determined by the character of the employment, and not by the character of the employer.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 179.\*]

**3. MASTER AND SERVANT (§ 180\*)—EMPLOYEE KILLED—APPLICABILITY TO STATUTE.**

Acts 1893, p. 294, c. 180 (*Burns' Ann. St. 1901, § 7083*), making corporations liable for negligent injury to an employee caused by one in the service of such corporation having charge of a locomotive or train upon a railway, etc., applies to an action against a car manufacturing company for death of an employee caused by the company's negligent operation of a train.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 360; Dec. Dig. § 180.\*]

**4. NEGLIGENCE (§ 12\*)—SUDDEN CRISIS—CARE REQUIRED.**

One acting in a sudden crisis need not exercise that deliberate judgment which time for reflection affords.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 14; Dec. Dig. § 12.\*]

**5. MASTER AND SERVANT (§ 279\*)—RAILROADS—EMPLOYEE RUN OVER—NEGLIGENCE—EVIDENCE—SUFFICIENCY.**

Evidence held to warrant a finding that a car factory superintendent was negligent in

backing a train to rescue an employee whose leg was pinioned by a wheel of one of the cars, resulting in the employee's death.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 279.\*]

**6. MASTER AND SERVANT (§ 248\*)—RAILROADS—EMPLOYEE'S NEGLIGENCE—EFFECT.**

That an employee who was knocked from a car and whose leg was pinioned by a car wheel was negligent in being knocked from the car does not bar a recovery for his death caused by the negligent backing of the train after he was so pinioned.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 801-804; Dec. Dig. § 248.\*]

Appeal from Circuit Court, Clark County;  
H. C. Montgomery, Judge.

Action by Mary Inzer, administratrix, against the American Car & Foundry Company. From a judgment for plaintiff, defendant appeals. Affirmed.

M. Z. Stannard and Ward H. Watson, for appellant. G. H. Voigt, for appellee.

**ROBY, J.** Action by administratrix for damages resulting from death of John A. Inzer, which is alleged to have been caused by the negligent operation of a train of cars by defendant, the appellant herein. A demurrer to the amended complaint was overruled, trial had by a jury, verdict returned in plaintiff's favor for \$2,500, with answers to 168 interrogatories. Defendant moved for judgment on the said answers and for a new trial, both of which motions were overruled. Judgment was rendered on the verdict. Errors relied upon for reversal are (1) overruling demurrer to complaint; (2) motion for judgment on answers to interrogatories; (3) motion for a new trial, 13 separate errors being enumerated under the last head.

Appellant by filing additional citations of authority seeks to present the question of the constitutionality of the law under which the action is brought. Rule 22 (53 N. E. v) provides that no alleged error or point not contained in appellant's original brief shall be raised afterwards. These citations are therefore insufficient, and no constitutional question is presented or decided. It is necessary, however, to determine whether *Bedford Quarries v. Bough*, 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (N. S.) 418, declares the employer's liability act (*Burns' Ann. St. 1901, § 7083*), inapplicable to the appellant company. That case decides the act is violative of the fourteenth amendment of the federal Constitution, in so far as it imposes upon corporate employers burdens which are not imposed upon individual employers. The act as applied to railroads is upheld, but the case does not decide that only railroads as such are within the purview of the act, but that the Legislature intended it to apply to "railroad hazards." The character of the employment must be the test by which to determine its applicability, and not the character of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup>Superseded by opinion in Supreme Court, 37 N. E. 722.

employer. *Kline v. Minn. Iron Co.*, 93 Minn. 63, 100 N. W. 681; *Bedford Quarries Co. v. Bough*, supra. "One rule of liability cannot be established for railway companies merely as such, and another rule for employers under like circumstances and conditions. \* \* \* Neither would it relieve the act from the imputation of class legislation that it applies alike to all railroads. It has sometimes been loosely stated that special legislation is not class, 'if all persons brought under its influence are treated alike under the same conditions.' But this is only half the truth. Not only must it treat all alike, under the same conditions, 'all who are brought within its influence,' but in its classification it must bring within its influence all who are under the same conditions. Therefore if a distinction is to be made between railway corporations and other employers as respects their liability to their employes, it must be based upon some difference in the nature of the employment, and can only extend to cases where such difference exists." *Bedford Quarries Co. v. Bough*, supra. Similar language was used in *Johnson v. St. Paul*, etc., R. Co., 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419; *Jemming v. Great Northern R. Co.*, 96 Minn. 302, 104 N. W. 1079, 1 L. R. A. (N. S.) 696. Analogous statutes of other states applying to "railroads" have been upheld because their manifest purpose was to give their benefits to employes engaged in the hazardous business of operating railroads. *Akeson v. Ch.*, etc., R. Co., 106 Iowa, 54, 75 N. W. 676; *Mo. Pac. R. Co. v. Haley*, Adm'r, 25 Kan. 53. A consideration of the reasoning of the foregoing cases shows that the appellee was within the statute. Clearly it was a railroad hazard which caused the death. In *Pierce v. Iowa Cent. R. Co.*, 78 Iowa, 140, 34 N. W. 783, a person employed in a railway car shop recovered for an injury caused by the negligent moving of a train while on a ladder leaning against one of the cars of the train. Other cases deciding what are "railroad hazards" are collected in a note to *Jemming v. Great No. R.*, 96 Minn. 302, 104 N. W. 1079, 1 L. R. A. (N. S.) 697. The statute under which this action is brought provides: "That every railroad or other corporation, except municipal, operating in this state, shall be liable for damages for personal injury suffered by an employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases: \* \* \* Fourth: Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round-house, locomotive engine, or train upon a railway. \* \* \* " Acts 1898, p. 294, c. 130; section 7033, Burns' Ann. St. 1901. The complaint was therefore sufficient, and the demurrer to it was correctly overruled.

The testimony, particularly that regarding the controlling facts, was most conflicting.

The evidence establishes facts substantially as follows: Defendant owns and operates a car manufacturing plant at Jeffersonville. A railroad track runs through its building and connects with the Baltimore & Ohio Southwestern Railway. On January 1, 1902, there were six cars in the course of construction standing on said track within defendant's building. On said day John A. Inzer was employed by defendant as a tinner in roofing one of the said cars. While Inzer was so employed on the top of the fifth car, a locomotive was attached to the train, and, after due notice to the workmen, hauled it from the building. Inzer was knocked from the top of the car by a fixture, which was part of the building, fell to the track, and was dragged for a distance of about 35 feet into the yard. One of the wheels of the sixth car rolled upon his right leg, and he was thus pinioned and helpless when the train was brought to a stop. While Inzer was lying in such position, the engineer, acting under the orders of William Dolan, the conductor of the train and superintendent of the shop, backed the train, causing a wheel thereof to pass over said Inzer's body above the groin and below the waist, bisecting his body, and causing his death. Dolan knew at the time he ordered the engineer to back the train that Inzer was lying under the train, and that his body was lying partly on one of the rails of the track immediately behind a wheel. Appellant contends that the order to back the train was given in good faith, and for the purpose of rescuing the decedent from his perilous position, and that the doctrine that one acting in a sudden crisis is not required to exercise that deliberate judgment which time for reflection affords is applicable, and relieves the order thus made by its superintendent from the implication of negligence. The doctrine is a most reasonable one. *Pa. Co. v. McCaffrey*, Adm'r, 139 Ind. 430, 38 N. E. 67, 29 L. R. A. 104. But in the present case the jury were warranted in finding that the superintendent was guilty of negligence in backing the train, when the result was obvious to the casual observer. Negligence is shown on the part of appellee's decedent in failing to avoid being knocked from the car upon which he was working, but this does not bar the right to recover here. This action does not proceed upon the theory that the appellant was negligent in causing Inzer to fall and in running the car wheel upon his leg; but is based on its alleged negligence in backing the train over his body while he was lying on the track.

The alleged errors in giving and refusing instructions are not such as will serve to reverse the case. Having already considered the principal propositions involved, a further consideration is rendered unnecessary.

Judgment affirmed.

WATSON, J., absent.

(42 Ind. App. 604)

**OWEN v. HARRIOTT.** (No. 6,914.)<sup>1</sup>(Appellate Court of Indiana, Division No. 1.  
Dec. 10, 1908.)**APPEAL AND ERROR (§ 659\*)—RECORD—CORRECTION—CERTIORARI—DEFECTS AMENDABLE BELOW.**

The Appellate Court will not correct errors in the record of the proceedings of the lower court, and certiorari will not lie to this court to review matters which should be presented to the lower court by a proceeding to correct its record *nunc pro tunc*.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2835; Dec. Dig. § 659.\*]

Appeal from Circuit Court, Delaware County; Ed. Jackson, Special Judge.

Action by Timothy S. Owen against Arthur L. Harriott. Petition for certiorari to correct the record of the trial court, and for other relief. Petition denied.

Timothy S. Owen and Frank Ellis, for appellant. McClellan & Hensel, for appellee.

**HADLEY, J.** Appellee's petition for a certiorari exhibits matters that should be presented to the lower court in the nature of a proceeding to correct the records of such court *nunc pro tunc*, and thereafter brought to this court under a writ of certiorari. It is not the province of this court to correct errors in the records of the proceedings of the lower court. That should be done in the forum where the errors occurred.

Petition denied.

(43 Ind. App. 578)

**LINDSEY et al. v. HEWITT et al.**  
(No. 6,420.)(Appellate Court of Indiana, Division No. 2.  
Dec. 8, 1908.)**1. APPEAL AND ERROR (§ 1078\*)—WAIVER OF ERROR—FAILURE TO DISCUSS.**

Errors assigned, but not discussed, are waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

**2. REPLEVIN (§ 119\*)—BONDS—BREACH—DAMAGES RECOVERABLE.**

Right of action on a replevin bond carries with it the right to damages for failure to perform its conditions.

[Ed. Note.—For other cases, see Replevin, Dec. Dig. § 119.\*]

**3. REPLEVIN (§ 119\*)—ACTION ON BOND—DEFENDANT'S RIGHTS.**

Where plaintiff in replevin is in possession of the property, and defendant recovers judgment for its return, but the value of the property is not found as required by Burns' Ann. St. 1908, § 575 (Burns' Ann. St. 1901, § 558), defendant in the replevin suit may sue on the bond to recover the value of the property, the common-law remedy for breach of the bond not being excluded by Burns' Ann. St. 1908, § 599 (Burns' Ann. St. 1901, § 581), authorizing on verdict for plaintiff, judgment in the alternative

for the return of the property or the value thereof in case a return cannot be made.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 472, 473; Dec. Dig. § 119.\*]

**4. JUDGMENT (§ 748\*)—REPLEVIN—CONCLUSIVENESS.**

Matters litigated in replevin cannot be retried in a suit on the bond, and it will be presumed that all matters that might have been litigated were litigated.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1299; Dec. Dig. § 748.\*]

**5. JUDGMENT (§ 748\*)—REPLEVIN—CONCLUSIVENESS—ACTIONS.**

An adjudication of costs in replevin is final.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1299; Dec. Dig. § 748.\*]

**6. REPLEVIN (§ 119\*)—ACTION ON BONDS—MATTERS DETERMINABLE.**

Plaintiff in replevin, having failed to have adjudicated the value of the property, cannot object to an adjudication in an action against him on the bond on a refusal to return the property as offered, though Burns' Ann. St. 1908, § 575 (Burns' Ann. St. 1901, § 558), requires that the jury in replevin must assess the value of the property.

[Ed. Note.—For other cases, see Replevin, Dec. Dig. § 119.\*]

**7. REPLEVIN (§ 124\*)—ACTION ON BOND—MEASURE OF DAMAGE.**

Where property depreciates in value after being replevied, and before judgment for its return, plaintiff can recover the value at the time suit was brought, with 6 per cent. interest.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 487-490; Dec. Dig. § 124.\*]

**8. REPLEVIN (§ 124\*)—ACTION ON BOND—MEASURE OF DAMAGES.**

Generally, when suing on a replevin bond, defendant in replevin is entitled to the value of the property from the time he was awarded its return, with interest until the trial on the bond.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 487-490; Dec. Dig. § 124.\*]

**9. EVIDENCE (§ 18\*)—JUDICIAL NOTICE—VALUE OF PRODUCTS.**

Courts take judicial notice that wheat, corn, and tobacco have fluctuating values.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 22; Dec. Dig. § 18.\*]

Appeal from Superior Court, Vanderburgh County; Alexander Gilchrist, Judge.

Action by Asa Hewitt and another against Thomas W. Lindsey and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

Hatfield & Hemenway and Spencer & Brill, for appellants. W. Z. Bennett and James R. Wilson, for appellees.

**COMSTOCK, P. J.** The appellees, who were the plaintiffs below, sought to recover on two replevin bonds executed by the appellants, defendants below, in the months of July and October, 1904, respectively, upon the execution of which bonds and the issuance of a writ of replevin the sheriff of Warrick county delivered to the defendant Lindsey certain property therein described, to wit: 102 shocks of wheat, 800 pounds of

\*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup> See 94 N. E. 591.

tobacco and 180 bushels of corn. The cause was put at issue and a trial had resulting in a verdict for \$——, \$—— of which were remitted and a judgment rendered for \$200. Each of said bonds was conditioned that appellant Lindsey would prosecute his action with effect and without delay, and return said property of appellee, if return should be adjudged by the court, and that he would pay to appellees all sums of money which might be recovered in the action. In the replevin proceedings, the Vanderburgh superior court on March, 1905, adjudged that the appellees were the owners of and entitled to the possession of the property described in the complaint heretofore set out, that they have the return of the same, and that appellees recover of appellant Lindsey their costs in said cause paid out and expended, but did not find or adjudge that the property was of any value.

While numerous errors are assigned, the only one discussed (and under the rules the others are waived) is the overruling of appellants' motion for a new trial. Of the reasons for new trial discussed we deem it necessary only to consider: (1) Whether the action on the bond in suit may be maintained for the value of the property, although the jury in the trial of the replevin suit failed to find the value thereof, and where judgment for return was awarded to the defendant; and (2) whether the court erred in giving to the jury instructions 1 and 2 of its own motion, and in refusing to give instructions 1 and 2 requested by appellants. The controversy is over these questions presented in various forms.

The record presents a valid bond and the conditions broken. The breach is the failure to return the property. The right of action on the bond carries with it the right of damages for failing to perform its conditions. Burns' Ann. St. 1908, §§ 575, 599 (Burns' Ann. St. 1901, §§ 558, 581), require that in actions for replevin the jury must assess the value of the property and the damages for the taking or detention thereof. Whenever by their verdict there will be a judgment for the recovery or return of the property, the judgment may be in the alternative for such return or the value thereof in case a return cannot be had. Where the plaintiff is in possession of the property, and the defendant recovers judgment for its return, but the value of the property is not found, the defendant may still have his action on the bond to recover the value of the property. Yelton v. Slinkard, 85 Ind. 191; Whitney v. Lehmer, 26 Ind. 503. This holding is upon the ground that the right of action arises by the common law out of a breach of the contract, and, the statute giving a remedy without negative words, the common-law remedy still remains, and may be pursued at the plaintiff's option. In the case last named the court, at page 506 of 26 Ind., say: "An assessment of the value of the property in the replevin suit and a

judgment in the alternative for its return or its value would, as evidence, undoubtedly have bound the parties upon the question of value, for the reason that it would have been a judicial determination of that question by a tribunal having that authority, putting it at rest forever. But it does not follow that the absence of such assessment and judgment shall have the practical effect of a finding and judgment that the property was of no value, or that no other tribunal shall examine the question. Common justice, as well as reason, would be shocked by the announcement of such a doctrine."

The foregoing are the only Indiana cases passing upon the precise question here involved. In other jurisdictions under statutes substantially like ours, the question has been decided the same way. *Gardiner v. McDermott*, 12 R. I. 206; *Pierce v. King*, 14 R. I. 611; *Myers v. Dixon*, 106 Ill. App. 322; *Washington Ice Co. v. Webster*, 125 U. S. 426, 8 Sup. Ct. 947, 31 L. Ed. 799; *Id.*, '62 Me. 363, 16 Am. Rep. 462; *Balsley v. Hoffman*, 13 Pa. 603; *Bank v. Hall*, 107 Pa. 583, 588, 589; *Sweeney v. Lomme*, 22 Wall. 208, 22 L. Ed. 727; *Leighton v. Brown*, 98 Mass. 515, 516. In the case last named, in which the action was upon a replevin bond, plaintiff had possession of the property, and judgment was for a return, the court say: "The breach assigned is the failure of the principal defendant, as plaintiff in the replevin suit, to comply with the order to return the property replevied, which was a part of the final judgment in that action. Damages for that breach must be the value of the property replevied. In ascertaining the value of the (property) which was taken by the replevin writ and which the principal defendant now fails to restore, the leading principle is that the party who has been deprived of his property is entitled as far as possible to complete indemnity." It is universally held that matters litigated in the replevin suit cannot be retried in the suit on the bond, and it will be presumed that all matters that might have been are litigated. *Jackson v. Morgan*, 167 Ind. 528, 78 N. E. 633. It appears that the costs were adjudicated. This is a final settlement as to them. It also appears that there was no adjudication as to the value of the property. The failure to adjudicate the value of the property is as justly chargeable to appellant as to appellee. Appellant, having failed to assert the right then, cannot be heard to object now to the adjudication of the value of the property. He should not be permitted by disregarding the order of the court and failing to return the property to injure the adversary party and thus advantage himself.

The instructions in question related to the measure of damages. Those given told the jury that the measure of damages was the market value of the property at plaintiff's farm at the time of the trial of the replevin suit when judgment was rendered for the

return of the property, less the reasonable charge for labor and care thereon in preparing the same for market, with 6 per cent. interest from date of such judgment (March 24, 1905) until time of the trial. Said first instruction refused charged that the plaintiff was entitled to recover the value of the articles replevied and that all questions, except as to the value of the articles, were adjudicated in the replevin suit. The second instruction refused fixed the measure at the value of the articles in their condition and location at the time the replevin suit was instituted and the property taken by virtue thereof, with 6 per cent. to this time. In the event of a depreciation in the value after the taking and before the judgment for to return, this rule ought to apply as shown by the decisions hereinafter given. The position of appellant with reference to the action of the court as to these instructions is not, we believe, well founded. It is the general rule, for the purpose of recovery in an action on a bond or undertaking, that the value of the property be estimated as of the time of the judgment for its return with interest thereon to the time of the trial. *Swift v. Barnes*, 16 Pick. (Mass.) 194, 196, 197; *Caldwell v. West*, 21 N. J. Law, 411, 416, 417; *Peacock v. Haney*, 37 N. J. Law, 179, 181; *Western, etc., Co. v. Shelton*, 8 Tex. Civ. App. 550, 29 S. W. 494; *Talcott v. Rose* (Tex. Civ. App.) 64 S. W. 1009; *Wall v. Johnson*, 16 Ind. 373; *Hopkins v. Ladd*, 35 Ill. 178. In *Yelton v. Slinkard*, 85 Ind. 194, it is said: "If the property has been entirely destroyed so that a return could not be had, the measure of damages would be the value of the property at least." In this connection, see, also, *Whitney v. Lehmer*, 28 Ind. 508. *Peter, etc., Box Co. v. Lesh*, 119 Ind. 98, 20 N. E. 291, 12 Am. St. Rep. 367, and other Indiana cases cited by appellants are not necessarily in conflict with the foregoing Indiana cases. It has been held that, if the value of the property was greater at the time of the order for its return than at the time it was taken under the replevin writ, the defendant in replevin is entitled to recover in an action upon the bond for nonreturn the value at the time of the order for its return. *Treman v. Morris*, 9 Ill. App. 237; *Leighton v. Brown*,

98 Mass. 515. If pending the action of replevin, and before the rendition of the judgment for the return of the property, the property has depreciated in value through the fault of plaintiff in replevin, the defendant has been held entitled to recover for its nonreturn its value at the time it was taken under the replevin writ. *Bradley v. Reynolds*, 61 Conn. 271, 284-286, 23 Atl. 928. And in *Page v. Fowler*, 39 Cal. 412, 426, 2 Am. Rep. 462. In which the question before us is ably considered, and in which many cases are cited and commented upon, the court say: "In other words, the rule deducible from the authorities is that in cases affecting property of fluctuating value where exemplary damages are not allowed the correct measure of damages is the highest market value within a reasonable time after the property was taken, with interest computed from the time such value was estimated. This is in effect the rule established in *Scott v. Rogers*, 31 N. Y. 676, where the precise question was more elaborately discussed than in any other case." The courts take judicial notice that wheat, corn, and tobacco have fluctuating value. The rule, stated by the trial court, giving to appellee the value of his property from the time he was awarded its return with interest until the trial upon the bond, is amply supported by authority and was favorable to appellants.

Appellants insist that the judgment is excessive. The verdict returned was for \$224.95. The court upon hearing the argument upon motion for a new trial (excessive verdict being one of the reasons for a new trial) required appellants to remit \$24.95, which was done and judgment rendered for \$200. The attention of the trial court was called to this claim as to the amount of the verdict. The question therefore came directly under the review of the trial court. There was some conflict in the evidence as to the value of the articles involved, but the trial court was manifestly clear in its opinion that the judgment for \$200 was warranted by the evidence, and, looking at the record, we cannot say that this verdict was not sustained by the evidence.

Judgment affirmed.

(71 Ind. 337)

## REGADANZ v. STATE. (No. 21,259.)

(Supreme Court of Indiana. Dec. 11, 1908.)

## 1. INDICTMENT AND INFORMATION (§ 110\*) — SUFFICIENCY OF ACCUSATION — STATUTORY OFFENSES — CHARGING OFFENSE IN LANGUAGE OF STATUTE.

The crimes denounced by the blind tiger law (Act February 13, 1908; Acts 1907, p. 27, c. 16, § 1; Burns' Ann. St. 1908, § 8338) and Act March 16, 1907 (Acts 1907, p. 689, c. 293, § 1; Burns' Ann. St. 1908, § 8351), both providing that any person who shall keep a place where intoxicating liquors are sold, bartered, or given away in violation of the state law, or who shall be found in possession of such liquors for such purpose, shall be guilty of a misdemeanor, may be charged in the language of the statute, except that the matters stated disjunctively should be charged conjunctively.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 110.\*]

## 2. INTOXICATING LIQUORS (§ 221\*)—STATUTORY OFFENSES—PROVISOS AND LIMITATIONS.

Though an affidavit charging a violation of the blind tiger law (Act Feb. 13, 1907; Acts 1907, p. 27, c. 16, § 1; Burns' Ann. St. 1908, § 8338), punishing one who, not being licensed, sells spirituous, etc., liquors, or keeps a place where intoxicating liquors are sold, in violation of the state laws, provided that the act shall not apply to a licensed wholesale dealer, druggist, or pharmacist, need not negative the provisos in the section, yet, where it was sought to charge a keeping of intoxicating liquors for sale without a license, and the pleader departed from the language of the statute, it was necessary to show that the proposed sale would have been in violation of a license requirement by the averment of substantive facts.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 240-248; Dec. Dig. § 221.\*]

## 3. INTOXICATING LIQUORS (§ 211\*) — SALE WITHOUT LICENSE—INFORMATION.

An affidavit charging a violation of the blind tiger law (Act Feb. 13, 1907; Acts 1907, p. 27, c. 16, § 1; Burns' Ann. St. 1908, § 8338), punishing one who, not being licensed, keeps a place where intoxicating liquors are sold in violation of the laws of the state, provided that the act shall not apply to a licensed wholesale dealer, druggist, or pharmacist, which alleged that accused was unlawfully found in possession of intoxicating liquors, kept to be sold by him, who did not have a license to sell intoxicating liquors in less quantities than five gallons, according to the laws of the state, etc., was insufficient, since accused might have been authorized to sell as a licensed druggist.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 211.\*]

## 4. INDICTMENT AND INFORMATION (§ 117\*)—SUFFICIENCY OF ACCUSATION.

The sufficiency of a criminal charge must be judged according to the force of its general scope and structure.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 310; Dec. Dig. § 117.\*]

## 5. INDICTMENT AND INFORMATION (§ 117\*) — SUFFICIENCY OF ACCUSATION — DOUBTFUL AND UNCERTAIN ALLEGATIONS.

While ungrammatical or awkwardly constructed sentences will not vitiate an indictment or information where the meaning is plain, Burns' Ann. St. 1908, § 2040, provides that it must contain a statement of the facts constituting the offense in plain and concise language, and, as the burden cannot be cast upon the op-

posite party to correctly interpret doubtful allegations as to matters of substance, all substantial doubts on reasonable attack will be resolved against the pleader.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 310; Dec. Dig. § 117.\*]

## 6. INTOXICATING LIQUORS (§ 255\*)—SEARCHES — SEIZURES AND FORFEITURES — NATURE OF REMEDY—STATUTORY PROVISIONS.

The blind tiger law (Act Feb. 13, 1907; Acts 1907, p. 29, c. 16, § 2; Burns' Ann. St. 1908, § 8338) provides that, if any person shall make affidavit that he believes that another has in his possession intoxicating liquors which are being sold or given away as a beverage or kept therefor in violation of law, a search warrant may issue, and if such liquors, or implements used for their sale, etc., are found, they shall be seized. Section 3 provides that, when the liquors or implements are found, affidavit may be filed charging violation of the law. Section 6 (page 30) provides that, if nobody be found in possession of the premises where the liquors are found claiming ownership, and no one assert title thereto, the officer serving the warrant shall post notice of his warrant on the premises, the court shall fix a time to determine the purpose for which the liquors were kept, and a notice thereof shall be posted on the premises, and, if the liquors be not claimed within 30 days after the hearing, the liquors shall be destroyed. *Held*, that the proceeding to seize and destroy the liquors is in the nature of a libel to procure their condemnation, independent of the criminal proceedings to determine the guilt of the possessor, which may be instituted at a different time and before a different court, and hence the authority to order the destruction of the liquors is not an adjunct of the power to determine the guilt of the possessor, and a judgment ordering their destruction, based on a conviction of the possessor without a hearing and determination in rem, is erroneous.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 255.\*]

## 7. INTOXICATING LIQUORS (§ 253\*)—APPEAL—REVIEW—PRESUMPTIONS—BASIS OF JUDGMENT.

Where the evidence in a prosecution for keeping intoxicating liquors for illegal sale shows that the liquors of accused had been seized under a search warrant, and the record shows that the petition to destroy them was filed in a case of the same title and number as that in which a judgment of conviction was rendered against accused and as that in which the judgment of destruction of the liquors was rendered, it will be assumed that the judgment of destruction was based upon the conviction of accused.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 253.\*]

Appeal from Circuit Court, Huntington County; S. E. Cook, Judge.

Charles Regadanz was convicted of being in possession of intoxicating liquors kept for the purpose of being unlawfully sold, and appeals. Reversed, and affidavit ordered quashed.

Kenner & Kenner, for appellant. James Bingham, Ed. M. White, H. M. Dowling, and A. G. Oavins, for the State.

GILLETT, J. Omitting its formal parts, the affidavit herein, punctuated as it appears in the record, is as follows: "That Charles

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Regadans (sic.) on the 23d day of March, A. D. 1907, at and in said county aforesaid, was then and there unlawfully found in possession of intoxicating liquors, which intoxicating liquors were kept for the purpose of being sold by the said Charles Regadans, he, the said Charles Regadans, not then and there having a license to sell intoxicating liquors, in less quantities than five gallons, according to the laws of such state, contrary," etc. After unsuccessfully moving to quash, appellant entered his plea of not guilty, and as a result of a trial there was a verdict and judgment in favor of the state. The judgment was rendered February 15, 1908, and on the same day appellant's motion for a new trial was overruled. Five days later, the prosecuting attorney filed a petition praying the court "that the intoxicating liquors in the above-entitled cause (*State of Indiana v. Charles Regadanz*) in the possession of the sheriff be by this court ordered destroyed according to section 14 of the blind tiger law (Acts 1907, p. 82, c. 18)." The petition was sustained, whereupon a judgment for the destruction of the property followed. The second and fourth assignments of error call for a review of the action of the court in overruling the motion to quash and in ordering the destruction of the liquors.

A number of questions are raised by appellant's counsel as to the constitutionality of the act of February 13, 1907 (Acts 1907, p. 27, c. 18, section 8338 et seq., Burns' Ann. St. 1908), commonly known as the "Blind Tiger Law," and the question is also raised whether said act was repealed by the act of March 16, 1907 (Acts 1907, p. 689, c. 293; section 8351 et seq., Burns' Ann. St. 1908); but as section 1 of each of said acts defines, in the same language, the offense sought to be charged, it is unnecessary, for the purpose of disposing of the affidavit, to consider the questions thus raised. In section 1 of said acts the following language is found: "Any person who shall keep, run or operate a place where intoxicating liquors are sold, bartered or given away, in violation of the laws of the state, or any person who shall be found in possession of such liquors for such purpose shall be deemed guilty of a misdemeanor, and upon conviction shall be fined," etc. Under the above language we have no doubt that either of the offenses defined may be charged in the language of the statute, excepting only that the matters mentioned disjunctively should be charged conjunctively. *Donovan v. State* (Ind.) 83 N. E. 744; *Yazel v. State* (Ind.) 84 N. E. 972. As it is held in the above cases, it is not necessary to negative the provisos and limitations which are found in the statute; but the objection to the affidavit in question is that, if we eliminate the word "unlawfully," there is nothing to show that appellant's possession of the intoxicating liquors was for the purpose of selling, bartering, or giving them away in violation of the laws of the state. The particular kind of

a violation which the pleader sought to charge that appellant purposed was to sell without a license, and, having failed by averment to show that appellant was without a license which would authorize him to sell, the charge was insufficient. In other words, since the pleader saw fit to predicate the charge on the want of a license, he was at least bound to go far enough to show that the purposed sale would have been in violation of a license requirement. *State v. Pitzer*, 23 Kan. 250; *State v. Sommers*, 3 Vt. 156; 22 Cyc. 347. The word "unlawfully" was not sufficient for this purpose, for while it was a proper word to use in introducing the charge, yet, having departed from the language of the statute, the pleader was bound to show the commission of a crime by the averment of substantive facts. *Terre Haute Brewing Co. v. State*, 169 Ind. 242, 82 N. E. 81; *Commonwealth v. Crossley*, 162 Mass. 515, 39 N. E. 278. The sufficiency of a criminal charge must be judged according to the force of its general scope and structure. *Terre Haute Brewing Co. v. State*, supra.

It may be, as the Attorney General argues, that there is no such thing as a license issued under the laws of the state under which sales are confined to quantities of less than five gallons, yet the pleader evidently thought that there was, while the fact might have been that appellant was a licensed druggist, and as such entitled to sell under the provisions of sections 1 and 2, pp. 689, 690, c. 293, of the act of March 16, 1907, supra. It is, however, contended by the Attorney General that we should indulge in a process of transposition, and read the affidavit as though the latter part thereof charged that the "intoxicating liquors were kept for the purpose of being sold by the said Charles Regadans in a less quantity than five gallons; he, the said Charles Regadans, not then and there having a license to sell intoxicating liquors according to the laws of said state." As the affidavit is actually constructed, the phrase "according to the laws of the state" is descriptive of a license to sell in a less quantity than five gallons, while under the proposed substitution the affidavit would deny that the defendant had any license. The theory suggested, however, is without practical value. It is true that ungrammatical or awkwardly constructed sentences will not vitiate where the meaning is plain (*Ellis v. State*, 141 Ind. 357, 40 N. E. 801), yet our Criminal Code provides that an indictment or information must contain "a statement of the facts constituting the offense in plain and concise language" (section 2040, Burns' Ann. St. 1908), and it is a rule of pleading, both criminal and civil, that as to matters of substance it is not allowable to cast upon the opposite party the burden of correctly interpreting doubtful or uncertain allegations. To avoid this, all substantial doubts, on seasonable attack, are to be resolved against the pleader. *Walker v.*

State, 23 Ind. 67; State v. Locke, 35 Ind. 419; State ex rel. v. Casteel, 110 Ind. 174. 11 N. E. 219; Littell v. State, 133 Ind. 577, 33 N. E. 417; Terre Haute Brewing Co. v. State, supra. The court below erred in overruling motion to quash.

We proceed now to consider the order for the destruction of the liquors. Appellant's counsel assail the validity and continued operation of sections 2 to 14 (pages 29-32, c. 16) of the act of February 13, 1907, supra; but, as this case can be disposed of upon the assumption that said sections are valid and still in force, we shall not enter upon a consideration of the questions thus raised, but shall only look to the general nature of the legislative scheme, to aid in determining whether the court below had authority to make the order that it did. As we construe the procedure provided for by said act relative to the seizure and destruction of intoxicating liquors, the intentment of the lawmaking power was that the procedure should be in the nature of a libel to procure the condemnation of the liquors. See 25 Am. & Eng. Ency. of Law (2d Ed.) 152, 154; 23 Cyc. 292, 299; State v. Derry (Ind.) 85 N. E. 765. Upon any other construction it would be impossible to condemn the property where no arrest was made, although it is evident that section 6 of the act contemplates a condemnation in cases where no person is found in possession of the premises, or claiming ownership of the liquors. So the fact might be, under the latter part of said section, that a person other than the owner found in possession, or proceeded against criminally under section 3, might appear and contest the proceeding to condemn. It is to be noted, too, that section 14, relative to the final judgment, refers to it as based on the "affidavit or complaint provided for in section 2" (our italics), which is the affidavit for search referred to in said section and also in section 4, which is a wholly different affidavit from that provided for in section 3, which provides for the charging of persons with a violation of law. It was the evident intent of section 6 that, after the seizure and taking possession of the property, the posting of a copy of the search warrant (in the cases provided for), and the making of return, the court before whom the proceedings are had should fix a time for hearing and determining the purpose for which such liquors were kept, and the section requires that the court shall issue a notice of the hearing to the officer, who shall post a copy on the building or premises where the liquors were found. This is the provision which is designed to give jurisdiction to hear and determine as against all persons, although by the latter part of said section it was evidently contemplated that persons who did not appear at the hearing might appear within 30 days, at least for certain purposes.

The only objection which might be urged to the view that the proceedings to condemn the liquor are independent of the criminal proceedings is that section 14 provides for the taxing of a compensation, not exceeding \$10, to be collected as costs in the case, upon a return showing the destruction, in favor of the officer who seizes and keeps the property; but the difficulties involved in the opposite holding are insuperable, while the provision for compensation may, by construction, be limited to cases where some person appears and contests the condemnation. The legislative scheme being as indicated, it results that the proceedings, civil and criminal, provided for by the act, are separate, and may be instituted at different times and before different courts. It therefore follows that authority to order the destruction of the property is not an adjunct of the power to determine the guilt or innocence of the possessor.

The evidence in this case shows that there had been a seizure of the intoxicating liquors of appellant under a search warrant, and the Attorney General makes the point that the validity of such judgment cannot be considered because the affidavit on which the search warrant is based is not in the record; but as the record entries show that the petition to destroy was filed in the case of State of Indiana v. Charles Regadanz, No. 1,781, which was the same title and number of the case in which a judgment imposing a sentence of a fine and imprisonment was rendered against appellant, and that under the same title and number the judgment of destruction was rendered, we can only assume the fact to be that such judgment was designed to have for its basis the conviction of appellant, and was not the result of a hearing and determination in a proceeding in rem. The court is therefore shown to have been without jurisdiction in the case before us to render judgment against the property.

The judgments are reversed, and the court is ordered to quash the affidavit on which appellant was convicted.

(43 Ind. A. 203)

YANTHIS et al. v. KEMP et al. (No. 6,699.)<sup>1</sup>

(Appellate Court of Indiana, Division No. 2.  
Dec. 10, 1908.)

RELIGIOUS SOCIETIES (§ 25\*) — PROPERTY OF CHURCH—RIGHT OF POSSESSION—REMEDY TO DETERMINE—EJECTMENT.

Ejectment is a proper method by which to determine the right to possession of church property as between parties claiming to be trustees of the church.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 25.\*]

On rehearing. Petition overruled.

For prior report, see 85 N. E. 976.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup> Transfer denied.

ROBY, J. Doctrine, discipline, and creed are not matters with which the courts concern themselves, except as they come incidentally in question in the adjudication of property rights, and the settlement of ecclesiastical questions is most wisely left to ecclesiastical tribunals. *Lamb v. Cain*, 129 Ind. 510, 29 N. E. 13; 14 L. R. A. 518; *Gaff v. Greer*, 88 Ind. 122, 45 Am. Rep. 449; *White Lick Quarterly Meeting v. White Lick Quarterly Meeting*, 89 Ind. 186; *O'Donovan v. Chatard*, 97 Ind. 422, 49 Am. Rep. 462; *Smith v. Pedigo*, 145 Ind. 361, 33 N. E. 363, 19 L. R. A. 433, 82 L. R. A. 888; *State ex rel. v. Cummins* (Ind.) 85 N. E. 361. Appellees' counsel in their exhaustive and learned argument state that: "We understand the rule to be that it is only where there has been a radical departure from the doctrine for which the charitable use was established that the courts will intervene. \* \* \* They further state that there is no division between the parties upon any question of baptism, predestination, personal election, or other doctrinal point, which may be granted, but the facts set up in the complaint, and admitted by the demurrer, bring this case within the exception stated by counsel, and show a radical departure from the principles for which the Baptist Church stands. Suppose it were charged that Johnson, with the approval of the trustees, had converted the church building into a house of ill fame, and that the funds of the church were expended to pay fines assessed in criminal proceedings against him. No one would deny the right of objecting members to sue for the possession of the property. Yet no question of baptism, predestination, personal election, etc., would be involved. It is averred, after setting out various immoral acts on the part of Johnson, "that the defendants (appellees) herein at a public meeting joined the said Charles H. Johnson in declaring that no church discipline, Bible, or creed should or could govern them, but that they were a law unto themselves, and would do as they pleased, and if any member did not like the way they did, he could get out of the church," and "that ever since the election and employment of the said Charles H. Johnson by defendants herein, \* \* \* the said defendants have indorsed, encouraged, consented to, aided, abetted, directed, and concurred in the unlawful, wrongful, and sinful acts of the said Charles H. Johnson above set forth." These allegations, taken in connection with others, to which brief reference has been made in the opinion heretofore filed, leave no room to ascribe allegiance by appellees to the doctrines of the church as shown by the articles of faith incorporated in the pleading.

In the argument it has been assumed that a majority of the congregation approve the action of appellees, and this assumption was adopted in the opinion heretofore filed. Such approval would not legalize acts violative of

the fundamental principles of the church. *Schnorr's Appeal*, 67 Pa. 138, 5 Am. Rep. 415; *Bear v. Hensley*, 98 Mich. 279, 57 N. W. 270, 24 L. R. A. 815; *Reorganized Church v. Church of Christ (C. C.)* 60 Fed. 937; *Sutter et al. v. Trustees of First Reformed Dutch Church*, 42 Pa. 503; *Jones v. Wadsworth*, 11 Phila. (Pa.) 227, and cases cited in original opinion. But the fact is that, so far from showing that a majority of the congregation have approved the conduct of appellees in that behalf, the allegations, when considered in their entirety, show that no meeting of the congregation has been had at which the judgment of the members thereof was fairly obtained. It is averred that Johnson "refused to comply with the requirements of the Scriptures as to the government of the church as laid down in the discipline and adopted by the church, in this: That he declared in the public church meeting that 'we [meaning the members of the church] need not bring them [the rules for governing the church] with them to the church meeting, as he would govern the meeting to suit himself'; that he refused to permit an orderly consideration of charges of immorality brought against him; that he "dismissed" various members without notice on account of "rebellion against the pastor"; that he called and presided at a meeting attended by the appellees and a large number of nonmembers of the church, and after declaring that he would never resign, went through the farce of tendering his resignation to said meeting, which was packed by appellees and Johnson for the purpose of refusing to accept such resignation. There are many other allegations which go to establish the fact that no meeting has been held at which an expression could be obtained from the members of the church, and instead of showing that appellees and Johnson hold with the approval of a majority of the members, the showing is that they hold *vi et armis*, and therefore do not come within any adjudication in their favor by any authority of the church.

Appellants aver themselves to have been duly elected trustees of said church. The averments in this regard are extended, general, and embody various legal conclusions, but there is enough on the subject averred to withstand a demurrer.

Ejectment is a proper method by which to determine the right to possession of the church property. *Lamb v. Cain*, *supra*; *Smith v. Pedigo*, *supra*. The property in question is dedicated to the uses of the Baptist Church. If appellants sustain the averments of their complaint, the effect will be to insure its use for such purposes. The property will not be taken away from any one who owns it, nor given to any one who does not. If the parties are all as good Baptists as counsel for appellees assert, 24 hours ought to be a sufficient length of time in which to end this controversy.

The petition for a rehearing is overruled.

(42 Ind. A. 597)

**GWINN et al. v. WRIGHT. (No. 6,459.)**(Appellate Court of Indiana, Division No. 2.  
Dec. 10, 1908.)**1. CONTRACTS (§ 147\*) — CONSTRUCTION — INTENTION OF PARTIES.**

The intention of the parties expressed in the contract, as interpreted from the surrounding circumstances, must control in its construction.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 730; Dec. Dig. § 147.\*]

**2. MECHANICS' LIENS (§ 317\*) — INDEMNITY AGAINST LIENS — CONTRACTORS' BONDS — RIGHT OF ACTION.**

Where a building contract bond, executed by the contractor to the owner, required the contractor to discharge all indebtedness incurred in performing the contract, free of all mechanics' liens, etc., and provided that any person who "might become entitled to a lien" under the contract could sue on the bond as if it ran to them personally; one who became entitled to a lien for materials furnished, etc., could sue thereon, though he did not in fact perfect his lien; the purpose of the contract being to avoid suits against the property for materials, etc., furnished.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 317.\*]

**3. MECHANICS' LIENS (§ 317\*) — CONTRACTOR'S BOND — WANT OF CONSIDERATION — NECESSITY OF PLEADING.**

A want of consideration for a bond executed by a contractor to the owner as indemnity against liens, etc., must be specially pleaded to be available as a defense.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 317.\*]

**4. APPEAL AND ERROR (§ 295\*) — PRESENTATION BELOW — MOTION FOR NEW TRIAL — REVIEW OF AMOUNT OF RECOVERY.**

Whether, in an action on a contractor's bond, the finding and judgment were excessive, could only be raised on appeal by assigning the erroneous assessment of damages as a ground of the motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1704; Dec. Dig. § 295.\*]

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by William L. Wright against Charles A. Gwinn and another. From a judgment for plaintiff, defendants appealed. Affirmed.

Blackledge & Wolf and Frank H. Blackledge, for appellants. Edwin B. Pugh, for appellee.

**RABB, J.** This action was brought by appellee against the appellants upon a builder's bond given by them to Laycock and wife, in connection with a building contract entered into at the same time between the Laycocks and appellant Charles A. Gwinn, in which said Gwinn contracted to construct for the Laycocks a dwelling house in the city of Indianapolis, and recovery is sought for the price of materials furnished by appellee to the contractor, and used in the construction of the building. Appellants' demurrer to the complaint was overruled, answer filed, cause

tried, finding rendered in favor of appellee for \$152.84, appellants' motion for a new trial overruled, and judgment rendered on the finding. The errors assigned presented by the record and discussed in appellants' brief call in question the sufficiency of the complaint and of the evidence to sustain the finding. The bond which forms the basis of appellants' complaint was substantially as follows: That Charles A. Gwinn, and George L. Gwinn are held and firmly bound to Dr. R. T. Laycock, as well as to all persons who may become entitled to liens under the contract hereinbefore mentioned, in the sum of \$3,500, to be paid to the said Dr. R. T. Laycock and M. E. Laycock, and to said parties who may be entitled to liens, for which payment we bind ourselves, jointly and severally. The conditions of this obligation are such that, if the above-bounden Charles A. Gwinn shall in all things abide by, keep, and perform the covenants, conditions, and agreements in the above-mentioned contract entered into by and between said Charles A. Gwinn and R. T. Laycock and M. E. Laycock, dated on the 5th day of May, 1902, for the construction of the work on the lot mentioned in the foregoing contract, and shall promptly pay and discharge all indebtedness that may be incurred by said Gwinn in carrying out said contract, free of all mechanic's liens, and keep and perform the conditions and agreements of said contract, as well as all costs, including attorney's fees in enforcing the payment and collection of any and all indebtedness incurred by Charles A. Gwinn in carrying out said contract, then the above obligation to be void, otherwise to remain in force. This bond is made for the use and benefit of all persons who may become entitled to liens under the said contract, according to the provisions of law in such cases made and provided, and may be sued upon by them as if executed to them in proper person. The complaint sufficiently avers the furnishing by the appellee to the contractor of building material alleged to have been used by him in the construction of said house, for which the statute gave to appellee the right to a mechanic's lien upon the building and grounds upon which it was situated, by appellee's complying with the provisions of the statute on the subject, but contained no averment that a mechanic's lien upon such building had been at any time perfected for such material furnished.

It is earnestly insisted by appellants that under the terms of the bond sued upon the appellee was not entitled to a recovery, unless it was shown by proper allegations in the complaint that he had complied with all the provisions of the law that would give him a lien upon the premises, and that the terms of the bond are such that the right of all third parties who claim its benefits are limited to those who have acquired such lien.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The case is sought to be distinguished from that of *Ochs v. M. J. Carnahan Co.*, 76 N. E. 788, and *National Surety Company v. Foster Lumber Company*, decided by this court on July 1, 1908, and reported in 85 N. E. 489, in the fact that by its express terms this bond is made payable to "parties who may be entitled to liens," and expressly declares that it is made for the use and benefit of all persons who may become entitled to liens, according to the provisions of law in such cases made and provided, that by thus expressly declaring the persons who shall be entitled to benefits under the contract, by a fair implication all others are excluded, and that the appellee in this case failed to bring himself within the conditions prescribed in the bond, in that he failed to show that he was entitled to a lien. The conditions of the bond are practically the same as the conditions expressed in the bond sued on in the case of *Ochs v. M. J. Carnahan Co.*, supra, and in the case of *National Surety Company v. Foster Lumber Company*, supra, except that in this case there is this express provision in the contract that it is made for the benefit of parties who may be entitled to liens, and that such parties may sue upon the bond.

The guiding rule to be observed in the construction of all contracts is the intention of the parties. Of course, this intention must be expressed in the contract; but when the court has determined what the parties meant by their contract, from the language contained in it, and the circumstances under which it was made, this must control in its interpretation. This contract was entered into between the owners of the property, on the one hand, and the building contractor, on the other. Manifestly, it was not in the minds of either party to encourage the filing of mechanic's liens upon the builder's property. We think from the context it clearly appears that it was the purpose of the owners of the property in making this contract to avoid all trouble and annoyance on account of unpaid bills for labor and material used by the contractor in the course of the construction of the building, and to avoid any annoyance or disadvantage on account of the title to their property becoming clouded and incumbered of record by the acquiring of such liens by those who furnished such material and labor, and that appellants were bound to know of this purpose in the owners' minds from the very nature of the contract. Such being the purpose and object of the contract, it seems not difficult to determine what the contracting parties meant by the terms "all persons who may become entitled to liens under said contract." Section 8295,

Burns' Ann. St. 1908, the law which has been in force since 1883 upon the subject, provides, among other things, that all persons performing labor or furnishing material for the erection of any house or other structure may have a lien, separately or jointly, upon the house for which they may have furnished material, and on the interest of the owner of the lot or parcel of land on which it stands, to the extent of the value of the labor done, material furnished, or either, so that, when the appellee furnished material for the construction of the house, he became entitled, under this law, to a lien therefor. There are other provisions that point out the manner in which those who are entitled to have such lien may proceed to acquire it. Looking to the context of this contract, considering the manifest purpose for which it was entered into by the parties, we think that it should be construed to mean that all persons who have the right to acquire liens upon the property are entitled to its benefit. This construction is aided by the conditions of the bond in this case which require the appellants, as did the conditions of the bonds in the case of *Ochs v. M. J. Carnahan Co.*, supra, and *National Surety Co. v. Foster Lumber Co.*, supra, to pay and discharge all indebtedness that may be incurred by the contractor in carrying out the contract, and this regardless of whether a lien was acquired upon the property or not. It contemplated payment by the contractor of those who were entitled to acquire a lien. We think to give this contract the construction contended for by appellants would be to nullify the plain and manifest intention of the parties, and reverse the purpose for which it was entered into by the owners of the property. The demurrer was properly overruled to the complaint.

Appellants contend that the evidence does not support the finding, for the reason that it is shown that the bond in suit was executed by defendant Charles A. Gwinn after the execution of the building contract which it was intended to secure, and that therefore there was no consideration for the bond. It is sufficient answer to this contention to say that there was no plea of a want of consideration, and without a special plea of that kind the question could not arise.

It is further contended that the finding and judgment are excessive, but this question could only be raised by assigning an erroneous assessment of damages as one of the grounds of appellants' motion for a new trial. No such ground was stated in the motion for a new trial, and therefore no such question is presented here.

The judgment is in all things affirmed.

(193 N. Y. 446)

## In re SHATTUOK'S WILL.

(Court of Appeals of New York. Nov. 24, 1908.)

## CHARITIES (§ 22\*)—CERTAINTY AS TO PURPOSE OF GIFT—EFFECT OF STATUTORY PROVISIONS — "EDUCATIONAL" — "ELEEMOSYNARY" — "INSTITUTIONS"—"RELIGIOUS."

Laws 1893, p. 1748, c. 701, § 1, as amended by Laws 1901, p. 751, c. 291, provides that no gift for religious, educational, charitable, or benevolent uses, which shall in other respects be valid under the laws of this state, shall be deemed invalid on account of indefiniteness or uncertainty of the beneficiaries; but the title to the subject-matter of the gift shall vest in the trustee named in the instrument, and, if no trustee is named, the same shall vest in the Supreme Court. Section 2 provides that the Supreme Court shall have control over the gifts provided for by section 1, and that the Attorney General shall represent the beneficiaries and enforce the trust by proper proceedings. A will devised the residue of testator's estate to his executor in trust to collect the rents and profits thereof and to pay the same annually to "religious, educational or eleemosynary institutions" as in his judgment shall seem advisable, not more than \$500 to any one institution in any one year. *Held*: That the statute applies to public and not private charitable gifts, and has reference to indefiniteness of beneficiaries, but not of the purposes for which the gift is made; that while the words, "religious" and "eleemosynary," when used to designate institutions, may necessarily imply that the institutions are engaged in public and not private charitable work, the words "educational" and "institutions" have a broad significance, and may refer as well to private as to public organizations or charities; and that, since the terms used are in the disjunctive, the invalidity of the provision as to educational institutions renders the entire gift invalid.

[Ed. Note.—For other cases, see Charities, Dec. Dig. § 22.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2343, 2344; vol. 4, pp. 3661-3663.]

Edward T. Bartlett, J., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

Proceeding for probate of the will of Mary E. Shattuck, deceased. From a judgment of the Appellate Division (118 App. Div. 888, 108 N. Y. Supp. 520) affirming a decree of the Surrogate's Court declaring certain provisions of the will valid, William A. Cook, an incompetent person, an heir at law and next of kin of decedent, through his special guardian, appeals. Reversed.

Said Mary E. Shattuck died on the 14th day of March, 1906, leaving a last will and testament, which has been duly admitted to probate. The eighth clause of said will is as follows: "All the rest, residue and remainder of my real and personal property, I give, devise and bequeath to my executor hereinafter named, in trust, however, the rents, profits and income thereof to be expended by him annually and to be paid over to religious, educational or eleemosynary institutions as in his judgment shall seem advisable, not more than \$500, however, to be paid to any one such institution in any one year."

Robert Dornburgh, for appellant. Edgar T. Brackett, for respondent.

CHASE, J. The beneficiaries of the proposed trust are most indefinite and uncertain. Many years ago, in *Morice v. Bishop of Durham*, 9 Ves. 599, it was said: "If there be a clear trust but for uncertain objects, the property that is the subject of the trust is undisposed of, and the benefit of such trust must result to those to whom the law gives the ownership in default of disposition by the former owner." In England, however, this rule did not hold in cases of trusts for charity, and in the same case it was said, in connection with what we have already quoted: "But this doctrine does not hold good with regard to trusts for charity. Every other trust must have a definite object. There must be somebody in whose favor the court can decree performance." In this state prior to the statute of 1893, hereinafter further mentioned, all trusts for uncertain beneficiaries were held invalid. In *Levy v. Levy*, 33 N. Y. 97, this court say: "A 'charitable trust' is simply an indefinite or uncertain trust, a trust without a beneficiary; and certainly a trust of that description is void by the rules of the common law as it existed at the time of adoption by us, and now exists. If there is a single postulate of the common law established by an unbroken line of decisions, it is that a trust without a certain beneficiary who can claim its enforcement is void, whether good or bad, wise or unwise. This is conceded." In the last important case in this court involving the validity of a will including a trust for uncertain beneficiaries before the enactment of the statute of 1893 (*Tilden v. Green*, 130 N. Y. 29, 23 N. E. 880, 14 L. R. A. 33, 27 Am. St. Rep. 487) the court say: "The objection is not obviated by the creation of a power in the trustees to select a beneficiary, unless the class of persons in whose favor the power may be exercised has been designated by the testator with such certainty that the court can ascertain the object or objects of the power."

Chapter 701, p. 1748, of the Laws of 1893, is as follows:

"Section 1. No gift, grant, bequest or devise to religious, educational, charitable, or benevolent uses, which shall, in other respects be valid under the laws of this state, shall or be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, bequest or devise there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes shall vest in such trustee. If no person be named as trustee then the title to such lands or property shall vest in the Supreme Court.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"Sec. 2. The Supreme Court shall have control over gifts, grants, bequests and devises in all cases provided for by section 1 of this act. \* \* \* The Attorney General shall represent the beneficiaries in all such cases, and it shall be his duty to enforce such trusts by proper proceedings in the court." As amended by chapter 291, p. 751, Laws 1901.

It was undoubtedly the purpose of the Legislature to change the law relating to gifts for charitable uses. In *Allen v. Stevens*, 161 N. Y. 122, 55 N. E. 568, this court, referring to that act, say: "Practical effect can be given to the provision that no devise or bequest shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as beneficiaries only by treating it as a part of a general scheme to restore to the courts of equity the power formerly exercised by chancery in the regulation of gifts for charitable purposes, for, in order to ascertain the class of persons who were entitled to the benefits of the trust, the rule formerly in force must necessarily be invoked by which the court ascertained as nearly as possible the intention of the testator, by decree adjudged who were intended to be the beneficiaries of the trust, and directed its administration accordingly." It was held in that case, in substance, that a gift in trust for charitable uses is not void for uncertainty and indefiniteness of the beneficiaries named therein, and also that gifts within the provisions of the act are not subject to our statutes against perpetuities. This court has since the decision in that case repeatedly reaffirmed its construction of such statute. *Matter of Griffin*, 167 N. Y. 71, 60 N. E. 284; *Matter of Graves*, 171 N. Y. 40, 63 N. E. 787; *Murray v. Miller*, 178 N. Y. 316, 70 N. E. 870; *Bowman v. Domestic & Foreign Miss. Society*, 182 N. Y. 494, 75 N. E. 535; *Mount v. Tuttle*, 183 N. Y. 358, 76 N. E. 873, 2 L. R. A. (N. S.) 428; *Robb v. Washington and Jefferson College*, 185 N. Y. 485, 78 N. E. 359; *Rothschild v. Schiff*, 188 N. Y. 327, 80 N. E. 1030; *St. John v. Andrews Institute*, 191 N. Y. 254, 83 N. E. 981.

The residuary clause of the will of the testatrix would have been void under the law of this state as it existed prior to the enactment of said statute. It is void now unless it is saved by the provisions thereof. The selection of the beneficiaries is left wholly to the judgment, from time to time, of the trustee, and the only limitation upon his discretion is that such beneficiaries shall be "religious, educational or eleemosynary institutions." In selecting them, the trustee is not confined to any creed, denomination, or territory. The intention of the testatrix in founding the trust is not expressed. Even if the trustee selected by the testatrix may be presumed to be familiar with her purpose and design and to act upon such knowledge, his death would make it necessary for the court in whom the title to the trust would rest to direct in regard to its control and disposition.

It is manifest that it is necessary for a testator to define his purpose and intention in making a trust sufficiently so that the court, at the instance of the Attorney General representing the beneficiaries, can by order direct in carrying out the trust duty. Religion is polemic. We have no established religion, and, as there is no guiding hand in the will to direct in the distribution of the testatrix's bounty, the personal views or religious faith of the Attorney General representing the indefinite and uncertain beneficiaries, or of the judge holding the court for the time being and from time to time, might affect the distribution to be made of the income of the trust fund. The distribution from time to time might thus be contradictory in its purposes and results. It would be possible also to have the bounty of a testator of uncompromising religious views distributed among institutions managed by those having entirely different and antagonistic views. The act of 1893 doubtless saves a trust from being invalid because the beneficiaries are indefinite and uncertain, but a trust may be so indefinite and uncertain in its purposes as distinguishable from its beneficiaries as to be impracticable, if not impossible for the courts to administer. We make these suggestions for the express purpose of calling attention to the fact that there must be some limitation upon the power of a testator to make a valid trust, if he leaves his objects and purposes undefined and the beneficiaries indefinite and uncertain. We may assume, however, for the purposes of this decision, that the will is not generally void by reason of the wide discretion left to the trustee and the great uncertainty as to who are to be beneficiaries thereunder, and we may further assume that the words "religious" and "eleemosynary," when used to describe institutions, necessarily show that the work to be performed by said institutions is charitable and public, and not private, and that the eighth paragraph of the will is not so uncertain that the trust cannot be controlled and directed by the court.

The three classes of institutions to which the income of the trust fund is directed to be divided are named in the disjunctive. The word "educational" does not necessarily describe a public or charitable institution, and for that reason, as we will show, the trust is not saved by the provisions of the act of 1893. The intention of the Legislature in passing the act of 1893 was to save to the public charitable gifts made in trust to uncertain and indefinite beneficiaries. Gifts for the benefit of private institutions or individuals were not intended to be included within its provisions. The meaning of a charitable use or purpose in England is stated by Tudor on *Charities and Mortmain* (4th Ed.) 87, as follows: "In the first place it may be laid down as a universal rule that the law recognizes no purpose as charitable unless it is of a public character. That is to say, a purpose must,

in order to be charitable, be directed to the benefit of the community or a section of the community. The distinction between a public purpose and one which is not public is often fine. The principle deducible from the cases seems, however, to be as follows: If the intention of the donor is merely to benefit specific individuals, the gift is not charitable, even though the motive of the gift may be to relieve their poverty or accomplish some other purpose in reference to those particular individuals which would be charitable if not so confined; on the other hand, if the donor's object is to accomplish the abstract purpose of relieving poverty, advancing education or religion or other purpose charitable within the meaning of the Statute of Elizabeth without reference to any particular individuals and without giving any particular individuals the right to claim the funds, the gift is charitable." It is defined by Pomeroy, in his *Equity Jurisprudence* (2d Ed. vol. 2, § 1019), as follows: "In order that a trust may be charitable the gift must be for the benefit of such an indefinite class of persons that the charity is really a public and not a mere private benefaction." In *Sherwood v. American Bible Society*, 40 N. Y. 581, this court say: "To constitute a charity the use must be public in its nature." In *Smith v. Havens Relief Fund Society*, 44 Misc. Rep. 594-608, 90 N. Y. Supp. 168, 175, referring to the law relating to charitable uses, it is said: "It requires that the use shall be public, that the benefit shall be intended not for individuals as such, but as representatives of a class; that the announcement of the altruistic aim shall not be a cover for the bestowal of a private bounty." Affirmed and opinion adopted and approved, 118 App. Div. 678, 103 N. Y. Supp. 770; affirmed without opinion, 190 N. Y. 557, 83 N. E. 1182. In *Attorney General v. Soule*, 28 Mich. 153, a will directed the setting apart of \$10,000 to be expended, according to the directions of the executors, "for the establishment of a school at Montrose for the education of children." It was held that the provision was so uncertain and indefinite as not to bind the trustees to an application of the fund to public charity, or even perhaps to charity at all as recognized in courts of equity, but clothed them with a discretion broad enough to permit of their applying the fund to a private school. In *Stratton v. Physio-Medical Institute*, 149 Mass. 505, 21 N. E. 874, 5 L. R. A. 33, 14 Am. St. Rep. 442, the will gave one-fourth of the net income of the residue of testator's property to the defendant to be used for the promotion of the medical art as favored and believed in by the testator during his lifetime and in support of that institution, as the trustees thereof should from time to time determine. It appeared that the supposed corporation in the mind of the testator was neither a free nor a public school, but a private pecuniary enterprise. It was held that such an enter-

prise is not a public charity even if indirectly it serves charitable ends. In *Haynes v. Carr*, 70 N. H. 463, 49 Atl. 638, the gift of the income of the trust there considered was given "for the benefit of the poor and destitute in said state of New Hampshire and for charitable and educational purposes therein." Although the trust was sustained as for charitable purposes, the court say: "It is undoubtedly the law in most states that, where property is given to trustees with power to apply it either to uses which are or those which are not within the classes included in charities, the whole must fall so far as the application of the peculiar doctrines of charitable uses is concerned." Every charitable gift must be actually dispensed by some individual, and ultimately substantially every charitable fund must be applied to the relief of individual need; but the trust cannot for the reasons stated be made for individual beneficiaries as such. The general purpose of the trust must be the well-being of humanity or some specified but indefinite class or part thereof. Fowler, in his work on *Charitable Uses*, says (page 106): "As we have no statute defining what are religious, educational, and charitable uses, and this statute (act of 1893) refers to none other than such as may be so classed, the courts must now determine what gifts are within the statute."

In view of the quite universal rule that charitable uses and public uses are synonymous, and the title of the act, which is "An act to regulate gifts for charitable purposes," we repeat that the Legislature intended to preserve charitable gifts made in trust to uncertain and indefinite beneficiaries, but did not intend to include in the purpose of the act gifts to private institutions or individuals. An "institution" is an established or organized society or corporation. It may be private in its character, designed for profit to those composing the organization, or public and charitable in its purposes. An institution is a mere organism for the accomplishment of an object, and the existence of such organism cannot in the nature of things make such object definite. *Thompson v. Norris*, 20 N. J. Eq. 524. The use of the word "institution" does not point to a public, as distinguished from a private, organization, and there is nothing whatever in the will, except in the words "religious, educational and eleemosynary," that points in the slightest degree to a charitable use. The will does not in terms refer in any way to the use to be made of the income of the trust fund. Such income is not in terms devoted to any purpose or object, and there is no direction by the testatrix to the institutions to which the income on the trust fund is paid as to what use they shall make of such gift. Its devotion to charity is dependent upon the object and purposes of the several institutions which by the grace of the trustee may become the beneficiaries thereof. An education-

al institution is not necessarily a public or charitable institution. Such an institution may be organized under the business corporations law of this state as a stock corporation and be conducted wholly for the profit of the stockholders. Such corporations are frequently organized under the general laws of this state. A few years ago the session laws of our state frequently contained special acts incorporating private educational institutions. Private incorporated and unincorporated schools are less frequent than they were before the public schools of this state had become as efficient and satisfactory as they are at the present time, but private schools are maintained in every part of our state. Under the will of the testatrix the trustee could make a division of the proceeds of the trust fund which would be in whole or in part private and individual and not public and charitable. Even a school, unless it be a free school, does not come within the statute of charitable uses (43 Eliz.). *Robertson v. Bullions*, 9 Barb. 64. A corporation or association organized for educational work is not exempt from taxation by the statutes of our state if the officers, members, or employees thereof shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof. Tax Law, Laws 1896, p. 797, c. 906, § 4, subd. 7, as amended by chapter 478, p. 1033, Laws 1907.

It is suggested in the opinion of the Appellate Division (*Cook v. Moses*, 118 App. Div. 888, 103 N. Y. Supp. 520) that the Supreme Court can be appealed to at any time to require that the gift shall not be taken or used by any society for a purpose not contemplated by the statute or by the testatrix. The statement of the court, it seems to us, entirely overlooks the fact that there is no declared purpose of the testatrix in making the trust. Where a trust fund is by a will dedicated to the purposes contemplated by the act, then the act by express terms gives to the Supreme Court control over it, and the Attorney General, representing the beneficiaries, can enforce the trust by proper proceedings before the court. In this will the testatrix, without defining the use to which the income of the trust fund is to be applied, directs generally that it be paid over to such particular ones of certain institutions as in the judgment of the trustee seems advisable. The power of the court to control the trustee is bounded by the directions of the testatrix. It cannot add to or take from the terms of this will, properly construed, any more than it could if the testatrix had specified by name the particular institutions entitled to the income of the trust fund, and she had included among them one or more manufacturing or transportation corporations. The possible devotion of the income of said trust in whole or in part to private use necessarily af-

fects the entire gift and requires that the same shall be held invalid.

The judgment of the Appellate Division and the decree of the Surrogate's Court, so far as it holds the eighth paragraph of the will valid and binding, should be reversed, and the eighth paragraph of the will should be declared invalid, with costs to the appellant and respondent payable out of the estate.

CULLEN, C. J., and HAIGHT, VANN, WERNER, and HISCOCK, JJ., concur. EDWARD T. BARTLETT, J., dissents, upon the ground that chapter 701, p. 1748, of the Laws of 1893, as construed by this court, renders the eighth paragraph of the will valid.

Judgment reversed, etc.

(193 N. Y. 460)

### MAISCH v. CITY OF NEW YORK.

(Court of Appeals of New York. Dec. 1, 1908.)

COURTS (§ 183\*)—COUNTY COURTS—JURISDICTION — ACTION AGAINST NEW YORK CITY — "RESIDENT IN COUNTY."

Const. art. 6, § 14, confers on county courts jurisdiction of actions to recover money only, not exceeding \$2,000, "where the defendant resides in the county," and provides that the jurisdiction shall not be extended to an action where the person sued is a nonresident. Code Civ. Proc. § 340, is to the same effect. Section 341 provides that, for the purpose of determining the jurisdiction of a county court, a domestic corporation whose principal place of business is established by statute, or is actually located within the county, is to be deemed a resident of the county. By Laws 1897, p. 1, c. 378, § 1, and Laws 1901, p. 1, c. 446, § 1, the city of New York is constituted a domestic corporation, which also appears from Code Civ. Proc. § 431, declaring that, in an action against the mayor and aldermen of the city of New York, service may be made on the mayor, comptroller, or counsel of the corporation. Held that, the principal place of business of the city of New York being in New York county, it was not a resident of Kings county, and that the county court of Kings county had therefore no jurisdiction of an action against such city.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 183.\*]

Cullen, C. J., and Willard Bartlett, J., dissenting.

Appeal from Supreme Court, Appellate Term, Second Department.

Action by Rudolph Maisch against the City of New York. From an order of the Appellate Division (127 App. Div. 424, 111 N. Y. Supp. 645), reversing an order denying plaintiff's motion to retax costs and granting such motion, defendant appeals. Affirmed.

Francis K. Pendleton, Corp. Counsel (Samuel K. Probasco and James D. Bell, of counsel), for appellant. Harry C. Underhill, for respondent.

VANN, J. This action was brought in the Supreme Court, the venue being laid in Kings

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

county, to recover damages for the alleged negligence of the defendant in so constructing a public sewer as to injure the property of the plaintiff by causing water to flow into his cellar. Upon the trial a verdict was rendered in favor of the plaintiff for the sum of \$341.25, and thereupon his counsel presented a bill of costs to the clerk for taxation, but the defendant objected to the allowance of any part thereof, upon the ground that the action could have been brought in the County Court of Kings county, and that no costs could be recovered on account of the prohibition contained in paragraph 5 of section 3228 of the Code of Civil Procedure. From an order made at Special Term denying a motion to tax the costs, or to direct the clerk to adjust them, an appeal was taken to the Appellate Division, which reversed the order and granted the motion. Permission to appeal to this court was given, however, and the following question was certified for decision: "Has the County Court of Kings county jurisdiction over actions against the city of New York?"

The statute relied upon by the defendant to prevent any allowance of costs provides that: "In all actions hereafter brought in the Supreme Court, triable in the county of New York or the county of Kings, which could have been brought, except for the amount claimed therein, in the City Court of the city of New York, or the County Court of Kings county, and in which the defendant shall have been personally served with process within the counties of New York or Kings, the plaintiff shall recover no costs or disbursements unless he shall recover \$500 or more. \* \* \* Code Civ. Proc. § 3228, par. 5. The City Court of the city of New York has no jurisdiction of an action against that city, as we have recently held. *O'Connor v. City of New York*, 191 N. Y. 238, 83 N. E. 979. Therefore the question whether the plaintiff is entitled to costs depends upon the answer to the question certified, which is clearly before us, although it arose in an unusual manner. The revised Constitution provides that: "County courts shall have the powers and jurisdiction they now possess, and also original jurisdiction in actions for the recovery of money only, where the defendants reside in the county and in which the complaint demands judgment for a sum not exceeding two thousand dollars. The Legislature may hereafter enlarge or restrict the jurisdiction of the county courts, provided, however, that their jurisdiction shall not be so extended as to authorize an action therein for the recovery of money only, in which the sum demanded exceeds two thousand dollars, or in which any person not a resident of the county is a defendant." Article 6, § 14. It is provided by the Code of Civil Procedure that: "The jurisdiction of each county court extends to the following actions and special proceedings, in addition to

the jurisdiction, power, and authority, conferred upon a county court, in a particular case, by special statutory provisions. \* \* \* (3) To an action for any other cause, where the defendant is, or, if there are two or more defendants, where all of them are, at the time of the commencement of the action, residents of the county, and wherein the complaint demands judgment for a sum of money only, not exceeding two thousand dollars. \* \* \* Code Civ. Proc. § 340. Prior to the year 1901 the charter of the city of New York conferred upon the Supreme Court exclusive jurisdiction of all actions in which the city "is made a party defendant," but by the revision of that year this provision was omitted, and the section in which it formerly appeared was re-enacted without it. But, as we said in the *O'Connor Case* (supra), it "would be contrary to public policy and to the canons of statutory construction" to imply from the omission a repeal of the limitation upon the jurisdiction "of the City Court," as it was then said, but the remark applies with equal force to the County Court.

The question turns, therefore, upon the provisions of the Code, which, so far as pertinent to the question before us, make the jurisdiction of county courts depend upon the residence of the defendant, or the defendants, when there are more than one. The section following that last quoted from the Code provides a test to decide when a domestic corporation is a resident for the purpose of giving or withholding jurisdiction. Thus it provides that: "For the purpose of determining the jurisdiction of a county court in either of the cases specified in the last section, a domestic corporation \* \* \* whose principal place of business is established, by or pursuant to a statute, \* \* \* or is actually located with in the county, \* \* \* it is deemed a resident of the county." Section 341. The city of New York is a domestic corporation, according to section 3343, because it was "created by or under the laws of the state." Laws 1897, p. 1, c. 378, § 1; Laws 1901, p. 1, c. 466, § 1. The intention of the Legislature to classify the city of New York as a domestic corporation further appears by section 431, which, so far as now material, is as follows: "Personal service of the summons upon a defendant, being a domestic corporation, must be made by delivering a copy thereof, within the state, as follows: (1) If the action is against the mayor, aldermen and commonalty of the city of New York, to the mayor, comptroller or counsel to the corporation. (2) If the action is against any other city, to the mayor, treasurer," etc. As the Legislature has power to create cities, it has power to enact that a city shall be deemed a resident of the county, or one of several counties within which its boundaries are located, at least for the purpose of determining the jurisdic-

tion of county courts. Otherwise no city in the state could be sued in a county court, and yet the Constitution provides that "All corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons." Article 8, § 3. It appears from the record that the summons and complaint in this action were served upon the defendant within the county of New York, and it is conceded that the principal place of business of the city is within that county. We think that, for the purpose of determining the jurisdiction of county courts, the Legislature has treated all domestic corporations alike, and has placed both municipal and business corporations in the same class. Its intention to so classify the cities of the state is emphasized by section 431, which, in regulating the service of process upon domestic corporations, *eo nomine*, expressly provides upon what city officers the summons must be served when an action is commenced against a city. It is suggested, however, that it would be better to take a broader and more natural view, and hold that a city is a resident of every county into which its territory extends, but that subject is not for the courts to deal with. A corporation necessarily resides, so far as a corporation can have a place of residence, within the territory of the sovereignty which created it. *St. Louis v. Ferry Co.*, 11 Wall. 423, 429, 20 L. Ed. 192. In this state the Legislature creates municipal corporations, and confers upon them such powers and attributes as it sees fit. We think it has conferred upon every city in the state the attribute of residence in that county in which its principal place of business is located, so far as residence controls the jurisdiction of county courts. While we do not usually speak of a city as carrying on business, any more than a charitable corporation, still it does carry on the important business of government, and its principal place of business within the meaning of the statute under consideration is that place where its chief governmental functions are exercised. It was held of a city in Ohio, located in two counties, that its "principal office or place of business" was in the county "where its principal seat of municipal government is located." *City of Fostoria v. Fox*, 60 Ohio St. 340, 54 N. E. 370.

We think the plaintiff is entitled to costs because the County Court of Kings county has no jurisdiction of an action against the city of New York. The order appealed from should therefore be affirmed, and the question certified answered in the negative.

GRAY, HAIGHT, HISCOCK, and CHASE, JJ., concur. CULLEN, C. J., and WILLARD BARTLETT, J., dissent.

Order affirmed.

(193 N. Y. 433)

**SNELL v. NIAGARA PAPER MILLS.**  
(Court of Appeals of New York. Nov. 24, 1908.)

1. JURY (§ 14\*)—RIGHT TO TRIAL BY JURY—CIVIL ACTIONS.

Where plaintiff's cause of action on contract for a definite sum or for damages ex contractu is disputed, plaintiff has an absolute right to a jury trial, which cannot be taken away by anything which defendant may set up in the answer.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 14.\*]

2. REFERENCE (§ 8\*)—RIGHT TO TRIAL BY JURY—CIVIL ACTIONS.

Where allegations of a complaint in an action for breach of a contract for services were put in issue by the answer, which set up a counterclaim, the cause of action and the denials entitled plaintiff to a jury trial, and the action was not referable because the counterclaim involved a long examination of documents, etc.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 21; Dec. Dig. § 8.\*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Ralph M. Snell against the Niagara Paper Mills. From an order of the Appellate Division (127 App. Div. 948, 111 N. Y. Supp. 1145) reversing an order of reference, defendant, by leave, appeals, and the Appellate Division certifies questions to the Court of Appeals. Order affirmed, and questions answered.

John Desmond, for appellant. Abner T. Hopkins, for respondent.

GRAY, J. The question, which we are to pass upon, is whether, although the cause of action alleged in the complaint is not referable, the action is made so by the answer. At the Special Term, a reference of the issues was ordered over the objection of the plaintiff. At the Appellate Division, the order of reference was reversed, and the defendant's motion therefor was denied. Leave was then given to the defendant to appeal to this court.

The complaint contains two causes of action. The first is based upon the failure of the defendant to pay a balance of salary due to the plaintiff under a contract for his services. For a second cause of action, the plaintiff sets forth: That, under a written contract with the defendant, his services were engaged by the latter as the superintendent of its paper mills, for one year, at a stated salary; that, in the event that he demonstrated his ability to fill such position, his employment was to continue thereunder for a further period of two years, at a stated increase of salary; and that he performed all the requirements of his position, but was discharged, after the expiration of the first year, wrongfully and in violation of the contract. Judgment was demanded in damages. The defendant's answer, admitting the performance by plaintiff of services as superintendent

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for the first year, denied the making of the contract alleged, pleaded payment in full, and, also, that plaintiff had not performed the requirements of his position. It set forth the making of representations by the plaintiff as to his competency and qualifications, that he was incompetent and was not qualified to do the work of superintending, that much of the product manufactured by the defendant during the time of plaintiff's service, was worthless, and that a large quantity of paper had to be remanufactured. Upon the basis of these allegations, made by way of a defense to the action, and as separately stated and set up by way of counterclaim, judgment was demanded against the plaintiff for damages in a certain sum.

Clearly, the causes of action alleged in the complaint, in no sense, involved the examination of an account, and they were not referable, unless a reference were consented to by both parties. The contention of the defendant, however, is that, because its counterclaim will involve a long examination of documents, of witnesses, and of specimens of its products, in order to establish its claim of damage sustained from the plaintiff's lack of ability as superintendent, the action may be compulsorily referred. Assuming that the examination required to establish the facts set up by way of counterclaim is such an examination as the statute contemplates, when providing for a compulsory reference, nevertheless the referability of the cause of action set up by way of counterclaim would not confer any jurisdiction to refer the plaintiff's cause of action, without his consent. The plaintiff's cause of action is for the breach of an alleged contract for his services. The answer puts in issue all the material allegations of the complaint. The issue of contract, or no contract, is made, and the defendant seeks to offset a possible recovery by the plaintiff, by setting up an independent claim for damages occasioned by incompetent services. On the issue made upon the contract, the plaintiff was entitled to a trial by jury at common law, and that right has been preserved to him by the Constitution of the state and is inviolate. Whatever the counterclaim involved in the nature of proof, it would not affect the proof requisite to establish the plaintiff's case. The question presented does not differ from that discussed in the case of *Steck v. Colorado F. & I. Co.*, 142 N. Y. 236, 37 N. E. 1, 25 L. R. A. 67, upon the authority of which the Appellate Division has reversed the order of reference. In that case, the action was for, substantially, the same cause as the present one. The opinion of Judge Earl is an elaborate historical discussion of the question whether such an action could have been referred prior to, and at the time of, the first state Constitution, which provided that "trial by jury, in all cases in which it has heretofore been used in the colony of New York, shall be established and remain inviolate forever." Upon a consideration of

the colonial laws and of the revised laws, and upon the decisions of this court, the conclusion was reached that, if the plaintiff's cause of action be upon contract for a definite sum of money, or for damages *ex contractu*, and the cause of action be disputed, then there is an absolute right to a jury trial, which could not be taken away, or destroyed, by anything which the defendant might set up in answer. The dissenting opinion that the provisions of section 1013 of the Code of Civil Procedure were operative, which authorize a reference where the examination of a long account was involved on either side, was not adopted. In the case of *Untermeyer v. Belhauer*, 105 N. Y. 521, 11 N. E. 847, which was cited in support of our conclusion in the *Steck Case*, the cause of action alleged in the complaint was for the recovery of unliquidated damages for the breach of a contract in no sense involving an account, and the answer contained a counterclaim, which did require the examination of a long account. It was held, in an opinion written by Judge Rapallo, that, as the cause of action was not referable, it could not be made so by the counterclaim.

The case of *Irving v. Irving*, 90 Hun, 422, 35 N. Y. Supp. 744, which was affirmed in this court, upon the opinion of the General Term (149 N. Y. 573, 43 N. E. 987), and upon the authority of which there was a dissent in the Appellate Division, in no respect disturbed our conclusion in *Steck v. Colorado F. & I. Co.*, and does not affect its authority. In *Irving v. Irving*, the complaint was upon a promissory note of the defendant, and it was alleged that it was made and delivered for value received, and that the amount thereof was due. The answer denied that the note was made for value and alleged that it was without any consideration. The issue was upon the question of whether there was any consideration for the note, and whether anything was due upon it. Of course, if there was nothing due upon it, the plaintiff had no cause of action, and only in that sense was the plaintiff's cause of action gainsaid. In holding that a compulsory reference might be ordered of the issues in the action, it was pointed out that the decision in *Steck v. Colorado F. & I. Co.* did not cover the question, and that a long account would be involved in the issue, as to whether the note was given without consideration. It was observed that in *Steck's Case* "the counterclaim was a distinct and independent cause of action, and the fact that it involved the long account did not make it an element in the proof of the plaintiff's cause of action." The authority of *Steck v. Colorado F. & I. Co.* was not disputed, and, in commenting upon the difference between the cases, it was said that there the question was "whether the fact that the trial of the counterclaim might involve an examination of a long account would justify a compulsory reference of the issues where the plaintiff's

cause of action was controverted and non-referable." In affirming *Irving v. Irving*, what we upheld was the jurisdiction of the court to order a compulsory reference of the issues in a case where, although the cause of action set up in the complaint appears on its face to be nonreferable, the defense interposed thereto shows that the trial of that issue will, necessarily, involve a long account. In this case, there is an absolute denial of the contract, upon which the plaintiff rests his cause of action, and the counterclaim alleged constituted a distinct and independent cause of action.

For these reasons, I advise the affirmance of the order appealed from.

The court below has certified a number of questions to this court, some of which are impertinent to the determination to be reviewed. The actual question presented below was whether a compulsory reference of the issues might be ordered. Therefore only the first two of the six questions certified require to be answered. To the first question, "Do the causes of action set out in plaintiff's complaint and the denials and defenses in the answer entitle plaintiff to a jury trial?" we answer, "Yes." To the second question, "Did the court have jurisdiction to refer the issues in the first question to a referee, to hear, try, and determine the same without the consent of plaintiff?" we answer, "No."

CULLEN, C. J., and HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

Order affirmed, with costs.

(198 N. Y. 430)

In re THAYER.

(Court of Appeals of New York. Nov. 24, 1908.)

APPEAL AND ERROR (§ 1094\*)—DECISIONS REVIEWABLE—QUESTION OF LAW OR FACT.

The mode of appraisal of shares of stock in an interstate railroad for the purpose of assessing the transfer tax, not having been fixed by the Legislature, the correct method of valuing such stock is not a matter of law, but is one of fact; and hence a decision of the surrogate fixing the value of such stock, which decision has been unanimously affirmed by the Appellate Division, is not reviewable by the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322, 4324; Dec. Dig. § 1094.\*]

Appeal from Supreme Court, Appellate Division, First Department.

In the matter of the appraisal under the act in relation to taxable transfers of the property of Julia B. Thayer, deceased. From an order of the Appellate Division (126 App. Div. 951, 111 N. Y. Supp. 1147), affirming an order of the Surrogate's Court (58 Misc. Rep. 117, 110 N. Y. Supp. 751) fixing the cash value

of the estate, the Comptroller of the State of New York appeals. Affirmed.

Charles M. Russell, for appellant. Charles P. Howland, for the executors and trustees of Julia B. Thayer, respondents.

WILLARD BARTLETT, J. This controversy relates to the transfer tax upon certain shares of stock belonging to the estate of a nonresident decedent in the Boston & Albany Railroad Company and the Fitchburg Railroad Company. Both companies are incorporated under the laws of Massachusetts, as well as under the laws of New York, and each company owns property in both states. In *Matter of Cooley*, 186 N. Y. 220, 78 N. E. 939, 10 L. R. A. (N. S.) 1010, this court decided that such stock should be assessed, for the purposes of the transfer tax, at a value representing the corporate property within this state, to be arrived at by ascertaining the proportionate value of the property of the corporation situated in New York, with reference to that of the property situated in Massachusetts. It was suggested in the opinion that this value might be computed with substantial accuracy by "an apportionment based upon trackage or figures drawn from the books or balance sheets of the company." Accordingly in the present case the surrogate adopted the total track mileage of the Boston & Albany Railroad and the Fitchburg Railroad as the basis for his computation; and neither party, upon the argument of the appeal in this court, finds any fault with his action in this respect. It was made to appear, however, upon the hearing before the appraiser, that the Fitchburg Railroad Company owns in Boston and in Somerville, Mass., certain grain elevators and connecting tracks, which are described as being "outside of and apart from the ordinary freight and passenger terminals of the road." This so-called special property was deducted by the surrogate from the total capital before apportioning the stock on a mileage basis, and the learned counsel for the comptroller insists that this was an error which demands a reversal of the order. He argues that it is a departure from the method of assessment approved by this court in *Matter of Cooley* (supra), which might wisely be accepted by both of the states concerned in the taxation of a transfer of stock representing property partly situated in one state and partly in the other.

It must be borne in mind, however, that the observations in the *Cooley* Case as to what would be a convenient, practicable and substantially correct method of computing the transfer tax upon property of this character were merely by way of suggestion to be adopted if the appraising officials saw fit, but were not intended to be controlling upon them. Judge Hiscock took pains to point out

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that, if the parties so desired, an appraisal, based upon an apportionment of the entire property situated in New York and in Massachusetts, might be carried to the extent of a detailed inventory comprising very numerous items. Such an appraisal might involve a wasteful expenditure of labor, with a result not practically different from one based upon the proportion of total track mileage in each state, and yet, if the parties insisted upon adopting that course, it could not be condemned as matter of law. To render the method recommended in the Cooley Case the sole standard to be adopted, it must be prescribed by an act of the Legislature, as has been done in Massachusetts. Mass. Laws of 1907, p. 801, c. 563, § 2.

In the case at bar the effect of the decision of the surrogate is to hold that a deduction of the special property of the Fitchburg Railroad Company, which has been mentioned, consisting of marine terminals in Boston and Somerville, not used in the ordinary business of the corporation, was necessary in order to determine the true value of the stock. The valuation of the stock is a question of fact. The decision of the surrogate on this question of fact has been unanimously affirmed by the Appellate Division, and, as it involves no error of law, it is conclusive in this court.

The order of the Appellate Division should, therefore, be affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, HISCOCK, and CHASE, JJ. concur.

Order affirmed.

(193 N. Y. 423)

BECKER et al. v. McCREA et al.

(Court of Appeals of New York. Nov. 17, 1908.)

1. APPEAL AND ERROR (§ 1094\*)—DECISIONS OF INTERMEDIATE COURTS—FINDINGS—CONCLUSIVENESS—UNANIMOUS AFFIRMANCE.

The findings of fact are conclusive on the Court of Appeals on appeal from a judgment of the Appellate Division unanimously affirming the judgment of the Special Term, but the question remains whether such findings support the legal conclusions and judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4324, 4325; Dec. Dig. § 1094.\*]

2. MORTGAGES (§ 137\*)—TITLE CREATED.

Under the statutes, a mortgage creates no estate in land, but is merely a lien on the mortgaged premises; the mortgagor's title remaining legal, with the incidents of a legal title, subject to the lien.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 270, 273; Dec. Dig. § 137.\*]

3. MORTGAGES (§ 143\*)—MORTGAGEE IN POSSESSION—HOSTILE CHARACTER—ACQUISITION OF TITLE.

One cannot become a mortgagee in possession unless his entry is with the consent, express or implied, of the owner of the equity of redemption, and a mortgagee entering into pos-

session with such consent is in no sense in possession in hostility to the title of the mortgagor, and such possession confers no title on the mortgagee.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 282; Dec. Dig. § 143.\*]

4. MORTGAGES (§ 213\*)—MORTGAGEE IN POSSESSION—REMEDY OF MORTGAGOR.

A mortgagor surrendering the possession to the mortgagee cannot maintain ejectment, but must resort to a suit in equity to redeem.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 482, 484; Dec. Dig. § 213.\*]

5. MORTGAGES (§ 597\*)—REDEMPTION—SUIT TO REDEEM—LIMITATIONS—"ADVERSE."

A mortgage foreclosure action was prosecuted to judgment of foreclosure and sale, but no sale was had. Subsequently the mortgagee entered into possession of the premises, and held the same for over 25 years, continuously cultivating and improving the same as owners usually do, with the knowledge and acquiescence of the mortgagor, who made no claim adversely to such occupancy, and who did not pay any taxes during such period. *Held* that, under Code Civ. Proc. § 379, providing that an action to redeem from a mortgage may be maintained by the mortgagor against the mortgagee in possession, unless he has maintained an "adverse" possession for 20 years, the mortgagor might sue to redeem; the word "adverse," in view of the judicial decisions rendered prior to the adoption of the section, being used in its ordinary meaning.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1749; Dec. Dig. § 597.\*]

For other definitions, see Words and Phrases, vol. 1, p. 223.]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by C. Adelbert Becker and another against Maggie McCrea and others. From a judgment of the Appellate Division (119 App. Div. 56, 103 N. Y. Supp. 963), affirming a judgment of the Special Term (48 Misc. Rep. 341, 94 N. Y. Supp. 20) in favor of certain defendants, plaintiffs and defendant Maggie McCrea appeal. Reversed, and new trial granted.

Brainard Tolles, for appellants. J. Addison Young, for respondents.

CULLEN, C. J. This action was brought for the partition of certain lands in Westchester county, claimed to be owned by the plaintiffs and certain of the defendants as tenants in common. The premises were not in the actual possession of these parties, but were held and occupied by the respondents, the defendants Anne B. Eddy and others. It appears that on May 1, 1877, Jane B. Eddy conveyed to Bernard Spaulding the premises in question. From him the appellants deduce their title. It further appears that, contemporaneous with the conveyance to Spaulding, he executed a mortgage of the same premises to said Jane B. Eddy to secure a portion of the purchase money. On July 25, 1878, default having been made in the payment of that mortgage, said Eddy instituted an action in the Supreme Court for the foreclosure of the same, in which action a judgment of foreclosure and sale was entered on April 22,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1879. No sale was ever had under this judgment, but some time in the year 1879 said Jane B. Eddy entered into possession of the mortgaged premises and held the same until her death (subsequent to the commencement of this action) in February, 1905, when her title devolved upon the respondents, the executors and trustees of her will. Mrs. Eddy was made a party to the action. The complaint set forth the mortgage, the ignorance of the plaintiffs as to its validity, and charged that the same had been paid or was barred by the statute of limitations. Judgment was demanded that the rights and claims of all the parties to the action be ascertained and determined, that partition of the premises be made, or that a sale of the same be had. The respondents, Mrs. Eddy's executors and trustees (she having in the meantime died), answered, claiming to own the premises in fee, and setting up adverse possession in themselves and in their testatrix for more than 20 years. The Special Term rendered judgment in favor of these last-named defendants, holding that the rights of the plaintiffs and the other defendants were barred by lapse of time. That judgment has been affirmed by the Appellate Division.

The whole controversy depends upon the character of the possession taken and held by Mrs. Eddy, and on the interpretation to be given to section 379 of the Code of Civil Procedure. The learned trial court found that no part of the mortgage had been paid; and, as to the entry and possession of Mrs. Eddy, its findings are as follows: "In the year 1879 the said Jane B. Eddy, with the knowledge and consent of the said Bernard Spaulding and the defendant Maggie McCrea, entered into the open, actual, and visible possession and use of the said premises described in the complaint in this action, and became a mortgagee in possession of said premises." "That the said Jane B. Eddy continued in such possession and use of said premises up to the time of the commencement of that action, a period of 25 years and upwards, and until the time of her death, as hereinafter found, and continuously cultivated and improved the same, ploughing and planting and raising crops thereon, cutting the meadow, using the timber, building roads and walls thereon, and also built a barn upon the same, and received the fruits and benefits of said premises, and possessed and improved the same as owners are accustomed to possess and improve their estates, and that such possession and use and said acts of ownership by the said Jane B. Eddy were continued, during all said period, with the knowledge and acquiescence of the defendant McCrea, and no claim adverse to such use and occupancy was ever made by said defendant McCrea until the spring of 1904, nor did she at any time, from 1879 to 1904, pay any taxes or assessment on said property or use or occupy the same."

On these findings it determined as conclu-

sions of law: "(1) That the said Jane B. Eddy in the year 1879 became and was a mortgagee in possession of said premises. (2) That the possession of said premises by said Jane B. Eddy was, for more than 20 years prior to the commencement of this action, exclusive, hostile, and adverse to the defendant McCrea. (3) That by reason of such adverse possession by said Jane B. Eddy the right of plaintiffs and said defendant McCrea to redeem from said mortgage is barred." The findings of fact are conclusive in this court, the affirmance of the Appellate Division having been unanimous; but the question remains whether those findings support the legal conclusions and the judgment founded thereon. That the possession of Mrs. Eddy was not adverse in the ordinary sense of the term is quite apparent, for she entered with the consent of the owner of the equity and, as found, became a mortgagee in possession of the premises. Under our statutes, contrary to the common law, a mortgage creates no estate in the land, but is merely a lien on the mortgaged premises. Since his right to recover the premises in ejectment upon default has been abrogated by the statute, one cannot become a mortgagee in possession unless his entry is with the consent of the owner of the equity of redemption, express or implied. *Howell v. Leavitt*, 95 N. Y. 617; *Barson v. Mulligan*, 191 N. Y. 306, 84 N. E. 75. Therefore, when a mortgagee enters into possession with such consent, it is in no sense in hostility to the title of the mortgagor. In *Packer v. Rochester & S. R. R. Co.*, 17 N. Y. 283, it is said by Judge Pratt: " \* \* \* The mortgagee holds simply a chose in action, secured by a lien upon the land. Since the Revised Statutes there is not an attribute left in the mortgagee, before foreclosure, upon which he can make any pretense for a claim of title; for the mere right, where he goes into possession by the consent of the mortgagor, to retain possession, is not an attribute of title." In *Trimm v. Marsh*, 54 N. Y. 599, 13 Am. Rep. 623, it was held that the legal title to the mortgaged premises remains in the mortgagor, and that title is not affected by default in payment, or by surrender of possession to, or the taking of possession by, the mortgagee. In that case Judge Earl said: "How can the mere possession change the title from the mortgagor to the mortgagee, or in any way diminish the estate of the one or enlarge the estate of the other? Before taking possession the mortgagee had a mere lien upon the real estate pledged for the security of his debt. After possession he has in his possession the property pledged as his security, the title remaining as it was before. The mortgagor's title is still a legal one, with all the incidents of a legal title subject to the pledge, and the mortgagee's interest is still a mere debt secured by the pledge. If the mortgagee should die in possession, the debt would still go to his personal representatives to be administered as personal estate, and the

mortgagor's title would go to his heirs." In the same case Judge Reynolds said: "In such case the creditor, instead of leaving his debtor in possession and relying upon his intangible legal lien for his security, takes the thing pledged in his own possession, and enjoys its use until his debt is paid. He must account for profits and waste to his debtor, and when his debt is paid by the receipts of rents and profits, or in any other manner, his lien is extinguished and his possession is no longer justified by law."

Though, as we have seen, the surrender of possession by the mortgagor to the mortgagee confers no title upon the latter, still it is settled law that in such case ejectment cannot be maintained by the mortgagor against the mortgagee, but he must resort to an action in equity to redeem (*Phye v. Riley*, 15 Wend, 248, 30 Am. Dec. 55; *Chase v. Peck*, 21 N. Y. 581), and the only question remaining is whether the plaintiffs and their co-owners have lost their right to that relief by the lapse of time. Before the enactment of the present Code there was no provision of law specially prescribing the time in which such actions must be instituted, but it was held that they fell within section 97 of the old Code which prescribed that actions for relief not otherwise specially provided for must be brought within 10 years. *Miner v. Beekman*, 50 N. Y. 337; *Hubbell v. Sibley*, 50 N. Y. 468. In the former case it was held that the cause of action did not accrue at least until the mortgagee entered into possession. That was all that was necessary to decide in that case. The learned judge who wrote for the court, however, said further: "The statute, I think, would not then commence running had the defendants or their grantor entered and continued in possession, avowedly as mortgagees, and would not run while they so held, for the reason that it is a continuing right of the owner to pay off and discharge a mortgage, and, by so doing, regain the possession of the land." This was the state of judicial authority when the present Code, prepared by Mr. Throop, was enacted. The section before us, as already said, is new. In his note to the section Mr. Throop says: "One of the questions which has given rise to much conflict of opinion is that relating to the application of the statute of limitations to such a case [to redeem]." He refers to the *Miner* and *Hubbell* Cases, and suggests that in analogy to other actions for the recovery of real estate the period prescribed should be 20 years instead of 10. In the section as drawn by him and enacted by the Legislature we find the words "unless he or they [mortgagee in possession and those claiming under him] have continuously maintained an adverse possession of the mortgaged premises for twenty years after a breach of a condition of the mortgage." The use of the word "adverse,"

86 N.E.—30

in the light of the previous intimation by this court in the *Miner* Case seems to indicate very clearly that it was the intention of the Legislature to incorporate that intimation or dictum into the statute law. It is admitted by the learned judge who wrote for the Appellate Division that the possession of the respondents was not adverse, but he thought that the word "adverse" was not to be construed in the same sense as that in which it is used in the sections of the Code relative to the time for the bringing of other actions in regard to real property. He was led to this conclusion by the consideration that, if the term "adverse" was to be given its ordinary meaning, there would be practically no limitation of time on the institution of actions to redeem, for, as he argues, if the mortgagee enters without the consent of the mortgagor, he is a mere trespasser, his possession is unlawful, and he can be ousted in ejectment, and the action to redeem is unnecessary; or, if he enters with the consent of the mortgagor, he becomes a mortgagee in possession, and the statute never commences to run. I think the learned judge is somewhat in error in thinking that under the ordinary definition of the word "adverse" there can be no case to which the section applies. The mortgagee might enter with the consent of the mortgagor and thus become a mortgagee in possession. He might thereafter assume to convey the land as the absolute owner thereof. In that situation the possession of the grantee of the mortgagee would be plainly adverse, or there might be such a repudiation by the mortgagee of his relation as such to the mortgagor as would set the statute running. The section would also apply to the cases of all lienors and incumbrancers. But whatever force there may be in the argument of the learned court, it cannot justify the unqualified elimination of the word "adverse" from the statute, yet this is precisely what the decision below has done. No suggestion of a possible interpretation of the word "adverse" is attempted. It is simply ignored. If the Legislature intended that 20 years' possession as mortgagee merely should bar an action to redeem, it is difficult, if not impossible, to see why it required that such possession should be adverse. It may be unfortunate that so long a period should be permitted during which the title to land can be unsettled, but the remedy is with the Legislature. The courts are not justified in disregarding its express enactment.

The judgment appealed from should be reversed and a new trial granted, with costs to abide the final award of costs.

GRAY, EDWARD T. BARTLETT, WERNER, HAIGHT, WILLARD BARTLETT, and HISCOCK, JJ., concur.

Judgment reversed, etc.

(193 N. Y. 248)

**PEOPLE ex rel. BROWNELL v. BOARD OF ASSESSORS OF CITY OF BUFFALO.**(Court of Appeals of New York. Oct. 23, 1908.  
On Rehearing, Dec. 18, 1908.)**1. MUNICIPAL CORPORATIONS (§ 111\*)—COMMON COUNCIL—ORDINANCES—POWER TO ENACT.**

The power of a city council to enact ordinances is limited to those not inconsistent with the charter or the state laws.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 246; Dec. Dig. § 111.\*]

**2. MUNICIPAL CORPORATIONS (§ 292\*)—PUBLIC IMPROVEMENTS—PETITION—SIGNING.**

Where a city charter provided as to public improvements that the petition should be applied for by a majority of the resident owners, but there was no requirement that such owners must apply in person, their duly authorized agents or attorneys were entitled to appear for them, and to fill in the date of signing after their signatures.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 768-771; Dec. Dig. § 292.\*]

**3. MUNICIPAL CORPORATIONS (§ 295\*)—PUBLIC IMPROVEMENTS—BOARD OF ASSESSORS—JURISDICTION.**

Under Buffalo City Charter (Laws 1891, pp. 221, 222, c. 105, §§ 398, 399), as amended by Laws 1900, p. 1538, c. 707, requiring petitions for improving and paving streets to be submitted to the board of assessors, who are required to certify to certain facts, such board has no jurisdiction to determine questions of law as to the form of the petition and the manner in which the names were signed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 789; Dec. Dig. § 295.\*]

**4. MUNICIPAL CORPORATIONS (§ 321\*)—PAVING STREETS—PETITION—ASSESSORS—CERTIFICATE—REVIEW—CERTIORARI—FRAUD.**

Buffalo City Charter (Laws 1891, pp. 221, 222, c. 105, §§ 398, 399), as amended by Laws 1900, p. 1538, c. 707, relating to the paving of streets, provides that improvement be applied for by a majority of the resident owners of lands fronting on the street representing at least two-fifths of all the frontage of the lands on the street or alley to be improved, or, if the improvement is to be made along one part of such street or alley, then it must be petitioned for by a majority of such resident owners of the lands representing at least two-fifths of all the land fronting on the part of such street or alley to be improved, and requires the board of assessors, to which the petition is referred, to return the same to the common council with a certificate as to the facts required which shall be conclusive as to such facts. *Held*, that a certificate of the assessors that a petition contained the names of a majority of the resident owners of the land fronting on a portion of the street to be improved, that they represented two-fifths of the frontage, and that the lands had not been divided to effect such majority, was not reviewable by certiorari, notwithstanding the assessors erred in counting the number of resident owners, or proceeded on an improper theory, where there was no allegation or claim that they acted fraudulently or in bad faith, or that they intentionally omitted to count persons as owners whom they knew to be such.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 840; Dec. Dig. § 321.\*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Certiorari by the People, on relation of William C. Brownell, to review the action of the Board of Assessors of the City of Buffalo, certifying certain facts in favor of a public improvement. From an order of the Appellate Division (127 App. Div. 851, 111 N. Y. Supp. 924), affirming an order denying a motion to quash or supersede the writ (109 N. Y. Supp. 991), the Board of Assessors appeals. Reversed.

Samuel F. Moran, for appellant. Frank F. Williams, for respondent.

**HAIGHT, J.** On or about the 11th day of November, 1907, a petition was presented to the common council of the city of Buffalo by alleged property owners liable to be assessed for improvement of Broadway in the city of Buffalo, from Herman street to Bailey avenue, praying that the same may be paved with German rock asphalt. The petition appears to have been received by the common council, and referred to the board of assessors for the purpose of having that board determine whether the petition was signed by a majority of the resident owners of real estate fronting upon the street, and as to whether the signers were the owners of two-fifths of the land so fronting, and as to whether the lands had been divided for the purpose of effecting such majority. On the 18th day of November, 1907, the board of assessors returned the petition to the common council, with its certificate thereto attached, in which it is certified that the petition was signed by a majority of the resident owners of lands fronting on that part of the street in and along which the improvement was sought to be made, and that such owners represented at least two-fifths of all the land fronting on that part of the street, and that, in the judgment of the assessors, none of the lands had been divided for the purpose of effecting such majority. Thereupon the common council ordered the street to be repaved in the manner provided for in the petition, and directed the board of assessors to make an assessment of the cost thereof upon the real estate benefited by such improvement. The relator then presented a petition to the Supreme Court praying for a writ of certiorari directed to the assessors, commanding them to certify and return to the court all the proceedings, decisions, and actions of the board had and made in the premises to the end that the decision and certificate by the board may be reviewed and corrected upon the merits. The relator, in his petition, alleged that the certificate of the board of assessors was incorrect and erroneous and contrary to law, for the reason that the petition of the property owners was not signed by a majority of the resident owners, on the part of the street in which the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

improvement was to be made, owning and representing at least two-fifths of all the land fronting on that part of the street; that the assessors had unlawfully and erroneously counted the signatures upon the petition signed by attorneys, agents, or executors; that in some instances the signers of the petition had not written opposite their signatures the time when the same was signed, but that other persons had written such time in their stead; that in counting and determining the number of resident owners of the lands fronting on that part of the street in and along which the improvement was to be made, for the purpose of making a certificate the board counted only one such resident owner in all cases where premises fronting on the street were owned by and assessed, on the books and maps kept by the board of assessors, to two or more persons as owners; that 29 of such resident owners as tenants in common or by the entirety were not counted as such resident owners by said assessors; that the total number of such resident owners was 296, and a majority thereof was 149, and that the total number of signatures counted and allowed by the board of assessors was 146. Upon the presentation of such petition the writ was allowed which the assessors now move to quash and supersede.

Inasmuch as the motion to quash the writ of certiorari is based upon the petition of the relator, the question presented is as to whether its allegations are sufficient in law to authorize the issuing of the writ. The charter of the city of Buffalo (Laws 1891, pp. 221, 222, c. 105, §§ 398, 399, as amended by chapter 707, p. 1538, Laws 1900) provides that when the expense of any work or improvement for paving or repairing of a street shall exceed the sum of \$500 it shall not be ordered unless "(1) upon the vote of three-fourths of all the members elected to the common council, and after notice of the intention to order it shall have been published three times a week for two weeks, in the official paper of the city; or (2) unless it shall be applied for by a majority of the resident owners of the lands fronting on the street or alley, representing at least two-fifths of all the feet front of the lands on the street or alley, in and along which such improvement is to be made; or if such improvement is intended to be made in and along only part of such street or alley, then by a majority of such resident owners of the lands, representing at least two-fifths of all the lands fronting on the part of such street or alley as to which such improvement is to be made." "The board of assessors shall return the application of the common council, with its certificate thereon as to the facts required, which certificate shall be conclusive as to the facts. The board of assessors shall also certify whether, in its judgment, any of the lands have been divid-

ed for the purpose of effecting such majority."

Chapter 86 of the ordinances of the city of Buffalo provides that:

"Section 1. All petitions for paving or repaving a street shall be first filed with the city clerk and by him transmitted to the board of aldermen.

"Sec. 2. \* \* \* Every such petition shall be void unless every name upon it shall be the bona fide signature of the person indicated by such name, who at the time of the signing shall have written opposite his signature the day of the month and year when such signature was written; nor shall any such petition be valid unless every signature appearing thereon shall have been written with ink or with indelible pencil, and shall bear date within six months prior to the date of presentation of said petition to the city clerk. Every petition which does not comply in all respects with the conditions prescribed by this section shall be rejected."

It must be conceded that, under the allegations of the petition, there was an error in the determination of the board of assessors as to the number of resident owners; that only 146 had signed the petition, and it required 149 to constitute a majority. In other words, the petition lacked three of having a majority of the resident owners. It will be observed, however, that the relator has failed to allege that there was any intentional omission in the counting of the names of tenants in common, or joint tenants, nor is there any allegation in the petition that the persons signing the names of owners as attorneys, agents, or executors were not in fact such attorneys, agents, or executors authorized to sign the names of such owners, or that in the writing of the date opposite the signatures of the owners the persons so writing the same were not authorized by the owners so to do. The power of the common council to enact ordinances is limited to those which are not inconsistent with the provisions of the charter or of the laws of the state. The charter has not, in express terms, provided that the petition shall be physically signed by the resident owner. It is, as we have seen, that "it shall be applied for by a majority of the resident owners." There is no provision that such owners must apply in person, nor does any reason now occur to us why they may not appear through their duly authorized agents or attorneys, and if they may do so, it would seem to follow that such owners may authorize the filling in of the date of such signing after their signatures. But we are of the opinion that the board of assessors was not called upon to determine the questions of law which arise upon the construction of the provisions of the charter and of the ordinances referred to. The petition, as we have seen, is addressed to the common council and was presented

to it. It was referred to the board of assessors to determine certain questions of fact which would appear from the records on file in that office. The board of assessors was not a part of the law department of the city, nor were its members authorized or required to determine questions of law. The form of the petition and the manner in which the names were signed to the petition presented questions of law which the common council, through its officer, was called upon to determine, and not the board of assessors.

The questions referred to the board of assessors, as we have seen, were three in number: "(1) Did the petition contain the names of a majority of the resident owners of land fronting upon the portion of the street to be improved? (2) Did they represent two-fifths of the frontage; and (3) had the lands been divided for the purpose of effecting such majority?" These were the questions presented to the assessors, and these were the questions answered by their certificate. True, as we have seen by the allegation of the petition, the assessors erred in counting up the number of the resident owners, but errors of this kind are liable to occur. Assessors cannot always keep the records of their office up with the frequent changes in the ownership of real estate. Owners are liable to die, and heirs at law thereby become vested with the title. They may be numerous and scattered, and the assessors may not always be able to determine their number or names, and for a time may be left in ignorance even as to the death of the owner. It would therefore be difficult for them always to be accurate in determining the number of the owners. It was doubtless for this reason that the Legislature saw fit to specifically provide that their "certificate shall be conclusive as to the facts." This provision of the charter appears to us to be controlling upon the right of the relator to review the work of the board. The assessors may have omitted in this case to count tenants in common that should have been counted. They may have failed to ascertain accurately the number of resident owners, but they are charged with no fraud or intentional violation of their duty; and, in the absence of fraud or bad faith, their certificate must be regarded, as the statute provides, conclusive as to the facts. *Matter of Kiernan*, 62 N. Y. 457.

The learned Appellate Division appears to have entertained the view that, in counting up the number of the resident owners, they intentionally omitted some of the tenants in common, and only counted one person for each lot, thereby adopting a wrong basis of counting. We do not think the petition sustains the contention in this particular. We have quoted the wording upon this point. It is to the effect that they did not count

but one such resident owner when there were "two or more persons as owners"; but there is no allegation that there were two or more resident owners that they intentionally omitted to count if they knew of them. There may be 2 or more, or 20 or more tenants in common. They may be owners of an undivided interest, and may not be resident owners. We, therefore, conclude that the contention of the Appellate Division is not borne out by the petition under review.

The orders of the Appellate Division and the Special Term should be reversed, and the writ of certiorari quashed, with costs in both courts.

CULLEN, C. J., and EDWARD T. BARTLETT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur.

Orders reversed, etc.

On Motion for Rehearing.

PER CURIAM. Motion for reargument denied, without costs.

(193 N. Y. 409)

#### HAWKINS v. HAWKINS.

(Court of Appeals of New York. Nov. 17, 1908.)

##### 1. HUSBAND AND WIFE (§ 288\*)—ACTION FOR SEPARATION — RIGHT OF GUILTY WIFE TO SUPPORT.

Code Civ. Proc. § 1762, subds. 3, 4, provides that a wife may have judgment of separation and for support where abandoned by the husband, and where he refuses to provide for her. Section 1765 provides that in such an action defendant may set up in justification plaintiff's misconduct. *Held*, that where a wife sues for separation and support, and the husband proves that his refusal to live with and support her was the result of his discovery of her adultery, he is entitled to judgment, notwithstanding the husband had himself been guilty of adultery, and had been refused an absolute divorce because of the parties' mutual guilt.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1077; Dec. Dig. § 288.\*]

##### 2. HUSBAND AND WIFE (§ 288\*)—DUTY OF HUSBAND TO SUPPORT WIFE—ADULTERY OF WIFE—FAILURE TO OBTAIN DIVORCE.

That the court had previously refused to dissolve the marriage because of the parties' mutual adultery did not continue in full force the husband's obligation to support the wife notwithstanding her guilt, so that he could not urge her misconduct as a defense in her action for separation as expressly provided by Code Civ. Proc. § 1765, especially where it was not claimed that his adultery conducted to or mitigated hers.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1077; Dec. Dig. § 288.\*]

##### 3. HUSBAND AND WIFE (§ 288\*) — MUTUAL LIABILITIES—SUPPORT OF WIFE.

The fact that the wife's right of dower and of administration on her husband's estate continued notwithstanding her adultery so long as the marriage was not annulled, and that it would not be in harmony with the continuance of those rights that she should lose her right to support would not preclude the husband from

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

urging her adultery as a defense to her action for separation and support, as expressly provided by Code Civ. Proc. § 1765.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1077; Dec. Dig. § 288.\*]

**4. HUSBAND AND WIFE (§ 288\*)—CONJUGAL RIGHTS OF WIFE—EFFECT OF WIFE'S ADULTERY—RULE OF ECCLESIASTICAL LAW.**

Under the ecclesiastical law of England, the loss to a wife of the right of support by her husband because of her adultery was not prevented by a similar fault of her husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1077; Dec. Dig. § 288.\*]

**5. STATUTES (§ 214\*)—CONSTRUCTION—PRACTICE OF OTHER JURISDICTIONS.**

Though the ecclesiastical law of England is no part of the common law adopted in New York, the courts of the state in determining the effect of a state of facts arising under a statute relating to actions for separation may consider the effect given to such facts by the ecclesiastical court, which had jurisdiction of the same subject.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 214.\*]

Cullen, C. J., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Separation action by Jennie F. Hawkins against Daniel A. Hawkins. From a judgment of the Appellate Division (121 App. Div. 896, 105 N. Y. Supp. 889) affirming a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

John McCormick, for appellant. Andrew J. Shipman, for respondent.

HISCOCK, J. This action is one brought by the respondent to procure a judgment of separation from her husband, the appellant, and to compel suitable provision for her support and maintenance. Its determination will be governed by the application to rather unusual facts of sections 1762 and 1765 of the Code of Civil Procedure.

Section 1762 provides that a wife may have judgment of separation and for support for either of the following causes: " \* \* \*

(3) The abandonment of the plaintiff by the defendant. (4) \* \* \* the neglect or refusal of the defendant to provide for her." The respondent alleged and has proved that at a certain date the appellant left her, and since then has refused either to live with her or support her, and on these facts she would be entitled to the judgment which was awarded to her in the court below. But section 1765 provides that in such an action as this "the defendant may set up, in justification, the misconduct of the plaintiff; and that if that defense is established to the satisfaction of the court, the defendant is entitled to judgment." Under this section the appellant alleged, and has established beyond controversy, that his refusal to live with and support the respondent immediately followed and was the result of his discovery that she had been guilty of adultery. On

these facts, added to the others above stated, appellant unquestionably would be entitled to judgment dismissing the action, for it is settled that the adultery of the wife relieved the husband from the obligation to support her, and such misconduct is a defense to an action of this character. *Doe v. Roe*, 23 Hun, 19; *Deisler v. Deisler*, 59 App. Div. 207, 69 N. Y. Supp. 326; *People ex rel. Keller v. Shradly*, 40 App. Div. 460, 58 N. Y. Supp. 143. See, also, *Nelson on Divorce and Separation*, § 429; *Decker v. Decker*, 193 Ill. 285, 294, 61 N. E. 1108, 55 L. R. A. 697, 86 Am. St. Rep. 325.

But still further facts are established which it is claimed materially qualify the force of those last recited. It appears that the appellant was guilty of adultery before the respondent, although not known to the latter at the time of her offense, and that in an action brought by the former for absolute divorce the latter made a counterclaim based upon the appellant's wrongdoing, and the court on familiar principles refused to grant relief to either party. Under these circumstances, the respondent argues in support of her judgment that the appellant's misconduct somehow prevents him from successfully urging hers under section 1765 as a defense to this action, and especially that, inasmuch as the court refused to dissolve the marriage obligation on account of the said mutual acts of adultery, said obligation continues in full force notwithstanding those acts, and as an incident thereto the appellant can be compelled to support his wife. I am unable to agree with these contentions. In the first place, and disregarding for the moment the judgment in the divorce action, it is to be kept in mind that the respondent is not basing her action on general principles of law under which the court might be urged somehow to set off and balance against each other the mutual misdeeds of the parties, and so leave the respondent with all her original marital rights and claims unimpaired. On the other hand, her right of action is based on and limited by the absolute statutory provisions which have been quoted. One of these in effect provides that, even though she establishes the usual elements of an action for separation and support, she will not be allowed such affirmative relief based on the marriage contract which she herself has disregarded. It does not favor an assertion of marital obligations which is accompanied or preceded by their violation. This being so, and it fully appearing that respondent had been guilty of misconduct which is made a bar under the statute to her recovery, I fail to see how it justifies or excuses her misconduct or changes the nature of her act, or avoids the consequences thereof, or contributes an element of support to her cause of action, to prove that her husband also at some time has been guilty of a similar vio-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lation. And especially is this so where, as here, there is no claim that the latter violation, even as a matter of moral influence, conduced to or mitigated the evil of the former. It is also to be borne in mind that this is not a case where the husband has been continuing and living in profligacy while he cast his wife off for a single offense. Of course, if the appellant were seeking affirmative relief, his conduct would be important and subject to the strictest scrutiny, and no other rule should be applied to him than is being urged against the respondent. But he is not. The respondent alone is seeking legal relief and in my opinion the only material question relates to her act. Neither do I perceive how the force of this reasoning and conclusion if otherwise correct is affected or impaired by the decree in the divorce action. On the other hand, the logic of that judgment which refused relief with respect to the marriage obligation to the husband who had been guilty of violating it seems to aid the appellant rather than otherwise. Certainly if the respondent is permitted to maintain this action notwithstanding her adultery, she will be enabled to secure part of the very relief which was denied to her in the former action because of such adultery.

There was nothing in that decree which technically bars the appellant from urging the respondent's adultery as a defense in the present action. It refused to give him affirmative relief on account thereof in the former action because of his own similar fault, but that is not inconsistent with his right to urge the same act under the express provisions of the statute as a defense to the wife's request for affirmative relief in this action.

But it is urged that, the court having refused to dissolve the marriage tie, all the obligations of that contract, including that of support of the wife by the husband, must remain in full force. And as sustaining this view reference is made to the expression in *Wood v. Wood*, 2 Paige Ch. 108, that, "if both parties (to a divorce action) are guilty, neither has any claim to relief; and they are in that case suitable and proper companions for each other," and to the remark in *Beeby v. Beeby* (1 Hag. Eccl. 790): "It is not unfit if he \* \* \* who has violated his marriage vow should be barred of his remedy. The parties may live together and find sources of mutual forgiveness in the humiliation of mutual guilt." I do not attribute to these opinions and to the decree any such significance or effect as is claimed for them, but think that the only meaning legitimately to be deduced from them is that the court will not give affirmative relief to mutually guilty husband and wife by dissolving the marriage contract, but will leave them where it finds them subject to whatever burdens of that relation still remain, and the conclusion is not justified that such a decree amounts to an adjudication that all of the original obliga-

tions remain unimpaired. Independent of any statutory provision, it might be questioned whether a wife who has been guilty of adultery may successfully insist that her husband shall live with or support her, even though the court has refused to dissolve the marriage relation because of his similar fault. Certainly the decree denying dissolution does not preserve or confer such right in view of the express provisions of section 1765 that the misconduct of the wife shall be a bar to her right to support, for, of course, the Legislature has the undoubted right to annex this consequence to her misconduct, and necessarily the provision making her misconduct a bar to an action for support must apply to a case where there has been no decree dissolving the marriage on account of adultery. If there had been a decree of divorce, there would be no occasion for the exemption of the husband from liability for support as a result of such misconduct.

Neither, in view of the statutory provision to which reference has been made, does it avail as an argument to say that the wife's right of dower and of administration on her husband's estate and possibly various other rights continue notwithstanding her adultery, so long as the marriage has been allowed to remain undissolved, and that it is not in harmony with the continuance of these rights that she should lose her right to support. This is a matter of statutory policy. It cannot be doubted that the Legislature would have the power to cancel her right of dower and administration because of mere adultery without a decree of divorce founded thereon, and, if it had so enacted, I can hardly believe that she would have avoided the results of her misconduct by proving that at some time her husband had committed a similar sin. It has been expressly held otherwise in *England. Bostock v. Smith*, 34 Beav. 57.

Authorities are not wanting to sustain the proposition that, independent of any statutory provision such as we have, the destructive consequences to her conjugal rights of the wife's adultery are not prevented or compensated and avoided by similar fault of her husband. *Govier v. Hancock*, 6 Durnford & East, 603, was an action to recover for necessaries furnished to a wife living apart from her husband. It appeared, however, that she had committed adultery after leaving him, and it was held that this exonerated him from liability for her support, although he had first committed a similar act and had otherwise treated her cruelly. In *Bostock v. Smith*, 34 Beav. 57, it was held that the wife who left her husband and committed adultery came within the statute forfeiting her dower for such offense, even though she left her husband in consequence of his gross misconduct, "which was such as would justify, if anything could justify her act. But nothing could justify it." In *Stimpson v. Wood & Son*, L. J. (37 Q. B.)

485, it was in effect held that a wife living in adultery lost all right of support, although her husband was doing the same thing. In *Culley v. Charman*, L. R. (7 Q. B. Div.) 89, it was said by Hawkins, J.: "I do not think there is any need to cite authorities to show that a husband is not bound at common law to maintain a wife who has been guilty of adultery and who is living apart from him." In *Hope v. Hope*, 1 S. & T. 94, it appeared that each party had sought divorce for the adultery of the other, and had been denied relief on account of their mutual misdeeds; that thereafter the wife applied for a decree of restitution of marital rights, which in its important aspects was like the present case, an action to compel support. It was urged "that cohabitation is a duty resulting from marriage, and that neither party can withdraw from cohabitation without the judgment of a court, which in this case the husband not only had not obtained, but having asked the proper tribunal to release him from that duty his prayer was rejected; and, secondly, that the guilt of each being the same their mutual delinquencies were compensated and both were restored to their original position as innocent parties." The court overruled both contentions. And to the same effect are the cases of *Drummond v. Drummond*, 2 Swabey & T. 274, and *Otway v. Otway*, L. R. (13 P. D.) 141. It may be said that these later English decisions are based on the principles of the ecclesiastical law, which have not been adopted in this country, and therefore are not applicable. There may be controversy as to how far the ecclesiastical law has been adopted, and it may be conceded for argument that these decisions would not be useful in interpreting the meaning of our statutes. When, however, the words of a statute being plain, certain facts have been developed under it, we have a right to consider what effect another court exercising jurisdiction over the same general subject and governed by principles not unlike those embodied in our statute has given to similar facts.

As was said by Judge Folger in *Brinkley v. Brinkley*, 50 N. Y. 185, 190, 10 Am. Rep. 460: " \* \* \* Though it has been held that the ecclesiastical law of England is not a part of the common law of that country, and is no part of the common law therefore adopted in this state, \* \* \* yet, when by our statutes any part of the jurisdiction exercised by these courts was given to our courts, the settled principles and practice of those courts became a precedent and a guide for our courts." The case of *People ex rel. Keller v. Shrady*, 40 App. Div. 480, 58 N. Y. Supp. 143, has not been overlooked, wherein it is written by Judge Barrett that in criminal proceedings against the husband for abandoning his wife it would not be a defense to show that the wife had been

guilty of adultery, it also appearing that the defendant had been first guilty of similar fault which would prevent him from procuring a dissolution of the marriage. It is, however, to be noted that what was thus said was not necessary to the decision of the case; and, secondly, that it was expressly directed to the proposition that under such circumstances the husband would be bound not to permit his wife to become a "public charge." Independent of the Code provision and as a matter of public policy, there very well might be a distinction between proceedings by the guilty party for her individual benefit and those instituted in behalf of the people to prevent the burden of a public charge.

The judgments of the courts below should be reversed and a new trial granted.

CULLEN, C. J. I dissent from the decision about to be made. The statutory provisions now found in article 8, c. 15, Code Civ. Proc., do not bar plaintiff's right to relief. Both plaintiff and defendant have been guilty of adultery, as was determined in an action previously brought by the defendant against the plaintiff for an absolute divorce. After the rendition of a decree therein, the defendant refused to live with the plaintiff or in any manner provide for her support. By subdivision 4 of section 1762 of the Code, the wife is entitled to a decree of separation and maintenance where the husband neglects or refuses to provide for her. Her prima facie right to relief is therefore conceded. The sole question is as to the sufficiency of the husband's defense. By section 1765, "the defendant may set up, in justification, the misconduct of the plaintiff; and, if that defense is established to the satisfaction of the court, the defendant is entitled to judgment." What is the misconduct intended by this section? Plainly only such misconduct as justifies the action or conduct of the husband in refusing to support her. It is urged that unquestionably the plaintiff's adultery was misconduct on her part. That is true, but the question is: Was it misconduct towards her husband, who himself had been guilty of a similar offense? Doubtless every dictate of honor, morality, and self-respect should keep a wife pure even when her husband has done wrong; but, if her only obligation to chastity rested on loyalty due to an adulterous husband, the plaintiff would not be subject to censure from the most strict of moralists. If the wife should commit an assault and battery on a third party or larceny and be sent to prison for either offense, it would undoubtedly be misconduct on her part, but would any one pretend that by reason thereof the husband was for ever afterwards relieved from the obligation of supporting her? In some states imprisonment under sentence for a felony is a ground for divorce; not so with us.

Therefore the simple question presented in this case is whether the defendant remains under any obligation to support the wife after the commission of adultery; he himself having been guilty of the same offense. It must be also borne in mind that there is here no claim that the plaintiff abandoned her husband's home and lived in open adultery, or that she is continuing adulterous intercourse. The evidence established a single act of adultery committed by the defendant in September, 1904, and one committed by the plaintiff in November of the same year. By reason of the mutual guilt a divorce was denied to either party.

In determining this question, we must not be misled by the false analogy of ordinary contracts, and the argument that where both parties have violated a contract neither can claim any right thereunder. Though based on contract, as distinguished from religious sacrament, marriage is not a contract in the accurate sense of that term. In *Wade v. Kalbfleisch*, 58 N. Y. 282, 17 Am. Rep. 250, Chief Judge Church said: "It cannot be dissolved by the parties when consummated, nor released with or without consideration. The relation is always regulated by government. It is more than a contract. It requires certain acts of the parties to constitute marriage, independent of and beyond the contract. It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the community." The learned judge quotes with approval the declaration in *Ditson v. Ditson*, 4 R. I. 87: "In strictness, though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract which they can make." Nor are we to be controlled by the decisions in England (which will be referred to hereafter) where both the law and public opinion view in very different lights unchastity in the wife and the same offense in the husband, and where even now under the divorce act of 1857, not only is distinction made between adultery by the wife and that by the husband, but a divorce may be granted to a party guilty of adultery. The question is to be determined in the light of the public policy of this state as declared in its statute law, which imposes the obligation of marital fidelity equally on the husband and wife, which for a violation of that obligation grants the innocent party, whether wife or husband, the same right to relief, and where both parties have been guilty requires them to remain husband and wife. The obligation resting on the husband to support the wife does not spring from contract, but arises from the marital relation and is imposed by law. It is not even within the power of the parties to contract to the contrary. Such was the rule of the common law, and it is expressly enacted in this state by section 21 of the domestic relations law:

"Husband and wife cannot contract to alter or dissolve the marriage, or to relieve the husband from his liability to support his wife." Laws 1896, p. 215, c. 272. When, therefore, the law says that man and wife who have each been guilty of adultery shall remain man and wife, it enacts that the marriage obligation shall continue between them in its full integrity. It is conceded that in all other respects except that of support, the rights and obligations of the parties remain unaffected. On the death of the defendant the plaintiff will be entitled to her dower right in his real estate, and, if he dies intestate, to a share of his personalty. The defendant has a similar right of inheritance in case of the plaintiff's death intestate. If either one should be killed by the wrongful or negligent act of a third party, the survivor will be entitled to sue for damages for the death. In case of intestacy, the survivor will be entitled to take out letters of administration. Neither can adopt a child without the consent of the other. It is unnecessary to extend this enumeration of the respective rights of either party in the person and estate of the other. It is urged, however, in answer to this argument, that these are matters of statutory policy, and that the Legislature could abrogate all these rights. This is undoubtedly true, but it is equally a matter of statutory policy that the adulterous husband must retain as his wife an adulterous woman, and as for the suggestion that the Legislature could abrogate these rights, were it not for the provision in the state Constitution forbidding divorce except by judicial decree, the Legislature might abrogate the marriage itself, for it is not a contract within the protection of the federal Constitution. *White v. White*, 5 Barb. 480.

The English ecclesiastical cases, which take a contrary view of the obligation of the adulterous husband to support an adulterous wife, are of recent date, long subsequent to the Revolution, and therefore not evidence of the ecclesiastical law of that country as it existed at the time of our separation. *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 576, 19 Am. Rep. 211. The earliest of these is *Hope v. Hope*, 1 Swabey & Tristram, 94, decided in 1858. There it was held that an adulterous wife cannot obtain a decree for the restoration of conjugal rights against an adulterous husband. The learned judge who decided the case states that the question had never been determined in the courts of that country, and admits that the canon law, which, though not adopted in its entirety, is concededly the foundation of the English ecclesiastical law, was directly contrary to the conclusion which he reached. He further admitted that there were dicta of that eminent ecclesiastical judge, Lord Stowell, evincing a different view. In *Proctor v. Proctor*, 2 Hagg. Con. (Eng. Eccl.) 292, where a separation was refused by reason of mutual adultery, Lord Stowell said: "it (the

court) therefore presumes, when it withholds its decree of separation, that the parties return to cohabitation. All matters return to their former course, but with increased vigor. The husband and wife live again on their former footing, and there is no anticipation of separate debts, or of the probability of a spurious offspring. That such is the doctrine of the canon law is most certain. The authorities are numerous and precise to that effect." The Hope Case proceeded on two decisions of the common-law courts. The first was that of *Govier v. Hancock*, 6 Term. R. 803; temp. 1790. The action was for board and lodging furnished to defendant's wife. The report thus states the case: "The defendant, having committed adultery with a woman of the name of Bazely whom he had brought home, treated his wife with great cruelty, and finally turned her out of doors. Then the wife committed adultery, after which she offered to return home, but her husband would not receive her; and this action was brought for her board and lodging subsequent to that time." It was held that the husband was not liable. In *Rex v. Flintan*, 1 Barn. & Adol. 227, the defendant was convicted as a disorderly person in failing to maintain his wife by reason of which she became a charge on the parish. Both husband and wife had committed adultery. The conviction was reversed, the court holding that, as the defendant was not civilly liable for the supply of necessaries to his wife, he could not be held a disorderly person for not supplying them. The Irish case of *Seaver v. Seaver*, 2 Swabey & Tristram, 665, was decided prior to *Hope v. Hope*, but the decision is not noticed in the later case. The *Seaver Case* was decided both in the Consistorial Court of Dublin and on appeal exactly the reverse of the *Hope Case* to which it was entirely similar in its facts. The court there said: "The sentence is not merely that the parties shall live together, but its effect in substance is that they shall fulfill all their matrimonial duties, of which fidelity to the nuptial bed is not the least important. I know that, according to the modern code of morals and feelings, it is hard for the husband to comply with such a sentence. According to this code a husband incurs no disgrace and need feel no shame for his own adultery, while his honor is ruined totally by the adultery of his wife. The disgrace thus caused by another's guilt is capable of only one possible aggravation, viz., if he forgives her. This code cannot be recognized in a Court Christian; nor will a man against whom adultery is charged and proved be permitted to allege any reluctance to associate with an adulteress because she happens to be his wife."

While the law in England as to judicial separations remains unchanged by the matrimonial causes act of 1857, which first authorized the courts to decree a dissolution of the marriage tie, the practice in suits for

absolute divorce is so entirely foreign to the law and policy of this state as to render the decisions under that statute of no value here. There a husband may obtain a divorce from his wife for her adultery. A wife cannot obtain a divorce for the adultery of her husband unless it is accompanied by cruelty, abandonment, or the adultery is incestuous. The adultery of the plaintiff is not a bar to a divorce for the adultery of the other party. Under the statute the courts may, but are not bound, to deny relief for that reason. Alimony seems to be in the discretion of the courts and has been granted to a wife who has been divorced for adultery. A full collection of these cases can be found in the work of Gwynne Hall on Divorce and Matrimonial Causes.

My learned associate, who writes for the majority of the court, says: "Independent of any statutory provision, it might be questioned whether a wife who has been guilty of adultery may successfully insist that her husband shall live with and support her even though the court has refused to dissolve the marriage relation because of his similar fault." From this intimation I dissent toto coelo. Its effect would be to set up one standard of morality for the woman, another for the man, a distinction which, whatever may be the view taken of it by society, is expressly repudiated by the statute law of this state by which adultery on the part of husband or wife is equally made a crime. I can only repeat the forcible language of the court in the *Seaver Case*, supra: "Nor will a man against whom adultery is charged and proved be permitted to allege any reluctance to associate with an adulteress because she happens to be his wife." I do not say that the commission of a single act of adultery on the part of the husband gives the wife unlimited license to commit adultery at all times thereafter and still compel her husband to support her, but this is equally applicable to the wife, and a single act of adultery on her part, possibly committed at a time long past, and sincerely repented of, should not enable the husband to cast her off without support, though he may be living a life of continuous and gross profligacy. The circumstances under which an offense is committed, while they may not affect the penalty which the law imposes on its commission, may form a controlling factor in determining the moral delinquency attributable to the act. The effect of the decision about to be made is to put the law of this state on the same basis as that declared by the King's Bench in the *Govier Case*, supra; that is to say, that the adultery of the wife bars her right to support no matter how flagrant the misconduct of the husband may have been in the same direction. In the case before us the parties seem to have equally sinned. The plaintiff's right to relief, unless barred by her misconduct, was conceded. The burden was therefore upon the defend-

ant to show that his wife's misconduct was of such a nature or so far exceeded his own in moral obliquity as to justify him in turning her off. No proof of the kind appears in the record. No finding to that effect has been made or requested. We have here the bare facts that the plaintiff committed an act of adultery and that the defendant also committed an act of adultery. These facts standing alone, I say, do not justify the defendant's refusal to support his wife.

The judgment appealed from should be affirmed, with costs.

GRAY, HAIGHT, EDWARD T. BARTLETT, and WERNER, JJ., concur with HISCOCK, J. OULLEN, O. J., reads dissenting opinion. WILLARD BARTLETT, J., not sitting.

Judgment reversed, etc.

(193 N. Y. 441)

PEOPLE ex rel. COLLINS v. AHEARN.

(Court of Appeals of New York. Nov. 24, 1908.)

**1. MUNICIPAL CORPORATIONS (§ 203\*)—DEPARTMENTS OF CITY GOVERNMENT—POWER TO CREATE BUREAU—REMOVAL OF HEAD OF BUREAU—EFFECT OF CIVIL SERVICE REGULATIONS.**

New York Charter (Laws 1897, p. 1, c. 878), creating a number of departments, among which was the department of highways, by section 458 (page 160) provides that the commissioner at the head of each department "may organize such bureaus as he shall from time to time deem necessary." Greater New York Charter (Laws 1901, p. 166, c. 466) § 388, vested in the city of New York all the powers and duties conferred on the commissioner of highways of the city of New York by the charter of 1897, and devolved upon the president of the borough as "matter of administration" certain powers and duties to be executed pursuant to the provisions of the act. Laws 1901, p. 636, c. 466, § 1543, provides that no head of a bureau, holding a position in the classified municipal civil service subject to competitive examination, shall be removed, unless he has been allowed an opportunity of making an explanation. *Held*, that the charter of 1901 conferred on the president of the borough of Manhattan the same powers possessed by the commissioner of highways under the charter of 1897; that the organization of bureaus is "matter of administration" within the meaning of the charter of 1901, and under such charter the president of the borough of Manhattan had power to organize a bureau of highways, and to appoint a head therefor; and that one appointed as head of such bureau was not subject to removal, except under the restrictions of section 1543.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 203.\*]

**2. CONSTITUTIONAL LAW (§ 63\*)—DISTRIBUTION OF GOVERNMENTAL POWERS—DELEGATION OF LEGISLATIVE POWER.**

Such power to organize bureaus being administrative, and not legislative, it was competent for the Legislature to confer the same on the president of such borough.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 108, 109; Dec. Dig. § 63.\*]

**3. MANDAMUS (§ 160\*)—MUNICIPAL CIVIL SERVICE RULES—REINSTATEMENT OF APPOINTEES—PLEADING.**

In mandamus by the head of a bureau in the city of New York against the president of the borough appointing him to secure reinstatement after a removal in violation of Greater New York Charter (Laws 1901, p. 636, c. 466) § 1543, allegations in the alternative writ that respondent, having on June 1, 1902, appointed relator as head of such bureau, on June 1, 1904, assumed to appoint another person to such position in place of relator, and that relator was ejected from such position, and that such removal was made without allowing relator an opportunity of making an explanation, as he was entitled to do under the provisions of the municipal charter, was sufficient to show relator's appointment and his removal in violation of such charter provision.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 828, 827; Dec. Dig. § 160.\*]

Chase, J., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Mandamus by the People of the State of New York, on the relation of James G. Collins, against J. F. Ahearn, as President of the Borough of Manhattan, City of New York, to compel the reinstatement of relator to the position of head of the bureau of highways. From an order of the Appellate Division (124 App. Div. 939, 109 N. Y. Supp. 1141), affirming a judgment of the Trial Term sustaining a demurrer to the alternative writ and dismissing the writ, relator appeals. Reversed and remanded.

Charles F. Brown, for appellant. Francis K. Pendleton, Corp. Counsel (Theodore Conolly of counsel), for respondent.

WILLARD BARTLETT, J. The relator in this proceeding seeks to be reinstated in the position of head of the bureau of highways in the borough of Manhattan, on the ground that he was unlawfully removed therefrom by the respondent as president of the borough, without having been allowed an opportunity of making an explanation, as prescribed by section 1543, Greater New York Charter (Laws 1901, p. 636, c. 466). He has been unsuccessful thus far because the courts below have been of the opinion that there was not, and is not, any such lawfully organized bureau as that of which he claims to have been appointed the head, and from which he was removed.

In the alternative writ of mandamus it is alleged that, on or about the 1st day of June, 1902, Jacob A. Cantor, then president of the borough of Manhattan, in the city of New York, by virtue of his office and the powers and authority conferred upon him by law, and by certain specified sections of the charter of the city, duly and lawfully created the bureau of highways in the borough of Manhattan, and duly and lawfully designated and appointed James G. Collins, the relator herein, to be the head of said bureau. The re-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lator's duties as head of such bureau related, among other things, "to superintending, regulating, grading, regrading, curbing, flagging and guttering of streets, the laying of crosswalks, the construction and repair of public roads, paving, repaving and repairing of streets, and the relaying of all pavements removed for any cause." The alternative writ further alleges, in substance, that on or about the 1st day of June, 1904, the respondent, John F. Ahearn, as president of the borough of Manhattan, assumed to appoint one George Scannel to the position of head of the bureau of highways in place of the relator; that the relator was ejected from the position, and not permitted any longer to perform the duties thereof, and that the removal of the relator thus attempted to be effected was made without ever allowing him an opportunity of making an explanation, as he was entitled to do under the provisions of the charter of the city of New York.

In the case of *People ex rel. Michales v. Ahearn*, 111 App. Div. 741, 98 N. Y. Supp. 492, the Appellate Division of the Supreme Court in the First Department, in March, 1903, decided that the president of a borough, under the Greater New York charter, as amended in 1901, had no power to create a bureau of sewers; and that whatever power had previously existed in the commissioner of sewers under the charter of 1897 (Laws 1897, p. 1, c. 378) to create separate bureaus could now only be exercised by the board of aldermen as the legislative body of the city. The doctrine of that decision was just as applicable to the establishment of a bureau of highways by a borough president as it was to the establishment of a bureau of sewers; and therefore the Special Term and the Appellate Division in the present case sustained the respondent's demurrer to the alternative writ of mandamus on the ground that the attempt of the former borough president, Mr. Cantor, to organize a bureau of highways in the borough of Manhattan was ineffectual. We are of opinion that this is an erroneous view of the powers of the borough president under the existing charter. By chapter 378, subc. 10, of the charter of 1897 provision was made for the establishment of a number of different departments in the city of New York, among which was the department of highways; and by section 458 of that charter it was provided that the commissioner at the head of each of said departments "may organize such bureaus as he shall from time to time deem necessary to the proper discharge of the duties of his department." This provision of law remained in force until the 1st day of January, 1902, when the revised charter of 1901 took effect. Section 388 of the revised charter provided, among other things, as follows: "All powers and duties which on the 1st day of January, 1902, are conferred upon the commissioner of highways of the city of New York \* \* \* in any way relating to the regulating, grading, regrading, curbing, flag-

ging, and guttering of streets, the laying of crosswalks, the constructing and repairment of public roads, paving, repaving and repairing of all streets, and the relaying of all pavements removed for any cause, the filling of sunken lots, and all matters directly related thereto, are hereby vested in the city of New York, as constituted by this act, and as matter of administration devolved upon the president of the borough within which is situated the territory to which or to the official representatives of which said powers and duties heretofore appertained, and by him are to be executed pursuant to the provisions, directions and limitations of this act." Laws 1901, p. 166, c. 466.

Here we have vested in the city of New York all the powers and duties in respect to the regulation, construction, and repair of highways which had been conferred upon the commissioner of highways under the original charter. The section, however, does not stop with the declaration that such powers and duties are vested in the city. It proceeds to devolve them as matter of administration upon the president of the borough. We think that it was the clear intent of the Legislature, as manifested in this provision, to give to the borough presidents, so far as the regulation, construction, and repair of highways are concerned, precisely the same authority to organize bureaus as was possessed by the commissioner of highways under section 458, of the charter of 1897. That power was unquestionably administrative in its character, and is therefore plainly comprehended within the phrase "as matter of administration." If the Legislature could vest the power to establish bureaus in the commissioner of highways by the charter of 1897, it could vest it in the borough presidents by the revision of 1901. There is no reason to suppose that what was regarded as an administrative power, in the enactment of the first charter was regarded as exclusively a legislative power when the charter came to be revised. The power clearly belongs to that class which "can be delegated to the administrative officers of a municipality for exercise within the municipality," of which many notable examples were given by the chief judge of this court in *Village of Saratoga Springs v. Saratoga Gas, etc., Co.*, 191 N. Y. 123, 83 N. E. 693.

These views lead to the conclusion that President Cantor was authorized by law to organize such a bureau as is described in the alternative writ of mandamus herein. The relator, having been appointed to be the head thereof, was entitled to the protection afforded him by section 1543 of the existing charter of the city of New York, which provides that "no regular clerk or head of a bureau, or person holding a position in the classified municipal civil service subject to competitive examination, shall be removed until he has been allowed an opportunity of making an explanation." The alternative writ contains

sufficient averments as to the appointment of the relator and his removal in violation of this provision. The order of the Appellate Division affirming the final judgment sustaining the demurrer to the writ should therefore be reversed, as well as the final judgment itself, and judgment should be directed overruling the demurrer, with costs to the appellant in all courts, with leave to the respondent to file a return within 20 days upon payment of costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, and HISCOCK, JJ., concur. CHASE, J., dissents.

Order reversed, etc.

(193 N. Y. 439)

VELLEMAN v. ROHRIG et al.

STRASBOURGER v. MONONA CO. et al.  
(Court of Appeals of New York. Nov. 24, 1908.)

APPEAL AND ERROR (§ 84\*)—RIGHT TO APPEAL—MORTGAGE FORECLOSURE—SURPLUS MONIES—DISTRIBUTION.

A proceeding after mortgage foreclosure, to distribute surplus moneys, is a special proceeding; and, even though an order distributing such moneys was entitled in the original action, an appeal lies to the Court of Appeals from an order of the Appellate Division thereon, without permission.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 84.\*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by Joshua Velleman against William F. Rohrig and others to foreclose a mortgage. From an order of the Appellate Division (111 N. Y. Supp. 736), affirming an order distributing surplus moneys arising in such proceedings, the Monona Company and others appeal. Affirmed.

Frank M. Avery, for appellants. Austen G. Fox, for respondent.

PER CURIAM. Upon the argument it was insisted by the learned counsel for the respondent that no appeal could be taken to this court, without permission, from an order for the distribution of surplus moneys arising upon the foreclosure of a mortgage by action. Such appeals have been before us since the adoption of the revised Constitution, and we have uniformly held that we had jurisdiction to decide them, because such orders, even if entitled in the action, are not made therein, but in a special proceeding, commenced after the action is ended, by a final judgment which effects every object that the action was brought to accomplish. *Bushwick Savings Bank v. Traum*, 158 N. Y. 668, 52 N. E. 1123; *Id.*, 26 App. Div. 582, 50 N. Y. Supp. 542. As it seems that we have made no public announcement of the rule, for in

the case cited we affirmed on the opinion below, and in other cases without an opinion, we now announce it for the information of the profession. We think that the action of the courts below in the proceeding now before us was in accordance with law, for the reasons stated in the prevailing opinion of the Appellate Division, and we, therefore, affirm the order appealed from, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

Order affirmed.

(79 Oh. St. 130)

STATE v. ORTH.

(Supreme Court of Ohio. Dec. 1, 1908.)

WITNESSES (§ 52\*)—COMPETENCY—HUSBAND AND WIFE.

The wife is not a competent witness to testify on behalf of the state and against her husband on the trial of the latter upon an indictment charging him with a violation of section 3140-2, Rev. St. 1908.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 133; Dec. Dig. § 52.\*]

(Syllabus by the Court.)

Exceptions from Court of Common Pleas, Hancock County.

Arthur Orth was convicted for neglecting to provide for his minor children. From an order sustaining an objection to the competency of his wife as a witness, the state brings exceptions. Exceptions overruled.

W. L. David, Pros. Atty., for the State. John E. Betts, for defendant in error.

CREW, J. At the September term, 1907, of the court of common pleas of Hancock county, the defendant, Arthur Orth, was indicted by the grand jury of said county under section 3140-2, Rev. St. 1908, for unlawfully neglecting and refusing to provide his minor children, Edna Orth and Harter Orth, aged, respectively, nine and five years, "with necessary and proper home, care, food, and clothing." Thereafter, at the February term, 1908, of said court of common pleas, said indictment duly came on for trial, and the state, to maintain the issue on its part and to sustain and prove the allegations and charge in said indictment, called as a witness for the state Mrs. A. E. Orth, wife of the defendant. Thereupon, after certain preliminary questions had been put to and answered by her, from which it was made to appear that she was then the lawful wife of said Arthur Orth, the defendant's counsel interposed an objection to her as a witness, on the ground that, in this case, she was incompetent to testify as a witness against her husband. Said objection was upon consideration sustained by the court, to which ruling the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

prosecuting attorney excepted. Thereupon the state, without calling any other witness, or offering any evidence in support of the charge made in said indictment, rested its case. Whereupon the court, on motion of counsel for the defendant, directed the jury to return a verdict of not guilty, which was accordingly done. The prosecuting attorney, on behalf of the state, under favor of section 7205, Rev. St. 1908, presents to this court his exception to the ruling and decision of the court of common pleas, in order that he may secure a decision which shall determine the law to govern in similar cases.

Upon the present record, the only question presented to this court for determination is: Was Mrs. Orth, wife of the defendant, competent to testify as a witness for the state and against her husband, on the trial of the latter on the indictment returned against him in this case? It was the well-known and well-settled rule of the common law, adopted and followed in this state, that husband and wife were not competent witnesses for or against each other in any criminal case, except in prosecutions for personal injury committed by the one upon the other, in which latter case it was held that from necessity the injured party was a competent witness. 1 Arch. Crim. Pl. & Pr. 472; Bishop's Crim. Procedure, § 69; Steen v. State, 20 Ohio St. 333; Whipp v. State, 34 Ohio St. 87, 32 Am. Rep. 357. The first statutory modification of this common-law rule in Ohio is found in the act of the General Assembly passed March 28, 1889 (86 Ohio Laws, p. 161). This statute of 1889 was subsequently amended by the enactment of what is now section 7284, Rev. St. 1908, which section provides as follows: "No person shall be disqualified as a witness in any criminal prosecution by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of any crime; and husband and wife shall be competent witnesses to testify in behalf of each other in all criminal prosecutions; but such interest, conviction or relationship may be shown for the purpose of affecting his or her credibility. But husband or wife shall not testify concerning any communication made by one to the other, or act done by either in the presence of each other during coverture, unless the communication was made or act done in the known presence or hearing of a third person competent to be a witness, or unless in case of personal injury by either the husband and wife to the other, or in case of the neglect or cruelty of either to their minor children under ten years of age. And the rule shall be the same if the marital relation has ceased to exist; provided, that the presence or whereabouts of the husband or wife shall not be construed to be an act under this section." While it is perfectly obvious, and would seem to be conceded in this case, that the above statute does not in express terms enact or provide that

husband and wife shall be competent witnesses against each other in the cases therein specified, it is nevertheless insisted by counsel for the state that the provisions of said statute are only consistent with a legislative purpose to so enact, and therefore that such provision should be read into the statute and the statute be construed and given effect accordingly. This we think is clearly a misconception of the proper office and legal effect of the plain provisions of said statute. This section should not be construed or adjudged as requiring or sanctioning such a radical departure from the well-recognized and long-established rule of evidence in criminal cases, unless its language imperatively demands such construction. If this statute contained only the provisions that: "No person shall be disqualified as a witness in any criminal prosecution by reason of his interest in the event of the same as a party or otherwise, or by reason of his conviction of any crime; and husband and wife shall be competent witnesses to testify in behalf of each other in all criminal prosecutions; but such interest, conviction or relationship may be shown for the purpose of affecting his or her credibility. But husband and wife shall not testify concerning any communication made by one to the other, or act done by either in the presence of each other during coverture"—none would claim that such statute was effectual to remove the disqualification and establish the right of husband and wife to testify for the state and against each other in criminal cases. Nor do we think that, with any better reason or right, it can be said or claimed that the mere addition to such statute of certain provisions, the sole office of which is to modify the rule of evidence as to confidential or privileged communications in certain enumerated cases, shall have the effect to so change the rule of the common law, which is grounded on public policy, as to make husband and wife competent witnesses to testify generally against each other in such cases. The only proper effect of the statute (section 7284), if interpreted to mean what is said—and its language being plain, only such interpretation is permissible—is: (1) The removal thereby of the interest disqualification, and of disability by reason of the conviction of a crime; (2) to make husband and wife competent witnesses on behalf of each other in all criminal prosecutions; (3) to enact and provide that the rule of evidence as to confidential or privileged communications shall not apply, in case of personal injury by either the husband or wife to the other, or in case of the neglect or cruelty of either to their minor children under ten years of age, but that in such cases, husband or wife, testifying on behalf of each other, shall be competent to testify to communications made by one to the other, or acts done by either in the presence of the other, although no third person was present. That

the Legislature did not intend by the adoption of this statute to abrogate, or modify, the firmly established general rule of the common law that husband and wife are incompetent to be witnesses against each other in criminal cases, is at once evident when we consider that, with the whole subject before it for consideration, it enacted, by positive provision and in express terms, that husband and wife shall be competent witnesses on behalf of each other, but declined to thus enact that they should be competent witnesses against each other. If it had been the purpose and design of the Legislature to so relax or change this rule of the common law as to permit husband and wife to testify against each other in the cases in said statute specified, it would doubtless have so declared in express and appropriate terms, and it would not have left this purpose to be ascertained or discovered by interpretation, or supplied by mere conjecture. With the policy of the rule that makes the wife incompetent as a witness against her husband in the present case we are not now concerned. If the law should be changed in this behalf, so as to make husband and wife competent witnesses against each other in such cases, the duty of changing it devolves upon the Legislature, not upon this court.

Exceptions overruled.

SHAUCK, SUMMERS, SPEAR, and DAVIS, JJ., concur.

(79 Oh. St. 39)

**UNION SAVINGS BANK & TRUST CO. v. WESTERN UNION TELEGRAPH CO.**

(Supreme Court of Ohio. Dec. 1, 1908.)

**1. ABATEMENT AND REVIVAL (§ 55\*)—DEATH OF PLAINTIFF—ACTION FOR TRESPASS.**

In a suit to recover damages for injuries to real estate by a trespass, the cause of action survives the death of the plaintiff; and the action may be revived in the name of the executor or administrator of the deceased plaintiff.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 271; Dec. Dig. § 55.\*]

**2. EXECUTORS AND ADMINISTRATORS (§ 29\*)—APPOINTMENT—COLLATERAL ATTACK.**

An order of the probate court appointing an executor, if made without jurisdiction, is void, and it may be disregarded in any other court; but, if made in the exercise of proper jurisdiction over the subject-matter and estate, although based upon erroneous conclusions of law or fact, it cannot be collaterally attacked.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 178-182; Dec. Dig. § 29.\*]

Price, C. J., dissenting.

(Syllabus by the Court.)

Error to Circuit Court, Clark County.

Action by Adolphus H. Smith against the Western Union Telegraph Company. On the death of plaintiff the Union Savings Bank & Trust Company, executor, was substituted as plaintiff. The order of the court of common pleas reviving the action in the name of

the executor was reversed in the circuit court, and the executor brings error. Judgment affirming judgment of circuit court (85 N. E. 1134) reversed on rehearing, and judgment of court of common pleas affirmed.

Adolphus H. Smith recovered a judgment in the court of common pleas against the defendant in error in the sum of \$2,350, for damages accruing by unlawful and unauthorized cutting of the limbs and branches of an avenue of trees situated on the farm of the plaintiff. This judgment was affirmed by the circuit court, and thereafter was reversed and remanded by the Supreme Court to the court of common pleas for a new trial. Before the retrial of the case the plaintiff died, being a resident of Clark county. His will was duly presented for probate in the probate court of Clark county, and the Union Savings Bank & Trust Company, which was named in his will by the testator as executor, was appointed and qualified as such executor, and has ever since acted as such. The said trust company is a corporation organized under the laws of Ohio. On application therefor the common pleas court made a conditional order of revivor of the action in the name of said trust company, as such executor. Thereafter the defendant, the Western Union Telegraph Company, filed an answer, objecting to such revivor, for the reason that the Union Savings Bank & Trust Company was not the duly appointed and qualified executor of the last will and testament of the decedent, and that it had no authority to act as executor for said decedent, was not the legal representative of the same, and could not prosecute this action for or on behalf of the decedent or his estate. Other objections, against the conditional order of revivor being made absolute, were asserted in said answer, but are not material here. The Union Savings Bank & Trust Company, for reply to the answer of the Western Union Telegraph Company, with other allegations and denials, alleged that it was the duly appointed and qualified executor and trustee under the last will and testament of the decedent. On full hearing the court of common pleas ordered that the case be revived in the name of the Union Savings Bank & Trust Company, as executor as aforesaid. The circuit court reversed the order of the common pleas court, and proceedings thereunder, upon the ground that it erred in ordering the revivor of the action in the name of the Union Savings Bank & Trust Company, as executor as aforesaid. This proceeding is prosecuted to reverse the judgment of the circuit court.

Charles L. Spencer, Edwin S. Houck, Lawrence Maxwell, Andrew Squire, and Drausin Wulsin, for plaintiff in error. Martin & Martin, Robert S. Alcorn, and Edward Barton, for defendant in error.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

DAVIS, J. (after stating the facts as above). This suit is brought to recover damages for a trespass. It did not abate by the death of the plaintiff, and it was proper to revive it in the name of the decedent's personal representative. Sections 4975, 5144, and 5148, Rev. St.; *Dobbs v. Gullidge*, 20 N. C. 197; *McPherson v. Seguline*, 14 N. C. 153; *City of Seymour v. Cummins*, 119 Ind. 148, 21 N. E. 549, 5 L. R. A. 126; *Conklin v. Keokuk*, 73 Iowa, 843, 35 N. W. 444; *Clark's Adm'r v. Railway Co.*, 36 Mo. 202; *Upper Appomattox Co. v. Harding*, 11 Grat. (Va.) 1; *Darling, Adm'r, v. Blackstone Mfg. Co.*, 16 Gray (Mass.) 187. "It is now the general American doctrine that all causes of action arising from torts to property, real or personal—injuries to the estate by which its value diminishes—survive and go to the executor or administrator as assets in his hands." 1 Cyc. 52. It is not disputed that the plaintiff in error was appointed by, and gave bond in, the probate court as executor of the deceased plaintiff, and has ever since acted as such; but it is contended here that such appointment is invalid, for the reason that the plaintiff in error is legally incompetent to be an administrator or executor. This contention may be entertained here, if the order of the probate court may be collaterally attacked in this action by showing that it was made erroneously or without jurisdiction; otherwise it cannot be considered, for it is admitted that no direct attack has been made on the order appointing the executor, in the probate court, or by appeal or error, and it stands unreversed and unmodified to this time. The probate court is a court of record and its jurisdiction in matters testamentary and in the appointment of administrators and guardians has been broadly given by the Constitution of this state (article 4, §§ 7 and 8). The jurisdiction is plenary, and it may well be doubted whether the Legislature, if it chose to do so, could in any respect limit it. But for every purpose of this case we may assume that the Legislature has constitutionally limited the power of appointment to such persons as are "legally competent" (section 5995, Rev. St.), and that the jurisdiction of the probate court is thereby restricted to the appointment of such persons only as are designated by the Legislature to be "legally competent."

When the plaintiff died, being at that time a resident of Clark county, and left a will nominating the plaintiff in error to be executor of the will, and the will was offered for probate in the probate court of that county, it was within the jurisdiction of the court, and it became its duty, to appoint the person named in the will to be executor, if there were no obstacles thereto in the law as it then existed. Upon the assumption which we have made, this necessarily involved an inquiry by the court into the legal competency of the Union Savings

Bank & Trust Company to be an executor. This was 18 months before the decision in *Schumacher v. McCallip et al.*, 69 Ohio St. 500, 69 N. E. 986, and at a time when, as appears from the statement of facts in that case, probate courts, common pleas courts, and circuit courts were entertaining a contrary view of the law. The probate court of Clark county, having jurisdiction of the subject-matter and of the estate, had the right and duty to inquire into the legal competency of the trust company. The presumption is that it did so, and its judgment in that regard, however erroneous it might thereafter be found to be, was not void. It was no more void than the judgments of the several courts which decided the same way in *Schumacher v. McCallip*, *supra*. It could not therefore be ignored in any collateral proceeding, and could not be reviewed or set aside in any other way than in a direct proceeding for that purpose. The defendant, if it had such an interest in the estate as would give it the legal standing to do so, might have attacked the appointment in the probate court, or by appeal or error. It did not do so, and cannot complain if it now finds itself bound by the presumptions which arise upon the record. *Moore v. Robison*, 6 Ohio St. 302; *Shroyer, Gdn., v. Richmond*, 16 Ohio St. 455; *Caujolle v. Ferrie*, 13 Wall. 465, 20 L. Ed. 507.

The counsel for the defendant in error seem to have misunderstood the court in regard to its decision in *Hoffman, Adm'r, v. Fleming*, 66 Ohio St. 143, 64 N. E. 63. The plaintiffs in error in that case insisted that it clearly appeared on the face of the record that the probate court did not have jurisdiction to make the appointment. The court went into the inquiry only far enough to show that this proposition was not correct. Of course, if it had affirmatively and conclusively appeared that the court had acted without jurisdiction, the order making the appointment would have been entirely void, and not merely erroneous, as it may have been in this case.

The former judgment of this court (35 N. E. 1134) is vacated, and the judgment of the circuit court is reversed, and that of the court of common pleas affirmed.

SHAUCK, CREW, SUMMERS, and SPEAR, JJ., concur.

PRICE, C. J. (dissenting). I think it exceedingly unfortunate that the court has not decided the main question in this case, which is, Has the trust company legal capacity to act as executor under the appointment made in the will of Adolphus H. Smith, deceased? This question was fully argued in the briefs on the first submission of the case to this court, and on the recent rehearing it was fully argued orally. Eminent counsel not of record have been heard on the subject,

but the case is now disposed of, not on that question, which is of state-wide importance, but on the other point that the judgment of the circuit court is a collateral attack upon the order made by the probate court appointing the trust company executor. The doctrine of collateral attack occupies a vast field, and from its almost infinite resources enough has been gathered to wean the majority away from the main issue, upon which it now expresses no opinion. I presume that under these circumstances it is not proper to define or express my own opinion about the capacity of the trust company to serve as executor, although that question is paramount, and must soon be met in the courts.

I cannot consent that the judgment of the circuit court is a collateral attack on the order of the probate court. The testator, Smith, died during the pendency of his suit against the telegraph company. The proceedings to revive the action disclosed the name of the trust company as successor to Smith in the action. Who or what is this trust company that asks the place of successor? That question was no doubt answered in the court of common pleas to the effect that it is an Ohio corporation, having a certain

place of residence. Its name, and thereby its character, was made known to that court. In short, the action was revived in the name of a corporation, and that fact stands out on the record of that proceeding. If the trust company was legally incompetent to take the appointment made in the will, it was likewise incompetent in the proceedings to revive the action. If there was no legal authority to act under the appointment made in the will, there was absolutely no authority to revive the action in the name of the disqualified corporation. It being wholly a question of law, and not of fact, and that question of law being apparent of record, the order of the court of common pleas could not give life and authority to the trust company. If the appointment of the corporation as executor was illegal in the first instance, the order of revivor was illegal; and if illegal on its very face, it was void because illegal, and could be so treated in a court of review. The state of the law is a matter always to be reckoned with.

It is not necessary to multiply words, but I believe the doctrine of collateral attack, as applied to this case, has been greatly overwrought.

(171 Ind. 428)

**BARNHARDT v. STATE.** (No. 21,220.)  
(Supreme Court of Indiana. Dec. 16, 1908.)

**1. INTOXICATING LIQUORS (§ 140\*)—OFFENSES—STATUTES—CONSTRUCTION.**

Acts 1907, p. 27, c. 16, § 1 (Burns' Ann. St. 1908, § 8337), making any person who shall sell, keep, run, or operate a place where intoxicating liquors are sold in violation of law, or any person who shall be found in possession of such liquors for such purpose, guilty of a misdemeanor, denounces the offense of keeping, running, or operating a place where intoxicating liquors are sold in violation of law, and the offense of being found in possession of intoxicating liquors for the purpose of selling them in violation of law and the element of place does not enter into the latter offense.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 150; Dec. Dig. § 140.\*]

**2. INDICTMENT AND INFORMATION (§ 71\*)—SUFFICIENCY—CERTAINTY.**

An affidavit charging an offense should state the facts with such certainty as to inform accused of what offense he is to be put on trial.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 193, 194; Dec. Dig. § 71.\*]

**3. INTOXICATING LIQUORS (§ 211\*)—OFFENSES—AFFIDAVIT—SUFFICIENCY.**

An affidavit averring that accused was found unlawfully in possession of intoxicating liquors in a designated building in his possession for the purpose of keeping, running, and operating a place where intoxicating liquors are sold, in violation of law, does not charge accused with keeping, running, or operating a place where intoxicating liquors are sold in violation of Acts 1907, p. 27, c. 16, § 1 (Burns' Ann. St. 1908, § 8337).

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 251; Dec. Dig. § 211.\*]

**4. INTOXICATING LIQUORS (§ 211\*)—OFFENSES—AFFIDAVIT—SUFFICIENCY—"UNLAWFUL."**

An affidavit averring that accused was found "unlawfully" in possession of intoxicating liquors in a building described in his control for the purpose of keeping, running, and operating a place where intoxicating liquors are sold, in violation of the law, does not charge that accused was found in possession of liquor for the purpose of illegal sales, in violation of Acts 1907, p. 27, c. 16, § 1 (Burns' Ann. St. 1908, § 8337); the word "unlawful" not showing that the possession was in violation of law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 251; Dec. Dig. § 211.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7186, 7187.]

Appeal from Circuit Court, Randolph County; J. W. Macy, Judge.

R. Bruce Barnhardt was convicted of violating the liquor laws, and he appeals. Reversed, with direction to quash the affidavit.

Ralph S. Gregory and Walter J. Lotz, for appellant. James Bingham, E. M. White, A. G. Cavins, and Wm. H. Thompson, for the State.

GILLETT, J. Appellant appeals from a judgment of conviction based on an affidavit which charges that "R. Bruce Barnhardt on the 9th day of March, A. D. 1907, at and in the county of Randolph and state of Indiana, was then and there found unlawfully in pos-

session of certain intoxicating liquors, to wit, forty-six pints of beer, together with the vessels containing such liquor, and other furniture, to wit, one cork puller, one glass tumbler, one jug, fifty boxes and barrels, in a certain frame building, situate on the east side of Main street, in the town of Parker, said county and state, on lot number six, block number two, in said town of Parker, and owned by Susan Barnhardt, and under the control and in the possession of the said R. Bruce Barnhardt for the purpose of keeping, running, and operating a place where intoxicating liquors are sold, bartered, and given away in less quantities than five gallons at a time, in violation of the laws of the state of Indiana, he, the said R. Bruce Barnhardt, not then and there having valid license (here follows certain negations not necessary to be here set out), contrary," etc. Error is assigned based on the overruling of a motion to quash. We assume that the effort of the prosecuting attorney was to charge a violation of section 1, Acts 1907, p. 27, c. 16 (section 8337, Burns' Ann. St. 1908). In part that section reads as follows: "And any person who shall keep, run, or operate a place where intoxicating liquors are sold, bartered or given away in violation of the laws of the state, or any person who shall be found in possession of such liquors for such purpose shall be deemed guilty of a misdemeanor," etc. The portion of the section quoted denounces two offenses: (1) Keeping, running, or operating a place where intoxicating liquors are sold, bartered, or given away, in violation of the laws of the state; and (2) being found in possession of intoxicating liquors for the purpose of selling, bartering, or giving them away, in violation of the laws of the state. The element of place does not enter into the latter offense. The latter clause must receive the construction indicated because that is its natural meaning, to say nothing of making the statute adequate to meet the mischiefs which the General Assembly was seeking to obviate. This much in answer to a contention of appellant's counsel, and now to the affidavit.

It is evident, to say the least, that the pleading falls short of stating an offense with such certainty as to inform the defendant of what offense he is to be put on trial. Regadanz v. State (No. 21,259, at this term) 86 N. E. 449. It cannot be said with any certainty whether the purpose of the state was to charge the defendant with an offense under the first clause of the statute or under the second. We are of opinion, however, that the affidavit will not admit of an analysis under which it would charge sufficient facts upon either view. As to the first, it does not appear that there was any keeping, running, or operating of a place where such liquors were sold, bartered, or given away; but a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
86 N.E.—31

possession of a building in which there were intoxicating liquors with a purpose (which, of course, refers to the future) to sell, barter, and give away intoxicating liquors, which might not be those referred to as possessed. As to the second theory, since the word "unlawfully" is not sufficient to show that the possession was in violation of law (*Reganz v. State*, supra), we have only averred the facts that appellant had possession of the liquors in a building which he had possession of for the purpose of keeping, running, and operating a place where intoxicating liquors (not necessarily those described) were to be sold, bartered, and given away in violation of the laws of the state. Neither by the reading of the charge as set out nor by any process of transposition can a criminal charge be evolved out of the affidavit. On either theory there is no charge that there was a keeping, running, or operating of a place where intoxicating liquors were sold, bartered, or given away, or that the particular intoxicating liquors possessed were to be sold, bartered, or given away. In other words, appellant may have been possessed of the place with a purpose of conducting a liquor business therein thereafter, and he might have been possessed of the particular liquors for his own use, and have intended to sell, barter, and give away intoxicating liquors to be thereafter acquired.

Judgment reversed, with a direction to quash the affidavit.

MONKS, J., did not participate.

(171 Ind. 726)

**STATE v. DERRY.** (No. 21,198.)

(Supreme Court of Indiana. Dec. 15, 1908.)  
**GAMING (§ 93\*)—VISITING GAMBLING HOUSE—AFFIDAVIT—SUFFICIENCY.**

An affidavit charging that accused visited a gambling house in a certain county in violation of Public Offense Statute 1905 (Laws 1905, p. 693, c. 169), § 470 (Burns' Ann. St. 1908, § 2371), etc., is sufficient.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 273; Dec. Dig. § 93.\*]

Appeal from Circuit Court, Orange County; Thomas B. Buskirk, Judge.

Thomas G. Derry having been discharged under a charge of visiting a gambling house, the State appeals. Reversed, with instructions.

See, also, 85 N. E. 765.

James Bingham, Geo. W. McMahan, E. M. White, H. M. Dowling, and A. G. Cayins, for the State.

**JORDAN, C. J.** Appellee in this case is charged upon affidavit with having unlawfully visited a gambling house in Orange county, Ind., in violation of section 470 of the public offense statute of 1905. Laws 1905, p. 693, c. 169; section 2371, Burns' Ann.

St. 1908. Upon his motion the affidavit was quashed and judgment rendered, discharging him without day. The state appeals, and assigns that the court erred in sustaining the motion to quash the affidavit. The charging part of the affidavit in this case is identical with the one involved in *State v. Bridgewaters* (No. 21,139, decided at last term) 85 N. E. 715. The same questions in regard to its sufficiency are presented and urged by counsel as were in the latter appeal. Upon the authority of the decision in that case, the affidavit herein in controversy must be held sufficient.

The judgment below is reversed, with instructions to the lower court to overrule the motion to quash.

(171 Ind. 410)

**OAYWOOD v. SUPREME LODGE OF KNIGHTS & LADIES OF HONOR.** (No. 21,269.)

(Supreme Court of Indiana. Dec. 15, 1908.)

**1. INSURANCE (§ 622\*)—CONTRACT—VALIDITY—LIMITING TIME TO BRING ACTION.**

A provision in an insurance policy, limiting the time to bring suit thereon to a period less than that fixed by the statute of limitations, is valid, unless forbidden by statute.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1545; Dec. Dig. § 622.\*]

**2. INSURANCE (§ 815\*)—MUTUAL BENEFIT INSURANCE—PLEADING—INVALIDITY OF PROVISIONS.**

If a mutual benefit certificate holder desired to show herself within Burns' Ann. St. 1908, § 4803 (Burns' Ann. St. 1901, § 4923), invalidating any condition in the policy of a foreign insurance company not to sue for a period of less than three years, she must allege and prove facts sufficient to bring the certificate on which she sues within the statute, as, that the company was a foreign corporation, etc.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 815.\*]

**3. INSURANCE (§ 623\*)—WAIVER—PROVISIONS WAIVED—TIME TO BRING ACTION.**

A provision limiting the time within which an action may be brought on an insurance certificate, being for the company's benefit, may be waived by it.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1551-1553; Dec. Dig. § 623.\*]

**4. INSURANCE (§ 815\*)—MUTUAL BENEFIT INSURANCE—PLEADING—PAYMENT OF ASSESSMENT.**

In an action on a mutual benefit certificate, the defense being nonpayment of an assessment, and plaintiff claiming that the company owed insured money for services which it should have applied to the assessment, the mere allegation that the company owed for the services, and that it was its duty to apply the money to payment of the assessment, was insufficient; it being necessary to allege positively the facts from which such duty arose.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 815.\*]

**5. INSURANCE (§ 754\*)—MUTUAL BENEFIT INSURANCE—ASSESSMENTS—SUFFICIENCY OF PAYMENT.**

That a mutual benefit company owed insured money for services when an assessment was due would not authorize its application to the payment of an assessment on insured's cer-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tificate, or constitute a payment of such assessment, unless the company was directed or requested so to do.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1906; Dec. Dig. § 754.\*]

#### 6. PLEADING (§ 214\*)—DEMURRER—FACTS ADMITTED.

A demurrer admits only such facts as are sufficiently pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 528; Dec. Dig. § 214.\*]

#### 7. INSURANCE (§ 714\*)—MUTUAL BENEFIT INSURANCE—EXECUTION OF CONTRACT.

Where a mutual benefit certificate was not countersigned by the secretary of the subordinate lodge, as required by the certificate, it was not completely executed.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 714.\*]

#### 8. INSURANCE (§ 817\*)—MUTUAL BENEFIT INSURANCE—ACTIONS—EVIDENCE—PRESUMPTIONS—WAIVER.

Even if a provision of a mutual benefit certificate, requiring it to be countersigned by an officer of the subordinate lodge, could be waived by the company, the mere possession thereof by insured without being so countersigned would not raise a presumption that the requirement was waived.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 817.\*]

Appeal from Circuit Court, Hancock County; Edward W. Felt, Judge.

Action by Ellen M. Caywood against the Supreme Lodge of Knights & Ladies of Honor. From a judgment on demurrer for defendant, plaintiff appealed. Transferred by the Appellate Court under the first clause of section 1394, Burns' Ann. St. 1908 (section 1337), Burns' Ann. St. 1901, being section 10, Acts 1901, p. 567, c. 247. Affirmed.

George Young, John M. Bailey, and Wm. Ward Cook, for appellant. W. A. Hough and Taylor, Woods & Willson, for appellee.

**MONKS, J.** This action was brought by appellant on a benefit certificate issued by appellee, a mutual benefit association, to appellant's son, in which she was named as the beneficiary. The amended complaint is in two paragraphs. A demurrer for want of facts was sustained to the complaint, and judgment rendered on demurrer against appellant.

The errors assigned call in question the action of the court in sustaining said demurrer. The benefit certificate sued on contains the following provision: "No suit shall be commenced against the Supreme Lodge after one year from the date of the death of the member." It appears from each paragraph of the complaint that the member to whom the certificate was issued died in the month of September, 1902. This action was commenced June 30, 1906, more than two years after the death of the member named in said certificate. Appellant insists that said provision limiting the time in which suit must be commenced is void, citing *Eagle Insurance Co. v. Lafayette Insurance Co.*, 9

Ind. 443. The case cited followed *French v. Lafayette Insurance Co.*, 5 McLean, 461, Fed. Cas. No. 5,402, which last-named case was disapproved by the Supreme Court of the United States in *Riddlesbarger v. Hartford Insurance Co.* (7 Wall.) 74 U. S. 386, 19 L. Ed. 257. This court, in *Insurance Co. v. Brim*, 111 Ind. 281, 12 N. E. 315, held that such a provision was not void, citing *Riddlesbarger v. Hartford Insurance Co.*, supra, and thereby overruled the holding in *Eagle Insurance Co. v. Lafayette Insurance Co.*, 9 Ind. 443, that such a provision was invalid. It is settled by the great weight of the authorities that a provision in an insurance policy limiting the time in which suit may be brought thereon to a period less than that fixed by statute of limitations is binding, unless it contravenes a statute. *Riddlesbarger v. Hartford Insurance Co.* (7 Wall.) 74 U. S. 386, 19 L. Ed. 257, and cases cited; *Lewis v. Metropolitan Life Insurance Co.*, 180 Mass. 317, 62 N. E. 369, and cases cited; *Sullivan v. Prudential Insurance Co.*, 172 N. Y. 482, 65 N. E. 268; *Fey v. I. O. O. F. Mutual Life Insurance Co.*, 120 Wis. 358, 98 N. W. 206; *Mead v. Phoenix Insurance Co.*, 68 Kan. 432, 75 Pac. 475, 64 L. R. A. 79, 104 Am. St. Rep. 412, and cases cited; *McFarland v. Railway, etc.*, 5 Wyo. 126, 38 Pac. 347, 677, 27 L. R. A. 48, 63 Am. St. Rep. 29; *Insurance Co. v. Brim*, 111 Ind. 281, 12 N. E. 315; 29 Cyc. 216; 25 Cyc. 910; 19 Am. & Eng. Enc. of Law (2d Ed.) 103, 104; *Cooley's Briefs on Law of Insurance*, 3964-3967; *Bacon on Mutual Societies*, § 443; *Niblack on Mutual Benefit Societies*, § 370, 371; *May on Insurance*, § 478; *Kerr on Insurance*, p. 423.

We have, however, in this state a statute (section 4803, Burns' Ann. St. 1908; section 4923, Burns' Ann. St. 1901, in force since 1865) which this court has held renders any provision in the policy of a foreign insurance company doing business in this state, limiting the time within which suit can be brought thereon to less than three years, void. *Insurance Co. v. Brim*, 111 Ind. 281, 288, 289, 12 N. E. 315. It does not appear, from either paragraph of the amended complaint, that appellee is a foreign corporation. There is nothing, therefore, in the complaint showing that appellant is entitled to the benefit of said section 4803 (4923) supra, in regard to foreign corporations in this action. It is well settled that, to entitle appellant to the benefit of said section 4803 (4923) supra, she must allege and prove facts which will bring the certificate sued on within its provisions. *Wier v. State*, 161 Ind. 435, 438, 68 N. E. 1023, and cases cited; *Indianapolis, etc., Co. v. Foreman*, 162 Ind. 85, 96, 69 N. E. 669, 102 Am. St. Rep. 185, and cases cited. A stipulation limiting the time within which an action may be brought on an insurance policy or certificate, being for the benefit of the company, may be waived by it. 4 Cool-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ey's Briefs on Law of Insurance, 3989-4000; Bacon on Mutual Benefit Societies & Life Ins. § 445; Grant v. Lexington Ins. Co., 5 Ind. 23, 81 Am. Dec. 74; Thompson v. Phoenix Ins. Co., 136 U. S. 287, 297-299, 10 Sup. Ct. 1019, 34 L. Ed. 408; Lynchburg v. Travelers' Ins. Co., 79 C. C. A. 464, 149 Fed. 954, 9 L. R. A. (N. S.) 654, and note.

Appellant claims that, if said clause limiting the time within which suit must be brought on said certificate is valid, the allegations of the first paragraph are sufficient to prevent appellee from taking advantage thereof. It is not necessary for us to determine this question, because said paragraph is insufficient for other reasons. It appears from said first paragraph that the certificate was issued in consideration of the premium paid and the payment of \$1.05 each month during the life of said John C. Caywood; that the monthly assessment of \$1.05 for August, 1902, was not paid, and on the 30th of said month, appellee forfeited said certificate for the nonpayment of said assessment. Appellant attempts to avoid the effect of the failure to pay said August assessment of \$1.05, and said forfeiture of the certificate on that account, for the reason alleged that, during the month of August, appellee owed said Caywood, for services rendered by him for appellee "the sum of \$2, which sum the defendant had the right to apply on the payment of the August assessment of \$1.05, and should have applied on the August assessment levied on said policy, but wholly failed to do so; that said defendant refused to apply said sum of \$2 on said payment, and on the 30th day of August, 1902, forfeited said policy and still retained, and has ever since retained, said \$2; that the September assessment of \$1.05 was tendered to said defendant, and was refused by it, and said amount was paid into court for the benefit and use of defendant." It has been held that a life insurance policy cannot be forfeited for the nonpayment of a premium or assessment when the company has in its possession dividends declared under said policy sufficient to pay the same, which it has the right to apply to such payment. Franklin, etc., Co. v. Wallace, 93 Ind. 7; Girard Life Ins. Co. v. Mutual Life Ins. Co., 97 Pa. 15; Mutual Life Ins. Co. v. Girard, etc., Co., 100 Pa. 172; 3 Cooley's Briefs on Law of Ins. pp. 2324, 2325, note. The mere allegation that appellee, during the month of August, owed said Caywood \$2 for services rendered by him for appellee did not show any right or duty, on the part of appellee, to apply the same, or any part thereof, to the payment of said August assessment. Willcuts v. Northwestern Mutual Life Ins. Co., 81 Ind. 300; Butler v. American, etc., Co., 42 N. Y. Super. Ct. 342; Plster v. Benefit Association, 3 Pa. Super. Ct. 50, 57-59; Smith v. Penn Mutual Life Ins. Co. (1882) 11 Wkly. Notes Cas. (Pa.) 295; 1 Am. & Eng. Ency. of Law (2d Ed.) p. 291; 8 Cooley's Briefs on Law of Ins. 2324,

2325, note. See, also, Leffingwell v. Grand Lodge, 86 Iowa, 279, 53 N. W. 243; Petrie v. Mutual Benefit Life Ins. Co., 92 Minn. 489, 100 N. W. 236; Irvin v. Rushville Tel. Co., 161 Ind. 524, 69 N. E. 258, and cases cited.

It is said in 21 Am. & Eng. Ency. of Law (2d Ed.) p. 291: "Where the insured is in the employ of the company, the fact that there were wages due him, at the time of his default in the payment of an assessment, sufficient to pay the assessment will not prevent a forfeiture for nonpayment, as the company is under no duty to apply such wages to the payment of the assessment." And this was the theory of said paragraph, for it averred as above set out, that "the defendant had the right to apply said \$2 on the payment of the August assessment of \$1.05, and should have applied it," and "that the defendant refused to apply said sum of \$2 on said payment." It is not sufficient, however, to allege that it was the right or duty of the appellee to apply said \$2, or any part thereof, to the payment of the August assessment, the same being the mere conclusion of the pleader, but the facts from which such right or duty arises must be clearly and positively alleged. Chicago, etc., R. Co. v. Barker, 169 Ind. 680, 681, 83 N. E. 369; Chicago R. Co. v. Lain, 170 Ind. —, 83 N. E. 632, 633, 634, and cases cited; Chicago, etc., R. Co. v. McClandish, 167 Ind. 648, 651-653, 79 N. E. 903, and cases cited; City of Buffalo v. Halloway, 7 N. Y. 493, 5 Am. Dec. 550, 552, and note, p. 554; Wabash R. Co. v. Hassett (Ind.) 83 N. E. 705, 708, and authorities cited; Southern Ind. R. Co. v. Fine, 163 Ind. 617, 621, 72 N. E. 589; Pittsburg, etc., R. Co. v. Lighthouse, 163 Ind. 247, 251, 252, 71 N. E. 218, 660, and cases cited. "That said defendant refused to apply said sum of \$2 on said payment" involves the assumption that appellee had been directed, requested, or otherwise empowered to apply said \$2 in payment of said August assessment by said Caywood or his authorized agent, a fact which was not alleged in said paragraph, and without which it was insufficient. Lake Erie, etc., R. Co. v. McFall, 165 Ind. 574, 581, 76 N. E. 400; Alken v. City of Columbus, 167 Ind. 139, 150, 78 N. E. 657, 12 L. R. A. (N. S.) 416; Malott, etc., v. Sample, 164 Ind. 645, 647-652, 74 N. E. 245, and cases cited; Riley v. State, 168 Ind. 657, 660, 81 N. E. 726; Bliss on Code Pleading (3d Ed.) § 318.

It is well settled that a demurrer admits only such facts as are sufficiently pleaded. Moreover, the benefit certificate sued upon calls for the "Protector and Secretary of Gage Lodge No. 1663" to countersign said "certificate and impress the seal" of said subordinate lodge, "hereto rendering the same valid and in full force." Said benefit certificate appears to have been impressed with the seal of said subordinate lodge, but it was not countersigned by the protector and secretary of said subordinate lodge. It can-

not be said, therefore, to have been completely executed according to its own provisions. It has been held that an insurance policy is not executed by attaching the insurer's corporate seal, when the names of the president and secretary, called for by the attestation clause, are not signed thereto, nor when the same is not countersigned as required by its provisions. *Peoria, etc., Ins. Co. v. Walser*, 22 Ind. 73; *Globe Ac. Ins. Co. v. Reid*, 19 Ind. App. 203, 47 N. E. 947, 49 N. E. 291, and cases cited; *Badger v. American Pop. Life Ins. Co.*, 103 Mass. 244, 4 Am. Rep. 547; *McCully's Adm'r v. Phoenix, etc., Ins. Co.*, 18 W. Va. 782; *Prall v. The Mutual Protection, etc., Society*, 5 Daly (N. Y.) 298; *Kerr on Ins.* pp. 85, 86. It may be the requirement that the same be countersigned by some person or persons named may be waived by the company, but there can be no such presumption from the mere possession thereof, when it has not been countersigned in the manner provided for.

There are no facts alleged in the amended complaint showing that said requirement has in any way been waived by appellee. It follows that the court did not err in sustaining the demurrer to the complaint.

Judgment affirmed.

(171 Ind. 417)

CLEVELAND, C. C. & ST. L. RY. CO. v. HILLIGOSS. (No. 21,138.)

(Supreme Court of Indiana. Dec. 16, 1908.)

**1. RAILROADS (§ 297\*)—COLLISIONS—ACTIONS—COMPLAINT—NEGLIGENCE.**

A complaint in an action against a railway company for injuries to a street car conductor in a collision with his car on a grade crossing, which alleges that defendant operated railroad tracks crossing the street on which street cars were operated; that plaintiff, when approaching the crossing stopped his car and looked across the railroad tracks, and saw thereon no approaching trains or cars; that the street car proceeded to cross the railroad tracks; that plaintiff boarded it; that defendant negligently, without any warning, kicked one of its cars across the crossing and against the street car, injuring plaintiff—shows a breach of duty owed by defendant to plaintiff.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 944; Dec. Dig. § 297.\*]

**2. RAILROADS (§ 297\*)—COLLISIONS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**

A street car conductor in charge of a car running on a street crossed by railroad tracks stopped and left his car before crossing the tracks to ascertain whether any trains, engines, or cars were approaching. On seeing none, he signaled the motorman to make the crossing. *Held*, that whether the conductor was justified in giving the signal immediately after passing over the crossing on the nonappearance of approaching cars, or whether he should have stood on the crossing and looked for approaching cars for any definite period before signaling the motorman to advance, was for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 949, 950; Dec. Dig. § 297.\*]

**3. RELEASE (§ 29\*)—JOINT AND SEVERAL LIABILITY—RELEASE OF ONE TORT-FEASOR.**

For a single injury there can be but one recompense, and one who is injured by two or more uniting in the commission of wrong, or who is injured by the separate and independent acts of different persons, and who accepts from one of them compensation therefor, cannot recover compensation from any of the others.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. § 64; Dec. Dig. § 29.\*]

**4. TORTS (§ 22\*)—JOINT AND SEVERAL LIABILITY.**

Where two or more unite in the commission of a wrong or where separate and independent acts of different persons concur in perpetrating a single injury, each is responsible for all the damages, and the injured party may at his election pursue his remedy against all or any number and the court will not apportion the damages among the wrongdoers.

[Ed. Note.—For other cases, see *Torts*, Cent. Dig. § 29; Dec. Dig. § 22.\*]

**5. RELEASE (§ 29\*)—JOINT AND SEVERAL LIABILITY—RELEASE OF ONE TORT-FEASOR.**

A release unsupported by a consideration of one joint tort-feasor does not operate to release another wrongdoer, but a contract which purports to be a satisfaction and release of one wrongdoer jointly liable with another and which shows that the injured person has for a consideration surrendered his claim against one wrongdoer, cannot recover compensation from another wrongdoer jointly liable.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. § 64; Dec. Dig. § 29.\*]

**6. RELEASE (§ 29\*)—TORT-FEASORS—JOINT AND SEVERAL LIABILITY—RELEASE OF ONE.**

While one who compromises a claim does not necessarily admit that the claim was well founded, the one who receives the consideration is precluded from denying that it was well founded, and, when a pretended claim for a tort has been settled and satisfaction has been rendered the claimant by one so connected with the wrong as to be reasonably subject to an action and possible liability as a joint tort-feasor, the satisfaction will release all who may be liable, though the one released was not liable.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. § 64; Dec. Dig. § 29.\*]

**7. RELEASE (§ 2\*)—VALIDITY—EFFECT.**

The validity and effect of a release of a cause of action does not depend on the validity of the cause of action.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. § 2; Dec. Dig. § 2.\*]

**8. RELEASE (§ 46\*)—PLEADING—SUFFICIENCY.**

An answer in an action against a railway company for injuries to a street car conductor in a collision with his car at a grade crossing, which alleges that the accident resulted from the joint negligence of the street railway company and the steam railway company, and that plaintiff for a valuable consideration released the street railway company from liability, and which sets forth the release, which recites that plaintiff, in consideration of the agreement of the street railway company to re-employ him released the street railway company from all liability, is sufficient to bar the action as against the objection that it fails to aver a claim by plaintiff for damages against the street railway company as a basis for the release, for plaintiff by retaining the consideration will not be permitted to show that he had no claim against the street railway company.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. § 88; Dec. Dig. § 46.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**9. RELEASE (§ 12\*) — CONSIDERATION—SUFFICIENCY.**

One releasing a person from liability for injuries cannot complain of the inadequacy of the consideration, and whatever consideration he accepts in satisfaction is adequate.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 20; Dec. Dig. § 12.\*]

**10. RELEASE (§ 46\*)—PLEADING—SUFFICIENCY.**

An answer in an action against a steam railway company for injuries to a street car conductor in a collision with his car at a grade crossing, which alleges that the accident resulted from the joint negligence of the street railway company and the steam railway company, and that plaintiff for a valuable consideration released the street railway company from liability, and which sets forth the release which recites that plaintiff in consideration of the agreement of the street railway company to re-employ him released the street railway company from all liability, shows at least the semblance of a right of action in favor of plaintiff against the street railway company, and bars the action as against a demurrer.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 88; Dec. Dig. § 46.\*]

Appeal from Circuit Court, Madison County; J. F. McClure, Judge.

Action by James W. Hilligoss against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Lovett & Slaymaker and C. E. Cowgill, for appellant. Kittinger & Diven, for appellee.

**HADLEY, J.** Appellee sues to recover for injuries received in a collision between a freight car, belonging to appellant, and an electric street car, under his control, belonging to the Union Traction Company, on a grade crossing, in the city of Anderson, through the alleged negligence of appellant. There are two paragraphs of complaint, each of which was held good on demurrer for insufficient facts. There are two answers, a general denial, and one affirmative, to which a demurrer for insufficient facts was sustained, and an exception reserved. Verdict for \$12,500, for which, over appellant's motion for a new trial, judgment was rendered. Error is assigned on all adverse rulings. The complaints are substantially the same. It is alleged in both that the plaintiff was the conductor in charge of an electric car, which was being operated by the Indiana Union Traction Company, on Meridian, a north and south street in the city of Anderson, under a franchise from said city; that appellant operates a steam railroad running east and west, which crosses the track of the Union Traction Company at grade in a populous part of said city, and has at the point of intersection a large number of tracks; that it was the duty of the plaintiff, as such conductor, to cause said car to be stopped before reaching appellant's tracks, and to then leave said car and go across said tracks to see and observe whether there are any ap-

proaching cars thereon, and, when none are approaching, to signal his motorman in charge of the electric car to come on across said track; that on the day of the accident the plaintiff was running his car southward, and, when it had approached within 15 or 20 feet of appellant's tracks, he caused his said car to be stopped, and he went southward in Meridian street on and across said tracks, and found thereon no trains or cars on any of the tracks of said steam railway approaching said crossing, and having thus observed that there were no steam trains, engines, or cars of any kind in motion, or attempting to cross said Meridian street crossing, the plaintiff signaled the motorman operating said car to proceed over appellant's said tracks. Said motorman obeyed said signal, and did proceed southward, on the street car track, across said railway tracks, and while said car was moving the plaintiff boarded it in safety. "Said defendant then and there carelessly and negligently, without any warning to the plaintiff, or any one else, carelessly and negligently ran, backed, and kicked one of its cars, with one of its engines, with great force and violence, from east to west, on and along one of its said tracks crossing Meridian street, and against said moving electric car so occupied and managed by the plaintiff, thereby crushing said electric car and causing great injury to the plaintiff."

The objections presented to the complaint are: First. That the acts complained of fail to constitute negligence in the defendant; that the allegation that the defendant negligently ran, backed, and kicked one of its cars over the crossing, etc., without first giving warning to the plaintiff, or any one else, is insufficient to show a breach of any duty appellant owed appellee. We think otherwise. Second. That the complaint shows that appellee was guilty of contributory negligence, in this: It is alleged that the plaintiff went southward over the crossing, and observed no trains, engines, or cars, approaching the crossing, and did thereupon signal his motorman to proceed to make the crossing. "It is not alleged," says appellant, "that he [the plaintiff] continued to look. It was his duty, not only to continue to look until he had passed the crossing, but to look at a time and place when and where his observations would be effective." If, before crossing, he stopped and left his car, and walked southward across the railroad tracks to ascertain whether or not there were trains, engines, or cars approaching the crossing on any of said tracks, and seeing none, as he alleges, he signaled his conductor to proceed to make the crossing, whether he was justified in giving the signal to the motorman immediately after passing over the crossing and the nonappearance of approaching cars, or whether he should have stood on the cross-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing, and looked for approaching cars for any definite period, before signaling the motorman to advance, was, to say the least of it, a question of fact for the jury. As against the demurrer, we find no sufficient reason for condemning either paragraph of the complaint.

Did the court err in sustaining appellee's demurrer to the second paragraph of answer? Said answer, in effect, alleges that the cut of cars in charge of appellant's employes, and the street car in charge of the traction company's motorman, were each moving towards the crossing at a speed of about five miles per hour; and when they had arrived, to wit, the street car at a point 35 feet from the crossing, and the cut of cars 50 feet from the crossing, the cut of cars, which had the right of way, were then in plain view of said motorman, and he could see it, and had plenty of time to have stopped his car and avoided the collision and injury, but, on the contrary, he negligently continued to run his car forward, and reached the crossing point at the same time the cut of cars reached it, and thereby caused the collision and the plaintiff's injury. With reference to this part of the answer, appellant makes the point that it shows that the proximate cause of the plaintiff's injury was the negligence, not of appellant company, but of the Union Traction Company, in heedlessly running its car on to the crossing, in front of the moving cut of cars, and cites *Thompson v. Citizens' St. Ry. Co.*, 152 Ind. 466, 53 N. E. 462, in support of the contention. However, the view of the answer that we have taken makes the question here raised unimportant, and we express no opinion concerning it.

It is further averred in the second paragraph of answer that the collision was caused by the joint acts of said traction company through its motorman operating said street car and the railroad company through its employes in moving a cut of cars over the crossing; and, if there was negligence on the part of the defendant, as alleged by plaintiff, in moving its cut of cars over the crossing, nevertheless the plaintiff's injuries would not have occurred had it not been for the act of the traction company's employe in negligently running said street car on to said crossing at the same time the defendant's cut of cars was in the act of crossing the same, as aforesaid; and so the defendant says "that, if the collision resulted in any particular through the negligence of its employes, it was through the joint act and joint negligence of the employes of said two companies that said collision and the plaintiff's injuries occurred." It is then averred that on December 30, 1905, the plaintiff, for a valuable consideration, fully released the traction company from all liability arising from said collision, which release was in writing, and in the following words and figures: "Whereas, on the 24th day of Novem-

ber, 1905, James W. Hilligoss, while in the employ of the Indiana Traction Company, as conductor, was injured about the head, arms, body, and otherwise injured when freight car collided with South Meridian street car, in an accident which occurred on the lines of said traction company, at or near Meridian street crossing of Big 4 Railway. Now, therefore, in consideration of the agreements of said traction company herein contained to re-employ said employe for such time only as may be satisfactory to it, said James W. Hilligoss agrees to and does hereby receipt, release, and forever discharge the said traction company of and from any and all liability, claims and demands of every kind and character that he, the said employe, ever had against the said traction company to date, and especially from all claims and demands of any nature arising out of or due to the accident aforesaid, said traction company hereby agreeing, in consideration of the foregoing, to employ said employe so long as satisfactory to it, and not otherwise. Witness the name of the parties this 30th day of Dec., 1905. James W. Hilligoss. [Seal.] Indiana Union Traction Company. [Seal.] By Ellis C. Carpenter, Claim Adjuster." And it is alleged that the release of the traction company was a full and complete release of the defendant, and judgment is demanded accordingly. It is an ancient and well-established rule, almost without exception in England and America, that for a single injury there can be but one recompense. When more than one unite in the commission of a wrong, each is responsible for the acts of all, and for the whole damage; also, where separate and independent acts of negligence by different persons concur in perpetrating a single injury, each is fully responsible for the trespass. Courts will not undertake to apportion the damage in such cases among the joint wrongdoers. The injured party has at his election his remedy against all or any number. *Cooley on Torts* (3d Ed.) p. 224. He may elect to look to one only, and, if he accepts from that one a benefit or property in satisfaction and release, he can go no further. He cannot have a second satisfaction. Having had a reparation from one who was responsible for all the damage and released him, all others who were jointly or jointly and severally liable are also released. One satisfaction is a bar to further proceedings on the same cause of action. *Fleming v. Donald*, 50 Ind. 278, 19 Am. Rep. 711; *Ashcraft v. Knoblock*, 146 Ind. 169, 174, 45 N. E. 69. There is a clear distinction, however, recognized by the courts between a "satisfaction" and a "release" growing out of the right of the injured party to choose whether he will seek redress against all or a less number of those jointly liable to him. On the one hand, a naked promise not to sue, an action against a part only of the joint tort-feasors, and a forgiveness of the others, or a formal re-

lease, unsupported by a consideration, will in neither case operate as a release of those not favored. In other words, a release in fact may be given to a part of the joint trespassers, although no part of the damage has been paid, and those not released held liable for the whole. On the other hand, a contract, which purports to be a satisfaction and release of a wrongdoer jointly liable with others, to be effective, must clearly show that the injured party for a consideration has surrendered to the party in whose favor the contract runs all claim for recompense for and on account of the trespass complained of. If it does so appear, there can be no further proceeding, for the right of action for the wrong is forever gone. *Miller v. Beck*, 108 Iowa, 575, 582, 79 N. W. 344; *Brown v. City of Cambridge*, 85 Mass. 474; *Hartigan v. Dickson*, 81 Minn. 284, 83 N. W. 1091; *Eastman v. Grant*, 34 Vt. 387; *Seither v. Traction Co.*, 125 Pa. 397, 17 Atl. 338, 4 L. R. A. 54, 11 Am. St. Rep. 905; *McBride v. Scott*, 132 Mich. 176, 93 N. W. 243, 61 L. R. A. 445, 102 Am. St. Rep. 416; *Dulaney v. Buffum*, 173 Mo. 1, 78 S. W. 125; *Ducey v. Patterson*, 37 Colo. 218, 86 Pac. 109, 9 L. R. A. (N. S.) 1066, 119 Am. St. Rep. 284; *Abb v. Railroad Co.*, 28 Wash. 423, 68 Pac. 954, 58 L. R. A. 293, 92 Am. St. Rep. 864; *Allen v. Ruland*, 79 Conn. 405, 65 Atl. 138, 118 Am. St. Rep. 146; *Butler v. Ashworth*, 110 Cal. 614, 618, 43 Pac. 4, 386; *Cooley on Torts* (3d Ed.) p. 235.

Appellee insists that this answer proceeds upon the single theory of a release, and that it is not good upon that theory, because it pleads facts to show that the traction company, to whom the release was executed, was not a joint tort-feasor, and was not in any way liable to appellee, and, further, that it fails to show that the appellee ever made any claim for damages against the company on account of his injury. To sustain this contention, he relies on *K. & I. Bridge Co. v. Hall*, 125 Ind. 220, 25 N. E. 219. In the *Hall Case* the answer of release was traversed, and the question before the court was one of evidence, and not of pleading. It is said at page 223 of 125 Ind., at page 220 of 25 N. E.: "No question was raised as to the sufficiency of the second paragraph of answer, and hence we are not called upon to consider it." Neither a copy nor any part of the contents of the release is given, and in commenting on the evidence the court says: "But the evidence fails to show that he ever made any demand against the company (released) for damages on account of the injury, or ever claimed that it was in any way responsible for the accident, and the circumstances proven show the contrary. \* \* \* From the evidence before them the jury might well conclude that the (released company) was in no way responsible for the accident, and, if not, there was no joint liability to which the rule that the release of

one joint wrongdoer has the effect to discharge all others can apply." Under the meager facts given in the case relied on, we cannot accept it as an authority, for reason that will be developed as we proceed. With reference to the releasor and releasee, it may be said that the courts will not permit one who has suffered a wrong to profit by the fears of those who occupy a position to subject them to suspicion of being the wrongdoers, and who are willing to buy their peace rather than run a risk at law. One who compromises a claim does not necessarily admit that the claim was well founded, but the one who receives the consideration is precluded from denying that it was. So it may be said that when a pretended claim for a tort has been settled by treaty, and satisfaction rendered the claimant by one so connected with the trespass as to be reasonably subject to an action and possible liability as a joint tort-feasor, the satisfaction rendered will release all who may be liable, whether the one released was liable or not. In such a case it is not necessary that it should appear that the party making the settlement was in fact liable. It will be deemed sufficient if there is an appearance of liability; that is, something in the nature of a claim on the one hand and a possible liability under the rules of the law on the other. *Miller v. Beck & Co.*, 108 Iowa, 575, 79 N. W. 344; *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107; *Hubbard v. Railroad Co.*, 173 Mo. 249, 72 S. W. 1073; *Hartigan v. Dickson*, 81 Minn. 284, 83 N. W. 1091; *Denver, etc., Ry. Co. v. Sullivan*, 21 Colo. 302, 41 Pac. 501; *Tompkins v. Railroad Co.*, 66 Cal. 163, 4 Pac. 1165; *Abb v. Railway Co.*, 28 Wash. 423, 68 Pac. 954, 58 L. R. A. 293, 92 Am. St. Rep. 864; *Pickwick v. McCauliff*, 193 Mass. 70, 75, 78 N. E. 730. In the Iowa case, supra, it is said at page 578 of 108 Iowa, at page 345 of 79 N. W.: "In accordance with this rule, it has frequently been held that the validity and effect of a release of a cause of action does not depend upon the validity of the cause of action, and that, if the claim is made against one, and it is satisfied, all who may be liable are discharged, whether the one released be liable or not." From the *Leddy Case*, supra, we quote from page 397 of 139 Mass., at page 108 of 2 N. E., as follows: "The rule that a release of a cause of action to one of several persons applies to a release given to one against whom a claim is made, although he may not be in fact liable. The validity and effect of a release of a cause of action do not depend on the validity of the cause of action. If a claim is made against one, and released, all who may be liable are discharged, whether the one released was liable, or not." The text above is quoted with approval in *Denver, etc., Ry. Co. v. Sullivan*, 21 Colo. 302, 41 Pac. 501. It is also said by Judge Cooley, in his excellent work on Torts

(3d Ed.) p. 235: "Therefore, if he [the injured party] accept the satisfaction made by one, that is a bar to all. And so a release of one releases all, although the release expressly stipulates that the other defendants shall not be released. And this rule is held to apply, even though the one released was not in fact liable." It was not necessary to aver in the answer a demand or an avowed claim for damage against the traction company as a basis for the release agreement. The agreement is made a part of the answer, and provides that, in consideration of the agreement of said traction company to re-employ the plaintiff, the "said James W. Hilligoss agrees to and does hereby receipt, release, and forever discharge the said traction company of and from any and all liabilities, claims, and demands of every character that he, the said employé, ever had against said traction company to date, and especially from all claims and demands of any nature arising out of, or due to the accident aforesaid." As against such an acknowledgment, and the receipt and retention of the consideration, the plaintiff will not be heard to say that he had no claim against the traction company. *Brown v. Cambridge*, 85 Mass. 474, 478; *Tompkins v. R. R. Co.*, 66 Cal. 164, 167, 4 Pac. 1165. Neither can he be heard to complain that there was a want of, or an inadequate, consideration. His recoverable damage, if any at all, was unliquidated and uncertain. It might be much or little, and whatever consideration he accepted as satisfaction for what he surrendered will be held as adequate. That he accepted appellant's covenant for re-employment in satisfaction is incontrovertible from the language of the release, and that was a sufficient consideration. The payment of full wages for a month, without regard to the ability of the injured party to earn it, has been held a sufficient consideration to support a release. *Jackson v. Penn. R. Co.*, 66 N. J. Law, 319, 322, 49 Atl. 730, 55 L. R. A. 87; *Allen v. Ruland*, 79 Conn. 405, 65 Atl. 138, 118 Am. St. Rep. 146. It was said in this last case, at page 412 of 79 Conn., at page 140 of 65 Atl. (118 Am. St. Rep. 146), that "whether the sum was large or small was immaterial, since the demand extinguished was wholly unliquidated." The facts pleaded in the answer show at least the semblance of a right of action in favor of appellee against the traction company. As we have seen, this is enough to uphold the release.

We think the demurrer should have been overruled. There are numerous other questions reserved that we leave unconsidered, as they are not likely to arise again.

The judgment is reversed, with instructions to overrule the demurrer to the second paragraph of answer, and for further proceedings not inconsistent with this opinion.

(42 Ind. A. 612)

SMALLWOOD v. DUNHAM et al.

(No. 6,567.)

(Appellate Court of Indiana, Division No. 2.  
Dec. 15, 1908.)

TRIAL (§ 404\*)—CONSTRUCTION OF FINDINGS.

A finding that defendants executed a contract with M., the owner, by which she and her husband C. sold the real estate to defendant D., means that the contract was executed by M.; her husband joining therein.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 957; Dec. Dig. § 404.\*]

Appeal from Circuit Court, Monroe County; J. B. Wilson, Judge.

Action by John B. Smallwood against Mary Dunham and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Duncan & Batman, for appellant. Rufus H. East, for appellees.

ROBY, J. Action in ejectment by appellant. Special findings of fact were made and conclusions of law stated thereon, and judgment was rendered for the defendant. Appellant excepted to the conclusions of law and assigns error thereon.

The parties claim under one Mary C. Meadows. The first eight findings of fact are as follows:

"(1) That in the year 1891 Mary C. Meadows became the owner and went into the possession of lot 7, in Cron's addition to the city of Bloomington, and that in the year 1894 the defendants Mary Dunham and Charles Dunham signed and executed a written contract with Mary C. Meadows the then owner, by which contract she and her husband, Cornelius Meadows, sold said real estate to Mary Dunham for the sum of \$500, that by the terms of the contract the purchase price was to be paid at the rate of \$1.05 per week, and, when \$500 was paid, Mary C. Meadows and her husband, Cornelius Meadows, were to execute a deed to said Mary Dunham; said contract further providing that a failure to pay any of said installments the contract to be forfeited and all payments made to that time should be regarded as rent.

"(2) That Dunham and Dunham went into possession under the contract and have occupied continuously until this time and have made improvements in the way of grading, paving, fencing, planting fruit trees, papering, painting, repairing, etc.

"(3) That in 1895, Dunham and Dunham being in arrears in their payment of weekly installments, a suit was instituted before a justice by Cornelius Meadows and a judgment rendered in his favor for the possession of said property and \$199 damages. That said judgment for possession was not enforced and the money judgment not collected. That in June, 1896, said Mary C. Meadows entered into another written con-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tract with the Dunhams by which she sold them said lot for \$400 to be paid in quarterly installments of \$15, and then, when the amount of \$400 was paid, the said Meadows and Meadows should execute a deed therefor to said Mary Dunham, but, if said payments were not made when due, the contract of purchase was forfeited and all amounts paid thereon to be applied as rent.

"(4) Both contracts are lost.

"(5) That under the first contract the Dunhams paid \$213 prior to the execution of the latter contract. That they remained continuously in possession all the time claiming ownership. They paid \$15 quarterly until they paid \$360, making a total paid on said lot of \$573.

"(6) January 16, 1903, Meadows and Meadows conveyed the lot in suit to the plaintiff.

"(7) Before the commencement of this suit the plaintiff made a demand for possession which was refused.

"(8) That at the time of the execution of the before-mentioned contracts Cornelius Meadows was the husband of Mary C. Meadows and her authorized agent. That all the money paid him was paid as agent. That after the conveyance to the plaintiff by Meadows and wife the defendants tendered Cornelius Meadows \$15, the installment due, when he refused to accept."

Appellants rely upon the proposition that a married woman cannot convey her separate real estate or enter into an executory contract for the sale thereof unless her husband joins therein. Section 7852, Burns' Ann. St. 1908; *Shirk v. Stafford*, 31 Ind. App. 247, 67 N. E. 542; *Jones v. Ewing*, 107 Ind. 313, 6 N. E. 819. The proposition is not applicable to the facts found. The finding is that "defendants Mary Dunham and Charles Dunham signed and executed a written contract with Mary C. Meadows the then owner, by which contract she and her husband, Cornelius Meadows, sold said real estate to Mary Dunham." This finding does not seem susceptible of any other construction than that the contract was executed by Mrs. Meadows, her husband joining therein.

Judgment affirmed.

(42 Ind. A. 653)

**SOUTHERN INDIANA LOAN & SAVINGS INST. v. ROBERTS et al. (No. 6,490.)**

(Appellate Court of Indiana, Division No. 2. Dec. 18, 1908.)

**1. FRAUDS, STATUTE OF (§ 18\*)—PROMISE TO PAY DEBT OF ANOTHER—GRANTEE OF MORTGAGED PREMISES.**

In order to establish a personal liability for a mortgage debt against the grantees of the mortgagor, facts must be averred and proved sufficient to take the case out of the statute of frauds, and make the debt that of the grantees.

[Ed. Note.—For other cases, see *Frauds, Statute of, Cent. Dig. § 29; Dec. Dig. § 18.\**]

**2. FRAUDS, STATUTE OF (§ 18\*)—"DEBT OF ANOTHER"—GRANTEE OF MORTGAGED PREMISES.**

Where a grantee of land assumes as a part of the consideration for the conveyance a mortgage debt of the grantor, such debt is not the "debt of another" within the statute of frauds, but becomes the grantee's debt, who becomes personally liable therefor on his contract, whether it be in writing or by parol.

[Ed. Note.—For other cases, see *Frauds, Statute of, Cent. Dig. § 29; Dec. Dig. § 18.\**

For other definitions, see *Words and Phrases*, vol. 2, pp. 1889, 1890; vol. 8, p. 7628.]

**3. FRAUDS, STATUTE OF (§ 17\*)—DEBT OF ANOTHER—PROMISE—TO WHOM MADE.**

A promise to pay the debt of another, if made directly to the creditor, must be both in writing and based on a valuable consideration.

[Ed. Note.—For other cases, see *Frauds, Statute of, Cent. Dig. §§ 16, 17; Dec. Dig. § 17.\**]

**4. CONTRACTS (§ 334\*)—PLEADING—CONSIDERATION.**

When a right of action founded on an oral contract, or a written contract not importing a consideration, is pleaded, the consideration must be stated in the complaint with such particularity as to enable the court to determine whether the promise is supported by a sufficient consideration.

[Ed. Note.—For other cases, see *Contracts, Cent. Dig. §§ 1660-1663; Dec. Dig. § 334.\**]

**5. MORTGAGES (§ 559\*)—FORECLOSURE—PLEADING—"ASSUMED."**

An allegation that grantees of mortgaged premises "assumed" the mortgage debt meant only that they promised to pay it.

[Ed. Note.—For other cases, see *Mortgages, Dec. Dig. § 559.\**

For other definitions, see *Words and Phrases*, vol. 1, pp. 586, 587.]

**6. MORTGAGES (§ 559\*)—GRANTEES OF MORTGAGED PROPERTY—PERSONAL LIABILITY—COMPLAINT.**

A complaint merely alleging that the mortgagor conveyed the mortgaged premises to his codefendants, who each assumed to pay the mortgage in question, was insufficient to entitle plaintiff to a personal judgment against such grantees, there being nothing to show that their promise was based on a sufficient consideration, and was not within the statute of frauds.

[Ed. Note.—For other cases, see *Mortgages, Cent. Dig. § 1605; Dec. Dig. § 559.\**]

**7. FRAUDS, STATUTE OF (§ 148\*)—PLEADING.**

In an action to foreclose a mortgage against the mortgagor and his grantees, who were merely alleged to have "assumed to pay the mortgage," the contract by which the assumption was made not being alleged to have been in writing, it must be presumed that it was a parol contract, and not a part of the deed to them.

[Ed. Note.—For other cases, see *Frauds, Statute of, Cent. Dig. §§ 353, 354; Dec. Dig. § 148.\**]

**8. APPEAL AND ERROR (§ 1029\*)—HARMLESS ERROR—PERSONS NOT ENTITLED TO SUCCEED IN ANY EVENT.**

In an action in which the complaint was insufficient to sustain a judgment against defendants, any errors in ruling on demurrers to the answer or in denying plaintiff's motion for a new trial were harmless.

[Ed. Note.—For other cases, see *Appeal and Error, Cent. Dig. §§ 4035, 4036; Dec. Dig. § 1029.\**]

Roby, J., dissenting.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Spencer County; Roscoe Kiper, Judge.

Action by the Southern Indiana Loan & Savings Institution against John J. Roberts and others. Judgment for plaintiff for less than the relief demanded, and it appeals. Affirmed.

F. A. Henning, Jr., for appellant. Ralph E. Roberts, for appellees.

RABB, J. The appellant brought this suit in the court below against the appellees, seeking to foreclose a mortgage on certain real estate described, and also to recover a personal judgment against the appellees, William M. Smith and Walter Jones, who are alleged to have been subsequent grantees from Roberts of the premises mortgaged. The appellee Roberts suffered a default. The appellees, Smith and Jones, answered in four paragraphs. Appellant's demurrer to the first, third, and fourth were overruled, and exception reserved, a reply filed, cause submitted to a jury for trial upon the issues between appellant and Smith and Jones; a verdict being returned in favor of Smith and Jones. Appellant's motion for a new trial was overruled, and judgment of foreclosure was rendered in favor of appellant for the amount due on the debt against all the parties, and a personal judgment denied appellant as against Smith and Jones, and judgment rendered in their favor for costs. From this judgment an appeal is taken to this court, and errors assigned upon the overruling of appellant's demurrer to the first, second, and third paragraphs of the answer of Jones and Smith, and appellant's motion for a new trial as against them.

The theory upon which appellant claims a right to a personal judgment against Smith and Jones is that they are subsequent purchasers of the property, and that they assumed the payment of the mortgage upon the premises. The statute of frauds provides that no action shall be brought to charge any person upon any special promise to answer for the debt, default, or miscarriage of another, unless the promise, contract, or agreement or some memoranda thereof shall be in writing and signed by the party to be charged therewith. The mortgage debt which appellant seeks to charge the appellees Smith and Jones with in this action was not primarily their debt. It was the debt of Roberts, and, in order to make a case against them of personal liability for this debt of Roberts, such facts must be averred in the complaint and proved upon the trial as take the case out of the operation of this statute, and render this debt the debt of Jones and Smith. It is the well-settled law that where a conveyance of land is made, and the grantee assumes to pay, as a part of the consideration for the conveyance, a mortgage debt due from the grantor, that the debt thus as-

sumed to be paid is not the debt of a third person within the meaning of the statute of frauds, but becomes the debt of the grantee, and he is personally liable upon his contract, whether it be in writing or expressed orally. This doctrine is announced by the Supreme Court in the case of McDill v. Gunn, 43 Ind. 315, and is followed by a long line of decided cases in this state. It is not because the transaction relates to real estate that the contract to pay the mortgage debt is taken out of the operation of the statute of frauds, but because the promisor has by his contract with the grantor of the land agreed to pay part of the price of the land, which is his obligation, to the mortgagee. The fact that the party to whom he has thus agreed to pay part of the purchase price of the land happens to be a creditor of the seller is a matter of no controlling importance. It is his own debt he thus contracts to pay. As we understand the rule, a valid promise to pay another's debt cannot be made directly with the creditor, even though founded on a valuable consideration, unless it is in writing. It must both be founded on a valuable consideration, and be in writing, when made directly with the creditor; otherwise it is squarely within the statute. *Berkshire v. Young*, 45 Ind. 461; *Krutz v. Stewart*, 54 Ind. 178; *Langford v. Freeman*, 60 Ind. 50; *McCurdy v. Bowes*, 88 Ind. 583; *Catlett v. Trustee, etc.*, 62 Ind. 865, 30 Am. Rep. 197; *Hassinger v. Newman*, 83 Ind. 124, 43 Am. Rep. 64; *Parker v. Dillingham*, 129 Ind. 546, 29 N. E. 23; *Lowe v. Turple*, 147 Ind. 683, 44 N. E. 25, 47 N. E. 180, 37 L. R. A. 233; *Whitesell v. Helney*, 58 Ind. 108; 29 A. & E. Ency. of Law, 927, and cases cited. It is a well-defined rule of pleading that, when a right of action is undertaken to be set up founded on an oral contract, or a written contract that does not import a consideration, it is necessary that the consideration for such promise be stated in the complaint with such particularity as will enable the court to decide whether or not the promise sued upon is supported by a sufficient legal consideration. *Wheeler v. Hawkins*, 101 Ind. 486; *Windell v. Hudson*, 102 Ind. 521, 2 N. E. 303; *Higham v. Harris*, 103 Ind. 257, 8 N. E. 255; *Metzger v. Franklin Bank*, 119 Ind. 360, 21 N. E. 973; *Louisville, etc., v. Barnes*, 16 Ind. App. 312, 44 N. E. 1113.

In this case all the appellant's complaint avers upon the subject of the contract under which he claims a right to a personal judgment against the appellee is as follows: "That on the 3d day of September, 1902, the defendant John J. Roberts conveyed by warranty deed the above-mortgaged premises to the defendants William M. Smith and Walter J. Jones, who each assumed to pay the mortgage aforesaid." It is not averred that the promise to pay Roberts' mortgage note was in writing, or that it was included in the terms of the deed under which the parties took title to the premises. It avers as one

distinct fact that the property was conveyed to Jones and Smith, and as another distinct fact, not necessarily relating to the conveyance to Jones and Smith in any manner that they, Jones and Smith, "assumed," which means nothing more than that they "promised," to pay Roberts' debt. It is to be inferred that the contract was oral, because it is not averred to have been in writing. It is to be inferred that it was not included in the deed by which Jones and Smith acquired title, for, had it been, it would necessarily have been evidenced by writing, and the deed, or a copy, would have been a necessary part of the complaint. The averments of the complaint amount to nothing more than a bald assertion of an oral agreement with some undisclosed party on the part of Jones and Smith to pay Roberts' debt, and, for aught that appears in the averments of the complaint, the promise to pay the Roberts mortgage may have been made long after the conveyance of the land to Jones and Smith, and without any consideration whatever; and it may have been made, not to Roberts in consideration of the sale of the land, but to the creditors themselves. In every case that has come to our attention in which the right to enforce an oral contract to pay a mortgage debt made by a purchaser of the mortgaged premises has been upheld, the complaint has averred facts showing that the assumption of the debt was a part of the consideration of the sale of the land. They have set out in the complaint what the consideration was, so that the court could say that the contract was not within the statute of frauds. In this case the complaint was clearly insufficient to authorize a personal judgment against appellee. This being so, any ruling made by the court on the demurrer to the answer or motion for a new trial was harmless.

Judgment affirmed.

COMSTOCK, MYERS, and HADLEY, JJ., concur. WATSON, C. J., not participating. ROBY, J., dissents.

(42 Ind. A. 650)

STATE ex rel. CARTER v. SPENCER et al.  
(No. 6,576.)

(Appellate Court of Indiana, Division No. 2.  
Dec. 18, 1908.)

1. PLEADING (§ 195\*)—DEMURRER TO COUNTERCLAIM.

A counterclaim not arising from nor legally connected with the subject-matter of complaint is bad on demurrer for want of facts, though the facts set forth might have been a good defense if pleaded by answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 447; Dec. Dig. § 195.\*]

2. APPEAL AND ERROR (§ 882\*)—ERROR—ESTOPPEL.

Having secured an order sustaining a demurrer to the facts pleaded as an answer, plaintiff cannot urge on appeal that they should have

been pleaded as an answer instead of a counterclaim.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8596; Dec. Dig. § 882.\*]

3. APPEAL AND ERROR (§ 1040\*)—HARMLESS ERROR.

Any error in overruling a demurrer to a counterclaim was harmless where the decision on the counterclaim was in plaintiff's favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4101; Dec. Dig. § 1040.\*]

Appeal from Circuit Court, Vanderburgh County; Louis O. Rasch, Judge.

Action by the state of Indiana, on the relation of Frances Carter, against John Spencer and others. From a judgment for defendants, plaintiff appeals. Affirmed.

William Reister, for appellant. Foster & Wheeler and Whittenbraker & Luhring, for appellees.

ROBY, J. Appellee John W. Spencer was appointed commissioner to sell real estate by the Vanderburgh circuit court in a partition proceeding in which the relatrix was a party. The distributive share of relatrix amounted to \$1,454.03. The real estate sold was recovered for Frances Carter and the fund mentioned created for her by the law firm of Menzies, Spencer & Brill (of which John W. Spencer was a member), as the result of extensive litigation which they conducted in the circuit court of the county and in this court (see Phillips v. Heldt, 33 Ind. App. 388, 71 N. E. 520), and they held an equitable lien for \$510.16 upon the fund in the hands of the commissioner for their services. John W. Spencer, as commissioner, allowed and paid the firm Menzies, Spencer & Brill the sum named in discharge of their lien; such amount being equal to 30 per cent. of the gross amount recovered by said attorneys, and which per cent. had been previously determined by relatrix and the law firm. This action is a suit on the bond of John W. Spencer, as commissioner, with the Federal Union Surety Company as surety, to recover the amount so paid out. The defendants filed separate answers at different times, designated as paragraphs 1, 2, and 3. The third paragraph set up the history of the transaction with particularity, and was intended to constitute a special plea of payment. To these paragraphs of answer the plaintiff demurred, and the court sustained the demurrer. Upon application John R. Brill and Gustavus V. Menzies became parties defendant, and, with Spencer and the surety company, filed a counterclaim against the relator in which they allege their employment and services in the case (which was the contest of a will), the order of sale of the property, and the appointment of Spencer as commissioner, the filing of an attorney's lien for a reasonable fee upon the fund which they created. Judgment is prayed in the cross-complaint for \$510.16, and an

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

order asked directing the commissioner to pay the defendants. A demurrer to the cross-complaint was overruled, and the cause was tried by the court. The court found the facts substantially as above stated, upon which it considered and adjudged that the plaintiff take nothing on the complaint, and that the money due cross-complainants having already been paid that they take nothing on their cross-complaint.

The only alleged error relied upon for reversal by appellants is the overruling of the demurrer to the counterclaim. The appellees assign cross-errors in the sustaining of demurrers to their third paragraphs of answer. A counterclaim which does not arise out of or is not connected with the subject-matter upon which the complaint is based is bad on demurrer for want of facts, although the facts set forth might have been a good defense if pleaded by way of answer. *Stoner v. Swift*, 164 Ind. 652, 654, 74 N. E. 248; *Miller v. Roberts*, 106 Ind. 63, 5 N. E. 707. It is sufficient, however, that there is a legal connection between the counterclaim and the transaction out of which the original action arose. *Standley v. North-Western Mut. Life Ins. Co.*, 95 Ind. 254; *Excelsior Clay Works v. De Camp*, 40 Ind. App. 26, 80 N. E. 981. Whether the facts stated in appellee's counterclaim were matters to have been pleaded in an answer (see *Lupton v. Taylor*, 39 Ind. App. 412, 78 N. E. 689, 79 N. E. 523) need not be determined. Such facts were answered, and a demurrer to the answer sustained. Having secured an order of the trial court sustaining a demurrer to the facts pleaded as an answer, the appellant cannot now well urge that they should have been pleaded as an answer instead of a counterclaim. *McMahan v. McMahan*, 142 Ind. 110, 40 N. E. 681; *Carter v. Carter*, 35 Ind. App. 73, 77, 72 N. E. 187. The decision of the trial court was in favor of the appellant upon the counterclaim. Appellant's assignment is therefore based upon what was at most a harmless error (*Tucker v. Roach*, 139 Ind. 275, 38 N. E. 822; *Guthrie v. Carpenter*, 162 Ind. 417, 70 N. E. 486), and a reversal is therefore not allowable. Consideration of the cross-errors assigned by appellees is expressly waived.

Judgment affirmed.

(42 Ind. App. 630)

MILLER et al. v. STATE ex rel. HILL  
(No. 6,279.)

(Appellate Court of Indiana, Division No. 2.  
Dec. 17, 1908.)

1. PLEADING (§ 248\*)—AMENDMENTS—NEW CAUSE OF ACTION.

In an action on a contractor's bond by one who had furnished material and done work for the contractor to recover a certain sum therefor, where the complaint alleged that the oral contract under which the work was done was made

in March, an amendment alleging the contract was made in October did not change the cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.\*]

2. PLEADING (§ 246\*)—AMENDMENTS—LEAVE OF COURT—DISCRETION OF COURT.

Under Burns' Ann. St. 1908, § 403, providing that all amendments, except those as of course, shall be by leave of court, permission to amend a complaint alleging that an oral contract for furnishing material was made in March by alleging that it was made in October, was properly given.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 678½; Dec. Dig. § 246.\*]

3. APPEAL AND ERROR (§ 195\*)—PRESENTATION OF GROUNDS—AMENDMENT OF PLEADINGS.

Under Burns' Ann. St. 1908, § 403, providing that no cause shall be delayed by amendment, except only the time to make up the issues, but upon good cause shown by affidavit, and section 404, requiring such affidavit to show how the party asking a delay because of amendments had been prejudiced thereby, if the amendment of a complaint for services and materials furnished under a contract made in March by alleging that it was made in October prejudiced defendant in his defense, he should ask a continuance.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 195.\*]

4. APPEAL AND ERROR (§ 1001\*)—VERDICT—CONCLUSIVENESS.

In an action for materials and labor furnished, there being evidence to warrant a finding that plaintiff did the work, etc., and defendant received the benefit thereof and had not made payment, a verdict for plaintiff will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3923-3934; Dec. Dig. § 1001.\*]

5. APPEAL AND ERROR (§ 994\*)—REVIEW—QUESTIONS OF FACT—CREDIBILITY OF WITNESSES.

While not every sort of evidence will sustain a verdict, this rule will not justify a finding on appeal against the credibility of a witness because of his inability to remember facts without referring to a prior official report thereof made by him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901-3906; Dec. Dig. § 994.\*]

Appeal from Circuit Court, Henry County; John M. Morris, Judge.

Action by the State, on the relation of Jerry Hill, against Edmund J. Miller and others. From a judgment for plaintiff, defendants appealed. Affirmed.

Francis A. Walker and Frank P. Foster, for appellants. Ellis & Call and Forkner & Forkner, for appellee.

ROBY, J. This is a suit on a bond given to secure the execution of a contract for the construction of a gravel road, and to secure payment for material furnished and labor. The bond was executed by appellants Miller and Rapp as principals and the other appellants as sureties. The averment of the complaint is that appellee in October, 1901, the exact date of which he does not remember, entered into an oral contract with appellants Miller and Rapp for the construction

of all the masonry on section 3 of the Stony Creek township gravel road, at the agreed price of \$4.50 per yard, that he did the work, and that said appellants refused to pay therefor, wherefore, etc. The case was tried by a jury, which returned a verdict in favor of appellee for \$535. Appellants' motion for a new trial was overruled, and the court rendered judgment upon the verdict.

After the jury were sworn, the court permitted appellee to amend his complaint by substituting the word "October" for the word "March" therein. Whether a refusal on the part of the court to permit such amendment would constitute an abuse of discretion would be a close question (*Johnson v. McNabb*, 7 Ind. App. 393, 34 N. E. 667), but in allowing the amendment the court merely gave effect to the statute (*Burns' Ann. St. 1908*, § 403). The cause of action was in no wise changed. The plaintiff sued upon a contract under which a certain sum was claimed. If the change of date prejudiced appellants' defense, their remedy was by a motion for a continuance. *Burns' Ann. St. 1908*, § 404. The sufficiency of the evidence to sustain the verdict is questioned. A review of the evidence in this opinion could not be justified. There was evidence from which the jury were warranted in finding that appellee did do the work under a parol agreement, that appellants had the benefit thereof, and have not made payment. This being the case, it is not the province of this court to interfere with such result. Indeed, appellants base their argument upon the proposition that "that it is not every sort of evidence that will uphold a verdict though it may seem to do so." *Stringer v. N. W., etc., Co.*, 82 Ind. 100. This is, of course, true, but it cannot be applied so as to justify a finding on appeal against the credibility of a witness who is unable to remember facts without reference to an official report theretofore made by him. See concurring opinion in *Johnson v. Zimmerman* (Ind. App.) 84 N. E. 541. The evidence seems to show that appellants originally contracted with other parties to do all the masonry work on this division, that such parties abandoned the contract when it was partially completed, and that appellee thereupon undertook to finish it. Appellee had done work for the person to whom the contract was originally let. Twenty per cent. of the price therefor remained in appellants' hands, and appellee was to be paid the 20 per cent. so held to apply on what was due him for work already done, which, in addition to the contract price for the work subsequently done, makes the amount for which judgment was rendered. Appellants complain that this recovery was not according to the theory of the complaint. With this view we are unable to agree. The showing of the complaint was that appellants had agreed to pay appellee for certain work

which it was averred he had completed according to contract, and for which he had not been paid.

It is not claimed that appellee has recovered any amount which he has not earned, and the judgment is therefore affirmed.

(42 Ind. A. 635)

HARRIS v. MARTINDALE et al.

(No. 6,247.)

(Appellate Court of Indiana, Division No. 1.  
Dec. 17, 1908.)

MUNICIPAL CORPORATIONS (§ 7\*)—INCORPORATION—BOUNDARIES—UNPLATTED LANDS.

In the absence of statutory rules for determining the boundaries of a corporation, unplatted lands and outlots used for agricultural purposes within reasonable limits may be included, but they should be contiguous to some portion of the town, and not separated from it by land outside the corporate limits.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 12; Dec. Dig. § 7.\*]

Appeal from Circuit Court, Wayne County; Jonathan W. Newman, Special Judge.

Action for the incorporation of the Town of Greensfork by Eden S. Martindale and others. From a judgment overruling the objection of Alonzo M. Harris to the inclusion of certain property within the corporate limits, he appeals. Reversed.

A. C. Harris, Thos. J. Study, and John L. Rupe, for appellant. Thomas R. Jessup and Wilfred Jessup, for appellees.

HADLEY, J. This was an action for the incorporation of a town under the act of the General Assembly of 1905, concerning municipal corporations. Acts 1905, p. 219, c. 129, being sections 8975-8983, inclusive, *Burns' Ann. St. 1908*. Objections were filed before the board of commissioners at the inception of the proceedings to the notice and proof of the same, the map and survey, and other preliminary matters. These objections were overruled and further proceedings were had, by which an election was held, and the incorporation of the town ordered by the board. Appeal was taken to the circuit court, where the case was tried and judgment rendered in favor of appellees and in favor of the incorporation of the town. This appeal is taken from this judgment.

Many questions are urged on this appeal. In our view of the case we do not deem it necessary to consider but one of them. The persons directing the survey, in order to exclude the public schoolhouse from the corporation, ran the boundaries of the town so that a strip of appellant's land 202 feet wide along the west side of his land and adjoining the platted lots of the town was also excluded from the corporate limits, and a tract containing about six acres adjoining and lying east of this strip was included. The tract thus included lay north and abutted on the turnpike that constituted the main thorough-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fare of the town, was a pasture, had never been offered or used as town property, or platted or offered for sale in lots. At no point did it touch any portion of the platted portion of the town or the business or residential district, but was separated therefrom by land outside of the corporate limits. It was not shown that this field was necessary or desirable for town uses or town purposes. Greensfork is an old town, and it is shown there has been no material growth, either in business or population, in 50 years. The statute for the incorporation of towns does not prescribe any rules by which the boundaries of such corporation shall be determined. In the absence of such provisions, then, unplatted outlots and lands used for agricultural purpose may, within reasonable limitations and restrictions, be included within the corporate limits. *Ind. Imp. Co. v. Wagner*, 138 Ind. 658, 38 N. E. 49; *Vestal v. Little Rock*, 54 Ark. 321, 329, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778; *Rev. St. 1881*, § 3389; *Burns' Ann. St. 1901*, § 4426; *Elston et al. v. Board*, 20 Ind. 272. But such lands should be contiguous to some portion of the town, and not separated from it by land outside of the corporate limits (*Vestal v. Little Rock*, supra), and should be either held for sale in smaller lots or parcels as town property, or are valuable by reason of their adaptability to town uses, or required or desired to furnish premises for business or dwelling houses for the inhabitants, as in the case of a growing town, or be needed for any proper town purpose, as for extension of streets, or sewer, light, gas, or waterworks system, or other public utility, or other necessary demands of the town. *Vestal v. Little Rock*, supra; *People v. Bennett*, 29 Mich. 451, 18 Am. Rep. 111; *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *City v. Southgate*, 15 B. Mon. (Ky.) 491; *Morford v. Unger*, 8 Iowa, 82; *New Orleans v. Michoud*, 10 La. Ann. 763; *Bradshaw v. Omaha*, 1 Neb. 16; *State v. Mote*, 48 Neb. 683, 67 N. W. 810; *State v. Dimond*, 44 Neb. 154, 62 N. W. 498; *State v. Minnetonka*, 57 Minn. 528, 59 N. W. 972, 25 L. R. A. 755. Appellant's land is not shown to be within any of the above requirements. He has no need of town government, and the town has no need of his land. Under the facts in this case the town could have rendered him no compensation for the taxes it required of him. As is said in *Cheaney v. Hooser*, supra: "Such an act, though on its face simply extending the limits of a town, and presumptively a legitimate exercise of power for that purpose, would in reality, when applied to the facts, be nothing more or less than an authority to the town to tax the land to a certain distance outside of its limits, and in effect to take the money of the proprietor for its own use without compensation to him." The boundary lines exhibited by the map clearly show that the persons directing the incorporation proceedings were more

interested in excluding the schoolhouse, which might be an expense, from their boundaries, and including appellant's land, which would be a source of revenue, than they were in the symmetry of their corporate limits or the needs and demands present, or prospective, of their town. The inclusion of appellant's land within the boundary lines, under the facts shown, was an unwarranted and unreasonable exercise of the power conferred by the statute.

Judgment reversed.

(43 Ind. App. 614)

# SCOTT v. LAFAYETTE GAS CO.

(No. 6,763.)

(Appellate Court of Indiana, Division No. 1.  
Dec. 15, 1908.)

## 1. APPEAL AND ERROR (§ 939\*)—RECORD—PRESUMPTIONS.

Since, in the absence of a præcipe directing the clerk to certify certain portions of the record, it is his duty to make a complete transcript of all the proceedings, which he may do on written or oral request, where the transcript comes to the Appellate Court without a præcipe, an oral request for a complete transcript will be presumed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 989.\*]

## 2. PLEADING (§ 254\*)—AMENDMENTS—COMPLAINT—EFFECT—DEMURRER.

Where, after a demurrer to the complaint is sustained, an amended complaint is filed by leave of court, the amended complaint supercedes the original; and a demurrer subsequently filed, though not denominated as a demurrer to the "amended" complaint, is addressed thereto.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 254.\*]

## 3. MINES AND MINERALS (§ 78\*)—LEASES—OIL AND GAS LANDS—CONSTRUCTION.

Where a lease of oil and gas lands required the lessee to drill one well within two years from the date of the lease, and to also drill a second well thereafter unless the first should become useless, and also provided that, in case the wells were not drilled or utilized, then, on payment of the stipulated well rental, the agreement should continue as though the wells had been drilled, the latter clause, though optional in form, did not permit the lessee to refuse either to drill wells or pay the rent and thus entirely avoid the contract, and on failure to drill, the lessee was liable for the well rental.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 78.\*]

## 4. BILLS AND NOTES (§ 468\*)—ACTIONS—PLEADING—COMPLAINT.

Though the complaint on a promissory note must aver that the note was due and unpaid when the action was brought, this need not be in direct terms, and if sufficient facts are pleaded from which it may be fairly inferred that the note was due and unpaid, the complaint will withstand a demurrer.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1462, 1463; Dec. Dig. § 468.\*]

## 5. MINES AND MINERALS (§ 79\*)—LEASES—ACTION FOR RENT—COMPLAINT.

A complaint to recover rent under an oil and gas lease, alleging that defendant paid all the rents to a certain day, that for certain periods there became due as rents specified sums,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and that plaintiff was the owner of the premises, sufficiently alleged that the rent was due and unpaid when the complaint was filed.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 79.\*]

**6. CONTRACTS (§ 170\*)—CONSTRUCTION—INTERPRETATION BY PARTIES.**

When the language of a contract is of doubtful construction, the interpretation thereof by the parties themselves is entitled to great weight and may control, and such construction will be adopted by the court, unless at variance with the correct legal interpretation.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.\*]

**7. MINES AND MINERALS (§ 79\*)—LEASES—ACTION FOR RENT—COMPLAINT—SUFFICIENCY.**

A gas and oil lease reserved to the lessor the right to use gas for domestic purposes in his residence on the premises so long as the lease continued in force, the lessee to pay the lessor, at the latter's option, \$15 per year in lieu of gas. The complaint, in an action for rent, averred that defendant agreed to pay plaintiff \$15 per year in lieu of gas, etc.; that plaintiff was, and since the day of the lease had been, the owner of the premises; that defendant continued to pay during and including the whole of the year 1904; and that the \$15 for the year 1905 was due and unpaid. *Held* sufficient on demurrer; the allegations showing that the parties had construed the contract so as to entitle plaintiff to \$15 per year.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 79.\*]

**8. MINES AND MINERALS (§ 79\*)—LEASES—ACTION FOR RENT—COMPLAINT—SUFFICIENCY.**

Where a gas and oil lease provided that the lessee might cancel the lease by giving notice, and by paying all rent due, together with the sum of \$5, and releasing the lease of record, the complaint, in an action for rent, alleging that defendant had tendered to plaintiff the \$5 sued for, but failed to give written notice as agreed, and to pay the rent alleged to be accrued, and that the \$5 was due and unpaid, was insufficient; there being no averment that defendant had canceled the lease, and the fact that it was in arrears on the rent did not obligate it to cancel the lease and become liable for the cancellation fee.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 79.\*]

Appeal from Circuit Court, Blackford County; Chas. E. Sturgis, Judge.

Action by Addison Scott against the Lafayette Gas Company. Judgment for defendant, and plaintiff appeals. Reversed, with instructions.

A. R. Long and L. F. Sprague, for appellant. John R. Browne, Gus Condo, and Ferdinand Winter, for appellee.

**WATSON, C. J.** This was an action to recover rentals under the terms of a gas and oil lease.

We are confronted with a motion by appellee to dismiss this appeal for the reason that there was no praecipe filed, and therefore nothing is presented for our consideration. In the absence of a praecipe directing the clerk to certify to certain portions of the record, it was his duty to make a complete

transcript of all the proceedings, and this he may do upon the request of the party, either orally or in writing. If a transcript comes here without a praecipe, we, therefore, presume an oral request was given to the clerk for a full and complete transcript. Elliott, Appellate Procedure, § 200; Acts 1903, p. 338, c. 193, § 7; Burns' Ann. St. 1901, § 661; Burns' Ann. St. 1908, § 690; Rutherford v. Prudential Ins. Co., 32 Ind. App. 423, 70 N. E. 177; Workman v. State ex rel., 165 Ind. 42, 73 N. E. 917; Price v. Huddleston, 167 Ind. 536, 79 N. E. 493. The motion is therefore not sustained.

The record in this case discloses that on January 2, 1906, appellant filed his complaint, and on January 25th of the same year appellee filed its demurrer thereto. On June 17, 1907, the demurrer was sustained. Afterwards, to wit, on June 27, 1907, appellant, upon leave of court first obtained, filed his amended complaint in three paragraphs. Subsequently thereto, to wit, on November 1, 1907, appellee filed its demurrer to this complaint, but did not denominate it as the demurrer to the "amended" complaint. It is therefore contended by the appellee that no question is presented by the assignment of errors. We cannot agree with this contention. The amended complaint superseded the complaint on file, which was thereby removed from the record of this cause. Western Assurance Co. v. McCarty, 18 Ind. App. 449, 48 N. E. 265; Weaver v. Apple, 147 Ind. 304, 46 N. E. 642; Britz v. Johnson, 65 Ind. 561; Westerman v. Foster, 57 Ind. 408; Kirkpatrick v. Holman, 25 Ind. 293. The pleading filed June 27, 1907, became the complaint in this cause, and therefore the only pleading to which a demurrer could be addressed. City of Vincennes v. Speas, 35 Ind. App. 389, 393, 74 N. E. 277; Town of Whiting v. Doob, 152 Ind. 157, 52 N. E. 759.

In addition to setting out the lease it was alleged, in substance, in the first paragraph of the complaint, that appellant leased the described premises, containing 40 acres, to appellee in June, 1897. The term of the lease was five years, with an option in the lessee to renew or continue the lease for an additional term of five years by giving notice of its desire to do so. That notice was given, but not at the time required by the lease. That no well was ever drilled on the premises. That appellee paid all rentals accruing under the lease up to January 1, 1905, "and for the period from January 1, 1905, to July 1, 1905, there became due as rental \$50, and for the period from July 1, 1905, to December 31, 1905, there became due as rental \$50, making a total due as well rental, the same [sum] of \$100 as made and provided in said contract." That appellant is the owner of the leased premises, and prays judgment for \$100.

The clauses of the lease necessary to the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

consideration of the question raised are as follows:

"(3) The said party of the second part hereby covenants in consideration of the said premises, to pay unto said part— of the first part compensation at the rate of 50 cents per acre per annum for said land until the completion of a well upon said lands, as herein-after mentioned. The party of the second part further agrees that from and after the completion of a well on said premises which shall in its opinion produce gas in sufficient quantity to justify said second party in marketing said gas it will pay to the part— of the first part compensation at the rate of \$100 per annum for each well on said land so long as in the opinion of the party of the second part, said well produces a marketable quantity of gas. Said payments shall become due semiannually upon the first day of January and the first day of July, and shall be paid within ten (10) days of the maturity thereof, by depositing the same in the Fairmount Bank at Fairmount, subject to the order of said first part— or direct to said first part—.

"(4) Said party of the second part reserves and is hereby given the right to cancel and terminate this lease by giving to said part— of the first part written notice of such intention three months before the first day of January or the first day of July in any year, and by or on the first day of January or July paying to said part— of the first part all rents then due to said part— of the first part according to the terms of this lease and also paying to said part— of the first part the sum of \$5 and releasing of record this lease; whereupon the rights of both parties under this lease shall cease and determine, except that said second party shall have the right, without paying any further compensation therefor, to maintain, operate and repair or replace or to remove any pipe lines laid upon said premises.

"(5) To drill one well upon said premises within 2 years from this date; and a second well within — from the time the second party shall use the first well, unless said first well shall become useless to said second party before the expiration of the said — all subject to the same condition.

"(6) In case the well or wells are not drilled or utilized as herein provided, then upon the payment of the well rental herein stipulated to be paid by the second party, this agreement shall continue and shall have the same force and effect as though the well or wells had been drilled and utilized."

It will be observed that no forfeiture was provided for in the lease. Appellee by exercising the right of notice, release of record, and payment of \$5 and all accrued rentals might terminate this agreement before its expiration by lapse of time, but no similar right or privilege was reserved to the lessor. Appellee contends that the sixth clause is

optional in form; and that the effect of such clause is that, if said well rental be paid by the lessee, then and in that event the lease would continue alive. It is optional in form, but it does not thereby permit the lessee to refuse either to drill wells or pay the rent, and thus entirely avoid the contract. *Jackson v. O'Hara*, 183 Pa. 233, 38 Atl. 624; *Thornton, The Law Relating to Oil and Gas*, § 73. The lessee obligated itself to drill at least one well within two years from the date thereof. If it preferred not to perform that obligation, then there was the alternative provision for paying the "well rental" after the expiration of that time. The "well rental," as declared in the lease, was \$100 per annum. Therefore lessee, by its failure to drill a well upon the leased premises, incurred the alternative liability for the "well rental" of \$100 per year. Appellee further insists that the first paragraph is insufficient, in that there is no averment that the rent was due and unpaid at the time of bringing this action. It has been the holding of the courts of this state that a complaint upon a promissory note must aver that the note was due and unpaid at the time that the action was brought. This, however, need not be in direct terms. If sufficient facts are pleaded from which it may be fairly inferred the note was due and unpaid, it will withstand a demurrer. In this case the fair inference from the facts averred in the complaint is that the rental was due and unpaid at the time the complaint was filed in this cause. *Evansville, etc., R. Co. v. Darling*, 6 Ind. App. 375, 33 N. E. 636; *Malott v. Sample*, 164 Ind. 645, 74 N. E. 245; *Douthitt v. Mohr*, 116 Ind. 482, 18 N. E. 449; *Downey v. Whittenberger*, 60 Ind. 188. Therefore the court erred in sustaining the demurrer to the first paragraph of the amended complaint.

It is contended by appellee that the second paragraph of the amended complaint does not aver facts sufficient to withstand a demurrer. This paragraph was based upon the following clause of the lease in question:

"(8) To grant to said first party at said first part— expense and risk, but without charge for gas, the right to use natural gas for domestic purposes in the residence of the first part— on the demised premises, so long as this lease continues in force. Second party is to pay to first party 15 dollars per year in lieu of gas at the option of first party." It avers the execution of the contract; that appellee agreed to pay appellant \$15 per year in lieu of gas for the use in dwelling and premises of appellant; that appellant was then, and had been since June, 1897, the owner of the premises described in the contract; that the \$15 for the year 1905 was due and unpaid. It also averred "that the defendant [appellee] continued to pay for, during, and including, the whole of the year 1904." When the language of a contract is of doubtful construction, the interpretation

by the parties themselves is entitled to great weight, and may control. And the construction thus placed by them will be adopted by the court, unless it be at variance with the correct legal interpretation of the contract. *Smith v. Board of Comm.*, 6 Ind. App. 153, 33 N. E. 243; *Ralya v. Atkins Co.*, 157 Ind. 331, 61 N. E. 726; *Ewing v. Wilson*, 132 Ind. 223, 31 N. E. 64, 19 L. R. A. 767; *Frazier v. Myers*, 132 Ind. 71, 31 N. E. 536; *Louisville, etc., R. Co. v. Reynolds*, 118 Ind. 170, 20 N. E. 711; *Vinton v. Baldwin*, 95 Ind. 433; *Reissner v. Oxley*, 80 Ind. 580; *Chicago v. Sheldon*, 9 Wall. 50, 19 L. Ed. 594; *Steinbach v. Stewart*, 11 Wall. 568, 20 L. Ed. 56; *Topliff v. Topliff*, 122 U. S. 181, 7 Sup. Ct. 1057, 30 L. Ed. 1110; *Beach on Contracts*, §§ 721, 722; 17 Amer. & Eng. Ency. of Law (2d Ed.) 23-25. In the case of *Frazier v. Myers*, 132 Ind. 72, 31 N. E. 536, the court said: "The construction given the grant by the parties is the one upon which the courts must act in such a case as that made by the complaint. Where parties give their contract a construction, the courts will adopt that construction and hold the parties to it." We are now dealing with the allegations of the complaint as confessed by the demurrer. By these allegations it is shown that the parties have construed the contract so as to entitle the lessor to the \$15 per year, for this amount was paid for the year 1904. It was error to sustain the demurrer to this paragraph, and the court erred in thus doing.

The third paragraph of the amended complaint was founded upon the fourth clause of the lease above set out. This paragraph alleges the execution of the lease, that on or about July 16, 1905, appellee tendered to appellant the \$5 sued for, but failed to give written notice as agreed, and to pay the rental alleged to be accrued, and that said \$5 was due and unpaid. There is no averment that appellee has released of record, or attempted to release of record, the lease executed by these parties. There was no duty devolving upon appellee to cancel said contract. The power to cancel was expressly reserved to the lessee, but under certain restrictions. Those were that the agreed written notice be given, the contract released of record, and \$5 and the accrued rentals be paid to appellant. In the absence of an averment that appellee had canceled the lease there was shown no liability to pay the sum prayed for in the third paragraph. The fact that appellee was in arrears on the rental would not obligate it to cancel the lease and hence become liable for the cancellation fee. The court did not err in sustaining the demurrer to the third paragraph of the amended complaint.

For the reasons herein set forth, this judgment is reversed, with instructions to the trial court to overrule the demurrers to the first and second paragraphs of the amended

complaint, and for further proceedings not inconsistent with this opinion.

Judgment reversed.

(42 Ind. App. 690)

**DAILEY v. STATE ex rel. BIGLER, Auditor.**  
(No. 6,263.)<sup>1</sup>

(Appellate Court of Indiana. Dec. 18, 1908.)

**COURTS (§ 220\*)—APPELLATE COURT—NUMBER OF JUDGES CONCURRING—TRANSFER TO SUPREME COURT.**

Under the express provisions of Act March 12, 1901 (Acts 1901, p. 569, c. 247, § 15), the Appellate Court will transfer a cause to the Supreme Court where all of the appellate judges sit in the case, and there is not a concurrence of four of them in the result.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 220.\*]

Appeal from Circuit Court, Boone County; Samuel R. Artman, Judge.

Action by the State, on the relation of Warren Bigler, Auditor, against Americus O. Dailey. From a judgment for plaintiff, defendant appeals. Appeal transferred to Supreme Court.

T. J. Terhune, Roy W. Adney, and Miller, Shirley & Miller, for appellant. Chas. W. Miller, Henry M. Dowling, and Wm. C. Geake, for appellee.

**PER CURIAM.** This cause being submitted to the entire court and four judges not concurring in the result, the case is hereby transferred to the Supreme Court under section 15 of the act approved March 12, 1901 (Acts 1901, p. 569, c. 247).

(42 Ind. App. 605)

**INDIANAPOLIS & C. TRACTION CO. v. SMITH.** (No. 6,551.)

(Appellate Court of Indiana, Division No. 2. Dec. 15, 1908.)

**1. RAILROADS (§ 439\*)—INJURIES TO ANIMALS ON TRACKS—ACTIONS—PLEADING.**

A complaint, in an action against a railroad company for killing a horse on its track, averring that plaintiff's horse got out of his field and onto a private crossing, constructed on plaintiff's land by defendant, under a contract made part consideration for plaintiff's conveyance of the right of way, and because the right of way was not fenced, and the crossing equipped with cattle guards, as the contract required, the horse got on the right of way west of the crossing and was killed, did not affirmatively show that the horse got on defendant's road through a gate at a private crossing on plaintiff's farm, and wandered along the right of way to a public highway, where it was killed.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 439.\*]

**2. RAILROADS (§ 413\*)—INJURIES TO ANIMALS ON TRACKS—ANIMALS ENTERING RIGHT OF WAY THROUGH PRIVATE GATES—LIABILITY OF INTERURBAN RAILROAD—STATUTORY PROVISIONS.**

Burns' Ann. St. 1901, § 5320 (Acts 1885, p. 148, c. 44, § 1), allows persons owning land on both sides of a railroad to construct private

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup> Superseded by opinion in Supreme Court, 37 N. E. 4.

wagonways across the railroad. Section 5321 requires them to erect and maintain substantial gates in the right of way fence when erected. Section 5322 provides that, if animals are injured or killed on the track by the company's trains, the company shall not be liable if the animals entered on the track through the gates, unless the result of the company's negligence; and section 5327 requires gates and bars at farm crossings to be constructed and maintained and kept closed by the owner in the absence of agreement to the contrary. Acts 1903, p. 426, c. 227, requires electric interurban railroads to fence their rights of way and construct farm crossings and provide them with cattle guards. Section 4 (page 428) saves the right of action under existing laws. Section 6 (page 429) provides that, when a railroad has fenced on one or both sides, where a private crossing is constructed, the abutting owner shall erect and maintain substantial gates in the fence across the crossing, and keep them securely fastened when not in use by him or his employees. *Held*, that the liability of an interurban railroad company for the killing of stock entering the right of way through a private crossing is the same as that of railroads under the act of 1885; and, where the gate in a private crossing, through which the owner's horse entered the right of way, had been left insecurely fastened by others than the railroad company, the company was not liable for killing the horse, in the absence of negligence, where there was no agreement relieving the owner from the duty of keeping the gate securely fastened.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1465; Dec. Dig. § 413.\*]

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by George M. Smith against the Indianapolis & Cincinnati Traction Company. Judgment for plaintiff, and defendant appeals. Reversed, with instructions to sustain defendant's motion for a new trial.

Claude Cambern, for appellant. Brown & Kepperly, for appellee.

COMSTOCK, P. J. Appellee recovered judgment against appellant for \$125 for the killing of a horse.

The errors assigned and relied upon by appellant for a reversal are the overruling of the demurrer for want of facts to the fourth paragraph of complaint, and appellant's motion for a new trial. Said paragraph, omitting formal and preliminary averments, is substantially as follows: That on the 14th day of September, 1904, and before the construction by the defendant of its said roadway, the defendant and the plaintiff entered into a certain contract in writing, a copy of which is filed herewith and made a part hereof, marked "Exhibit A" wherein it is agreed that, as part of the consideration for conveying by the said plaintiff to the defendant sufficient land so that the defendant could construct a roadway for its said railroad over and through said farm, the defendant would provide and maintain a crossing, with suitable cattle guards over its tracks, which crossing and cattle guards were to be located at the option of plaintiff. Said defendant also agreed to construct and main-

tain a good and substantial fence on both sides of the land, so to be conveyed, such as is contemplated by the statute of Indiana, approved March 10, 1903, so that the land of the plaintiff might be inclosed on both sides of said road, when completed, and so that convenient access might be had from one portion of said land to that portion separated from it by said roadbed. Plaintiff further avers "that he executed his deed for said land to the defendant, all as provided in said contract, and the defendant then and there constructed its said roadway over and across said land and through plaintiff's said farm on the land so conveyed to it, and constructed said crossing provided for in said contract at a point indicated by plaintiff, but it wholly failed to provide and maintain a fence on both sides of said roadbed and barriers, and cattle guards sufficient and suitable to turn and prevent horses and other stock from getting onto defendant's road from said crossing; that plaintiff provided a lane from his barnyard on the northern part of his said farm, running down to and across said defendant's roadbed at the point where said crossing had been established as aforesaid, so that his cattle could pass from his barnyard to the field inclosed by the south fence along defendant's right of way; that gates were constructed and maintained by plaintiff opening into the field south of said roadway and in the lane north of said roadbed, as hereinbefore described." Plaintiff further avers "that on the 27th day of July, 1906, without any fault or negligence on his part contributing thereto, eight head of horses got out of said south field onto said crossing, and that, because there were no suitable and sufficient fences, barriers, and cattle guards, as contemplated and provided for in said contract, said horses got upon the roadway and right of way of the defendant, west of said crossing, and a car owned by defendant and operated by electricity and running over its tracks, as aforesaid, in said county of Marion, and state of Indiana, on said 27th day of July, 1906, struck one of said horses, namely, a young horse about two years old, and then and there the property of the plaintiff, and so maimed and wounded it that it died from the effects of being so struck by said car operated by said servants and agents of the defendant, all without fault or negligence of the plaintiff contributing thereto; that said horse was of the value of \$125, and to the plaintiff's damage in the sum of \$125." The agreement made a part of the complaint contains, among other, the following provisions: "That whereas the party of the first part has agreed to convey to the party of the second part, certain land (describing it), said land to be used by said second party for its roadway through the land of the party of the first part, \* \* \*. Now, therefore, it is agreed that in consideration for the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

transfer of said land to be described in said deed of conveyance, the said party of the second part agrees in addition to the payment to the party of the first part of the sum of twenty-one hundred dollars (\$2,100) to be expressed in said deed of conveyance, that it will \* \* \* provide and maintain a crossing with suitable cattle guards over its tracks, the said party of the first part to have the option of locating said crossing and cattle guard. That said party of the second part also agrees to construct and maintain a good and substantial fence on both sides of the land to be conveyed as aforesaid, such as is contemplated by statute of the state of Indiana, approved March 10, 1903, so that the land of the party of the first part may be inclosed on both sides of said road when completed, and so that convenient access may be had from one portion of said land to that portion separated from it by said roadbed. \* \* \*

"The objection to the said paragraph is that "it appears affirmatively therefrom that appellee's horse got on appellant's road through a gate at a private crossing on the appellee's farm, and wandered along the right of way to a public highway, where it was struck and killed." The reason given does not appear to be sustained from the reading of the complaint, and so far as the objections are stated, the demurrer was properly overruled. That the finding and decree of the court is not sustained by the evidence and is contrary to law are the reasons set out in the motion for a new trial.

From the proofs and admissions it is shown that appellant's railroad, operated by electricity, runs through appellee's farm, east and west; that appellee had a private crossing over said railroad; that the railroad was securely fenced by post and wire fence, put up by a son of the appellee from said private crossing to the Arlington road, a distance of three-eighths of a mile; that two gates were erected by appellee at the south end of said crossing in the line of appellant's fence, opening into appellee's pasture fields, south of the railroad; that appellee had his cows and horses running in this pasture, and in the evening of July 26, 1906, the appellee's son, in company with a boy whose name is not shown, went to the pasture, and drove the cows through the east gate across the railroad to the barn; that after passing through said gate he fastened it by running two boards between the cracks of the gate and the post; that there never was a lock or chain on the gate; that within one half hour after the appellee's son passed through this gate appellee's horses got out onto the private crossing through this gate, and were driven off the track by the crew of the passenger car that passed at 6:30 o'clock; that this gate was not left open by the appellants or any of its servants; that the horses wandered along the right of way towards the west, and three of them passed over the cattle guard at the Arlington road out onto the

public highway; that appellant's freight car, running at 20 miles an hour, struck one of these horses while it was on the highway, between the end of the plank crossing and the cattle guard; that in procuring the right of way from appellee through his farm the appellant executed the contract marked "Exhibit No. 1," by which it is agreed, among other things, to "provide and maintain a good and substantial fence on both sides of the land to be conveyed." The cattle guards at the private crossing and the cattle guards at Arlington avenue were not in condition, at the time appellee's horse was killed, to prevent horses or other stock from passing over the same.

In 1863 (Section 5312 et seq., Burns' Ann. St. 1901; Section 4025 et seq., Rev. St. 1881) the Legislature passed an act imposing upon railroad companies liability for stock killed at all places where the roads were not securely fenced, making no provision for private crossings. Under this act it has been held that, if a railroad company constructed, or permitted the landowner to construct, a private crossing for his accommodation, such landowner thereby waived the benefit of the statute as to all animals of his own that passed to the railroad through such private gate, but as to all other persons the obligations of the company to securely fence its right of way existed at private crossings the same as elsewhere, and the company was liable for injury to animals of others entering upon the railroad at such crossings. This remained the law until 1885, at which date an act was passed, providing that persons owning land on both sides of the railroad should have the right to construct and maintain private wagonways across the railroad; and, when such railroad is fenced, such landowner should erect and maintain substantial gates in the lines of such fence, and keep the same securely locked. It further provided that: "If animals are killed or injured on the track of such railroad by the cars or locomotives thereof, the company owning or operating such railroad shall not be liable to pay damages therefor, if such animal entered upon the track of such railroad through such gates, unless it shall be proved that such killing or injury was caused by the negligence of the servants of the company, owning or operating such railroad." Burns' Ann. St. 1901, §§ 5321, 5322 (Acts 1885, p. 149, c. 44, §§ 2, 3). Under the act of 1885, supra, it has been held that a railroad company is not liable, in absence of negligence, for the injury or killing of animals that enter upon its track by passing through one of said gates. *Chicago, etc., R. Co. v. Ramsey*, 168 Ind. 390, 81 N. E. 79, 120 Am. St. Rep. 379. In 1903 (Acts 1903, p. 426, c. 227) the Legislature passed an act requiring interurban railroads, traction lines, or suburban railways, using electricity for motive power, to fence their right of way used for railroad tracks, and to construct barriers and

cattle guards at said public roads and highway crossings, and maintain and keep the same in repair, and provide for the construction of farm crossings and for cattle guards at such crossings, etc. Sections 1, 2, 3, and 5, of said act, among other things, provide generally, for the fencing of railroads described in the title of said act, and the maintenance of such fences by the railroad companies, and in certain cases for such fencing and maintenance by adjoining landowners at the expense of such railroad companies. Section 4 saves the right of action under existing laws. Section 6 of said act provides as follows: "When such railroad is fenced on one or both sides at the point where such way is constructed such abutting landowner shall erect and maintain substantial gates in the line of such fence or fences across such way, and keep the same securely fastened and closed when not in use by himself or his employes." Section 5320, Burns' Ann. St. 1901 (Acts 1885) supra, provides for the construction of driveways at crossings where the landowners own on both sides of the right of way. Section 5327, Burns' Ann. St. 1901 (Acts 1885), provides: "All gates and bars at farm crossings shall in absence of contract or agreement to the contrary be constructed and maintained and kept closed by the owner of such farm crossing. If animals go upon the railroad tracks through a gate that has been left open the railroad company is not liable for injuries to such animals, unless such company is guilty of negligence." Penn. R. Co. v. Spaulding, 112 Ind. 47, 13 N. E. 268; Hunt v. Lake Shore, etc., R. Co., 112 Ind. 69, 13 N. E. 263. The construction of section 5327, supra, should control the construction of section 6, supra (Acts 1903), unless it appears that the contract in question releases appellees from keeping the gates securely fastened. This, the contract does not do. The gate through which the stock passed was not left open by appellants, and it was not its duty to keep it closed. The case at bar is within the doctrine of Chicago, etc., R. Co. v. Barnes, 118 Ind. 126, 18 N. E. 459. In that case the company had received a deed from plaintiff for its right of way, and in the deed the company agreed to build and maintain a fence on both sides of the right of way and farm crossings with cattle guards. The company built the fences with substantial gates at the crossings, but failed and neglected to build the cattle guards. Afterwards the gates got out of repair, and no effort was made by the company or plaintiff to repair them. Plaintiff's animals were fed in a pasture on the north side of the railroad, and passed from the field upon the railroad from an open gate at such private crossing. The court said: "The facts stated make a prima facie case for the appellee, for they show a valid contract to make a secure fence, a

breach of this contract, and that the animals got upon the tracks because the fence was not such as it was appellant's duty to erect and maintain. If it had appeared that the gates were left open by appellee, or by some wrongdoer other than the appellant, we should, perhaps, be required to hold that there was no liability; but no such facts appear." The facts bring the case within the ruling of the recent case of Chicago, etc., R. Co. v. Ramsey, supra.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

(42 Ind. A. 638)

PITTSBURG, C., C. & ST. L. RY. CO. v. JELLISON et al. (No. 6,524.)

(Appellate Court of Indiana, Division No. 2. Dec. 18, 1908.)

ADVERSE POSSESSION (§ 13\*)—HOSTILE CHARACTER OF POSSESSION—EXTENSION OF POSSESSION TO FENCE.

Plaintiff, in 1882, purchased lots adjoining defendant railroad company's right of way, and thereafter occupied the lots up to a fence separating his land from the right of way, which fence had been erected in 1867, and renewed from time to time since its erection. Plaintiff planted trees near the fence immediately after his purchase. Defendant did not disturb plaintiff's possession until 1904, when it erected a new fence 15 or 18 feet from the old one on the property occupied by plaintiff. Held, that plaintiff had acquired title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65-76; Dec. Dig. § 13.\*]

Appeal from Circuit Court, Jay County; J. F. La Follette, Judge.

Action by Matthew Jellison and others against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

G. E. Ross, for appellant. J. W. Newton, for appellees.

ROBY, J. This is an appeal from a judgment quieting appellee's title to real estate. The facts shown without apparent dispute are that appellees, in October, 1882, purchased and took possession of lots 45, 46, and 47 in Addington's Heirs' addition to Ridgeville, Randolph county, Ind. These lots are bounded on the north by the appellant's railroad. When appellees took possession, they found a fence north of said lots, and they have since then held to the fence, claiming it as their boundary line. They planted fruit trees near to the fence in 1882, which are still standing, and they have exercised dominion over the land ever since. The fence found by them was erected in 1867, and has been from time to time renewed, marking the boundary from that date until 1904, when appellants built a new one 15 to 18 feet south of the old one. The decree quiet's title in appellees to the lots named, describ-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed by metes and bounds, and following the line of the old fence, thereby including the strip in dispute. The evidence is supportive of the finding. *Webb v. Rhoads*, 28 Ind. App. 395, 61 N. E. 785; *Logsdon v. Dingg*, 32 Ind. App. 158, 69 N. E. 409; *Rennert v. Shirk*, 163 Ind. 542, 551, 72 N. E. 546.

The complaint joined paragraphs to quiet title with paragraphs for possession and for damages. The finding is a general one, and is within the issues, and is the only one which the court, under the evidence, could make. A right result having been reached, there can be no reversal. *Burns' Ann. St.* 1908, §§ 700, 407.

Judgment affirmed.

(43 Ind. App. 605)

**WALKER v. STATE** ex rel. **LABOYTEAUX**.  
(No. 6,550.)<sup>1</sup>

(Appellate Court of Indiana, Division No. 2.  
Dec. 16, 1908.)

**1. JUDGMENT (§ 335\*)—REVIEW—GROUNDS—PERJURY.**

A judgment will not be reviewed for perjury committed by a witness at the trial.

[Ed. Note.—For other cases, see *Judgment*, Dec. Dig. § 335.\*]

**2. JUDGMENT (§ 335\*)—REVIEW—GROUNDS—FRAUD.**

The court will not set aside a judgment because it was founded on a fraudulent instrument or on perjured evidence, or for any matter actually presented and considered in the judgment, but will grant relief where, by fraudulent means, the defeated party has been prevented from fully exhibiting his case, or for any fraud by reason of which there has never been a real contest of the subject-matter of the suit.

[Ed. Note.—For other cases, see *Judgment*, Dec. Dig. § 335.\*]

**3. JUDGMENT (§ 335\*)—REVIEW—GROUNDS—FRAUD.**

A defendant in bastardy is not entitled to relief from the judgment against him, on the ground that a witness committed perjury with the knowledge and connivance of relatrix, the transaction involved being one within the knowledge of defendant and relatrix as well as the witness, where defendant, by cross-examination, obtained the benefit of contradictory statements made by the witness.

[Ed. Note.—For other cases, see *Judgment*, Dec. Dig. § 335.\*]

**4. BASTARDS (§ 54\*)—PROCEEDINGS—PRESUMPTIONS.**

Opportunity is not presumptive of sexual intercourse.

[Ed. Note.—For other cases, see *Bastards*, Dec. Dig. § 54.\*]

**5. BASTARDS (§ 65\*)—PROCEEDINGS—EVIDENCE—SUFFICIENCY.**

In a bastardy proceeding, evidence held to justify a verdict against accused.

[Ed. Note.—For other cases, see *Bastards*, Dec. Dig. § 65.\*]

**6. BASTARDS (§ 41\*)—EXAMINATION OF RELATRIX—"PARTY."**

The relatrix in bastardy is not a party to the action, within *Burns' Ann. St.* 1908, § 533,

providing that a "party" to an action may be examined before trial.

[Ed. Note.—For other cases, see *Bastards*, Dec. Dig. § 41.\*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5202-5213; vol. 8, p. 7747.]

**7. BASTARDS (§ 33\*)—PROCEEDINGS—PARTIES.**

In a bastardy proceeding, the state is the party plaintiff, and the relatrix is a mere witness.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. § 79; Dec. Dig. § 33.\*]

Appeal from Circuit Court, Fayette County; Geo. L. Gray, Judge.

Action by Joseph W. Walker to review a judgment rendered against him in an action by the State on the relation of Pearl Laboyteaux. From a judgment denying relief, plaintiff appeals. Affirmed.

George Young, for appellant. Reuben Connor, W. O. Barnard, and W. E. Jeffrey, for appellee.

**ROBY, J.** This is a suit to review a judgment on the ground that it was obtained by fraud. Action was begun by the state, on the relation of Pearl Laboyteaux, before a justice of the peace in Henry county (March 25, 1903). After the certification of the case to the Henry circuit court, a change of venue was taken to the Fayette circuit court. Here trial was had, finding made that appellant was the father of the bastard child of Pearl Laboyteaux, and judgment rendered against him for \$500 and costs. An appeal from this judgment was taken, and a reversal was ordered by the Supreme Court. *Walker v. State ex rel.*, 165 Ind. 94, 74 N. E. 614. On the retrial judgment was again rendered against the appellant (March 29, 1906), and a finding made that he is the alleged father of the child as alleged. This action was brought to review that judgment, on the ground that a witness, Bertha Alger McCracken, who testified that one Ol Burgess and the relatrix were not left alone together on the night of September 5, 1902, when it was alleged that the child was begotten by this appellant, committed perjury with the knowledge and connivance of the relatrix, Laboyteaux.

The law is settled that a judgment will not be reviewed on account of perjury committed by a witness at the trial. *Pepin v. Lautman*, 28 Ind. App. 74, 62 N. E. 60. In *United States v. Thockmorton*, 98 U. S. 61, 25 L. Ed. 93, it is held that relief will be granted where, by reason of some fraudulent means, the unsuccessful party has been prevented from fully exhibiting his case—as by keeping him away from court, a false promise of compromise, where an attorney connives at his client's defeat, and all such fraud by reason of which there has never been a real contest before the court of the subject-matter of the suit—but that the court will not set aside a judgment because it was founded

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup> Rehearing denied. Transfer denied.

on a fraudulent instrument or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed. The transaction involved was one within the full knowledge of both appellant and the relatrix, as well as the witness testifying, and the truthfulness, or lack of truthfulness, of the witness was necessarily known by the parties. "The party present at the trial must be prepared to meet and expose prejudy, because he must know that in no other way can a false claim be supported, and the purpose of the trial is to ascertain the truth, and in so doing the court must determine the truth or falsity of the testimony given." *Pepin v. Lautman*, supra. The deposition of Bertha Alger McCracken had been taken previous to the trial, but could not be introduced in evidence because of her presence. Appellant by cross-examination obtained the benefit of her contradictory statements. Opportunity is not presumptive of intercourse, and, in view of the fact that the record shows by uncontradicted evidence that appellant had been guilty of unlawful sexual communication with Pearl Laboyteaux weekly for a period of over one year; that he had intercourse with her the week before September 5, 1902, and the week thereafter—the jury had ample evidence upon which to base a verdict regardless of the evidence of witness McCracken.

Another question is presented by the record. Appellant before trial filed his motion for the examination of Pearl Laboyteaux touching on matters charged in the complaint. The statute (*Burns' Ann. St. 1908*, § 533) provides only that a party to an action may be so examined. The relatrix is not a party to a prosecution for bastardy. "The state is the party plaintiff. The relatrix is the witness." *State ex rel. v. Smith*, 55 Ind. 385. And the motion was properly overruled.

Judgment affirmed.

(42 Ind. App. 629)

**INLAND STEEL CO. v. YEDINAK.**

(No. 6,281.)<sup>1</sup>

(Appellate Court of Indiana, Division No. 2.  
Dec. 16, 1908.)

**COURTS (§ 220\*)—INDIANA APPELLATE COURT—JURISDICTION—CONSTITUTIONAL QUESTIONS.**

Where an action for injuries to a servant was predicated on alleged violation of Factory Act (*Laws 1899*, pp. 231, 232, c. 142) §§ 1, 2, making a master liable for certain injuries to employes, and defendant claimed that such provisions were unconstitutional, an appeal from a judgment for plaintiff should be taken direct to the Supreme Court.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 220.\*]

Appeal from Circuit Court, Lake County; W. C. McMahan, Judge.

Action by John Yedinak, a minor, against

the Inland Steel Company. Judgment for plaintiff, and defendant appeals. Case transferred to Supreme Court.

Wm. J. Whinery and John B. Peterson, for appellant. F. N. Gavitt, for appellee.

**RABB, J.** This is an action for damages for personal injuries, and is predicated upon an alleged violation of the provisions of sections 1 and 2 of the factory act (*Laws 1899*, pp. 231, 232, c. 142). We are met at the threshold of the case by the contention of the appellant that these provisions of the factory act are unconstitutional, as being violative of section 10, art. 1, of the Constitution of the United States, and also of the fifth and fourteenth amendments thereto, and of sections 1 and 23, art. 1, of the Constitution of the state of Indiana, presenting, therefore, questions which this court has no jurisdiction to determine.

For this reason the cause is transferred to the Supreme Court for decision.

(44 Ind. App. 180)

**MICHIGAN MUT. LIFE INS. CO. v.**

**THOMPSON et al. (No. 6,470.)<sup>2</sup>**

(Appellate Court of Indiana, Division No. 2.  
Dec. 17, 1908.)

**1. PRINCIPAL AND AGENT (§ 24\*)—EVIDENCE OF AGENCY—QUESTION OF LAW.**

Whether, upon a given state of facts, a person is or is not an agent of another is a question for the court.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 722, 723; Dec. Dig. § 24.\*]

**2. INSURANCE (§ 88\*)—AGENTS—POWER OF LOCAL AGENTS—APPOINTMENT OF OTHER AGENTS.**

A local agent of an insurance company for a county has no authority to appoint another as its agent.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 118; Dec. Dig. § 88.\*]

**3. INSURANCE (§ 96\*)—AGENTS—AGENCY FOR INSURED—AGREEMENT TO PROCURE INSURANCE.**

Where an agent of a life insurance company which had rejected an application, told applicant's husband that he could procure insurance in another company, and applicant's husband told him to "go ahead and get her in any good company," and the agent obtained a policy through an agent of another company, he was the agent of the applicant, and not of the insurer.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 126; Dec. Dig. § 96.\*]

**4. INSURANCE (§ 198\*)—PREMIUMS—PAYMENT TO OTHER THAN AGENT—RATIFICATION BY INSURER.**

If a person paid a first premium to another whom he had authorized to secure life insurance, and the application was rejected by the company, such other person not being an agent thereof, the person paying the premium could not recover the money from the company if it had not received the money and had no knowledge of it; but, if it received the money, or had knowledge of its payment and acted upon the application, it would make the person re-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup> Transferred to Supreme Court, 87 N. E. 229. Rehearing denied.

<sup>2</sup> Rehearing denied. Transfer to Supreme Court denied.

ceiving the premium its agent by ratification, and would be liable for the money.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 198.\*]

**5. INSURANCE (§ 136\*)—POLICY—NECESSITY FOR DELIVERY.**

Where an application for life insurance recites that the contract shall be completed only by delivery of the policy, or that the policy shall not be in force until its delivery to the applicant, the contract will not become binding on the company until the policy is delivered, especially where the policy provides that it shall not take effect unless it is delivered while the applicant is in good health.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 225; Dec. Dig. § 136.\*]

**6. INSURANCE (§ 136\*)—POLICY—DELIVERY—DELIVERY TO AGENT FOR UNCONDITIONAL DELIVERY TO APPLICANT.**

The rule that receipt by an agent from his insurance company of a policy to be unconditionally delivered by him to the applicant is in law a delivery to the applicant, though the agent never surrender possession of the policy, and though its delivery to the applicant be by contract made essential to its delivery, did not apply, where the first premium had not been paid to the company or its agent, but to an agent of the applicant of which payment the company had no notice, and the applicant was so seriously ill when the policy was received by the company's agent that she afterwards died, and the policy and application provided that the policy should not take effect unless the first premium was paid and insured was in good health at the time the policy was delivered to her.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 226; Dec. Dig. § 136.\*]

Appeal from Superior Court, Vanderburgh County; Alex Gilchrist, Judge.

Action by Clifton Thompson and others against the Michigan Mutual Life Insurance Company. Judgment for plaintiffs, and defendant appeals. Reversed, with instructions to sustain defendant's motion for a new trial.

Iglehart, Taylor & Hellman and Andrew J. Clark, for appellant. Van Buskirk & Osborn and Geo. K. Denton, for appellees.

COMSTOCK, P. J. Appellees recovered judgment against appellants for \$1,000, upon a policy of insurance on the life of one Lulu Thompson, which policy was made to them. The complaint is in one paragraph, and alleges that all of appellees but Charles Thompson were infants, the said Charles acting as next friend; that appellant corporation on the ——— day of March, issued its policy of insurance upon the life of Lulu Thompson in the sum of \$1,000, payable to appellees, her children; that the premium was paid thereon, the policy delivered, and that the insured died April 21, 1900; that notice of death was given appellant, and request made for blanks for proof of death, but the liability was denied; that appellees had performed all conditions required by them to be performed, as had also the deceased in her lifetime; that the payment had been demanded and refused; that appellant

had possession of the policy, and appellees were therefore unable to make the same a part of the complaint. The action of the court in overruling appellant's motion for a new trial is the only error discussed. The insufficiency of the evidence, the correctness of the verdict, the refusal of the court to give certain instructions requested, and in giving certain instructions of its own motion, and misconduct of counsel for appellees in argument to the jury, are reasons set out in said motion.

The validity of the policy depends upon two conditions: (1) Whether the first premium was paid to any agent of appellant company authorized to receive it; (2) whether, at the time it was delivered to appellant's agent at Evansville, the insured was in good health. The policy contained the following provision: "This policy shall not take effect, unless the first premium is paid in cash or note for extension of time for such payment is accepted by the company at its home office at Detroit, Michigan, nor, unless the insured is in good health at the time of its delivery to him." In the application this condition is thus set out: "It is hereby agreed that the policy shall not take effect unless the first premium is paid in cash to the company or its authorized agent or a note for extension of time for such payment, is accepted by the company at its home office in Detroit; nor unless the insured is in good health at the time of its delivery." It appears from the evidence that one Veatch, the local agent at Evansville, Ind., of the Washington Life Insurance Company, had written an application on Lulu Thompson in the said company, which application had been rejected. Thereupon Veatch notified Mr. Thompson, husband of Lulu Thompson, that said application had been rejected, and told him that he could procure insurance in another company as good as the Washington Life, but that the premium would be a little more, and Thompson said, "Go ahead and get her in any good company." There is evidence (contradicted) to show that Thompson had paid the premium on the application in the Washington Life, and, at the time of making the application in the appellant company, he paid to Veatch the additional amount necessary to make the premium in that company. The money so paid to Veatch was, at the request of said Thompson, repaid to him after the death of his wife; a part of it being repaid by Veatch and a part by the state agent of the Washington Life. Veatch obtained from Tate, appellant's agent at Evansville, a blank application which was filled out by the applicant, and to which Veatch signed his name, attesting the signature, and delivered the same to Tate, who forwarded it to the state agent at Indianapolis. The policy was issued and returned by mail to Tate at

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Evansville, and was received by him on April 14th, about 4 o'clock in the evening, but was never delivered to applicant. On the same evening said Lulu Thompson was found to have been bitten by a spider from the effects of which (erysipelas) she died some eight days later. Veatch was not engaged, either on salary or on commission, under said Tate. He had written some fire and accident insurance, for which Tate paid him part of the commission when the premium was paid. Veatch and Tate also exchanged business. The application filled out by Mrs. Thompson was the only application to the Michigan Mutual Life Insurance Company asked for or given to said Veatch.

Whether, upon a given state of facts, a person is or is not an agent of another is a question for the court. *Indiana Ins. Co. v. Hartwell*, 123 Ind. 177, 193, 24 N. E. 100; *Indiana Ins. Co. v. Hartwell*, 100 Ind. 568. Tate was the local agent for Vanderburgh county at Evansville. He had no authority to appoint another as its agent. *Mutual Life, etc., Ins. Co. v. Reynolds*, 81 Ark. 202, 98 S. W. 963; 25 Cent. Dig. § 118, tit. "Insurance." Veatch was the agent of the insured in the procurement of said insurance and in the payment of the premium. Had the appellee paid the first premium and the application been rejected, he could not have collected from the appellant company money paid to Veatch which it had not received, and of which it had no knowledge. Had the appellant received the money, or had knowledge of its payment and acted upon the application, under the authorities cited by appellee, it would have made Veatch its agent by ratification. When Thompson told Veatch to "go ahead and get her in any good company," he made him his representative. When Veatch procured the application in question, he was acting under the authority and in behalf of the applicant. He was acting for the Washington Life, of which company he was agent, up to the time of the rejection of the application by that company. *Hamblet v. City Ins. Co. (D. C.)* 36 Fed. 118; *Fame Ins. Co. v. Mann*, 4 Ill. App. 485; *American Ins. Co. v. Brooks*, 83 Md. 22, 34 Atl. 373; *Duluth Nat. Bank v. Knoxville Fire Ins. Co.*, 85 Tenn. 76, 1 S. W. 689; *Commonwealth, etc., Ins. Co. v. Knabe*, 171 Mass. 265, 50 N. E. 516; *Bradley v. German Ins. Co.*, 80 Mo. App. 369; *Crisswell v. Riley*, 5 Ind. App. 496, 30 N. E. 1101, 32 N. E. 814; *Hartford, etc., Ins. Co. v. Reynolds*, 36 Mich. 502; *Marland v. Royal Ins. Co.*, 71 Pa. 393; *Pottsville, etc., Ins. Co. v. Minnequa Springs, etc., Co.*, 100 Pa. 137; *Wilber v. Williamsburgh, etc., Ins. Co.*, 122 N. Y. 439, 25 N. E. 926. Upon the undisputed facts Veatch was the agent of the insured. But, even if he had been agent of appellant company, a delivery of the policy under the conditions named was still essential to its validity. The applicant had no notice that the policy had been received by the appellant's agent

at Evansville. No premium was ever paid to any agent or representative of appellant or note given therefor. Neither the company nor any of its agents knew that any money had been paid as first premium on said insurance policy, or that it was claimed to have been paid to any one, either authorized or not as its agent to receive it.

The evidence shows that at the time the policy was received by Tate at Evansville, on April 14, 1900, Lulu Thompson had been inoculated with poison by the bite of a spider upon her neck. The exact time when she received the bite was not shown. The serious nature of the illness occasioned thereby is evidenced by the fact that she was continuously ill from the time of said bite, referred to in the evidence, until her death. Where the application contains a recital that the contract shall be completed only by delivery of the policy (*McCully's Adm'r v. Phoenix, etc., Ins. Co.*, 18 W. Va. 782), or that the policy shall not be in force until its delivery to the applicant (*Kohen v. Mutual, etc., Life Ass'n [C. C.]* 28 Fed. 705), the contract will not become binding on the company until the policy is delivered (*McMasters v. New York Life Ins. Co.*, 99 Fed. 856, 40 C. C. A. 119; *Union Cent. Life Ins. Co. v. Pauly*, 8 Ind. App. 85, 35 N. E. 190). The rule just discussed is especially applicable where the policy provides that it shall not take effect, unless it is delivered while the applicant is in good health. *Ray v. Security, etc., Ins. Co.*, 126 N. C. 166, 35 N. E. 246; *Paine v. Pacific, etc., Ins. Co.*, 51 Fed. 689, 2 C. C. A. 459; *Metropolitan Life Ins. Co. v. Howle*, 68 Ohio St. 614, 621, 622, 68 N. E. 4; *Roblee v. Masonic Life Ass'n*, 38 Misc. Rep. 481, 77 N. Y. Supp. 1098; *Volker v. Metropolitan Life Ins. Co.*, 1 Misc. Rep. 374, 21 N. Y. Supp. 456; *Misselhorn v. Life Ass'n*, 30 Mo. App. 589. The policy was returned to the company by Tate (Veatch never having had anything to do with the matter after delivering the application to him); the reasons given by Tate for its return being that Mrs. Thompson was in ill health, and that the first premium had not been paid. To have delivered the policy to the applicant upon its receipt, neither of these two conditions having been complied with, would have been in violation of the terms of the contract and against the rules of the company. The receipt by an agent from his insurance company of a policy to be unconditionally delivered by him to the applicant is, in law, tantamount to a delivery to the insured though the agent never surrenders possession of the policy, and though its delivery to the applicant is by contract made essential to its validity. *Neff v. Metropolitan, etc., Ins. Co.*, 39 Ind. App. 250, 73 N. E. 1041, and cases cited; *Yonge v. Insurance Co. (C. C.)* 30 Fed. 902; 1 May, Insurance (4th Ed.) § 60. The facts in this case do not bring it within the rule. There could be no presumption, in the absence of evidence, that

the principal had instructed its agent to deliver the policy without the payment of the first premium, or while the applicant was not in good health, in violation of the stipulations in the policy and the application.

Other alleged errors we do not deem it necessary to pass upon.

The verdict is not sustained by the evidence.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

(43 Ind. App. 621)

**MUTUAL RESERVE LIFE INS. CO. v. ROSS.** (No. 6354.)

(Appellate Court of Indiana, Division No. 1. Dec. 15, 1908.)

**1. APPEAL AND ERROR (§ 750\*)—ASSIGNMENTS OF ERROR—QUESTIONS PRESENTED FOR REVIEW—SUFFICIENCY OF COMPLAINT.**

An assignment on appeal that the complaint on which a default judgment was rendered does not state facts sufficient to constitute a cause of action tests the sufficiency of the complaint with all the strictness of a demurrer below for the same cause.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3076; Dec. Dig. § 750.\*]

**2. INSURANCE (§ 134\*) — CONTRACT — REQUIREMENTS OF POLICY—PAPERS ATTACHED TO POLICY.**

Where the company in which plaintiff was originally insured transferred its policies and business to another company, and the latter company sent insured a written notice of the contract of transfer between the companies, with directions to attach it as a rider to his policy, when so attached, it, together with the old policy, constituted insured's policy.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 134.\*]

**3. INSURANCE (§ 646\*)—ACTIONS—PRESUMPTIONS.**

Where, upon the transfer of insured's policy by the company in which he was originally insured to another company, the latter company notified him of the transfer, stating in the notice that the policy would be continued on the same terms, it will not be presumed, in an action on the policy, that the company did not have the power to insure him on the terms indicated.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 646.\*]

**4. INSURANCE (§ 631\*)—ACTIONS—EVIDENCE—EXHIBITS.**

Where the company in which insured was originally insured transferred its policies and business to another company, and the latter company sent insured a notice of the transfer, and requested him to attach the notice to his policy, but did not state the terms of the contract of transfer between the companies, in an action on the policy it was not necessary to file as an exhibit a copy of the contract of transfer, even if it was in writing.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 631.\*]

**5. JUDGMENT (§ 143\*)—DEFAULT JUDGMENT—OPENING—DISCRETION OF COURT.**

Summons was returnable June 12th, and judgment by default for want of an appearance was rendered against it on June 13th. Defendant moved to open the default on affidavits that on May 10th defendant sent a copy of the summons to its attorney, and the latter on the 17th

dictated a letter to the clerk of court, requesting him, among other things, to enter defendant's appearance, but the stenographer omitted the request from the letter, and on June 9th defendant's attorney directed his stenographer to write to another attorney to enter defendant's appearance, but was absent from his office on the 11th, 12th, and 13th, and did not learn until June 14th that the last letter was never written; that he immediately communicated with the other attorney, and found that a default had been entered on the 13th. It did not appear where the attorney was on the 10th, and his absence from his office on the three following days was not explained, and no excuse was offered for his failure to see that his stenographer wrote the letter as directed, or why he took no other means to have the appearance entered. Code, § 135 (Burns' Ann. St. 1908, § 405), provides that a party shall be relieved from a judgment taken against him through mistake, inadvertence, surprise, or excusable neglect. *Held*, that the trial court did not abuse its discretion in denying the motion to set aside the default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269-291; Dec. Dig. § 143.\*]

**6. JUDGMENT (§ 143\*)—DEFAULT—OPENING—EXCUSE FOR DEFAULT.**

On motion to set aside a default judgment entered for nonappearance, on the ground that it was taken through excusable neglect, inadvertence, etc., the defaulting party must show that he or his attorney attended to the matter of appearance with at least as much diligence and attention as a man of ordinary prudence gives to important business.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269-291; Dec. Dig. § 143.\*]

**7. APPEAL AND ERROR (§ 957\*)—DISCRETION OF TRIAL COURT—SETTING ASIDE DEFAULT.**

A motion to set aside a default is addressed to the discretion of the trial court; and, in the absence of a showing by the record of an abuse of its discretion, so as to work injustice, its ruling will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3523; Dec. Dig. § 957.\*]

Appeal from Superior Court, Tippecanoe County; H. H. Vinton, Judge.

Action by Albert R. Ross, executor of Alexander Ross, deceased, against the Mutual Reserve Life Insurance Company. From a default judgment for plaintiff, and an order refusing to open the default, defendant appealed. Affirmed.

G. H. Deitch, for appellant. Joseph B. Ross and James D. Parks, for appellee.

**MYERS, J.** The appellee, executor of the last will and testament of Alexander Ross, deceased, recovered judgment by default against the appellant. It is assigned here that the complaint does not state facts sufficient to constitute a cause of action. The judgment being by default upon the failure of the defendant to appear, such assignment tests the complaint with all the strictness of a demurrer in the court below for the same cause. *Erhardt v. Pfeiffer*, 29 Ind. App. 570, 64 N. E. 885; *Sloan v. Faurot*, 11 Ind. App. 689, 39 N. E. 539; *Migatz v. Stieglitz*, 166 Ind. 361, 77 N. E. 400.

The complaint showed the death of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

testator, and that letters testamentary were issued to appellant in September, 1905; that at the time of his death the testator was the owner and in possession of a policy of insurance for \$5,000, issued by the Northwestern Life Assurance Company of Chicago, Ill., on the life of the testator, payable at his death to his wife, or if she should not survive the insured, then to his executors, administrators, or assigns; that on or about August 21, 1900, said Northwestern Life Assurance Company merged and consolidated with the Mutual Reserve Fund Life Association of New York; that on September 10, 1900, said last-named association sent to the testator a written notice, which was received by the latter, and of the following tenor:

"New York, September 1, 1900.

"To Alexander Ross, of Lafayette, Indiana, Holder of Policy No. 148804: This is to certify that at a meeting of the members of the Northwestern Life Assurance Company, held on the 1st day of September, 1900, at Chicago, Illinois, all living members of said company in good standing, as shown by the books of said company upon said day, were transferred to the Mutual Reserve Fund Life Association, of New York. Said association accepts into membership as of that date (September 1, 1900) all such living members, transferred as provided in said contract of transfer, and will carry out the policy contract of each of such members, in the manner provided in and subject to the terms and conditions of said contract of transfer, so long as said member shall on his part pay his premiums, comply with all the terms of said contract of transfer, of the above-numbered policy, of the constitution and by-laws of said association, as they now exist or may hereafter be amended, and the laws of the state of New York, it being expressly understood and provided that the terms of said contract of transfer shall at all times measure and determine the extent of the obligation assumed by said association under each policy.

"Mutual Reserve Fund Life Association,

"Frederick A. Burnham, President.

"Attest: Charles E. Camp, Secretary.

"N. B.—Contract of transfer makes no change in the premium rate required or amount of lien under your policy, numbered as above, issued by the Northwestern Life Assurance Company."

It was also alleged that on or about April 17, 1902, said Mutual Reserve Fund Life Association reincorporated under the name of the Mutual Reserve Life Insurance Company, which "is identical with the Mutual Reserve Fund Life Association;" that the wife of the testator, the beneficiary, died before his death; that the insured "fully and completely performed all the conditions and agreements of said contract of insurance, which he was required to perform," and that the appellee had "performed all the conditions and agreements of said policy fully and

completely." "A copy of the policy sued on in this action" was made an exhibit. Other provisions of the contract need not be stated for the purpose of this case.

It is contended, on behalf of the appellant, that the foundation of the action is the contract of transfer referred to in the written notice set out in the body of the complaint, and that a copy of that contract should have been filed with the complaint as an exhibit. The appellee points out that this contract is nowhere in the complaint alleged to be in writing, and that for the purpose of pleading it was not necessary, under the statute, to file a copy. It is further contended for the appellant that, if the contract in question be taken to be an oral contract, yet its terms or provisions should have been stated. The written notice of the making of the contract of transfer was executed by the appellant, and was sent by it to the insured, with written directions to him to attach it, as a rider, to the policy already in his possession. When so attached it became a part of the policy, and the two papers together constituted a policy of the appellant. The terms of the transfer and consolidation were not set forth in the written notice, which indicated to the insured that all that was necessary to the creation of a contract of insurance between the appellant and the testator was to make the notice a rider to the policy of the merged company. No question as to the capacity of the appellant to assume such liability is presented for decision. It will not be presumed that it had no capacity to insure the testator on the terms indicated in the notice, and we are of the opinion, upon the point here in controversy, that the so-called contract of transfer should not be regarded, even though in writing, as a necessary exhibit in a suit upon the policy adopted by the appellant in its notice to the insured. At best it was no more necessary than the application of the insured, or the constitution and by-laws of the association, or the laws of the state of New York, mentioned in the written notice. *Penn Mutual Life Ins. Co. v. Norcross*, 163 Ind. 379, 72 N. E. 132; *Bird v. St. John's Episcopal Church*, 154 Ind. 138, 56 N. E. 129; *Continental Life Ins. Co. v. Kessler*, 84 Ind. 310.

Looking to the next question presented by the record, we find the complaint was filed May 9, 1906. The summons was returnable June 12, 1906. On June 13, 1906, the appellant having failed to enter an appearance, judgment was rendered against it upon its default. The appellant's motion, filed June 15, 1906, to set aside the default and judgment was overruled, and this ruling is assigned as error. In the appellant's brief the facts upon which such relief was sought, as set forth in the affidavits filed in support of the motion, are stated thus: "These affidavits state, in substance, the following facts: That on May 10, 1906, the appellant sent a copy of the summons to its attorney in In-

dianapolis, with request that he enter his appearance in the cause; that on the 17th day of May, 1906, this attorney dictated a letter to his stenographer, addressed to Mr. Quincy A. Earl, Clerk of the Court, as follows: 'Please send me copy of the complaint in the above-entitled cause, omitting all exhibits, and enter my appearance for the defendant, together with your memorandum for charges of same, and I will remit.' That by inadvertence the stenographer omitted in said letter the following: 'And enter my appearance for the defendant.' That on the 9th of June, 1906, said attorney directed his stenographer to write to Mr. Randolph, an attorney in Lafayette, to enter his appearance, together with that of the writer in said case. That said attorney was absent from his office on the 11th, 12th, and 13th of June, and did not learn until the 14th of June that his stenographer had neglected to write the last-mentioned letter; that immediately said Randolph was communicated with, and it was learned that a default had been taken on the 13th day of June." With the motion to set aside the default answers of the appellant to the complaint were tendered to the court, setting forth the appellant's defense, the substance of which the brief purports to state.

Appellant's motion is based upon that part of section 135 of the Code (section 405, Burns' Ann. St. 1908) which reads as follows: "And shall relieve a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect." Appellant and its attorney had notice, at least on May 17th, that the return day of the summons was on June 12th; and, unless an appearance was entered, appellant would be defaulted. It does not appear that anything occurred between May 17th and June 13th to mislead appellant or its attorney, or to cause either of them not to rely upon the notice which they had received. The excuse offered for the failure to appear is that appellant's attorney on May 17th dictated a letter to his stenographer, addressed to the clerk of the court, requesting such clerk to enter his appearance of record, and that the stenographer failed to include in the letter such request, and therefore said attorney's appearance was not entered. Whether appellant's attorney signed or read the letter is not shown, but if such a letter as was dictated had been received by the clerk, we are not prepared to say that such instructions alone were sufficient to show an appearance which would have precluded a default. *McCormack v. First National Bank*, 53 Ind. 466, 471; *Cassady v. Reid*, 4 Blackf. 178; *Craig v. Glass*, 1 Ind. 89. As it is unnecessary to pass upon this question in the decision of the case now before us, we refrain from expressing an opinion upon it. The clerk was not requested by appellant's attorney to en-

ter his appearance, and there is nothing in the record to warrant the attorney in believing that his appearance had been noted. During the interval between May 17th and June 13th neither the appellant nor its attorney appears to have taken any steps to ascertain whether an appearance was entered. It does appear that on June 9th, and while there was still ample time, appellant's attorney directed his stenographer to write to an attorney at Lafayette, and that on June 11th, 12th, and 13th he was absent. The last letter was not written. For aught that appears the attorney was in his office on June 10th, and no excuse is shown for the neglect of counsel to see to it that his instructions to his stenographer were obeyed, or to make the request to the attorney at Lafayette by other means. Nor is there any explanation for his absence from his office on the days mentioned, or facts shown which would justify this court in saying that appellant by its counsel was clearly excusable in not appearing in the Tippecanoe superior court on the 12th or 13th of June. On the hearing of such a motion it should be made to appear that the attorney gave the matter at least such attention "as a man of ordinary prudence gives to his important business." *Carr v. First National Bank*, 35 Ind. App. 216, 73 N. E. 947, 111 Am. St. Rep. 159. Such a motion is addressed to the judicial discretion of the trial court; and, unless we can say that upon the record before us there appears to have been an abuse of such discretion, whereby there has been undue interference with the course of justice, the judgment of the lower court will not be disturbed on appeal.

Judgment affirmed.

(44 Ind. App. 213)

TOLEDO & C. INTERURBAN RY. CO. v.  
WILSON et al. (No. 6348.)<sup>1</sup>  
(Appellate Court of Indiana, Division No. 1.  
Dec. 16, 1908.)

EMINENT DOMAIN (§ 235\*)—DAMAGES—TRIAL  
ON EXCEPTIONS.

Under Acts 1905, p. 62, c. 48, § 6 (Burns' Ann. St. 1908, § 934), providing that in condemnation proceedings appraisers shall determine and report, first, the value of each parcel sought to be appropriated; second, the value of improvements thereon; third, the damages to the residue of the land of the owner by taking out the part sought to be appropriated; and, fourth, such other damages as will result from the construction of the improvements; and section 8 (page 63), providing that one aggrieved by the assessment of damages may file exceptions thereto, and the cause shall proceed to issue, trial, and judgment as in a civil action, and the court may make such further order and render such findings and judgment as may seem just—the damages contemplated by the fourth clause of section 6 may be submitted to trial, and found under the exceptions to the appraisers' report that the assessment of the damages is too low; that the appraisers allowed no damages for depreciation in value to the remaining property from the ap-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup> Rehearing denied, 88 N. E. 864.

propriation; that the value of the part appropriated is assessed too low; and that no damages to improvements were assessed, whereas the property appropriated will take a part of a storage shed.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 235.\*]

Appeal from Circuit Court, De Kalb County; Emmett A. Bratton, Judge.

Condemnation proceeding by the Toledo & Chicago Interurban Railway Company against Hattie M. Wilson and others. From the judgment on a trial on exceptions to the award of the appraisers, said company appeals. Affirmed.

F. L. Welshelmer, for appellant. P. V. Hoffman, for appellees.

MYERS, J. The appellant brought this proceeding to condemn, for the purpose of a railroad, right of way, yards, switches, yard tracks, and storage tracks, certain real estate owned by appellees at Auburn Junction, De Kalb county. Appraisers appointed by the court reported, awarding the appellees damages in the sum of \$75. To this award the appellees filed exceptions. A jury returned a verdict, assessing the damages of the appellees at \$475. Appellant insists that the court erred (1) in overruling its motion for a venire de novo; (2) in overruling appellant's motion for judgment for \$150 in favor of appellees and against the appellant; (3) in overruling the appellant's motion for a new trial. Appellees insist that appellant's brief does not comply with clause 5, rule 22, of the Supreme and Appellate Courts, and therefore no question is presented for our consideration. Appellant's brief does not furnish a concise statement of the record presenting all of the errors relied upon; but, as the record consists of only a few typewritten pages, we have concluded to pass upon what we deem the controlling question in this case.

With reference to the real estate in question belonging to appellees, and appropriated, the appraisers valued at \$75, and assessed appellees' damages, on account of such appropriation, in the sum of \$75; that there were no improvements upon said real estate; that there were no damages to the balance of the real estate owned by appellees; that all of the said real estate owned by the said Wilson and Belden was subject to a mortgage thereon; and that the same was owned by appellees as tenants in common. The appellees for their exceptions to the report of the appraisers stated: "That they are the owners, as tenants in common for partnership purposes, of the lands sought to be appropriated belonging to them, as in the complaint and warrant to said appraisers described; to wit, 'lots 39, 40, 45, 46, and 47 in,' etc. 'That all of said lots are used as one piece of property for manufacturing purposes, and on which lots is situated the buildings, plant, and machinery of,' etc. 'That all of said lots are a part

of said plant and buildings and business. That said appraisers in assessing the expropriators' damages erred in the following particulars to wit: First, the assessment of the damages is too low; second, the appraisers allowed no damages for depreciation in value to the remaining property by virtue of the appropriation of the part of said property to the use of the plaintiff; third, the value of the part appropriated is assessed too low; fourth, that the appraisers assessed no damages to improvements, whereas the property appropriated will take a part of the storage shed of defendant's property, southeast corner of said shed." The remaining exceptions, on motion of the appellants, were stricken out. The expropriators ask "that the said appraisal be not confirmed, but wholly set aside, and the damages determined on trial, according to the law and evidence." The jury returned a verdict as follows: "We, the jury, assess the value of the defendants' lands taken by the plaintiff at seventy-five (\$75) dollars the damage to the residue of the land not taken at seventy-five (\$75) dollars, and such other damages as will result to the defendants from the construction of the improvement in the manner proposed by the plaintiff at \$325, making the defendant's entire damages four hundred and seventy-five dollars (\$475)." The jury also returned special findings in answer to interrogatories, by which it appeared, among other things, that the land appropriated was a part of lots 46 and 47. The matters which the appellant has sought to present here may be resolved into the question whether, upon the trial by the jury, the damages specified in the third item of the verdict might properly be included in the jury's award, and the question whether it was necessary for the jury to find the value of the portion appropriated of each of the two lots 46 and 47 separately. The statute (section 6, Acts 1905, p. 62, c. 48 [section 984, Burns' Ann. St. 1906]), "concerning proceedings in the exercise of eminent domain," provides that the appraisers shall determine and report: "First, the value of each parcel of property sought to be appropriated, and the value of each separate estate or interest therein; second, the value of all improvements thereon pertaining to the realty; third, the damages to the residue of the land of such owner or owners to be caused by taking out the part sought to be appropriated; fourth, such other damages as will result to any persons or corporation from the construction of the improvements in the manner proposed by the plaintiff." The fifth and last clause, after a provision relating to the case of land sought to be taken by a municipal corporation, proceeds as follows: "In estimating the damages specified in the foregoing first, second, third and fourth clauses, no deduction shall be made for any benefits that may result from such improvement. For the purpose of ascertaining

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

compensation and damages, the right thereto shall be deemed to have accrued at the date of the service of the notice provided in section 3, and its actual value, at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected, except as to damages stated in the fourth clause hereof." By section 8 of the same statute it is provided: "Any party to such action aggrieved by the assessment of benefits or damages, may file written exceptions thereto in the office of the clerk of such court in vacation, or in open court if in session, within ten days after the filing of such report, and the cause shall further proceed to issue, trial and judgment as in civil actions; the court may make such further orders, and render such findings and judgments as may seem just."

No issues except such as were presented by the exceptions filed appear to have been tried, and it is contended, in effect, that the damages contemplated by the fourth clause of section 8 of the statute above quoted could not properly be submitted to trial and found as they were by the jury under the exceptions tried. We are not prepared to accede to this view, but we are of the opinion that upon the trial, under such exceptions as those presented by the appellees, especially that the damages were too low, it was proper to investigate the question of damages as provided by any and all of the clauses of said section 8 of the statute, and not merely the damages specified in the second, third, and fourth items of said exceptions. Aside from these special items, the question as to the amount of all the allowable damages was sufficiently before the court for examination de novo, and for the rendition of such findings and judgment as upon the evidence might "seem just." *Louisville, etc., R. Co. v. Dryden*, 39 Ind. 393; *Lake Erie, etc., R. Co. v. Kinsey*, 87 Ind. 514, 518; *Indiana, etc., Ry. Co. v. Allen*, 113 Ind. 308, 311, 51 N. E. 451, 3 Am. St. Rep. 650, *Midland, etc., R. Co. v. Smith*, 125 Ind. 509, 25 N. E. 153.

The evidence is not in the record, and it does not appear that the land of the appellees appropriated was not in one continuous body or "parcel of property," though extending into and through two lots which, with other lots adjoining, constitute one piece of property for manufacturing purposes. The verdict was sufficiently formal for the rendition of a proper judgment thereon.

Judgment affirmed.

(42 Ind. A. 689)

**VREELAND v. WARREN-SCHARF ASPHALT PAVING CO.** (No. 5,824.)  
(Appellate Court of Indiana, Division No. 1.  
Dec. 18, 1908.)

Appeal from Superior Court, La Porte County; Chas. H. Truesdell, Special Judge.

Action by the Warren-Scharf Asphalt Paving Company against Albert T. Vreeland. From a

judgment for plaintiff, defendant appeals. Reversed.

James F. Gallaher, for appellant. C. R. & J. B. Collins, for appellee.

**MYERS, J.** This was an action by appellee to foreclose an alleged street assessment lien against appellant's property, situated on Spring street, in the city of Michigan City. From a judgment and decree of foreclosure, appellant appeals to this court, and has here assigned error, presenting the same questions which this court considered and decided adversely to appellee in the case of *Zorn v. Warren-Scharf Asphalt Paving Co.*, 84 N. E. 509; and upon the authority of that case the judgment in this case is reversed.

(43 Ind. A. 737)

**WOODSON v. WARREN-SCHARF ASPHALT PAVING CO.** (No. 5,825.)<sup>1</sup>  
(Appellate Court of Indiana, Division No. 1.  
Dec. 18, 1908.)

Appeal from Superior Court, La Porte County; Chas. H. Truesdell, Special Judge.

Action by the Warren-Scharf Asphalt Paving Company against William F. Woodson, trustee. From a judgment for plaintiff, defendant appeals. Reversed.

James F. Gallaher, for appellant. C. R. & J. B. Collins, for appellee.

**MYERS, J.** This was an action by appellee to foreclose an alleged street assessment lien against appellant's property, situated on Wabash street, in the city of Michigan City. From a judgment and decree of foreclosure, appellant appeals to this court, and has here assigned error, presenting the same questions which this court considered and decided adversely to appellee in the case of *Zorn v. Warren-Scharf Asphalt Paving Co.*, 84 N. E. 509; and upon the authority of that case the judgment in this case is reversed.

(42 Ind. A. 689)

**LEEDS et al. v. WARREN-SCHARF ASPHALT PAVING CO.** (No. 5,826.)<sup>1</sup>  
(Appellate Court of Indiana, Division No. 1.  
Dec. 18, 1908.)

Appeal from Superior Court, La Porte County; Chas. H. Truesdell, Special Judge.

Action by the Warren-Scharf Asphalt Paving Company against Offley Leeds and others. From a judgment for plaintiff, defendants appeal. Reversed.

James F. Gallaher, for appellants. C. R. & J. B. Collins, for appellee.

**MYERS, J.** This was an action by appellee to foreclose an alleged street assessment lien against appellants' property, situated on Pine and Spring streets, in the city of Michigan City. From a judgment and decree of foreclosure, appellants appeal to this court, and have here assigned error, presenting the same questions which this court considered and decided adversely to appellee in the case of *Zorn v. Warren-Scharf Asphalt Paving Co.*, 84 N. E. 509; and upon the authority of that case the judgment in this case is reversed.

(43 Ind. A. 736)

**LEEDS v. WARREN-SCHARF ASPHALT PAVING CO.** (No. 5,828.)  
(Appellate Court of Indiana, Division No. 1.  
Dec. 18, 1908.)

Appeal from Superior Court, La Porte County; Chas. H. Truesdell, Special Judge.

<sup>1</sup> Rehearing denied.

Action by the Warren-Scharf Asphalt Paving Company against Amelia Leeds. From a judgment for plaintiff, defendant appeals. Reversed.

James F. Gallaher, for appellant. C. R. & J. B. Collins, for appellee.

MYERS, J. This was an action by appellee to foreclose an alleged street assessment lien against appellant's property, situated on Wabash street, in the city of Michigan City. From a judgment and decree of foreclosure, appellant appeals to this court, and has here assigned error, presenting the same questions which this court considered and decided adversely to appellee in the case of *Zorn v. Warren-Scharf Asphalt Paving Co.*, 84 N. E. 509; and upon the authority of that case the judgment in this case is reversed.

(42 Ind. A. 689)

ROOT MFG. CO. v. WARREN-SCHARF ASPHALT PAVING CO. (No. 5,829.)

(Appellate Court of Indiana, Division No. 1. Dec. 18, 1908.)

Appeal from Superior Court, La Porte County; Chas. H. Truesdell, Special Judge.

Action by the Warren-Scharf Asphalt Paving Company against the Root Manufacturing Company. From a judgment for plaintiff, defendant appeals. Reversed.

James F. Gallaher, for appellant. C. R. & J. B. Collins, for appellee.

MYERS, J. This was an action by appellee to foreclose an alleged street assessment lien against appellant's property, situated on Wabash street, in the city of Michigan City. From a judgment and decree of foreclosure, appellant appeals to this court, and has here assigned error, presenting the same questions which this court considered and decided adversely to appellee in the case of *Zorn v. Warren-Scharf Asphalt Paving Co.*, 84 N. E. 509; and upon the authority of that case the judgment in this case is reversed.

(300 Mass. 308)

SULLIVAN v. OLD COLONY ST. RY. CO.†

(Supreme Judicial Court of Massachusetts. Bristol. Nov. 24, 1908.)

1. TORTS (§ 5\*)—NEGLIGENCE WITHOUT INJURY—LIABILITY.

A carrier is not liable for negligence toward a passenger not resulting in injury.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 5; Dec. Dig. § 5.\*]

2. CARRIERS (§ 236\*)—INTERURBAN STREET RAILROADS—RIGHTS OF PASSENGERS.

An interurban street railway company was not absolutely bound to carry a passenger to a particular town where there was no agreement therefor. He had procured no ticket and had paid no fare to that place. A separate fare was payable in each town upon the route, and he had been carried as far as he paid or offered to pay fare.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 236.\*]

3. DAMAGES (§ 62\*)—DUTY TO LESSEN.

One injured must use all reasonable care to lessen his damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 119-131; Dec. Dig. § 62.\*]

† Rehearing denied.

4. EVIDENCE (§ 594\*)—UNCONTRADICTED TESTIMONY—JURY'S POWER TO DISREGARD.

A jury may disregard uncontradicted testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2431; Dec. Dig. § 594.\*]

Exceptions from Superior Court, Bristol County.

Action by Daniel D. Sullivan against the Old Colony Street Railway Company. From a verdict for defendant, plaintiff brings exceptions. Exceptions overruled.

John T. Coughlin and David R. Radovsky for plaintiff. James M. Swift and John A. Kerns, for defendant.

SHELDON, J. No question was made at the trial but that the defendant was liable for any injury done to the plaintiff by reason of its car having left the track. But if no injury was caused by this to the plaintiff; if he suffered no damage whatever from the defendant's negligence, then he would not be entitled to recover. Although there has been negligence in the performance of a legal duty, yet it is only those who have suffered damage therefrom that may maintain an action therefor. *Heaven v. Pender*, 11 Q. B. D. 503, 507; *Farrell v. Waterbury Horse R. R.*, 60 Conn. 239, 246, 21 Atl. 675, 22 Atl. 544; *Salmon v. Delaware, Lackawanna & Western R. R.*, 38 N. J. Law, 5, 11, 20 Am. Rep. 356; 2 Cooley on Torts (3d Ed.) 791; *Wharton on Negligence* (2d Ed.) § 3. In cases of negligence, there is no such invasion of rights as to entitle a plaintiff to recover at least nominal damages, as in *Hooten v. Barnard*, 137 Mass. 36, and *McAneany v. Jewett*, 10 Allen, 151. Accordingly, the first and second of the plaintiff's requests for rulings could not have been given, and the rulings made were all that the plaintiff was entitled to.

The other rulings asked for could not have been given in the form in which they were expressed, because the third stated the rule of damages too broadly, so that the defendant would have been held for damages resulting from the plaintiff's own acts; the fourth was open to the same objection, and made the right of the plaintiff to be carried through to Newport depend merely upon his unexpressed intention, regardless of whether it had been communicated in any way to the defendant, and whether the defendant had undertaken to carry him to Newport or not; and the fifth made the plaintiff's rights depend solely upon his having heard the announcement made by the defendant's servant, without regard to the question whether it was seasonably and properly made. It was a question of fact for the jury whether under the circumstances the defendant had given sufficient notice of what was to be done in the existing emergency. The questions involved in these requests were fully covered

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by what was said to the jury. It could not have been ruled that there was an absolute and unqualified obligation upon the defendant, either by agreement with the plaintiff or as a duty arising from the circumstances, to carry him to Newport. He had procured no ticket, he had paid no fare to that place. A separate fare was to be paid in each town upon the route as it was passed through; and he seems to have been carried as far as he had paid or offered to pay his fare. The attention of the jury was carefully directed to the question whether the defendant had properly notified the plaintiff and the other passengers that those who wished to go to Newport should walk to the ferry, and there take the last through car, which would wait for them; and under the instructions the jury must have settled this question in the defendant's favor, and found that the plaintiff's exposure and subsequent failure to reach Newport were due to his own acts and to his own failure to conduct himself as a reasonable man should have done, rather than to any fault of the defendant. This makes it unnecessary to determine whether the judge went too far in saying that the jury could not find that there was a contract to carry the plaintiff from Fall River to Newport. And the ruling that he could not recover for the walk from Library corner was assented to by his counsel, and has not been specifically complained of.

There was no error in what was said by the judge as to the measure of damages. It was the duty of the plaintiff, not only to do nothing to aggravate the results of the accident, but to use all reasonable care to lessen the injurious effects of what had happened. *Ingraham v. Pullman Co.*, 190 Mass. 33, 78 N. E. 237, 2 L. R. A. (N. S.) 1087; *French v. Vining*, 102 Mass. 182, 187, 8 Am. Rep. 440; *Sherman v. Fall River Iron Works*, 2 Allen, 524, 526, 79 Am. Dec. 799; *Loker v. Damon*, 17 Pick. 284. This was in substance the ruling made.

The plaintiff's misfortune seems to have been that the jury failed to believe much of his testimony; but this they had the right to do, even where it was uncontradicted. *Lindenbaum v. N. Y., N. H. & H. R. R.*, 197 Mass. 314, 84 N. E. 129; *Commonwealth v. McNeese*, 156 Mass. 231, 30 N. E. 1021.

Exceptions overruled.

(79 Oh. St. 103)

**McMAHON v. AMBACH & CO. et al.**  
(Supreme Court of Ohio. Dec. 1, 1908.)

1. EXECUTORS AND ADMINISTRATORS (§ 482\*)  
—SETTLEMENT OF ESTATE—COMPENSATION.  
The statutes of the state bearing upon the settlement in the probate court of the estates of deceased persons, taken together, show that the allowance to an administrator for extraordinary services in the settlement of the estate

is part of the statement of his account, and is to be considered by the court accordingly.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 482.\*]

2. EXECUTORS AND ADMINISTRATORS (§ 513\*)  
—ALLOWANCES—NOTICE OF SETTLEMENT.

Whether the allowance is in fact made at the time of or prior to the filing of a settlement account, such allowance cannot take effect, as prejudicing the rights of others interested in the settlement of the estate who have not had notice, until the court, after legal notice, acts upon the settlement account itself.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 513.\*]

3. EXECUTORS AND ADMINISTRATORS (§ 510\*)  
—EXCEPTIONS—ALLOWANCES—REVIEW.

Exceptions to such allowance in the account by creditors constitute a direct attack on the allowance, and not a collateral attack, and the allowance is then subject to review upon the exceptions the same as any other disputed item of the administrator's account.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 510.\*]

(Syllabus by the Court.)

Error to Circuit Court, Franklin County.

In the matter of the accounting of Harry H. McMahon, administrator. From a judgment on the settlement of his account, sustaining exceptions to Ambach & Company and others, administrator appeals to the circuit court, and on affirmance of the judgment brings error. Affirmed.

H. H. McMahon, for plaintiff in error.  
John R. Horst and Huggins, Huggins & Johnson, for defendants in error.

SPEAR, J. The circuit court's judgment was an affirmance, on error, of the judgment of the court of common pleas. The latter judgment was rendered upon a trial on appeal from the judgment of the probate court of Franklin county in the matter of certain exceptions by the defendants in error Ambach & Co., and others, to the second partial account of the plaintiff in error, Harry H. McMahon, as administrator of the estate of Robert F. Burt, deceased. The exceptions which require consideration here relate wholly to an allowance, by the probate court, of \$1,500 to the administrator for extraordinary services, claimed to have been rendered by him in the settlement of the estate, and it is not necessary to set out the minutiae of the record beyond a sufficient statement to show how the legal question involved in the controversy here arose. The account to which exceptions were taken by the creditors, defendants in error, was filed in the probate court June 28, 1901. The \$1,500 allowance appears as the last item of the account in these words and figures, viz.: "To H. H. McMahon, administrator, allowance on account of extraordinary services, fixed by the court, \$1,500." This charge against the estate is without date, and the printed record nowhere distinctly shows when the allowance was made, although the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

inference is justified that it was made some time prior to the filing of the second account. The exceptions were filed in the probate court July 19, 1901, and were heard and overruled by that court January 7, 1902, and the account approved. Thereupon the cause was appealed by the exceptors to the court of common pleas. Long after the appeal was effected, to wit, July 1, 1905, there was filed in the court of common pleas by the administrator a motion setting out the allowance of the \$1,500, to him by the probate court as of June 28, 1901, but that no entry of such allowance was made on the journal of the probate court, and asking an order of the common pleas nunc pro tunc to require such entry as of the date named to be entered on the journal of the probate court. This motion was resisted by the exceptors, but the motion was sustained, and the order made and an entry of the character desired was placed on the journal of the probate court as of June 28, 1901. At the trial of the case upon the exceptions in the court of common pleas, January 27, 1906, the plaintiff in error, the administrator, in support of the allowance by the probate court, gave in evidence a duly attested copy of the said journal entry so made nunc pro tunc in the probate court by order of the common pleas, as of June 28, 1901, in substance showing that, on an application made by said administrator for extraordinary services in the settlement of the estate, from the time of his appointment to that date, in addition to such extra compensation as had been heretofore allowed, and as further part payment for such extraordinary services so rendered, the probate court allowed, for such extra services, the sum of \$1,500, and authorized and allowed the administrator to pay to himself, out of the funds in his hands belonging to said estate, the said sum of \$1,500, as further partial compensation for said extraordinary services. No other testimony was offered by the administrator to support his claim for said \$1,500 for such extraordinary services, but he rested his side of the case wholly on the said record of the probate court. It appeared by the cross-examination of the administrator that the application was a verbal one, not in writing, and that no notice was given to any creditor, or other person interested in the estate, of said application or said hearing, nor was any creditor, or other interested party, present or cognizant of said proceeding, but the same was wholly ex parte. No testimony was offered by the exceptors. The court of common pleas thereupon found and held that the claimed allowance of \$1,500 so made by the probate court is not conclusive upon the excepting creditors, or upon this court; and the same, being found by the court to be excessive, is vacated and set aside, and the exception to said second account so far as it refers to the \$1,500 item, is sustained. Thereupon judgment followed, from which, as before

stated, the administrator prosecuted error to the circuit court, and, failing there, brings error in this court.

The record, although somewhat involved, presents but a single question, viz.: Was the allowance of \$1,500 by the probate court, for claimed extraordinary services by the administrator, conclusive as against parties interested in the estate, or could the creditors, by excepting to the settlement account of the administrator in which the charge against the estate appeared, have the same reviewed? It is the contention of plaintiff in error that, there having been no attempt made to attack the allowance by direct proceedings instituted for that purpose, the said allowance and order of the probate court still standing upon that court's journal unreversed and unmodified, the same is conclusive, and cannot be attacked by exceptions to the account, that being a mere collateral attack. This claim rests upon the further proposition that the allowance was a judicial act of a court having full jurisdiction to pass upon and make such allowance; that such application for allowance is an ex parte proceeding in rem, of which no notice to creditors or others is necessary, and that the action of the court thereon does, and necessarily must, bind the whole world; and, further, that a proceeding in rem cannot be rendered adversary except by express legislative act, and our statutes show no such change of the rule. It is not doubted that the probate court has power in the proper way and at the proper time, to make allowances for extraordinary services by an administrator, nor that, speaking in the general sense, the proceedings in the settlement of estates by the probate court are not inter partes, or adversary in character, but are proceedings in rem. This because the estate itself, the res, is committed to that court; and on that court is devolved the duty of determining its status and disposing of its corpus. But it does not follow that every matter connected with the settlement of an estate is strictly in rem, and therefore binding on everybody without notice, for we find provision for notice in many matters which in their nature may be considered in rem. As observed by Okey, J., in *Heck v. Heck*, 34 Ohio St. 369: "While obviously many acts may be performed in the administration of the estate without notice (as in *Franklin County v. McElvain*, 5 Ohio, 200), others cannot be properly performed in the absence of it, though the statute be silent. Of the latter class are proceedings to appoint new appraisers, and the act of such appraisers in making allowance to a widow for a year's support. True the statute did not, in terms, require notice to the executor, much less notice in any prescribed form; but the executor represents the estate and in a sense the creditors, and upon the plainest principles of justice, he is entitled to notice of these proceedings."

Whether or not the action in making the

allowance taken by the probate court in this case should be regarded as in rem or adversary must therefore necessarily depend upon the proper construction of our statutes relating to the settlement of estates in the probate court, taken in connection with the clause of the Constitution; section 8, art. 4, giving jurisdiction to that court. The constitutional provision relating to this subject is: "The probate court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians." Statutory provisions are: By section 524, Rev. St. 1908, exclusive jurisdiction is given "to direct and control the conduct and to settle the accounts of executors and administrators, and to order the distribution of estates." Section 6175 imposes the duty on an administrator to render account of his administration at times as therein stated. By section 6006 every administrator is required, before entering on the execution of his trust, to give bond with condition, among other things, to render upon oath a true account within 18 months and at any other times when required by the court or the law, and, failing so to do for 30 days after he shall have been notified of the expiration of the time by the probate judge, he shall receive no allowance for services, unless the court shall enter upon its journal that such delay was necessary and reasonable. The same provision as to allowance for services is found in section 5996 as applicable to executors. Section 6402 makes it the duty of the probate judge to cause notice for not less than three weeks of the filing of accounts by administrators, etc., to be published in some newspaper of the county, specifying the time when such accounts will be heard, and recognizing the right of interested parties to interpose exceptions. By section 6186 authority is given the court to refer the account and exceptions to a special master commissioner. Special provision is given by section 6407 to appeal to the court of common pleas "from any order, decision or judgment of the probate court in settling the accounts of an executor, administrator," and also in a large number of controversies growing out of the settlement of estates, "and the cause so appealed shall be tried, heard, and decided in the court of common pleas in the same manner as though the said court of common pleas had original jurisdiction thereof." Section 6187 provides for the opening up of an account, by any one adversely interested, within 8 months where the account has been settled in his absence; and without actual notice to him. Also that upon every settlement of an account former accounts may be opened to correct mistake or error therein, save where the dispute had been previously heard and determined. And, finally, the provision specifically made for compensation for extraordinary services (section

6188), affecting commissions and allowances provides: "Executors and administrators may be allowed the following commissions upon the amount of the personal estate collected and accounted for by them, and of the proceeds of the real estate sold under an order of court for the payment of debts, or under directions of the will, which shall be received in full compensation for all their ordinary services, etc., \* \* \* and, in all cases such further allowance shall be made as the court shall consider just and reasonable for actual and necessary expenses, and for any extraordinary services not required in the common course of his duty," etc.

We are unable to agree with counsel that proceedings which grow out of jurisdiction in rem cannot be rendered adversary except by express legislative act, but are of opinion that statutes affecting jurisdiction must be tested as to their proper meaning by the ordinary rules of construction. What, taking all the provisions together, and applying them to the subject-matter, did the General Assembly mean by the language of the provisions as enacted? At the threshold we find that the subject of the settlement of the accounts of administrators, etc., has been deemed of so much importance as to call for a special constitutional provision. Why? Because the matter relates to the proper and lawful devolution of vast amounts of property, and affects the rights and interests of a great many people, of widows, adult heirs, children, and creditors. To make this power effective there has been enacted, as the epitome hereinbefore given shows, laws specifically providing for its exercise, and surrounding it, as we think, with safeguards intended to insure a fair hearing and due consideration of the rights of all parties interested. These various sections clearly imply that the specified compensation of the administrator is to be ascertained by the court when he shall have exhibited to the court, by a settlement account, the amount of the personal estate which he has collected and thus accounts for, and the amount of compensation for extraordinary services not required in the common course of his duty to be determined by the court on a showing to be made when the account is passed upon. This feature of the administrator's compensation relates to the settlement of his account as fully as any other, and is just as essential to a full statement of his account with the estate as any other item in it. If the probate judge may properly allow a claim for extra services *ex parte* and in advance of settlement, no reason is apparent why he may not in like manner allow every other item which properly belongs in an account, and thus practically defeat the plain justice and purpose of the statute. But, beside this, when analyzed, the position of the administrator is, in essence and spirit, adversary to the estate. He charges, as in this specific instance, the amount of the allow-

ance to the estate. Then for the first time in the record of the probate court's doings does the matter of extraordinary compensation make its appearance, and the very statement itself is adversary. "The estate to the administrator, debtor," is the form used in the account. This attitude of the administrator is recognized by the provision for appeal by a trustee, as given in section 6408. If the appeal is in the interest of the trust, he may appeal without giving bond. If in his own interest, he must give bond. *Thomas, Adm'r, v. Moore*, 52 Ohio St. 200, 39 N. E. 803; *Layer, Guardian, v. Schaber, Adm'r*, 57 Ohio St. 234, 48 N. E. 939; *Biddle, Trustee, v. Phipps*, 2 Ohio Cir. Ct. 61; *Taylor v. McCullom*, 5 Wkly. Law Bul. 414; *Kennedy v. Thompson*, 3 Ohio Cir. Ct. 448.

It cannot benefit the administrator that he has theretofore obtained the approval of that item at the hands of the probate judge, a practice which is not to be commended. The statute makes it clear that in general it is through the process of accounting that the probate court is given authority to allow extraordinary compensation, and the fact that the statute defines the conditions under which extraordinary compensation may be allowed implies that that is the proper way. In legal effect the item in dispute in the present case is part of the settlement account, is subjected to the same right of review, and must stand or fall on review the same as any other item excepted to. At the trial in the common pleas the item of extra allowance was, like any other item of the account, excepted to. Its correctness as a charge was to be tried the same as though that court had had original jurisdiction of the case. The burden, therefore, was on the claimant to show that the services rendered by him were such as the law permits an extra allowance for, and to offer evidence to enable the court to properly fix the amount. He did neither. He was content to rest upon the action of the probate court. But, as we have held, that action was open to review and was then the very subject of review. It is not necessary to here consider the effect of an allowance to an administrator for extraordinary services made in a proceeding to sell land by order of court, nor a case where a written motion for allowance had been filed in the probate court and notice given to all interested parties, for we have no such case before us.

It follows we think clearly that the attack in this case upon the action of the probate court was not a collateral, but a direct attack, and the court of common pleas was entirely justified in so treating it and in rendering judgment accordingly.

Judgment affirmed.

PRICE, C. J., and SHAUCK, CREW, SUMMERS, and DAVIS, JJ., concur.

(79 Ohio St. 138)

TOLEDO RY. & TERMINAL CO. v. LIMA & T. TRACTION CO.

TOLEDO, F. & F. RY. CO. v. PENNSYLVANIA CO.

(Supreme Court of Ohio. Dec. 1, 1908.)

1. RAILROADS (§ 90\*)—STEAM AND ELECTRIC LINES—GRADE CROSSINGS.

The act of April 23, 1904 (97 Ohio Laws, 548; sections 3333-1 and 2, Rev. St. 1908), in the cases to which it applies, defines the policy of the state to be that the tracks of steam and electric cars may cross at grade only in cases of necessity.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 90.\*]

2. RAILROADS (§ 90\*)—STEAM AND ELECTRIC LINES—GRADE CROSSINGS.

The junior company may not defeat the operation of the act by voluntarily choosing a place of crossing at which the grades cannot be separated, when there is a practicable place of crossing at which the grades may be separated.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 90.\*]

3. RAILROADS (§ 90\*)—STEAM AND ELECTRIC LINES—GRADE CROSSINGS.

The act requires that the cost of constructing, and the expense of maintaining, the crossing defined by the court shall, by its order, be equitably apportioned among the parties interested.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 90.\*]

4. RAILROADS (§ 91\*)—GRADE CROSSINGS—APPORTIONMENT OF EXPENSE—REVIEW.

Although this court will not consider the weight of evidence in such case, it will, in a proceeding in error to the circuit court, examine the record to see that the order of the circuit court is in accordance with a proper interpretation of the statute.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 91.\*]

(Syllabus by the Court.)

Error to Circuit Court, Lucas County.

Error to Circuit Court, Wood County.

Action between the Toledo Railway & Terminal Company and the Lima & Toledo Traction Company, and between the Toledo, Fostoria & Findlay Railway Company and the Pennsylvania Company. From orders requiring construction of overhead crossings, the expenses to be borne equally by the two companies in each case, the Toledo Railway & Terminal Company and the Toledo, Fostoria & Findlay Railway Company bring error. Judgments affirmed.

These cases began in the court of common pleas, by applications to that court to define the mode in which the junior company should construct its road in crossing that of the senior company, the applications being made under favor of the act of April 23, 1904 (97 Ohio Laws, p. 548). The applications having been heard and determined in the court of common pleas, an appeal was, in each case, taken to the circuit court, as authorized by the concluding provision of the first section of the act. In that court it was found, in

each case, that it is reasonable and practicable to avoid a grade crossing, and an order was made for the separation of the crossings; the Lima & Toledo Traction Company being required to construct its track beneath that of the senior company, and the Toledo, Fostoria & Findlay Company to cross the tracks of the Pennsylvania Company by an overhead structure, and in each case the character of the structure was indicated by specifications, which are admitted to be sufficiently clear and complete. In both cases the court ordered that the initial costs of construction and the expenses of maintenance be borne equally by the two companies. In the latter case the findings of the circuit court, 4 to 10, inclusive, raise a question which is peculiar to that case.

"Fourth. That the section line road between sections 8 and 9 in Lake township, Wood county, Ohio, is a public highway, and that the Toledo, Fostoria & Findlay Railway Company has procured from the commissioners of Wood county, Ohio, by an order duly entered upon the journal of said commissioners, the right to use the said section line road called the 'Loop Road,' for the construction and operation of its said line of electric interurban railway from the village of Pemberville to the north line of Wood county, Ohio, and one of the requirements of the grant is that the electric road shall conform to the present level of the public highway, wherever the tracks are laid in the highway, which, at this point, crosses the Pennsylvania Company's road at grade. The electric line is constructed upon private right of way the greater part of the distance from Pemberville to Walbridge, and turns into the highway about 30 rods from the proposed intersection of the Pennsylvania Company's tracks.

"Fifth. At the time of the filing of the application herein, and at the date of the hearing, the Toledo, Fostoria & Findlay Railway Company and the Pennsylvania Company had not agreed upon the manner and mode of crossing the tracks of the Pennsylvania Company by the tracks of the Toledo, Fostoria & Findlay Railway Company, the electric line, and the Pennsylvania Company has declined, and now resists, the installation of a grade crossing.

"Sixth. At the proposed point of intersection of the two roads the Pennsylvania Company's lines run in a northwesterly and southeasterly direction, so that the section line road called the 'Loop Road' does not cross the railroad tracks at a right angle, but at an angle of about 35 degrees, and a grade crossing at this point would be highly dangerous.

"Seventh. It is entirely reasonable and practicable to present and avoid a grade crossing at the point of the proposed intersection, and it is entirely practicable and reasonable that the grades be separated by

the construction, for the electric line, of an overhead crossing. It is not practicable or reasonable to construct an undergrade crossing of the tracks of the Pennsylvania Company. Such crossing would bring the tracks of the electric road below high-water mark, and the water would interfere with the operation of the road at that point.

"Eighth. To carry the crossing overhead within the limits of the highway at this point would be destructive, in part, of the uses of the road. The structure would necessarily occupy about 22 feet of the width of the road for a distance of about 1,000 feet, and would necessarily be immediately in front of a large number of dwellings and store buildings, and would impair the access of the proprietors thereof to the public highway.

"It would be practicable from an engineering standpoint to construct and operate an overhead crossing at this point within the limits of the highway, but the damage to private property therefrom would be so great, and the prevention of such crossing by the public authorities or others by legal process would be so probable, that, if there were no other point nearby at which an overhead crossing could be constructed and operated conveniently, it would not be reasonable and practicable to prevent and avoid a grade crossing.

"Ninth. That at points within a distance of 600 feet easterly from said highway and railway crossing it is reasonable and practicable to obtain a right of way for, and to construct and operate an overhead crossing with proper approaches for, said electric railroad over said Pennsylvania Company's tracks, and such crossing need not have any greater curvature or heavier grades than the grades and curves of said electric line of the Toledo, Fostoria & Findlay Railway Company at other points upon its line. Such overhead crossing is the mode that will do the least practicable injury to the rights of the Pennsylvania Company.

"Tenth. That the form of construction herein ordered is practicable and reasonable, and that it is fair and just to divide the expense as herein adjudged."

The following order followed the findings of fact in that case: "Upon the foregoing facts the court orders, adjudges, and decrees that a grade crossing of the tracks of the Pennsylvania Company by the track of the Toledo, Fostoria & Findlay Railway Company shall be, and the same hereby is, prevented, except as to the temporary crossing as hereinafter provided; that the track of the said Toledo, Fostoria & Findlay Railway Company shall cross the tracks of the Pennsylvania Company by an overhead structure composed of a steel span skew bridge and the necessary approaches thereto; that said approaches shall be constructed by an earthen fill of sufficient width for a single

track, and the steel bridge or span shall be supported by concrete abutments at either end of the necessary size and style, and said bridge shall be built of steel of sufficient width for a single track, and have sufficient strength to sustain the weight of the traffic to be carried, with a proper allowance as a factor of safety; said steel structure to weigh approximately 150,000 pounds, and the lowest parts of said bridge to clear the Pennsylvania Company's tracks at least 21 feet. It is further ordered, adjudged, and decreed that the cost of the necessary right of way for said overhead structure and fill, from the point where such right of way leaves the highway to the point where it returns to the highway, and the cost of constructing said entire fill and structure, shall be borne equally by both companies. That the cost of future maintenance of said entire overhead crossing, including approaches, ties, and rails, shall be borne alone by said the Toledo, Fostoria & Findlay Railway Company, its successors and assigns, except the maintenance of the bridge span and abutments, which shall be forever maintained at the equal joint expense of both companies, their successors or assigns. It is further ordered, adjudged, and decreed that the temporary grade crossing heretofore installed, and now in operation under the previous order of this court, be permitted and allowed to remain in place, and to be operated by said electric line, without any prejudice whatever to any of the rights of said the Pennsylvania Company, for a period of six months from the date of this decree, and the operation thereof shall cease, and said crossing shall be removed, not later than the 1st day of July, A. D. 1908, and upon the failure of said the Toledo, Fostoria & Findlay Railway Company to entirely remove said temporary crossing, on or before the said 1st day of July, A. D. 1908, said the Pennsylvania Company is hereby authorized to, and it shall, remove said crossing, restoring its tracks to the same condition which they were in prior to the installation of said crossing, unless an extension of time for such removal be granted by this court or by the Supreme Court. It is further ordered, adjudged, and decreed that the original cost of the installation of said temporary grade crossing, including the cost of laying and removing so much of the track in the highway as must be abandoned if overhead crossing shall be constructed (but not including the cost of any materials thereof except the cost of the bridge over the creek in the highway), be borne and paid equally by both of said companies. It is further ordered, adjudged, and decreed that each company shall pay one-half of the costs of this proceeding, taxed at \$——, and in default thereof within 60 days from this date that execution issue for the collection thereof."

In case No. 10,958 it made the following

order upon that subject: "It is further ordered that said structures may be built, and the necessary work incident thereto may be done, by plaintiff, and the total cost thereof, including the expense of removing said piling, of temporary supports for track of defendants, and earth filling, as above provided, and relaying of defendant's track, and all other material and labor necessary to complete said structures and crossing, shall be borne and paid one-half by plaintiff and one-half by the defendants, and shall be a first lien and charge against the property of the respective parties and the assets of said receivership. It is further ordered that the plaintiff and defendants shall share equally the cost of maintaining said crossing and structures. Ordered, further, that the costs of this proceeding be paid one-half by plaintiff and one-half by defendants."

F. W. Stevens and Selders & Cunningham, for plaintiff in error Toledo Railway & Terminal Company. Ross & Kinder, for plaintiff in error Toledo, Fostoria & Findlay Railway Company. Smith & Beckwith and Cable & Parmenter, for defendant in error Lima & Toledo Traction Company. Marshall & Fraser, for defendant in error Pennsylvania Company. George H. Warrington, W. C. Shepherd, Shotts & Millikin, and Charles Darlington, amici curiæ.

SHAUCK, J. (after stating the facts as above). The act (97 Ohio Law, p. 549) under whose favor these proceedings were had is as follows:

"Section 1. That where it becomes necessary, outside the corporate limits of a city or village, for the track of a steam, street, electric or interurban railroad company to cross the track of another steam, street, electric or interurban railroad company, unless the manner of such crossing shall be agreed to between such companies, it shall be the duty of the court of common pleas of the county wherein such crossing is located, or a judge thereof in vacation, on application of either party, to ascertain and define by its decree the mode of such crossing which will inflict the least practical injury upon the rights of the company owning or operating the road which is intended to be crossed; and, if in the judgment of such court or such judge thereof, it is reasonable and practicable to avoid a grade crossing, it shall by its process prevent a crossing at grade; but in determining the mode of such crossing, no grade shall be required to exceed the established maximum or ruling grade governing the operation by motive power of that division or part of the company on which the improvement is to be made, without the consent of the company; nor shall either company's tracks be required to be placed below high-water mark. The court shall, in its order, equitably apportion the initial expense of such construction or crossing and the expense

of maintenance thereof among the parties interested. Any party feeling itself aggrieved by the decision of said court shall have the right of appeal as in other civil cases.

"Sec. 2. Nothing in this act shall prevent any railroad company from laying additional tracks at existing crossings."

The validity of the act is not questioned. Indeed it is not left in doubt, since the decision of this court in *Lake Shore & Michigan Southern Ry. Co. v. Cincinnati, S. & C. Ry. Co.*, 30 Ohio St. 604. It is an exercise of the police power of the state for the protection of the lives and limbs of those who operate trains and electric cars, and of those who travel upon them. A consideration of the interests of carrying companies may not have contributed to the passage of the act, but those interests are sufficiently guarded. The brief filed on behalf of the Pennsylvania Company is attractive because of its insistence that it, and all other carriers, shall be required to perform fully the enjoined duty to employes and to the public. In view of the longevity of corporations and the durability of bridges of modern construction, and the damages which result from the many collisions occurring at grade crossings, the attitude of that company may also be entirely consistent with the most comprehensive view of its own interests.

While the act is not, in all respects, so complete, or so clear, as to entitle it to be regarded as a model for future legislation, the provisions involved in these cases are quite clear. The act plainly declares the policy of the state to be against crossings at grade. That conclusion necessarily results from the provision that the court shall prevent grade crossings whenever it is reasonable and practicable to do so. The court is expressly required to apportion ratably, among the parties interested, both the costs of constructing the crossing and the expenses of maintaining it. In this respect it applies the principle of former legislation, which was interpreted and approved in the case above referred to. We cannot say that the equitable apportionment of these costs and expenses must necessarily be their equal apportionment, as was ordered in the present cases. But here was no evidence tending to show that their equal apportionment would be inequitable, and the court followed the natural presumption that the separation of the grades would result to the equal benefit of the parties interested, and that they should contribute equally to the accomplishment of the purposes for which the statute was enacted. In all respects which are material to any question here presented, the act is substantially the same as that enacted in the state of Pennsylvania in the year 1871. The act has been repeatedly construed and applied, by the Supreme Court of that state, consistently with its obvious purpose to put

an end to grade crossings in the cases to which it applies. Indeed the frequency with which that court has reiterated the same views can be explained only by the persistency of the courts of first instance in that state in finding that it was not practicable to avoid grade crossings, thus calling upon the Supreme Court to intervene to the end that the obvious purpose of the statute might be permanently realized, and that its provisions might not be evaded by artifice or by improper interpretation. It is true that the Legislature has not seen fit to authorize the intervention of the courts to determine the matter of crossings, except in cases where the companies are unable to agree with respect thereto, and counsel for the Toledo Terminal Company insist that the courts were without jurisdiction in the case to which it is a party, because the inability of the companies to agree does not appear. The statute does not require a disagreement leading to violence. A sufficient disagreement appears in the briefs before us, and in the divergent views respecting their rights, which were presented in the courts below.

Counsel for the Toledo, Fostoria & Findlay Railway Company urge that the order of the circuit court, in the case to which it is a party, is erroneous, because the company had a right to locate its road in the highway, with the consent of the commissioners of the county; that the court could not order an overhead crossing in the highway where, according to its own finding, it would be a source of interruption to public travel, and that the court was without power to change the place of crossing. Paraphrased, the proposition seems to be that the junior company may defeat the operation of the statute by voluntarily choosing a place of crossing at which it will not be practicable to separate the grades. The circuit court very properly concluded that the conditions which would forbid an overhead crossing must not be voluntarily chosen by the company, and it enjoined the crossing at grade, because practical opportunities for an overhead crossing were at hand. The point was so disposed of in *Perry Co. Railroad Extension Company v. N. & S. Valley Railroad Company*, 150 Pa. 194, 24 Atl. 709. Though we are not charged with the duty of weighing conflicting evidence for the purpose of determining its weight, we have examined the records in these cases to see that the proceedings of the circuit courts are in accordance with the provisions and purpose of the statute, that their findings of fact are sustained by substantial evidence, and that they support the orders which the courts made.

Judgments affirmed.

PRICE, C. J., and CREW, SUMMERS, SPEAR, and DAVIS, JJ., concur.

(79 Oh. St. 9)

## PIERCE et al. v. HAGANS.

(Supreme Court of Ohio. Nov. 10, 1908.)

## MUNICIPAL CORPORATIONS (§ 984\*)—ACTION BY TAXPAYER — UNAUTHORIZED EXPENDITURES.

A resident taxpayer, owning property within an incorporated village, subject to be taxed for the support of the revenues of the village, in which village there is no solicitor nor other legal counsel whose duties require him, in the name of the corporation, to apply to a court to restrain the illegal use of the funds of the corporation, is not without legal capacity to maintain, for himself and on behalf of the village, an action against the municipal authorities to enjoin the unauthorized expenditure of the funds of the village.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2162; Dec. Dig. § 984.\*]

(Syllabus by the Court.)

Error to Circuit Court, Pike County.

Action by G. S. Hagans against A. C. Pierce and Samuel F. Hunter. Judgment sustaining a demurrer to the petition was reversed in the circuit court, and defendants bring error. Affirmed.

The action below was brought by the defendant in error, G. S. Hagans, a taxpayer, against the plaintiff in error A. C. Pierce, as clerk of the village of Piketon, and Samuel F. Hunter, in injunction, to prevent an alleged misapplication of the corporate funds of the village. In substance, the amended petition of the plaintiff below set forth that he is a resident taxpayer of the incorporated village of Piketon, Ohio, the owner of property on the tax duplicate of the village, which property has heretofore been and will hereafter be, taxed for the revenues of the village; that the village has not now, and never has had, a village solicitor or other legal counsel whose duty requires him, in the name of, and in behalf of, the village, to apply to a court for an injunction to restrain the misapplication of funds of the corporation or the abuse of corporate powers, and for such reason the plaintiff, as a resident taxpayer of the village, brings this action on behalf of said municipal corporation. April 18, 1908, the council of the village passed the resolution which follows: "Whereas, the incorporated village of Piketon is about to become involved in litigation, and it will be necessary to retain counsel to maintain the rights of said village; therefore, be it resolved by the village council of the incorporated village of Piketon, Ohio, that a committee of one be appointed to look after said matter, and that there be set aside of the general funds of said village the sum of seventy-five dollars, and that the clerk is hereby ordered to issue on the treasurer of said village, payable to said committee of one, to be appointed at once by the mayor, and that said committee of one is hereby instructed to report to council his proceedings in this behalf." The

mayor thereupon appointed the defendant Samuel F. Hunter as a committee of one to receive said order; said Hunter being at the time a member of said council. It is not true that the village is about to become involved in litigation, and that it will be necessary to retain counsel to protect its rights, but the resolution is nothing more than a subterfuge, and is a scheme to obtain \$75 from the village treasury with which to pay the obligations of said Hunter and others, as members of the council, in a certain proceeding in mandamus, wherein said Hunter and others were respondents, and in which proceeding, by the decision of this court, a judgment was rendered against the said respondents in their individual capacity, which judgment, at the time of the passage of said resolution, had been paid. The resolution is without legal effect because the fund from which the proposed money was to be drawn was at the time largely overdrawn, and the clerk of the village had not, before the passage of the resolution, nor since, certified to the clerk that the money required was in the treasury of the village to the credit of the fund from which it was to be drawn, and not appropriated for any other purpose; nor did the clerk certify that a levy had been made by the council and placed upon the tax duplicate, and the money provided by the resolution in process of collection. Said Hunter will demand from the clerk an order for said sum, and said clerk will issue to him such order unless enjoined, and plaintiff is without any remedy at law to prevent such misapplication of corporate funds. Plaintiff prays injunction. To the amended petition a demurrer was sustained by the court of common pleas, on the ground that the plaintiff was without legal capacity to maintain the action, and rendered judgment for defendant below. This judgment was reversed by the circuit court, for error in sustaining the demurrer, and the cause remanded to the common pleas for further proceedings. The defendants below now seek a reversal by this court of the judgment of the circuit court and an affirmance of that of the common pleas.

Eylar & Douglas, for plaintiffs in error.  
Dougherty & Moore, for defendant in error.

SPEAR, J. (after stating the facts as above). The only question presented by the record is as to the capacity of the plaintiff in the common pleas to maintain his action. It is insisted, as against the judgment of the circuit court, that the action below cannot be maintained because the statute (sections 1777, 1778, Rev. St. 1908) expressly forbids it, and because the common law affords no authority for its prosecution.

Pertinent provisions of those sections (1 Bates' Ann. St. pp. 959, 960), are:

"Section 1777. He [the city solicitor] shall apply in the name of the corporation, to a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

court of competent jurisdiction for an order of injunction to restrain the misapplication of funds of the corporation, or the abuse of its corporate powers, or the execution or performance of any contract, made in behalf of the corporation in contravention of the laws or ordinance governing the same, or which was procured by fraud or corruption.

"Sec. 1778. In case he fall upon the request of any taxpayer of the corporation to make the application provided for in the preceding section, it shall be lawful for such taxpayer to institute suit for such purposes in his own name, on behalf of the corporation; provided that no such suit or proceeding shall be entertained by any court until such request shall have been first made in writing; and, further, provided that no such suit or proceedings shall be entertained by any court until such taxpayer upon motion of the solicitor or corporation counsel shall have given security for the costs of the proceeding."

It seems fairly clear that these sections cannot have application to the case at bar. They treat of a situation which is essentially different. Their terms presuppose the presence of a solicitor, an officer on whom the request to begin a suit can be made. The petition shows that the village of Picketon had no solicitor. It was impossible, therefore, to comply with that requirement. The inhibition that no such suit shall be entertained by any court until a request shall have been first made upon the solicitor in writing, and until the taxpayer shall have given security for costs, necessarily, we think, means a suit brought by favor of those sections, one in which it is possible to make an effort to invoke the action of a law officer representing the corporation, and not a suit brought without relying upon the statute, and one in which such request is impossible. The restrictions here imposed may well be treated as provisions to regulate the practice in cases where reliance is had upon the statute to prevent the inconsiderate bringing of actions by dissatisfied taxpayers, and the consequent piling up of costs against the municipality in cases of doubtful merit. It may perhaps be matter of surprise that this effort at regulation did not go farther and cover the entire ground of actions by taxpayers to prevent illegal expenditures by municipalities of all grades, but that omission does not afford ground for the conclusion that these enactments were intended to cover cases not necessarily within their terms. These provisions first appear in our statutes by the act of March 3, 1860, entitled: "An act relating to cities of the first class having a population exceeding eighty thousand inhabitants." 57 Ohio Laws, p. 16. The natural inference would seem to be that, in the judgment of the General Assembly, such regulation as is by these sections provided did not then appear to be necessary in the municipalities of the state having a population of

80,000 or less. It may be added that the case of the plaintiff below does not purport to be brought under the sections of the statute quoted.

We come now to a consideration of the claim that the plaintiff below had at common law no legal capacity to sue, either on his own behalf or on behalf of the corporation. This proposition implies that, until the act of March 3, 1860, there was no power on the part of taxpayers residing and owning property subject to taxation within any municipality of the state, who could have a standing in any court to ask such court to restrain the unlawful expenditure of corporate funds by the municipal authorities, or the incurring illegally of corporate obligations by them necessarily resulting in increased burdens of taxation, and that after the date above stated, and until the amendment enacted some years later, resident taxpayers of all municipalities of a population of not over 80,000 were lacking in such right. The proposition is at least a startling one, and as a first inquiry occurs the question why such resident taxpayers should not have such standing. They are members of the corporation itself, units making in the aggregate the entire corporation, and thus necessarily possessing an interest in the corporate funds and property. Their individual items of property situate therein are units of the whole, and together constitute a large integral part, if not the entire body, on which the burdens of taxation are imposed. Speaking in the enlarged sense, the corporation is the trustee and the inhabitants the cestuis que trust. If the corporation were a private one, there could be no doubt of the power to sue. Can any situation involving only property be imagined where a stronger claim for relief can be made upon a court of equity? It is not easy to suggest one. Nor is the question a new one in this state. It is observed by Gilmore, J., in *Cincinnati Street R. R. Co. v. Smith*, 29 Ohio St. 291, treating of the sections of the statute hereinbefore referred to, that: "The sections do not provide remedies that were previously unknown. Courts of equity had long taken jurisdiction and granted injunctions in such cases, when properly presented by interested individuals, whose rights were put in jeopardy by the illegal or unauthorized acts, or threatened acts, of municipal corporations." And in *Weir v. Day*, 35 Ohio St. 143, a suit involving the right of a resident taxpayer to enjoin an alleged illegal use of a schoolhouse by a board of education, McIlvaine, J., observes: "It is also suggested that the plaintiff has not shown an injury to himself. As a resident taxpayer in the district, and hence a quasi corporator, it is his legal right to have the corporate property used solely for corporate purposes; and any diversion of the property to other uses is an injury to him in law. And in addition to this, the

unauthorized use to which this property was devoted, necessarily results in damage to a greater or less degree, to say nothing of the risks."

We think, also, that the general trend of judicial opinion in this state is consistent with the proposition that sections 1777 and 1778 do not apply where there is no solicitor, and that a resident taxpayer may, for himself and the corporation, seek to enjoin the illegal use of corporate funds and property, and cite in support thereof the following cases: *Hensly v. City of Hamilton*, 3 Ohio Cir. Ct. R. 201; *Cope v. Village of Wellsville*, 25 Wkly. Law Bul. 250; *Kissell v. Village of Columbus Grove*, 34 Wkly. Law Bul. 50, affirmed 53 Ohio St. 650, 44 N. E. 1140; *Wood v. Village of Pleasant Ridge*, 12 Ohio Cir. Ct. R. 177; *Hallock v. City of Columbus*, 1 Ohio N. P. (N. S.) 205; *Smith v. Village of Rockford*, 4 Ohio N. P. (N. S.) 513. See, also, dissenting opinion of Dempsey, J., in *Cincinnati v. Ferguson*, 12 Ohio S. & C. P. Dec. 488, 500. *Young v. Wilson et al.*, a case disposed of by the Brown county circuit court in the year 1893, holds the opposite doctrine. The decisions of that court are deserving of high respect, but they are persuasive only. A case from the Pike county circuit court is also cited as sustaining the contention of plaintiff in error. It seems not to do so. The point of the capacity of the plaintiff to maintain the action does not appear to have been passed upon by either the common pleas or circuit court. The general right of the resident taxpayer to maintain an action of this character is recognized by a number of decisions of courts in other jurisdictions. *Bromley v. Smith*, 1 Sim. 9; *Paterson v. Bowes*, 4 Grant's Chy. 170; *Hanson v. Hunter*, 86 Iowa, 722, 48 N. W. 1005, 53 N. W. 84; *City of Richmond v. Davis*, 103 Ind. 449, 8 N. E. 130; *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070. In the case last cited, opinion by Mr. Justice Field, it is held that: "Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they, in common with other property holders of the county, may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the state courts in numerous cases; and, from the nature of the powers exercised by municipal corporations, the great danger of their abuse, and the necessity of prompt action to prevent irremediable injuries it would seem eminently proper for courts of equity to interfere, upon the application of the taxpayers of a county, to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the state or county, there would seem to be no substantial reason why,

a bill by or on behalf of individual taxpayers should not be entertained to prevent the misuse of corporate powers. The courts may be safely trusted to prevent the abuse of their process in such cases. Those who desire to consult the leading authorities on this subject will find them stated or referred to in Mr. Dillon's excellent treatise on the Law of Municipal Corporations."

The principle is also recognized by a number of text-book authors of acknowledged authority, and by a number of digests. 1 *Pomeroy's Eq. Jur.* (2d Ed.) § 273; 2 *Dillon's M. C.* (4th Ed.) § 914; 21 *Ency. of P. & P.* 471; 20 *Am. & Eng. Ency. of Law*, 1231; *Ellis' Munic. Code*, 343. Counsel on both sides have been diligent in bringing to our attention many authorities, all of which we have examined. A further review, however, does not seem called for. A class of cases seems to support the contention of counsel for plaintiff in error, but many of them are cases where a taxpayer sought wholly in his own name, and without assuming to represent others, or the corporation itself, and where his interests were not distinct from those of all other taxpayers of the municipality or district. The distinction between such a case and the one at bar is manifest. And, as between the cases which seem to deny the resident taxpayer the right to sue, and the holdings in our own state and elsewhere which sustain that right, it is clearly our duty to follow the latter. If the resident taxpayer may not maintain such an action, then no one can, and the municipal authorities may plunder to their hearts' content so long as they observe legal forms and escape the clutches of the criminal law, and nobody shall say them nay. This right is not better stated than by Judge Dillon in the section before cited: "In this country the right of property holders or taxable inhabitants to resort to equity to restrain municipal corporations and their officers from transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the taxpayers—such as making an unauthorized appropriation of the corporate funds, or an illegal or wrongful disposition of the corporate property, or levying and collecting void and illegal taxes and assessments upon real property, under circumstances presently to be explained—has, without the aid of statute provision to that effect, been affirmed or recognized in numerous cases in many of the states. It is the prevailing, we may now add almost universal, doctrine on this subject. It can, we think, be vindicated upon principle, in view of the nature of the powers exercised by municipal corporations and the necessity of affording easy, direct, and adequate preventive relief against their misuse. It is better that those immediately affected by corporate abuses should be armed with the power to interfere directly in their own names than to compel them to rely upon the action of a distant

state officer. The equity jurisdiction may, in such cases, usually rest upon fraud, breach of trust, multiplicity of suits, or the inadequacy of the ordinary remedies at law.

\* \* \* The doctrine \* \* \* is supported by an analogy supplied by a settled rule of equity applicable to private corporations. In these the ultimate cestuis que trust are the stockholders. In municipal corporations the cestuis que trust are, in a substantial sense, the inhabitants embraced within their limits. In each case the corporation, or its governing body, is a trustee. If the governing body of a private corporation is acting ultra vires or fraudulently, the corporation is ordinarily the proper party to prevent or redress the wrong by appropriate action or suit in the name of the corporation. But if the directors will not bring such an action, our jurisprudence is not so defective as to leave creditors or shareholders remediless, and either creditors or shareholders may institute the necessary suits to protect their respective rights, making the corporation, and the directors defendants. This is a necessary and wholesome doctrine. Why should a different rule apply to a municipal corporation? If the property or funds of such a corporation be illegally or wrongfully interfered with, or its powers be misused, ordinarily the action to prevent or redress the wrong should be brought by and in the name of the corporation. But if the officers of the corporation are parties to the wrong, or if they will not discharge their duty, why may not any inhabitant, and particularly any taxable inhabitant, be allowed to maintain, in behalf of all similarly situated, a class suit to prevent or avoid the illegal or wrongful act? Such a right is especially necessary in the case of municipal and public corporations, and if it be denied to exist, they are liable to be plundered, and the taxpayers and property owners on whom the loss will eventually fall are without effectual remedy."

A very learned discussion of the subject is given in 38 Cyc. pp. 1732, 1738, and a large number of decisions of state courts are cited, some of the older cases of which seem to restrict the right of a taxpayer to maintain an action to situations where he is injuriously affected in some way different from taxpayers generally, others holding that, as against municipal corporations, the right of action is confined to instances where the municipal authorities have neglected to act, and then only after request to do so, unless the circumstances show that such a demand would be unavailing, but many cases are cited to the effect that, while taxpayers cannot contest municipal ordinances or acts merely upon the ground that they are unauthorized and invalid, they may judicially contest the validity of any official act which directly affects prejudicially their rights as taxpayers by increasing the burden of taxes or other-

wise, and the great weight of authority, says the commentator, "is that, if such action be illegal or unauthorized, taxpayers may sue to restrain it without showing any special injury different from that sustained by other taxpayers." The later cases seem to tend to the more liberal doctrine, and, taken as a whole, we do not regard the discussion as at war with the conclusions we have reached in the present case, but rather affording support to them.

Our holding is that a resident taxpayer of a village, having no solicitor, who owns property within the village subject to taxation, may maintain, for himself and the village, an action to restrain the misapplication by the municipal authorities of the funds of the corporation.

The plaintiff below had legal capacity to maintain the action. His amended petition states a cause of action. The sustaining of the demurrer to that pleading was erroneous, and the judgment of the circuit court reversing that holding will be affirmed.

PRICE, C. J., and SHAUCK, CREW, and SUMMERS, JJ., concur.

(198 N. Y. 457)

#### PEOPLE v. BRIGGS.

(Court of Appeals of New York. Dec. 1, 1908.)

#### 1. FOOD (§ 2\*)—CERTIFICATION OF MILK—VALIDITY OF STATUTE.

Agricultural Law (Laws 1893, p. 661, c. 338), as amended by Laws 1904, p. 1380, c. 566, § 22, providing that milk shall not be sold as certified milk, unless it is conspicuously marked with the name of the "association" certifying it, is invalid, in that it fails to designate the association by which the certification is to be made.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 2; Dec. Dig. § 2.\*]

#### 2. STATUTES (§ 241\*)—CONSTRUCTION—PENAL STATUTES.

In construing penal statutes, the courts will not go beyond the clear meaning of the statute in order to spell out a new offense, not clearly indicated by the ordinary meaning of the words used.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.\*]

#### 3. STATUTES (§ 46\*)—CONSTRUCTION—DOUBTFUL AND UNCERTAIN PROVISIONS.

If a statute is doubtful and uncertain, or is such as to make it difficult or impossible to comply with its provisions, it will be held invalid.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 46, 47; Dec. Dig. § 46.\*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by the People of the State of New York against Charles M. Briggs. From a judgment of the Appellate Division (121 App. Div. 927, 106 N. Y. Supp. 1140), affirming a judgment in favor of plaintiff, defendant appeals. Reversed, and complaint dismissed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

W. C. Carroll, for appellant. Thomas C. Burke, for respondent.

HAIGHT, J. This action was brought to recover penalties for alleged violations of the agricultural law. The facts established by the verdict are to the effect that the defendant, Charles M. Briggs, was a milk producer, having a dairy farm at Elma, Erie county, N. Y., on which he kept cows for the production of milk. The milk was put into quart glass bottles, on which were blown the words "Certified milk, C. M. Briggs, Elma, N. Y.," and upon the stopper to the bottles the same words were printed. The milk was shipped to two milk dealers or grocers in Buffalo, and was sold by them as and for certified milk. The milk in question was not certified by any association, but the milk was examined, from time to time, by Dr. Albert H. Briggs, a reputable and experienced physician practicing in the city of Buffalo, who did certify that the milk conformed to the requirements of the statute, but his certificate was not marked upon the bottles sold. The trial court charged the jury, in substance, that if it found that the defendant was the person who conducted the dairy farm and produced the milk, and that he sold it as certified milk without having the bottles in which the milk was inclosed conspicuously marked, either by the physician making the examination, or with the name of the association certifying it, he was liable under the statute. An exception was taken to this charge. The jury rendered a verdict for the people and assessed the amount of the penalty at \$100.

Agricultural Law (Laws 1893, p. 661, c. 338), as amended by chapter 566, p. 1380, Laws 1904, then in force, provided as follows: "Sec. 22. \* \* \* No person shall sell or exchange, or offer or expose for sale or exchange, as and for certified milk, any milk which has not been duly examined by a competent person to make such examination and which has not been found upon such examination to be free from antiseptics, added preservatives, and pathogenic bacteria, or bacteria in excessive numbers. All milk sold as certified milk shall be conspicuously marked with the name of the association certifying it." It will be observed that the defendant had complied with the requirements of the statute in so far as having his milk examined by a competent person who was a reputable and experienced physician practicing his profession in the city in which the milk was sold. The only default on the part of the defendant was, therefore, in not having the bottles in which the milk was sold "conspicuously marked with the name of the association certifying it." What is meant by the term "association"? Did the Legislature intend by its use to refer to an association of milk dealers? Evidently not,

for the purpose of the entire statute is to place restrictions upon the sale, by dealers, of milk that does not conform to its requirements. Did the Legislature intend to refer to some association of doctors, lawyers, or ministers? If so, to which? Is it a self-constituted, voluntary association, and if so, who are the persons composing it? It is quite possible that the Legislature had in mind some sort of a medical association, but unfortunately it has failed to designate any particular association or individuals composing it to whom the milk dealer could apply for the certification of his milk. This is a penal statute, and a violator is not only liable for penalties, but is also liable to be convicted for a misdemeanor, under which he may be punished by both fine and imprisonment. In construing penal statutes it is not our practice to go beyond the clear meaning and purpose of the statute, and we should not attempt to spell out the creation of a new offense which is not clearly indicated by the ordinary meaning of the words used. *Jones v. Estis*, 2 Johns. 379. If a statute is doubtful and uncertain, or is such as to make it difficult or impossible to comply with its provisions, it will be held to be of no force and effect. Subsequently the Legislature discovered the defect in this statute and by chapter 241, p. 449, Laws 1907, it amended the same, expressly providing that the milk shall conform to the regulations prescribed by, and bear the certification of, a milk commission appointed by a county medical society of the state. We, therefore, by this amendment have a commission specifically designated by which the certificate is to be made, but this amendment was subsequent to the offense charged against the defendant; and, inasmuch as there was then no such commission referred to in the statute to whom he could apply for certification, we conclude that this provision of the statute was without force and effect.

The judgment should therefore be reversed, and inasmuch as the meaning of the statute cannot be changed upon a new trial, the complaint should be dismissed, with costs in all courts.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, WERNER, HISCOCK, and CHASE, JJ., concur.

Judgment reversed, etc.

(198 N. Y. 537)

ORSER v. CITY OF NEW YORK.

(Court of Appeals of New York. Dec. 15, 1908.)

MUNICIPAL CORPORATIONS (§ 791\*)—TORTS—OBSTRUCTIONS IN STREET—INJURIES—CONSTRUCTIVE NOTICE—EFFECT.

In an action against a city for injuries caused by tripping over a loose stone in the street, the evidence of the only witness relied

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on to prove constructive notice to the city of the presence of the obstruction, that during a period of two or three weeks before the accident he had seen a loose stone of like character as the one tripped over in the general locality, but not at the precise place where the injury occurred, that during most of the time the stone was near a telegraph pole where it was not dangerous to travelers, and that on one occasion he had removed the stone from the street to a place near the pole, was insufficient to show that the city had constructive notice of the unlawful obstruction in the street, as the stone only became an unlawful obstruction as regards plaintiff when in the street.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1049; Dec. Dig. § 791.\*]

Edward T. Bartlett and Chase, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Margaret D. Orser against the City of New York for injuries caused by tripping over a stone in the street. From an order of the Appellate Division (127 App. Div. 335, 111 N. Y. Supp. 670) reversing a judgment of nonsuit, the defendant appeals. Reversed, and judgment of Trial Term affirmed.

Francis K. Pendleton, Corp. Counsel (James D. Bell, of counsel), for appellant. Charles H. Luscomb, for respondent.

**WILLARD BARTLETT, J.** The determination of this appeal depends upon the question whether there was any evidence adduced in behalf of the plaintiff sufficient to warrant the jury in finding that the city of New York had notice of the presence in the street of the obstruction which caused the injury to the plaintiff. There was no attempt to prove actual notice to any officer or agent of the municipality. The sole reliance of the plaintiff was upon the doctrine of constructive notice, based upon the proposition that the stone over which she fell had been at the place where the accident occurred long enough to charge the city with notice of its presence there. It was a loose stone, forming no part of the pavement, but wholly separate therefrom, and is described as being "about twelve, fourteen or sixteen inches long, and about six inches thick." The plaintiff, between half past 5 and 6 o'clock on the afternoon of January 12, 1905, stepped out from the sidewalk at the southwest corner of Atlantic avenue and Smith street, in the borough of Brooklyn, for the purpose of taking passage upon a trolley car, and while approaching the car she encountered and fell over a loose stone which was situated at the time between four and six feet from the curb and about three feet from the crosswalk. The gravamen of the action was the alleged negligence of the city in permitting this unlawful obstruction to be in the highway. The learned judge who presided at the trial nonsuited the plaintiff on the ground that she had fail-

ed to prove facts sufficient to warrant the inference of constructive notice to the municipality. The Appellate Division thought that he erred in this respect, and reversed the judgment entered upon the nonsuit. As between the conflicting conclusions reached in the courts below as to the sufficiency of the proof to establish constructive notice, I think that the view taken by the trial judge was correct, and that the order of the Appellate Division should be reversed and the judgment of the Trial Term affirmed.

The loose stone over which the plaintiff fell was unquestionably an unlawful obstruction in the street. The fact that it was readily movable did not change its character in this respect. *Davis v. Mayor, etc.*, of New York, 14 N. Y. 506, 524, 67 Am. Dec. 186. In the absence of evidence, however, tending to show actual knowledge of its presence at the place where the accident occurred on the part of the municipal authorities, it was necessary for the plaintiff to prove constructive notice by lapse of time; that is to say, that the stone had been there so long that information of its presence could fairly be presumed, upon the assumption that the highway officials, in the exercise of reasonable care, ought to ascertain the existence of any unlawful obstruction in the streets which has lasted for any considerable length of time.

The sole witness relied upon to establish constructive notice was one Joseph T. Tierney. He testified that he had seen a loose stone of the same dimensions as that over which the plaintiff fell near the place of the accident "more than a week, going on two weeks," before it happened. He refused to identify it positively as the same stone, but said there was no other stone there. "All I am ready to say is that I have seen around there some kind of a stone. I could not prove whether it was the same stone or not. All I will say is that around that corner, the southwest corner of Smith and Atlantic, for some time prior to this date I saw a stone, and it was not in this position where this lady fell all the time that I saw it. At various times I saw it up against the telegraph pole." The telegraph pole to which the witness referred appears to have been upon the sidewalk just within the curb. He further testified that he had himself taken a stone from the roadway and placed it up against this telegraph pole over toward the gutter so that no horses would fall over it on the day before the accident; that he had seen it at various times up against the telegraph pole; that it was up against the telegraph pole the last time he saw it, and he would not say that the stone over which the lady fell was at the place where she fell fifteen minutes before the accident. The fair purport of the testimony of this witness, taken as a whole, is that during a period of two or three weeks before the accident he had

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

seen a loose stone of like character in the general locality but not at the precise place where the injury occurred; that during most of this time the stone was up near the telegraph pole, where it was not dangerous to travelers; but that on one occasion he found it in the roadway, and, being apprehensive that horses might stumble over it, he removed it to the neighborhood of the telegraph pole. In my opinion this evidence does not suffice to warrant the application of the doctrine of constructive notice. In the ordinary life of the community in any great city it is customary for the inhabitants to place objects in the street from time to time which, strictly speaking, constitute unlawful obstructions in the highway, and which, if allowed to remain there for a sufficient length of time, would charge the municipality with liability if their presence was productive of injury to others. Thus, for example, sidewalks are frequently occupied for a longer time than is necessary by ash cans and cans for garbage, and in trade localities, boxes, barrels, and crates of merchandise are often unnecessarily allowed to incumber the streets. It would be a pretty severe rule, in the case of a drygoods box which had been permitted for a number of days to remain in a position on the sidewalk where it could practically harm nobody, to hold that because it was suddenly removed into the roadway and there caused an accident the city was liable for the injury because it had constructive notice of the previous presence of the box on the sidewalk. In the present case the stone referred to by the witness Tierney was not likely to harm any one while it remained up near the telegraph pole; and such appears to have been its position during the greater part of the period mentioned in his testimony. No doubt it was an unlawful obstruction even in that position; but, if it had stayed there, it would not have injured the plaintiff. It became an unlawful obstruction as to the plaintiff only when it was removed into the roadway where she stumbled over it. The doctrine of constructive notice, therefore, could not fairly be applied to her case, unless there was evidence tending to show the presence of the stone in the precise place where she fell over it long enough beforehand to impute knowledge to the city officials. Such proof, it seems to me, was wholly lacking.

The case is quite different from *Turner v. City of Newburgh*, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453, upon which the learned counsel for the respondent chiefly relies. There the loose stone which caused the injury was a stone in the crosswalk over which the plaintiff was stepping to pass. It constituted a defect in a crossing which the plaintiff had a right to assume was safe and secure. The proof tended to show that for a week or more before the accident the stone

over which the plaintiff in that case fell was loose and in a bad condition; so that there was an ample basis for the application of the doctrine of constructive notice, inasmuch as it was the duty of the city officials of Newburgh in the exercise of reasonable care and supervision over the public streets to ascertain the existence of a defect in a permanent part of the roadway. There is no analogy between such a case and one in which a portable object has been suddenly moved from a place in the street where it was harmless to a locality in the highway where it becomes dangerous to travelers thereon.

The order of the Appellate Division should be reversed and the judgment of the Trial Term affirmed, with costs in both courts.

CULLEN, C. J., and GRAY, HAIGHT, and VANN, JJ., concur. EDWARD T. BARTLETT and CHASE, JJ., dissent, on opinion of WOODWARD, J., below.

Order reversed, etc.

(193 N. Y. 496)

STRAUS et al. v. AMERICAN PUBLISHERS' ASS'N et al.

(Court of Appeals of New York. Dec. 8, 1908.)

MONOPOLIES (§ 9\*)—COPYRIGHTED BOOKS—MAINTENANCE OF PRICES.

As regards copyrighted books, an agreement between publishers and others to maintain fixed retail prices thereof, no retailer cutting prices to be allowed to handle them, is not subject to a state statute against monopolies and restraint of trade.

[Ed. Note.—For other cases, see *Monopolies*, Dec. Dig. § 9.\*]

Cullen, C. J., and Willard Bartlett and Chase, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Isidor Straus and others against the American Publishers' Association and others. From a judgment for defendants (127 App. Div. 935, 111 N. Y. Supp. 830), plaintiffs appeal. Affirmed.

The Appellate Division certified the following question to this court: "Are the plaintiffs, under the findings of fact contained in the decision in this case, entitled, in so far as copyrighted books are concerned, to the relief demanded in the complaint, or to any relief as against the defendants in this case?"

Edmond E. Wise, for appellants. Stephen H. Olin, for respondents.

GRAY, J. I think this judgment should be affirmed, and that we should adhere to our previous decision in this case. We should not, upon the present appeal, entertain the question of the correctness of the propositions decided; but we should take them as declarations of the law, pronounced by the court after due deliberation, and conclusive in the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

action. The question of the extent to which the rights conferred by the copyright statutes may be protected by contract is still an open one in the United States Supreme Court. The case of *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086, differs in the important fact that there was no such contract, as was in question here. The claim for protection, there, rested upon a printed notice in the book fixing its price at retail.

The object of copyright and of patent statutes is to give monopolies, and that contracts made by the owners of copyrights, to secure the fullest protection in the enjoyment of the monopoly, will not be condemned by the courts, for being in unlawful restraint of trade, we have decided. Until the United States Supreme Court has pronounced differently upon such an agreement concerning the future sales of copyrighted books, as is now in question, our former decision stands as the law of the case. However, it may be argued that in some other action the decision of the federal tribunal warrants a different inference as to the interpretation to be given to the copyright statute.

WILLARD BARTLETT, J. (dissenting). The grievance of the plaintiffs upon this appeal is that they have not been awarded all the relief to which they claim to be entitled. The interlocutory judgment proceeds upon the theory that the agreements of the American Publishers' Association and the American Booksellers' Association, which have given rise to the controversy in this action, are unlawful only so far as they relate to uncopyrighted books; but are lawful so far as they relate to copyrighted books. Such was the view of this court upon the previous appeal, when an order of the Appellate Division overruling a demurrer to the complaint was sustained. *Straus v. American Publishers' Ass'n*, 177 N. Y. 473, 69 N. E. 1107, 64 L. R. A. 701, 101 Am. St. Rep. 819. Upon that appeal the court, speaking through Parker, Chief Justice, held in substance that the agreements in question would have been free from legal objection if they had been intended to operate solely upon transactions in copyrighted publications. They were condemned only because they affected "the right of a dealer to sell books not copyrighted at the price he chooses, or to sell at all, if he fails to comply with the rules of the association." The two members of the court who then dissented upheld the validity of the agreements on the ground that they did not in their opinion really extend to uncopyrighted books. See dissenting opinion of Gray, J., 177 N. Y. 490, 69 N. E. 1109. It is apparent, therefore, that all the judges who participated in the decision of the first appeal in this case agreed as to one point; that is, that there was something in the federal copyright statutes which permitted a restraint of trade in copyrighted books that the law would not tolerate as applied to books not copyrighted.

This being the law of the case as laid down upon the first appeal, we are bound upon well-recognized principles to adhere to it upon any subsequent review of the controversy in any aspect, unless the doctrine of our previous decision has been adjudged to be erroneous by a tribunal of superior authority. In the great mass of litigations which are brought here for review, this is the court of last resort. Our construction and interpretation of the law, however, is not final and conclusive in regard to the meaning, scope, and effect of the laws of the United States. "The doctrine of stare decisis is based upon the assumption that the rules of law to which this doctrine applies have previously been determined by a court having final jurisdiction of the question involved. For this reason, where the decision of a tribunal is subject to review by one having superior authority over it, for that purpose, or the question determined may be passed upon by such tribunal in another case, the doctrine of stare decisis does not apply with full force until the same questions have been determined by the court of last resort. The construction of an act of Congress cannot be said to be authoritatively settled until passed upon by the highest court authorized to do so. This is the Supreme Court of the United States." *Calhoun G. M. Co. v. Ajax G. M. Co.*, 27 Colo. 11, 59 Pac. 607, 50 L. R. A. 209, 83 Am. St. Rep. 17.

The view which this court adopted upon the first appeal in this case as to the effect of the copyright laws of the United States upon the subject-matter of the agreements which are attacked as being in restraint of trade has, it seems to me, been quite distinctly rejected in a subsequent decision by the Supreme Court of the United States in a litigation to which the plaintiffs here were parties. *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086. On the previous appeal in this court Chief Judge Parker, after quoting the language used by the United States Supreme Court in *Bement v. Nat. Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, to the effect that the courts would uphold any conditions not in their very nature illegal in regard to patents, imposed by the patentee and agreed to by the licensee, for the right to manufacture or use or sell the article, went on to say that such reasoning although employed in the case cited in respect to patent rights was "equally applicable to copyrights." On the other hand, Mr. Justice Day, writing for the Supreme Court of the United States in the *Bobbs-Merrill* Case, expressly declares that "there are differences between the patent and copyright statutes in the extent of the protection granted by them," and cites with approval an opinion by Circuit Judge Lurton in which he said that these differences are so wide "that the cases which relate to the one subject are not controlling as to the other." 210 U. S. 346, 28 Sup. Ct. 724, 52 L. Ed. 1086. In the *Bobbs-Merrill* Case the owner of a copy-

righted book inserted below the copyright notice in each copy the following statement: "The price of this book at retail is \$1.00 net. No dealer is licensed to sell it at less price and a sale at a less price will be treated as an infringement of the copyright." The question presented for decision was whether the sole right to vend given to the owner of the copyright by the federal law was such as to "secure to the owner of the copyright the right after a sale of the book to a purchaser to restrict the future sale of the book at retail to the right to sell it at a certain price per copy because of a notice in the book that a sale at a different price will be treated as an infringement, which notice has been brought home to the one undertaking to sell for less than the named sum." The court answered this question in the negative, holding in substance that, while the copyright laws secure to the owner of a copyright the right of multiplication and the right to vend copies, he may not qualify the title of a future purchaser by means of such a notice as has been quoted. The fair import of the decision is that the owner of a copyright obtains nothing as such under the federal law but the exclusive right to publish and multiply copies of the protected work and vend the same. Where he sells copies, the contracts of sale are unaffected by the copyright statutes, but are subject to the same rules of law as those which apply to contracts for the sale of other personal property.

If I understand the decision in the *Bobbs-Merrill Case* correctly, the fact that the agreements in question here related to copyrighted books could not operate to make those agreements valid if they were otherwise in violation of the statutes forbidding contracts in restraint of trade. In other words, a copyright does not carry to the owner thereof any more right to enter into a contract in restraint of trade in the copyrighted book than he has to enter into a contract which will restrain trade in a book which is not copyrighted. As was said by the present chief judge of this court when a member of the Appellate Division in the Second Department, referring to the publication of a copyrighted book: "We suppose that the author of a new geometry may fix the price at which he will sell his work at any sum, or arrange with others for its publication and sale at the stipulated price. But, if all the publishers of books on geometry were to combine and agree not to sell any publication on that subject except for a stipulated price, the contract would be in restraint of trade and void." *Murphy v. Christian Press Ass'n Pub. Co.*, 38 App. Div. 490, 56 N. Y. Supp. 597.

Although it is true that the question decided by the Supreme Court of the United States in *Bobbs-Merrill Co. v. Straus*, supra, was not the precise question presented in the case at bar, nevertheless it seems to me that what was said in the opinion therein as to

the scope and effect of the copyright statutes is inconsistent, and indeed irreconcilable, with the view originally taken by this court as to the effect of a copyright upon books which are the subject-matter of a contract in restraint of trade. The effect of a copyright is a federal question. A decision by the Supreme Court of the United States upon such a question is binding upon the Court of Appeals. So far, then, as the previous decision of this court was in conflict with the construction of the copyright laws adopted by the Supreme Court of the United States, it must be deemed to have been overruled.

Subject to the modification rendered necessary by the decision in the *Bobbs-Merrill Case*, I think we are bound to construe the agreements in controversy as we construed them upon the previous appeal. We then held that the contracts were bad so far as they related to uncopyrighted books. That view remains unassailed. We held, on the other hand, that they were good so far as they related to copyrighted books. That view must now be deemed erroneous, and must be abandoned. Those parts of the agreements which deal with copyrighted books must now be regarded as equally objectionable and subject to the condemnation of the statutes forbidding contracts in restraint of trade. In so holding we shall be applying the doctrine of *stare decisis* as far as we can, and at the same time shall pay due regard to an adjudication which I think we ought to treat as a controlling authority.

I advise a reversal of the interlocutory judgment so far as it denies relief to the plaintiff in reference to transactions in copyrighted books under the agreements in controversy, and that the question certified be answered in the affirmative.

HAIGHT, VANN, and HISCOCK, JJ., concur with GRAY, J. CULLEN, C. J., and CHASE, J., concur with WILLARD BARTLETT, J.

Order affirmed, etc.

(198 N. Y. 397)

DE WOLF v. FORD et al.

(Court of Appeals of New York. Nov. 17, 1908.)

1. DISMISSAL AND NONSUIT (§ 73\*)—DISMISSAL OF COMPLAINT—PRESUMPTIONS.

On motion to dismiss on the pleadings, the allegations of the complaint must be taken as true.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Cent. Dig. § 167; Dec. Dig. § 73.\*]

2. INNKEEPERS (§ 10\*)—INSULTS TO GUESTS—INNKEEPER'S LIABILITY.

A hotel keeper is liable to a female guest for a servant's unjustified acts, in the course of his employment, in forcing his way into her room, subjecting her to the mortification of an exposure of her person in scant attire, accusing

her of immoral conduct, and ordering her and her visitor to leave the hotel.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. § 14; Dec. Dig. § 10.\*]

### 3. INNKEEPERS (§ 6\*)—NATURE OF BUSINESS.

At common law the business of an innkeeper is of a quasi public character, invested with many privileges, and burdened with correspondingly great responsibilities, he having the right to conduct his business as he deems best, so long as he does not violate the law.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. § 9; Dec. Dig. § 6.\*]

### 4. INNKEEPERS (§ 9\*)—ACCOMMODATIONS—DUTY TO GUEST.

Though an innkeeper impliedly invites the public to his establishment, he need furnish no particular accommodation, except those expressly stipulated for, or such as may be reasonably implied from the prices he charges or the grade of his inn.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. § 10; Dec. Dig. § 9.\*]

### 5. INNKEEPERS (§ 9\*)—GUESTS—INNKEEPER'S DUTY.

While an innkeeper must accept as guests all proper persons, so long as he has room for them, he need not assign a guest to any particular apartment.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. § 10; Dec. Dig. § 9.\*]

### 6. INNKEEPERS (§ 9\*)—APARTMENTS—INNKEEPERS' RIGHTS—"DWELLING HOUSE."

A room in an inn occupied by a guest is not, in a legal sense, his "dwelling house," the innkeeper having a right of access thereto at all reasonable times and for all reasonable purposes, e. g., to extinguish fire, to remedy leakage of water or gas, or any other emergency calling for immediate action, and to comply with his contract to furnish the guest with such convenience and comfort as the inn affords.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. § 10; Dec. Dig. § 9.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2285-2295; vol. 8, p. 7646.]

### 7. INNKEEPERS (§ 11\*)—GUEST'S PROPERTY—INNKEEPERS' LIABILITY FOR LOSS.

At common law an innkeeper is an insurer of the safety of a guest's property brought to the inn, and is liable for all loss, except that caused by the negligence or fraud of the guest, or by the act of God or the public enemy.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. § 17; Dec. Dig. § 11.\*]

### 8. INNKEEPERS (§ 11\*)—RELATION TO GUEST—NATURE.

The relation of innkeeper and guest is not the relation of landlord and tenant, since there is no contract as to realty.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. § 19; Dec. Dig. § 11.\*]

### 9. INNKEEPERS (§ 6\*)—RIGHTS.

An innkeeper can enforce reasonable rules to prevent immorality, drunkenness, or other misconduct that may be offensive to other guests or bring his inn into disrepute, or that may be radically inconsistent with the generally recognized proprieties of life.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. § 9; Dec. Dig. § 6.\*]

### 10. INNKEEPERS (§ 9\*)—GUESTS—RIGHTS.

A room assigned to a guest for his exclusive use is his for all proper purposes, and at all times, until he gives it up.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. § 10; Dec. Dig. § 9.\*]

### 11. INNKEEPERS (§ 9\*)—GUESTS—RIGHTS.

While an innkeeper is not an insurer of safety, convenience, or comfort of a guest, he must exercise reasonable care that neither he nor his servants shall, by uncivil, harsh, or cruel treatment, destroy or minimize the comfort or peace which the guest would enjoy if the inn were properly conducted; due allowance being made for the grade of the inn and the character of accommodation it is designed to afford.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. § 10; Dec. Dig. § 9.\*]

### 12. INNKEEPERS (§ 10\*)—INSULT TO GUEST—INNKEEPERS' LIABILITY—MEASURE.

The measure of an innkeeper's liability to a guest for a servant's acts in forcing his way into a female guest's room and insulting her is compensatory, and not punitive; her right to recover being confined to injury to her feelings and personal humiliation.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. § 16; Dec. Dig. § 10.\*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by Catharine De Wolf against Simon Ford and another. From a judgment of the Appellate Division (119 App. Div. 808, 104 N. Y. Supp. 876) affirming a judgment of the Trial Term, dismissing the complaint, plaintiff appeals. Reversed and new trial granted.

This action was brought to recover damages which the plaintiff claims to have sustained through the acts of the defendants' servant, who is charged with forcing his way into a room occupied by the plaintiff in defendants' hotel, and addressing to her insulting, derogatory, and defamatory language. The action was brought to trial before the court and a jury. At the opening of the trial the defendants' counsel moved to dismiss the complaint upon the pleadings. This motion was granted, and judgment entered dismissing the complaint. Upon appeal to the Appellate Division the judgment was affirmed by a divided court, and an appeal has been taken to this court. The sole question to be determined here is whether, upon the facts stated in the complaint and supplemented by the allegations of the defendants' answer, the case should have been submitted to the jury. The complaint alleges that on June 5, 1905, the defendants managed and controlled the Grand Union Hotel in the city of New York, which was a public inn for the entertainment of guests for hire; that the plaintiff, in company with her daughter and her brother, called at that hotel and applied for rooms, giving their true and proper names and stating the relationship of each to the other; that the plaintiff and her brother and daughter were thereupon received as guests of the hotel, and the plaintiff was assigned to a room therein; that thereafter, and at about 1 o'clock in the morning of the next day, while the plaintiff was occupying the room so assigned to her, one of the servants of the de-

fendants, in the course of his regular employment in the hotel, forced his way into the room of the plaintiff, without her consent and against her protest, she being then undressed, except in a nightgown, and addressed to her and in her presence, and in the presence of her brother and another person, vile and insulting language, charged her with being a disreputable person, accused her of conduct imputing guilt of impropriety and immorality, and insulted her in other ways; that the plaintiff was ordered to leave the hotel, and threatened with the publication of her name in the daily papers as a disreputable person; and that these acts committed by the said defendants' servant were in violation of the defendants' obligations towards this plaintiff as their guest. In their answer the defendants admit their management and control of the hotel, and that the plaintiff was assigned to a room therein on the day mentioned in the complaint. All the other allegations of the complaint are denied. Additional facts are set forth as a separate defense, and new matter is alleged by way of justification. The substance of this separate defense and of this new matter is that the defendants had established and enforced in their hotel a rule forbidding the presence of a man in a woman's bedroom, especially at night, unless the room was occupied by husband and wife; that such a rule was reasonable and necessary for the maintenance of the good repute of the hotel, and for the protection of its guests against improper persons; that the plaintiff had violated this rule by permitting a man to enter and remain in her bedroom at a late hour of the night while she was clad only in a nightdress; that the defendants' servant informed plaintiff of the rule referred to, and requested her male visitor to leave the room, or to leave the hotel, and that this request was refused; that the acts of the defendants' servant complained of were simply such as were necessary to enforce this rule, and that no more was done than was reasonably necessary to accomplish that object.

James L. Bennett, for appellant. Franklin Pierce and John C. Gulick, for respondents.

WERNER, J. (after stating the facts as above). As no evidence was taken at the trial, the dismissal of the complaint compels us to assume the truth of all the allegations of fact contained in that pleading. *Sheridan v. Jackson*, 72 N. Y. 170; *Bayles*, Trial Pr. (2d Ed.) 247. The facts which must therefore be regarded as established for the purposes of this review are that the relation of innkeeper and guest existed between the defendants and the plaintiff at the time when the servant of the former forced his way into the room of the latter; that this forcible entry was made without invitation from the guest, and against her protest; that she

was there subjected to the mortification of exposing her person in scant attire, and to the ignominy of being accused of immoral conduct; that she and her visitor were ordered to depart from the hotel, and that all this was done by the defendants' servant without justification and in the course of his regular employment. If the defendants, in these circumstances, are not to be held responsible, it must be upon the theory that they owed no duty to the plaintiff in respect of her convenience, privacy, safety, and comfort while she was their guest, and that an innkeeper is immune from liability for any maltreatment which he or his servants may inflict upon a guest be it ever so willful or flagrant. We think it may safely be asserted that this has never been the law, and that no principle so repugnant to common decency and justice can ever find lodgment in any enlightened system of jurisprudence.

For centuries it has been settled in all jurisdictions where the common law prevails that the business of an innkeeper is of a quasi public character, invested with many privileges, and burdened with correspondingly great responsibilities. Except as the general rule of the common law is modified by statutory enactment, an innkeeper has the undoubted right to conduct his inn as he deems best, so long as he does not violate the law. Although he impliedly invites the public to his establishment, he is bound to furnish no particular kind of entertainment or accommodation, except such as may be expressly stipulated for, or such as may be reasonably implied from the prices which he charges, or the grade of the inn which he maintains. And while he is bound to accept as guests all proper persons, so long as he has room for them, he is under no legal obligation to assign a guest to any particular apartment. *Fell v. Knight*, 8 M. & W. 269. From the very nature of the business it is inevitable that an innkeeper must, at all reasonable times and for all proper purposes, have the right of access to and control over every part of his inn, even though separate parts thereof may be occupied by guests for hire. Over against these general rights and privileges there is the well-recognized responsibility of the innkeeper for the guest's goods and chattels brought to the inn. As to these the innkeeper is an insurer unless his common-law duty is modified by statute, and he is liable for all loss except such as is occasioned by the negligence or fraud of the guest, or by the act of God or the public enemy. *Hulett v. Swift*, 33 N. Y. 571, 88 Am. Dec. 405. Although this liability of the innkeeper for the loss of goods intrusted to him by his guest was clearly defined nearly four centuries ago, it has been reserved for us at this late day, in the development of our jurisprudence, to define, with such accuracy as the nature of this case requires, the relation of the innkeeper to the person of his guest. It is clear-

ly not the conventional relation of landlord and tenant, for there is no contract as to the realty. Taylor's L. & T. § 66. A room in an inn occupied by a guest is not, in the legal sense, his dwelling house, for notwithstanding his occupancy, it is the house of the innkeeper. *Rodgers v. People*, 86 N. Y. 360, 40 Am. Rep. 548. Nor is the relation of innkeeper and guest usually created by express contract, for as a rule it is based wholly upon the mere circumstance that one man happens to have an inn which is patronized by another, and the law implies whatever else is necessary to constitute the relation between them. Anthon's Law Student, p. 57; *Willard v. Reinhardt*, 2 E. D. Smith, 148. It is a relation, moreover, which cannot be defined with exactitude in matters of detail, for it may be one thing in a mining camp, or in the remote and sparsely settled portions of a country. It may be another thing in the tavern by the rural wayside, and yet another in the modern urban palace called a hotel. Between the extreme of rugged simplicity on the one hand and of palatial magnificence on the other, there are numberless gradations of service, attention, convenience, and luxury which must necessarily give the relation of innkeeper and guest such flexibility as will render it adaptable to varying conditions and circumstances.

But underneath all these differing conditions there is, of course, a basic legal principle which governs the general relation of innkeeper and guest. The innkeeper holds himself out as able and willing to entertain guests for hire; and, in the absence of a specific contract, the law implies that he will furnish such entertainment as the character of his inn and reasonable attention to the convenience and comfort of his guests will afford. If the guest is assigned to a room upon the express or implied understanding that he is to be the sole occupant thereof during the time that it is set apart for his use, the innkeeper retains a right of access thereto only at such proper times and for such reasonable purposes as may be necessary in the general conduct of the inn or in attending to the needs of the particular guest. If, for instance, there should be an outbreak of fire, a leakage of water or gas, or any other emergency calling for immediate action in a room assigned to a guest, the innkeeper and his servants must necessarily have the right to enter without regard to the time of day or night, and without consulting the wish or convenience of the guest. It is equally obvious that, for the purpose of enabling the innkeeper to fulfill his express or implied contract to furnish his guest with such convenience and comfort as the inn affords, he and his servants must have such access to the room at all such reasonable times as will enable him to fulfill his duty in that behalf. It is obvious that, as to this general right of entry, no hard and fast rule can be laid down, for what would

be reasonable in a case where a room is occupied by two or more guests, or where access to one room can only be had through another, might be highly unreasonable where a separate room is assigned to the exclusive use of a single guest.

It is also manifestly proper and necessary that an innkeeper should have the right to make and enforce such reasonable rules as may be designed to prevent immorality, drunkenness, or any form of misconduct that may be offensive to other guests, or that may bring his inn into disrepute, or that may be radically inconsistent with the generally recognized proprieties of life. To these reserved rights of the innkeeper the guest must submit. But the guest also has affirmative rights which the innkeeper is not at liberty to willfully ignore or violate. When a guest is assigned to a room for his exclusive use, it is his for all proper purposes, and at all times, until he gives it up. This exclusive right of use and possession is subject to such emergent and occasional entries as the innkeeper and his servants may find it necessary to make in the reasonable discharge of their duties; but these entries must be made with due regard to the occasion, and at such times and in such manner as are consistent with the rights of the guest. One of the things which a guest for hire at a public inn has the right to insist upon is respectful and decent treatment at the hands of the innkeeper and his servants. That is an essential part of the contract, whether it is express or implied. This right of the guest necessarily implies an obligation on the part of the innkeeper that neither he nor his servants will abuse or insult the guest, or indulge in any conduct or speech that may unnecessarily bring upon him physical discomfort or distress of mind. The innkeeper, it is true, is not an insurer of the safety, convenience, or comfort of the guest. But the former is bound to exercise reasonable care that neither he nor his servants shall, by uncivil, harsh, or cruel treatment, destroy or minimize the comfort, convenience and peace which the latter would ordinarily enjoy if the inn were properly conducted; due allowance being always made for the grade of the inn and the character of the accommodation which it is designed to afford.

Upon the facts of record, considered in the light of this very general statement of the rules which govern the relation of innkeeper and guest, it is clear that the defendants were guilty of a most flagrant breach of duty towards the plaintiff. As a guest for hire in the inn of the defendants, the plaintiff was entitled to the exclusive and peaceable possession of the room assigned to her, subject only to such proper intrusions by the defendants and their servants as may have been necessary in the regular and orderly conduct of the inn, or under some commanding emergency. Had such an emergency

arisen calling for immediate and unpremeditated action, on the part of the defendants or their servants, in conserving the safety or protection of the plaintiff or of other guests, or of the building in which they were housed, the usual rules of decency, propriety, convenience, or comfort might have been disregarded without subjecting the defendants to liability for mistake of judgment or delinquency in conduct; but, for all other purposes, their occasional or regular entries into the plaintiff's room were subject to the fundamental consideration that it was, for the time being, her room, and that she was entitled to respectful and considerate treatment at their hands. Such treatment necessarily implied an observance by the defendants of the proprieties as to the time and manner of entering the plaintiff's room, and of civil deportment towards her when such an entry was either necessary or proper. Instead of acting according to these simple rules, the servant of the defendants forced his way into the plaintiff's room, under conditions which would have caused any woman, except the most shameless harlot, a degree of humiliation and suffering that only a pure and modest woman can properly describe. Not content with that, the servant castigated the plaintiff with opprobrious and offensive epithets, imputing to her immorality and unchastity, and, as a fitting climax to such an episode, ordered the plaintiff to leave the inn.

The majority opinion handed down by the Appellate Division, in which the dismissal of the complaint was sustained, seems to be based upon the theory that under the common law the innkeeper is not responsible for the safety of his guest for hire, and as authority for that view it cites *Calve's Case*, 8 Coke's Rep. 32. All that appears to have been decided in that case is that the innkeeper is under an absolute duty to safely keep the chattels brought to the inn and intrusted to him by his guest. There is a dictum in the opinion to the effect that, if the guest be beaten in the inn, the innkeeper shall not answer for it; but under no reasonable construction could that language be held to mean that an innkeeper and his servants might assault a guest and yet not be liable. There may doubtless be many conditions under which a guest at an inn may be assaulted or insulted by another guest, or by an outsider, without subjecting the innkeeper to liability; but, if it ever was thought to be the law that an innkeeper and his servants have the right to willfully assault, abuse, or maltreat a guest, we think the time has arrived when it may very properly and safely be changed to accord with a more modern conception of the relation of innkeeper and guest. We think it would be startling, to say the least, to announce it as the law of this state that an innkeeper and his male servants may invade the room of a female guest at any hour of the day or night without her

consent, in utter disregard of every law of decency and modesty, and that the necessity for such an extraordinary right lies in the rule that an innkeeper must be permitted to control every part of his inn for the protection of all his guests. Such a doctrine, so far from holding an innkeeper to a reasonable responsibility in the quasi public business which he is permitted to carry on, would clothe him with dangerous prerogatives permitted to no other class of men. We conclude, therefore, that the invasion of the plaintiff's room in the defendants' inn, and the treatment to which she was there subjected, under the circumstances described in the complaint, constituted a violation of the duty which the defendants owed to the plaintiff, and for which they may be held liable if the facts alleged are established by proof. The complaint, although somewhat inartificial in form, sets forth all the facts necessary to such a cause of action. The measure of liability, if any, will be purely compensatory, and not punitive; the plaintiff's right to recover being confined to such injury to her feelings and such personal humiliation as she may have suffered. *Gillespie v. Brooklyn Heights R. R. Co.*, 178 N. Y. 347, 70 N. E. 857, 66 L. R. A. 618, 102 Am. St. Rep. 503. That is the extent to which the defendants' liability may fairly be said to spring from their breach of duty. Any remedy beyond that which the plaintiff may seek to assert must be invoked in a different form of action. The gravamen of the action at bar is not the alleged slanderous defamation of the plaintiff, but the defendants' breach of the duty which it owed to the plaintiff and the injury which was directly caused thereby.

The precise question at issue, as we have suggested, seems to be one of first impression in this state. In a diligent search through the books we have found some cases that are analogous to the case at bar, but none that are identical. It has been held, for instance, that a tradesman is liable for an assault upon a customer committed by the tradesman's employé while acting within the scope of his employment (*Collins v. Butler*, 179 N. Y. 156, 71 N. E. 746), and the same rule was applied where such an employé had procured the unlawful imprisonment of a customer (*Craven v. Bloomingdale*, 171 N. Y. 439, 64 N. E. 169). In a very recent case this court decided that a common carrier is liable to a passenger for injury to his feelings caused by the insulting language of the carrier's employé; this liability being predicated upon a breach of the contract which obligated the carrier, not only to transport the passenger, but to accord to him respectful and courteous treatment, and to protect him from insult from strangers and employes. *Gillespie v. Brooklyn H. R. R. Co.*, *supra*. There is the same dearth of direct authority in other jurisdictions. In England an innkeeper has been held liable for injuries suffered by a

guest through a defect in the inn which existed because of the innkeeper's negligence, and the measure of the innkeeper's duty was held to be reasonable care. In Nebraska it was held that an innkeeper was liable for injury to a small boy, who was a guest, through the accidental discharge of a pistol in the hands of an employé, in a room not intended for guests, into which the lad had intruded. *Clancy v. Barker*, 71 Neb. 83, re-argument 71 Neb. 91, 98 N. W. 440, 103 N. W. 446, 69 L. R. A. 642, 115 Am. St. Rep. 559. The conclusion of the court in that case seems to have been based upon the theory that the innkeeper's liability is similar to that of common carriers, who have been held responsible for assaults or insults upon passengers, perpetrated by their employes while acting, not within the scope of their restricted authority, but within the apparent course of their employment, as in *Palmeri v. Manhattan Ry. Co.*, 133 N. Y. 261, 30 N. E. 1001, 16 L. R. A. 136, 28 Am. St. Rep. 632. In the Nebraska case referred to, the Federal Circuit Court of Appeals (131 Fed. 161, 68 C. C. A. 469, 69 L. R. A. 653) differed from the state court upon the ground that the innkeeper's employé was not, at the time of the accident, doing anything that was within either the actual or apparent scope of his employment, and also for the further reason that a common carrier's liability in such cases cannot be applied to an innkeeper. In California there is one reported case in which the innkeeper was held liable for an assault upon a guest committed by employes who were acting within the scope of their employment (*Wade v. Thayer*, 40 Cal. 578), and in the same state in a recent case the innkeeper was held to be free from liability for an assault upon a guest by an employé who was not acting within the scope of his employment (*Rahmel v. Lehnndorff*, 142 Cal. 681, 76 Pac. 659, 65 L. R. A. 88, 100 Am. St. Rep. 154). In Missouri an innkeeper has been held liable for injuries to a guest resulting from an assault by an employé even where, as the report seems to indicate, the employé was acting willfully and wantonly, rather than within the apparent scope of his employment (*Overstreet v. Moser*, 88 Mo. App. 72), and in Pennsylvania and Minnesota the courts have gone so far as to hold the innkeeper liable for assaults upon guests within the inn by others than the innkeeper or his servants (*Rommel v. Schambacher*, 120 Pa. 579, 11 Atl. 779, 6 Am. St. Rep. 732; *Curran v. Olsen*, 88 Minn. 307, 92 N. W. 1124, 60 L. R. A. 733, 97 Am. St. Rep. 517). All these cases bear certain analogies to the case at bar, but none are authoritative, for the precise principle is not involved. They have been cited because these analogies indicate, if they do not determine, that the innkeeper is not a lonely exception to the rule of respondeat superior, when a guest is assaulted

or injured under circumstances which would generally make other employers liable for the acts of their servants.

The judgments of the Appellate Division and the Trial Term should be reversed, and a new trial granted, with costs to the appellant to abide the event.

CULLEN, C. J., and GRAY, VANN, WIL-LARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

Judgment reversed, etc.

(193 N. Y. 435)

**BOSWELL v. SECURITY MUT. LIFE  
INS. CO**

(Court of Appeals of New York. Dec. 8, 1908.)

**1. INSURANCE (§ 4\*)—REGULATION—STATUTE—RETROACTIVE EFFECT.**

Insurance Law, § 97 (Laws 1906, p. 794, c. 326, § 33), limiting the amount life insurers may pay to procure new business, is not retroactive.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 4; Dec. Dig. § 4.\*]

**2. CONSTITUTIONAL LAW (§ 154\*)—OBLIGATION OF CONTRACTS.**

Insurance Law, § 97 (Laws 1906, p. 794, c. 326, § 33), limiting the amount life insurers may pay to procure new business, if retroactive, would be unconstitutional as violating Const. U. S. art. 1, § 10, forbidding states to pass laws impairing the obligation of contracts.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 154.\*]

**3. CONSTITUTIONAL LAW (§ 146\*)—OBLIGATION OF CONTRACTS—LIFE INSURANCE—GENERAL AGENCY CONTRACT—VALIDITY.**

A commission contract between a life insurance company and a general agent to run for 20 years and made before the adoption of Insurance Law, § 97 (Laws 1906, p. 794, c. 326, § 33), limiting the amount life insurers may pay to procure new business, whereby he was to devote his time to building up business in four states, receiving no salary and paying substantially the entire expense, does not violate the public policy, and cannot be interfered with under the general or reserved powers of the Legislature.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 146.\*]

**4. INSURANCE (§ 74\*)—LIFE INSURANCE—GENERAL AGENCY—CONTRACTS—CONSTRUCTION.**

A provision in a life insurance general agency contract, covering territory in other states, that the contract should become void as to new business on termination of the company's authority to do business in such territory, does not show that the parties had in mind the possibility that the New York Legislature might interdict the company from doing business in such territory.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 99, 100; Dec. Dig. § 74.\*]

**5. INSURANCE (§ 48\*)—LIFE INSURANCE COMPANIES—LEGAL KNOWLEDGE PRESUMED.**

A domestic insurance company was bound to know that, if it violated the statutes to such an extent as to merit corporate death, the Legislature could inflict that penalty.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 56; Dec. Dig. § 48.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**6. INSURANCE (§ 49\*)—LIFE INSURANCE COMPANIES—CORPORATE DEATH—EFFECT.**

Legislative action terminating the existence of a life insurance company would terminate all agency contracts, which are dependent upon the continued life of both parties.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 57; Dec. Dig. § 49.\*]

**7. INSURANCE (§ 84\*)—LIFE INSURANCE—GENERAL AGENCY CONTRACTS—COMMISSIONS.**

Evidence in an action by a life insurance general agent on a commission contract held to show that no new forms of policies had been adopted within a provision of the contract that the commissions specified should not apply to new forms of policies thereafter adopted.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 114; Dec. Dig. § 84.\*]

Appeal from Supreme Court, Appellate Division, Third Department.

Submitted controversy under Code Civ. Proc. § 1279, between William Boswell and the Security Mutual Life Insurance Company. From the judgment of the Appellate Division (119 App. Div. 723, 104 N. Y. Supp. 130), plaintiff appeals. Modified.

George M. Baker and Morgan J. O'Brien, for appellant. Harvey D. Hinman, for respondent.

**EDWARD T. BARTLETT, J.** One of the questions submitted was decided below in favor of the defendant, but the Appellate Division awarded the plaintiff judgment for \$132.06; the defendant conceding that amount was due him. The plaintiff insists this award of judgment was insufficient in amount for reasons hereinafter stated. It was stipulated that, if both the questions submitted were decided in favor of the plaintiff, he should have judgment for \$191.54. The case presented involves the construction of section 97 of the insurance law (Laws 1906, p. 794, c. 326, § 33), the material portions of which are as follows: "Sec. 97. Limitation of expenses.—No domestic life insurance corporation shall in any calendar year after the year nineteen hundred and six expend or become liable for or permit any person, firm or corporation to expend on its behalf or under any agreement with it (1) for commissions on first year's premiums, (2) for compensation, not paid by commission, for services in obtaining new insurance exclusive of salaries paid in good faith for agency supervision either at the home office or at branch offices, (3) for medical examinations and inspections of proposed risks, and (4) for advances to agents, an amount exceeding in the aggregate the total loadings upon the premiums for the first year of insurance received in said calendar year (calculated on the basis of the American Experience Table of Mortality with interest at the rate of three and one-half per centum per annum) and the present values of the assumed mortality gains for the first five years of insurance on the policies on which the first

premium, or instalment thereof, has been received during said calendar year, as ascertained by the select and ultimate method of valuation as provided in section 84 of this chapter. \* \* \* No such corporation, nor any person, firm or corporation on its behalf or under any agreement with it shall pay or allow to any agent, broker or other person, firm or corporation for procuring an application for life insurance, for collecting any premium thereon or for any other service performed in connection therewith any compensation other than that which has been determined in advance. \* \* \* No such corporation, nor any person, firm or corporation on its behalf or under any agreement with it, shall make any loan or advance to any person, firm or corporation soliciting or undertaking to solicit applications for insurance without adequate collateral security, nor shall any such loan or advance be made upon the security of renewal commissions, or of other compensation earned or to be earned by the borrower except advances against compensation for the first year of insurance."

The statement of facts contains, in part, the following: The plaintiff was at the time of making the contract and ever since has been a citizen of the state of Ohio. The defendant is a domestic life insurance company with its principal place of business in the city of Binghamton, N. Y. The defendant is a mutual company on what is known as the "old line" basis. In the written agreement between the parties entered into on the 30th day of October, 1901, the defendant is party of the first part and the plaintiff party of the second part. The defendant appointed the plaintiff its general agent in the states of Ohio, West Virginia, Tennessee, and Kentucky, for the purpose of procuring applications for insurance on the lives of individuals satisfactory to the defendant. It is provided that the contract is subject to the condition that the company continues to be legally authorized to carry on business in the territory named, and, if its authority is terminated in any section thereof, the contract is to be null and void so far as new business in such section is concerned. The plaintiff is obligated to devote his entire time and best energies to the service of the company; to have the exclusive right to appoint agents within said district, for whose fidelity and honesty he is to be responsible to the company. In consideration of the performance of this contract by the plaintiff, the company is to pay a brokerage commission on the cash premiums as collected for the first year, as follows: On certain participating policies from 70 per cent. to 20 per cent.; on other nonparticipating policies from 60 per cent. to 30 per cent. There are also provisions for overwriting brokerage and other commissions and various regulations unnecessary to state in detail. The plaintiff is to give a bond with sureties

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for the faithful performance of the contract; also is to pay all the expenses of building up and conducting the business, subject to minor exceptions not now important. The contract further provides as follows: "During the continuance of this contract, said party of the second part shall not act as agent or broker for any other life insurance company or agent, except to place business which this company may have declined. \* \* \* This contract is for the term of twenty years from its date subject to its terms and conditions."

It also appears in the statement of facts that at the time the contract was entered into the defendant had comparatively little business in force in the four states mentioned; that upon the execution of the contract the plaintiff entered upon the performance thereof and continues up to the present time; that he established agencies and rented offices for the conduct of defendant's business in numerous cities and towns in said territory, paying the resident agents and office rents; that he employed superintendents and instructors, paying their salaries and traveling expenses; that he advertised, at his own expense, the business of the defendant in various newspapers in the states named. In brief, it appears that the plaintiff has performed the contract on his part, and, as a result of his efforts and the expenditure of his money, he has built up for the defendant business aggregating about \$5,000,000 now in force in said states.

There are two questions presented for our determination. The first is whether the plaintiff's contract with the defendant as to the rate of commissions, which had been in existence for nearly five years, and having about fourteen years to run, at the time section 97 of the insurance law was enacted, in 1906, is affected by said legislation to the extent of changing its provisions as to the amount of plaintiff's commissions and materially reducing them. It is important to keep in mind the precise relations of the parties. The defendant company at the time the contract was executed, October 30, 1901, had comparatively little business, in force in the states of Ohio, West Virginia, Tennessee, and Kentucky. The plaintiff, who was a resident of the city of Cincinnati, Ohio, covenanted to devote his entire time and energies to building up a business for the defendant in the states named during the twenty years the contract was to run. He received no salary. He paid substantially the expense of the undertaking, and it is obvious that the long term of the contract was due to the fact that its initial years would be unproductive to a great extent; that the building up of a paying business was a work of time, hard labor, and large expenditure. It appears that, after the lapse of some five years, the plaintiff had secured the defendant business aggregating about \$5,000,000 now in force in the states mentioned. The remaining 14 years or more of the contract term evidently covered the period when plaintiff might well expect the

reward for past labor and expenditure. The plaintiff and defendant at the outset had agreed upon the commissions to be allowed the former, which were, by legal construction, to be paid during the life of the contract, unless modified by the parties, or interrupted as to its future performance by the decease or incapacity of the plaintiff, or the corporate death of the defendant. We thus have a contract in full force and effect satisfactory to the parties, and the sole question presented on this branch of the case is whether that has been abrogated or modified by the subsequent act of the Legislature of the state of New York. We are of opinion that section 97 of the insurance law should not be construed as retroactive, and therefore it does not apply to the contract before us. If construed otherwise, it would contravene the provision of the federal Constitution that no state shall pass any law impairing the obligation of contracts. Article 1, § 10. The contract provides for an ordinary business arrangement between a citizen of Ohio and a private corporation of this state. It does not offend against public policy, and cannot be interfered with by the general or reserve powers of the Legislature, or the exercise of the police power. At this late day it is unnecessary to quote largely from the authorities bearing upon the question when the obligation of a contract is impaired. In *Sturges v. Crowninshield*, 4 Wheat. 122, 197, 4 L. Ed. 529, Chief Justice Marshall said: "In discussing the question whether a state is prohibited from passing such a law as this, our first inquiry is into the meaning of words in common use. What is the obligation of a contract, and what will impair it? It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those which are to be explained. A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. \* \* \* Any law which releases a part of this obligation must in the literal sense of the rule impair it." Applying this language to the contract before us, we have precisely the situation pointed out by the learned Chief Justice in his illustration of what constitutes the impairment of the obligation of a contract. In the present case definite compensation of the plaintiff by way of commissions was fixed by the contract for 20 years, subject to minor exceptions.

In 2 Story on the Constitution (section 1385), the learned author lays down the rule as follows: "It is perfectly clear that any law which enlarges, abridges, or in any manner changes the intention of the parties resulting from the stipulations in the contract necessarily impairs it." See, also, *People ex rel. Manh. Sav. Instn. v. Otis*, 90 N. Y. 48; *Ogden v. Saunders*, 12 Wheat. 256, 6 L. Ed. 606. In *Mayor, etc., of N. Y. v. Twenty-Third Street Railway Co.*, 113 N. Y.

311, 317, 21 N. E. 60, 62, Earl, J., states: "It is difficult to put precise limits upon the power of the Legislature thus reserved over corporations created by it or under its authority. Under its reserved power it cannot deprive a corporation of its property, or interfere with or annul its contracts with third persons." *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684, deals with the legal situation presented when the Broadway Railway Company suffered legal death. It was held that its mortgages and valid contracts survived its dissolution. See, also, *People v. National Trust Co.*, 82 N. Y. 283. In the case before us the corporation has not suffered legal death, but is a going company clothed with all its charter rights.

The question is thus presented whether the obligation of the contract of the plaintiff with the defendant company can be impaired by the act of the Legislature of the state of New York long after the contract went into effect. The counsel seeking to sustain this legislation cites two cases, viz., *People v. Globe Mutual Life Insurance Co.*, 91 N. Y. 174, and *People v. Formosa*, 131 N. Y. 478, 30 N. E. 492, 27 Am. St. Rep. 612. The case of the *Globe Mutual Life Insurance Co.* held that where a life insurance company had entered into a contract with its general agent for his services for a specified term, and, before any breach of the contract on its part, it was deprived of corporate life and its assets turned over to a receiver, the agent had no valid claim upon the fund in the receiver's hands for damages for an alleged breach of the contract because of the discontinuance of his employment. The case of *People v. Formosa*, supra, held that a foreign corporation seeking to do business in this state must obey its laws and conform to its public policy. And it was accordingly held that the provision of law in relation to life insurance companies doing business in this state which forbids them or their agents from paying or allowing any rebates of premiums as an inducement to any person to insure, and declaring any person violating the prohibition guilty of a misdemeanor, was constitutional; and the fact that a person indicted and found guilty of a violation of the act was acting in the transaction as an agent of a foreign corporation did not affect his liability.

Obviously these cases, having in mind what was actually decided therein, have no bearing on the question before us. The Appellate Division in discussing when the obligation of the contract is impaired states: "The rule doubtless is, as contended by plaintiff, that the Legislature under this reserved power granted to it by the Constitution cannot interfere with or annul a contract between a corporation and other parties." This concession is in accordance with the unbroken current of authority, either in the case of a contract terminated by the

legal death of a corporation, where the agent may resort to the receiver for the collection of any amount due him at that time, or the case of an agent of a going corporation, where contract obligations for his benefit cannot be impaired by subsequent legislation. The ground upon which the court below rested its decision is best stated in its own language as follows: "Now, the plaintiff, when he became the general agent of the defendant under his contract, became vitally and essentially connected with its 'domestic affairs.' He became an important part of its mechanism. The machinery of life insurance has largely been conducted through the instrumentality of agents. Such corporations have, through their agents, promulgated, performed, and perpetuated their policies, plans, and purposes, and through them the wrongs and abuses, if any, of life insurance have sometimes been inflicted on a confiding public. When plaintiff made his contract, he knew that he was to become an essential factor in the domestic affairs and internal organism of the defendant, and that such domestic affairs and internal organism were under the reserve power of the Constitution of this state, subject to legislative change. He became identified with the operation, development, and business life of the defendant and one of the organs of its corporate existence." The learned court then cites *People v. Globe Mutual Life Insurance Co.* and *People v. Formosa*, supra. Referring to the *Formosa* Case, the court said: "What was said in the above case is doubly emphasized when we recall that the act of 1906 was enacted in response to an aroused and urgent public sentiment as the result of grave evils and abuses disclosed by the processes of a legislative investigation. And, when it is also recalled that among such abuses were the methods employed by certain agents, the claim of plaintiff that his contract was not within the purview of the statute would seem to be completely refuted." We are unable to concur in this reasoning of the court below. The plaintiff in executing his contract with the defendant became its general agent in the foreign territory named, subject to the provisions thereof, nothing more or less, and no inference is to be drawn that he became a factor in the domestic affairs, mechanism, internal organism, or policy of the defendant. The opinion of the court below then continues: "Were there otherwise any doubt that the legislation in question was within the contemplation of the parties to the contract, such doubt would be dissipated by reference to the following provision in such contract: 'This contract is made subject to the condition that the said company is and shall continue to be legally authorized to transact business in said district. Should authority to transact business in any section thereof be at any time terminated, this contract shall become null and void so far as

new business in such section is concerned.' True, this provision in terms only relates to a total cessation of business. But the parties clearly had in mind the possibility that the Legislature of this state might interdict the defendant from all business within the states comprising the plaintiff's territory. They were also bound to know, what no one disputes, that said Legislature might put the corporation to death. Knowing all this, it was a psychological impossibility for the parties not to include within their mental grasp the idea that the corporation might be limited or restricted in its operation in such a way as to affect the plaintiff's contract."

The court below in quoting from the contract, as above, is in error as to its terms only relating to a total cessation of business. The quotation is very clear when the other provisions of the contract are recalled. The defendant was entering upon an agreement with the plaintiff in regard to territory covering the four states named, and the first provision was that the contract was subject to the condition that the defendant should continue to be legally authorized to transact business in the district covered by these states, and, furthermore, it was provided that should authority to transact business in any section thereof—that is, in any of the territory embraced by the four states—be withdrawn, the contract should become null and void so far as new business in such section is concerned. We cannot concur with the reasoning that this very proper provision in the contract relating to the four states named leads to the inference that the parties clearly had in mind the possibility that the Legislature of the state of New York might interdict the defendant from all business within the states comprising the plaintiff's territory. It is doubtless true that the defendant, as a domestic corporation of this state, was bound to know the law that, if it violated the statutes of this state to such an extent as to merit corporate death, the Legislature had full power and authority to inflict upon it that penalty. The result of such legislative action would terminate all contracts of agency which were, of course, dependent upon the continued life of both parties. We agree with the contention of plaintiff's counsel that the police power of the state cannot justify the reduction by law of the compensation which the defendant agreed in its contract with the plaintiff to pay him. We see nothing in the provisions of the contract, or in the surrounding circumstances of this case, that disclose a situation which warrants an appeal to the police power. While it has been frequently said that the police power cannot be defined, and it is not desirable to have it limited by a hard and fast definition, yet all the cases hold that it must be invoked in order to protect the lives, health, morals, comfort, and general welfare of the public. There is nothing in the facts of this case that bring it within any

of the accepted definitions of the police power.

Referring to the nature of this power, Judge Peckham, in *Health Department of N. Y. v. Rector, etc.*, 145 N. Y. 82, 89 N. E. 833, 885, 27 L. R. A. 710, 45 Am. St. Rep. 579, said: "It has frequently been said that it is difficult to give any exact definition which shall properly limit and describe such power. It must be exercised subject to the provisions of both the federal and state Constitutions, and the law passed in the exercise of such power must tend in a degree that is perceptible and clear towards the preservation of the lives, the health, the morals, or the welfare of the community, as those words have been used and construed in many cases heretofore decided." This general subject was considered in *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 490, 38 L. Ed. 385. At page 137 of 152 U. S., page 501 of 14 Sup. Ct. (38 L. Ed. 385), the court said: "The Legislature may not, in the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police power is not final and conclusive, but is subject to the supervision of the courts." See, also, *Wright v. Hart*, 182 N. Y. 830, 833, 75 N. E. 404, 2 L. R. A. (N. S.) 338. The court below at the close of its opinion states that: "Having reached the conclusion that the statute limits the amount which the defendant may lawfully pay the plaintiff, it is unnecessary to consider the further question raised by defendant as to the difference in the forms of policies."

We will now consider the second question, as to whether new forms of policies have been adopted upon which plaintiff is to recover changed commissions under the contract, subdivision "sixteenth," which reads as follows: "The commissions hereinbefore specified shall not apply to any new forms of policies hereafter adopted by the said party of the first part, but shall apply only to the policies now in use by said company, but changes in premium rates, or clauses in present forms of policies shall not be construed as a new form of policy. It, however, is understood and agreed that the said second party shall be allowed and paid on any such new policies as large a brokerage and renewal commission as is paid to or allowed any other manager or agent of the company." The discussion of this question in the briefs and arguments of counsel has taken a wide range and considered many propositions that are irrelevant, in view of the fact that in deciding the first question we have reached the conclusion that section 97 of the insurance law (Laws 1906, c. 326) does not apply to the contract between the plaintiff and defendant, as it is not retroactive. The sixteenth paragraph of the contract, already quoted, provides in part that "the commissions hereinbefore specified shall not apply to any new forms of policies hereafter adopted by the

said party of the first part [the defendant], but shall apply only to the policies now in use by said company, but changes in premium rates, or clauses in present forms of policies shall not be construed as a new form of policy." In subdivision "fifth" of the statement of facts it is agreed that "the words 'form of policy,' as used in the contract, have, prior to January 1, 1907, been interpreted by the parties as equivalent to 'plan of policy'; the whole life being considered as one 'form' or 'plan,' the limited payment as another 'form' or 'plan,' the endowment as another 'form' or 'plan,' etc." It is agreed that the policies on which the plaintiff seeks to recover his commissions (subdivision "ninth" in the statement of facts) are Exhibits M and N, being the New York Standard Life Insurance Policies. It is also agreed in said subdivision that since January 1, 1907, the plaintiff has from time to time procured applications in his said territory for insurance which have been approved by the defendant company, and on which participating policies have been issued by the defendant, and for which the defendant has been paid in cash the first year's premiums thereon. It is further agreed that Exhibit N is the 20-year endowment; Exhibit M embraces two "forms" or "plans" of policy, viz., 20-payment life and 10-payment life.

The defendant asks the court to hold that the foregoing policies are all new forms of policies under the contract, and, as such, are subject only to commissions as therein provided. Referring to the statement of facts, subdivision "ninth," it is agreed that since January 1, 1907, the defendant has received on policies procured by plaintiff in cash the first year's premiums on 20-year endowment policies, Exhibit N; 20-payment life policies, Exhibit M; and 10-payment life policies, Exhibit M. It appears these "forms" or "plans" of policies were not new. The 20-year endowment policy issued after January 1, 1907, is within the meaning of the contract the same "form" or "plan" as the 20-year endowment policy issued prior to January 1, 1907. The same is true of the 20-payment life and the 10-payment life. In other words, changes in premium rates or clauses in present forms of policies are not to be construed as a new form. The various names applied to policies indicate the "form" or "plan" under which they are to be operated. We have in the statement of facts two illustrations of the rule above stated. It is agreed that some years after the making of the contract and prior to January 1, 1907, the defendant issued a "new form of policy" called a "Coupon Bond," which both parties agreed was a new form within the meaning of the plaintiff's contract, and the defendant fixed the commissions thereon accordingly. It is also agreed that since January 1, 1907, the defendant has

adopted for use outside of the state of New York a new form of policy known as the "five-year convertible term." We have, therefore, reached the conclusion that the policies involved in this submitted case are not new in "form" or "plan" as contended by the defendant. It follows that under the stipulation of the parties the plaintiff is entitled to judgment for \$191.54, without costs.

The judgment of the Appellate Division should be modified by providing that the plaintiff should have final judgment for \$191.54, without costs.

CULLEN, C. J., and GRAY, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

Judgment accordingly.

(123 N. Y. 555)

# DURKEE v. HUDSON VALLEY RY. CO.

(Court of Appeals of New York. Dec. 15, 1908.)

## 1. MASTER AND SERVANT (§ 111\*)—APPLIANCES AND PLACES FOR WORK—STREET CARS—"BUMPERS."

The extensions of the floors of street cars at either end which constitute the platforms are not "bumpers" in the sense in which that term is applied to freight and passenger cars operated in trains on steam railroad lines.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 215; Dec. Dig. § 111.\*]

## 2. MASTER AND SERVANT (§ 111\*)—MASTER'S LIABILITY FOR INJURIES TO SERVANT—TOOLS, MACHINERY, APPLIANCES, AND PLACES FOR WORK—STREET CARS—BUMPERS.

A street surface railroad company operating its cars not in trains, but singly, does not owe its employees the duty of using only cars with platforms at either end so constructed as to be at the same height above the track, or with buffers to guard motormen against injury from collisions.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 215; Dec. Dig. § 111.\*]

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Zadie E. Durkee, as administratrix, against the Hudson Valley Railway Company. From a judgment of the Appellate Division, affirming by a divided court a judgment for plaintiff, defendant appeals. Reversed.

For prior report, see 122 App. Div. 278, 106 N. Y. Supp. 735.

Lewis E. Carr, for appellant. J. A. Kellogg, for respondent.

WILLARD BARTLETT, J. This is a suit under the Employers' Liability Act (Laws 1902, p. 1748, c. 600), in which the plaintiff has recovered damages against the defendant corporation for having negligently caused the death of her intestate, a motorman in its employ, who was killed in a collision between two of the defendant's elec-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tric trolley cars on the line between the villages of Sandy Hill and Ft. Edward on the night of July 2, 1905. Oscar Durkee, the plaintiff's intestate, was operating a south-bound car. The main line is a single track. There is a switch at Baker's Falls, at which point, when he arrived there, he should have met and passed a car from Troy bound north. Durkee waited at this switch 10 minutes for the Troy car, as was his duty, and then proceeded, having under the rules of the company the right of way to the next switch, known as the "Fair Ground switch," distant 1,800 or 2,000 feet, or about two minutes in running time. Here the Troy car ought to have awaited his arrival on the siding; but, instead of so doing, it ran out upon the main track north of the siding, so that when Durkee's car came along it collided with the Troy car, and caused the injuries to Durkee which resulted in his death. The front platform of the Troy car was higher than the front platform of Durkee's car. When the collision occurred the higher platform passed over the lower platform on which Durkee was standing, and the main structures of the two cars thus came together crushing Durkee between them.

Assuming that the plaintiff's intestate himself was in no wise at fault, it is manifest that his death was wholly attributable to the negligence of his fellow servants who were operating the Troy car, unless it was also due to negligence on the part of the defendant corporation in failing to provide cars so constructed that, in the event of a collision such as occurred on this occasion, the platform of one of the colliding cars could not pass over the platform of the other. The learned judge before whom the case was tried recognized this as the sole test of liability. Throughout the trial witnesses, counsel, and the court used the term "bumpers" to characterize the extension of the floor of the car at either end which constitutes the platform; but there is no doubt what they were talking about. Such constructions are not bumpers in the sense in which that term is applied to freight and passenger cars operated in trains on steam railroad lines. The so-called bumpers in this case, as one of the principal witnesses for the plaintiff testified, "constitute the floor and the end of the floor under the vestibule and in the car." Referring to the bumpers, as thus defined, the trial judge instructed the jury as follows: "It is not claimed that the bumpers were defective, or that the cars were defective in the sense that they were inadequate, or in the sense that anything was broken about them. The charge is that in the construction of the bumpers one was built higher than the other, and that the company ought not to have allowed cars with bumpers so constructed to be used." He then referred to an alleged defect in the brakes, as to which he said the evidence was insufficient to warrant a finding of negli-

gence, and continued: "So, I instruct you that you must give your attention, so far as the negligence of this defendant is concerned, solely to the question of whether or not, in the construction of these two cars, one being built so that the bumper passed the other, there was negligence on the part of this defendant in allowing these cars to be used." It is plain that a judgment based upon a verdict rendered under such instructions cannot be sustained, unless we are prepared to hold that a street surface railroad company, operating its cars not in trains, but singly and as separate vehicles, owes the duty to its employes of using only cars which have the platforms at either end so constructed as to be at one and the same height above the track upon which such cars are operated. I can find no warrant for the assumption that the law imposes any such duty upon such corporations. It is supposed to have been declared by the decision of this court in *Ellis v. N. Y., L. E. & W. R. R. Co.*, 95 N. Y. 546, but the supposition is founded upon a misapprehension of what was decided in that case. The "bumpers" there under consideration were bumpers in the true and accurate sense of the word. They constituted "a buffing apparatus," and were applied to cars designed to be operated together in trains, for the purpose of protecting persons called upon to go between the cars to couple or uncouple them, or for other purposes, and also to protect the cars themselves from injury in case they should be at any time violently forced together. It is true that with reference to cars thus intended to be entrained this court did hold that an obligation existed, on the part of a steam railroad company, to provide them with "buffers of some kind" which should not overlap one another, but that proposition has no application to such a condition of things as is presented in the case at bar. Here we have cars which are not intended to be operated in physical conjunction with other cars. Each car, in the ordinary management of the business of a street surface railroad, is moved singly and wholly detached from any other car. The obligation asserted in the *Ellis* Case to adopt a method of buffer construction as a safeguard in cars designed to be run attached to one another in trains does not extend to cars the use of which is so radically different. To hold otherwise and in accordance with the view adopted by the trial court in this case would be to require every electric trolley line company in the state to use only cars of an absolutely uniform pattern so far as the height of the floor is concerned, for the front and rear platforms, the extremities of which constitute the so-called "bumpers," are and must be merely extensions of the floor. Thus, a corporation would practically be prohibited from running large cars between separate cities and villages and smaller local cars within the limits of the respective munic-

ipalities. The service which motormen and conductors are called upon to perform in the management of electric street surface railway cars operated singly involves no such elements of danger as appertain to the duties of brakemen on steam railroad trains; and hence there is no occasion to impose upon the employer the duty to maintain the same safeguards against injury. The employer's obligation in this respect is to be measured by the danger reasonably to be apprehended as indicated by practical experience. It is not going too far to say that there is nothing in the ordinary operation of single street surface railroad cars to suggest the necessity of supplying them with buffers of equal elevation above the surface of the tracks, or, indeed, with any buffers at all to guard motormen against injury in consequence of probable collisions.

I am of opinion that the evidence in this case wholly failed to disclose any negligence on the part of the defendant.

The judgment should be reversed and a new trial granted, costs to abide the event.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, and CHASE, JJ., concur.

Judgment reversed, etc.

(193 N. Y. 592)

JOHNSTON v. SYRACUSE LIGHTING CO.

(Court of Appeals of New York. Dec. 18, 1908.)

MASTER AND SERVANT (§ 235\*)—INJURY TO SERVANT—DUTY OF INSPECTION.

It is the duty of a lineman, before going onto a cross-arm of an electric light pole to fix wires, to inspect the cross-arm as to its being strong and sound enough to hold him; and this the court should charge, instead of submitting the question to the jury as one of fact.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710-722; Dec. Dig. § 235.\*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Camille B. Johnston, administratrix, against the Syracuse Lighting Company. From a judgment of the Appellate Division (122 App. Div. 895, 106 N. Y. Supp. 1132), affirming a judgment and order for plaintiff, defendant appeals. Reversed and new trial ordered.

George H. Bond, for appellant. Theodore E. Hancock, for respondent.

GRAY, J. The plaintiff's intestate was killed by falling from the cross-arm of an electric light pole, which had broken under his weight while engaged in adjusting a wire. His administratrix brought this action to recover damages of the defendant, charging it with negligence in the respect that the cross-

arm was defective and not of sufficient strength for the use intended. She recovered a verdict, and upon appeal to the Appellate Division the judgment entered upon the verdict was affirmed. The defendant appeals to this court, alleging several errors upon the trial, one of which, in my opinion, is fatal to the judgment.

It appears that the deceased was employed by the defendant as one of its linemen, whose duties, in case of any trouble with, or imperfection in, the defendant's lines, comprehended the repairing of the same. Upon the day in question he was ordered to proceed to a point where a crossing of wires, or a "cross-up" as it was termed, had been reported. After he had cleared the wires upon the pole where this had occurred, he observed the same trouble with some lines upon another pole standing close to the one upon which he was working. He proceeded from the one pole to the other in order to remedy the difficulty, and sat upon the cross-arm at a point halfway or more from the pole. As he was about adjusting a wire to a pin at the end of the cross-arm, it broke and he was precipitated to the ground. Examination revealed the presence of a knot running through the cross-arm, and also a "weather check," or crack, in it, caused by the expansion and contraction of the wood. Both knot hole and crack were visible. There was no other evidence of the acts of the deceased than in the testimony of witnesses, who related what they saw him do in finishing the work upon the first pole, and in then proceeding to the neighboring pole.

In its defense the defendant showed how its cross-arms were procured and the system of inspection, which they were usually subjected to before being put in use. In submitting the case to the jury the trial judge left it to the jurors to pass upon the question of the defendant's negligence with respect to furnishing this cross-arm, and he instructed them that they were to determine whether the deceased had "exercised reasonable care in going out on the end of the cross-arm." Thereupon, when the charge was finished, the defendant's counsel requested the trial judge "to charge the jury that it was Johnston's (the deceased's) duty to inspect the cross-arm and see that it was strong and sound enough to hold him before he placed his weight thereon, particularly in a place of known danger." The court ruled in answer to the request, that the jurors were to say from the evidence whether that was his duty, to which ruling an exception was taken. This was such an error as to require a reversal of the judgment, and that a new trial should be had. Upon the authority of the decision of *Flood v. Western Union Telegraph Co.*, 131 N. Y. 603, 30 N. E. 196, we must hold that the defendant was entitled to have the jurors instructed as re-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

quested. The duty of the defendant towards its employes was to provide them with a reasonably safe place for the performance of the work required of them, but it was not an insurer of their safety. The duty rested upon its linemen to use some judgment in their dangerous occupation. The necessities of their work upon the poles, when performed at so great a distance from the ground, and dependent, as it was, upon the original, or continued, soundness of the wooden arm, demanded, upon their part, the exercise of the duty of inspection. While presumably the cross-arms furnished are fitted to bear the weight of the workman, perfection is not to be expected in any human system of safeguards, or of inspection, and he is not exempted from the duty of being vigilant for his own protection. In this case the deceased was working in the daytime, and it may be inferred, from all the evidence, that he might have observed the knot hole and the weather crack and have regulated his action accordingly. The defendant was entitled to have the jurors instructed as to what the rules of law required of both plaintiff and defendant in their relations. If they believed that the defendant had not discharged the full measure of its duty as the employer, they were to consider whether the deceased had acted with that reasonable caution, under the circumstances, which was due from him. In *Flood v. W. U. Tel. Co.* (supra) the facts were quite similar to those in the present case, except that there it did not appear from the evidence that the company had been negligent in furnishing the cross-arm. The deceased, in that case, was one of the defendant's linemen, and came to his death through the breaking of the cross-arm. The judgment, which the plaintiff had recovered, was reversed and a new trial was ordered; this court holding that linemen "are expected to see the condition of the arms and, if they find them insufficient, to replace them or to report the fact," and that "it is the obvious duty of every lineman, before going upon one of these arms many feet above the earth, to inspect it for his own safety." The error committed upon this trial was in submitting to the jury, as a question of fact, whether it was the duty of the deceased to inspect the cross-arm, when that duty was imposed by the law as one, the performance of which is, naturally, to be expected.

For these reasons, the judgment and order appealed from should be reversed, and a new trial should be had, with costs to abide the event.

CULLEN, C. J., and HAIGHT, VANN, WILLARD BARTLETT, and CHASE, JJ., concur. EDWARD T. BARTLETT, J., takes no part.

Judgment reversed, etc.

(198 N. Y. 486)

ZIMMERMANN et al. v. TIMMERMAN et al.

(Court of Appeals of New York. Dec. 8, 1908.)

1. BONDS (§ 84\*)—CONTRACT OF SALE—CONSTRUCTION—TIME OF DELIVERY—"WHEN, AS AND IF ISSUED."

A scheme for the consolidation of the traction lines of San Francisco contemplated the issuance of \$20,000,000 bonds to be delivered to B. & Co., who were entitled to offer them for sale prior to February 1, 1903, at the best price obtainable, but not less than 90 per cent. of their face value, with accrued interest. On or before June 18, 1902, \$3,500,000 of the bonds were duly certified and delivered according to directions from B. & Co. to a syndicate by which large amounts of them were sold on the San Francisco market. Defendants on March 17, 1902, contracted to sell plaintiffs 100 of the bonds at 89 and interest payable and deliverable "when, as and if issued," etc. *Held*, that the words, "when, as and if issued," did not relate only to the total issue of bonds contemplated by the scheme, but meant that the contract should mature and delivery be due when such a reasonable amount of the bonds had been issued as would enable defendants with due diligence to procure the bonds and make delivery, and, defendants having refused to deliver after the \$3,500,000 issue, plaintiffs were entitled to sue immediately for breach of contract.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 88; Dec. Dig. § 84.\*]

2. BONDS (§ 12\*)—"ISSUED."

A bond is issued when it comes into the hands of the holder so executed and delivered as to bind the obligor.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 8; Dec. Dig. § 12.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3773-3782; vol. 8, p. 7693.]

3. STREET RAILROADS (§ 52\*)—"BONDS"—TAKING EFFECT.

An ordinary street railroad bond represents a loan of money from the holder to the borrower, and, although completely executed in due form to be used as security, does not become a valid obligation until it is actually delivered for a valuable consideration.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 130, 131; Dec. Dig. § 52.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 830-834; vol. 8, p. 7592.]

4. JUDGMENT (§ 200\*)—FINDINGS TO SUSTAIN.

Where the Appellate Division reversed a judgment for plaintiff on the law only in an action for breach of a contract to deliver corporate bonds "when, as and if issued," and the finding that an issue of \$3,500,000 of the bonds was a sufficient amount to have enabled the defendants to have obtained sufficient bonds to have made delivery when requested was unassailed, such finding was sufficient to sustain the judgment of the trial court on the determination of the Court of Appeals that the Appellate Division erred in holding as a matter of law that an issue of all the bonds was necessary in order to charge the defendant at all.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 364; Dec. Dig. § 200.\*]

5. BONDS (§ 84\*)—SALE OF BONDS—BREACH—DAMAGES—MARKET VALUE.

Where defendants breached a contract for the sale of bonds of a San Francisco corporation, plaintiff's loss was properly estimated with reference to the price of the bonds at San Francisco on the day of the breach; that being the

best available market for the bonds, and not on fictitious sales in the New York market.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 88; Dec. Dig. § 84.\*]

Gray and Hiscock, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Leopold Zimmermann and others against Henry G. Timmermann and others. A judgment for plaintiffs was reversed by the Appellate Division (120 App. Div. 218, 105 N. Y. Supp. 443), and plaintiffs appeal. Reversed, and judgment of Trial Term affirmed.

Alton B. Parker and Benj. N. Cardozo, for appellants. Joseph Fettretch and George H. Earle, Jr., for respondents.

**WILLARD BARTLETT, J.** In this action the plaintiffs, constituting the firm of Zimmermann & Forshay, bankers and brokers in the city of New York, seek to recover of the defendants, who are also bankers and brokers in the same city, under the firm name of Timmermann, Dahlgren & Co., damages for the breach of contracts in writing whereby the defendants agreed to sell, and the plaintiffs agreed to buy, certain bonds of a California corporation, known as the United Railroads of San Francisco. The following is a copy of one of the contracts, the others being like it in form: "New York, March 17, 1902. 100 Bonds at 89 and int. W. I. We have sold to Zimmermann & Forshay one hundred thousand dollars par value of the New 4% Bonds of the United Railroads of San Francisco at 89 per cent. payable and deliverable when, as and if issued, with accrued interest at the rate of four per cent. per annum, either party having the right to call for deposits according to the requirements of article 30 of the constitution of the N. Y. Stock Exchange, and on the failure of the party called upon to comply with the call for deposits, which contract shall mature, with the right and authority to the party not in default to close the contract in accordance with the rules of the New York Stock Exchange. Due when issued. Timmermann, Dahlgren & Co." The plaintiffs in each instance executed a corresponding obligation to purchase the bonds on the terms and conditions thus specified. On the 21st day of June, 1902, the plaintiffs, claiming that the bonds had been issued, demanded the delivery thereof from the defendants. The defendants refused to comply with the demand on the ground that it was premature. They wrote to the plaintiffs: "We have been notified by Messrs. Brown Bros. & Co., who are the parties to issue the bonds, that said bonds have not been so issued, and hence that they are not entitled to be delivered under the agreement of sale made with you." The learned judge before whom the case was tried (a jury having been waived) found that the bonds had

been issued by the United Railroads of San Francisco at the time when the demand was made, and rendered judgment in favor of the plaintiffs for \$12,837.90, measuring their damages with reference to the market rate for the bonds in San Francisco at the date of the breach of the contract. The Appellate Division has reversed this judgment because only \$3,500,000 of the \$20,000,000 issue of bonds contemplated by the United Railroads of San Francisco had actually been issued when the plaintiffs demanded of the defendants the delivery of their bonds under the contract. In the opinion of that learned court no right accrued to the plaintiffs to call for a delivery of any of the bonds until the issue of the \$20,000,000 was complete. The disposition of this appeal depends upon the correctness of that view.

The bonds in question were the outcome of a syndicate plan for the acquisition of a controlling interest in the principal independent street surface railroads in the city of San Francisco, and the consolidation of their lines into a single corporate organization to be known as the United Railroads of San Francisco. The agreement for effectuating this scheme provided, among other things, for the creation and issue by this new corporation in payment for the properties of the constituent companies of \$40,000,000 of stock, common and preferred, and \$20,000,000 of bonds. The bonds were to be secured by a mortgage upon the properties and franchises of the constituent companies. The stock of these companies was acquired through the agency of Brown Bros. & Co.; to whom the bonds were to be delivered under an agreement which gave them the right to offer such bonds for sale at any time prior to February 1, 1903, at the best price obtainable, being not less than 90 per cent. of their face value with accrued interest. On or before June 16, 1902, bonds to the amount of \$3,500,000, duly certified by the trustee under the mortgage, were delivered by the trustee, pursuant to directions from Brown Bros. & Co. to a San Francisco syndicate, by which they had been purchased and by which large amounts of them were immediately resold. It is this delivery of \$3,500,000 which the plaintiffs insist was an issue of the bonds under the "when, as and if issued" clause of the contract between the parties to this action. The defendants, on the other hand, contend (and in this they have been sustained by the Appellate Division) that the words, "when, as and if issued," relate only to the total issue of bonds contemplated by the scheme for the union of the San Francisco street railways, and that the plaintiffs could not rightfully demand performance of the contracts in controversy here until substantially the whole \$20,000,000 of bonds had been issued. The fact that the plaintiffs may have had no knowledge of the terms of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plan under which the bonds were to be issued was held by the court below to be entirely immaterial.

In order clearly to understand the position of the contending parties on this appeal, it is necessary to state somewhat more fully the facts concerning the formation of the syndicate for the purchase of the \$20,000,000 of bonds of the United Railroads of San Francisco. The syndicate agreement was executed on February 17, 1902, between the United Railways Investment Company of San Francisco of the first part, Brown Bros. & Co., as syndicate managers, of the second part, and such persons and corporations as should actually sign the agreement or accept participation thereunder or become holders of subscription receipts issued by the managers, parties of the third part. These parties of the third part were described in the agreement as "participants." The agreement provided that the investment company would cause a corporation to be organized to be known as the United Railroads of San Francisco, to which it would sell the stock of certain specified railroad companies in San Francisco; "it being intended that said corporation, when formed, shall also acquire the railroad lines, properties and franchises of such companies." The United Railroads corporation was then to deliver to the investment company, in payment for these shares, \$17,408,000 (subsequently increased to \$20,000,000) of its bonds, and \$40,000,000 of its stock, common and preferred. The investment company was thereafter to deliver to Brown Bros. & Co. as the representatives of the shareholders in the constituent railroads these bonds and this stock. The participants in the agreement were to receive for each \$1,000 paid by them \$758.29 of the bonds, or the proceeds of as many as might be sold prior to February 1, 1903, and the balance in preferred and common stock. The participants covenanted and agreed that Brown Bros. & Co., the managers, should have the absolute control of the bonds of the United Railroads of San Francisco until the 1st day of February, 1903, and that they might offer the same at public issue or private sale at any time prior to said date at the best price obtainable in their judgment, not to be less than 90 per cent. of the face value thereof, together with accrued interest. The agreement further provided for the issuance to the participants, upon the payment of their subscriptions respectively, of negotiable subscription receipts which recited that the holder thereof fully consented to all the terms and conditions of the syndicate plan. The United Railroads of San Francisco, having been duly organized, certified on March 31, 1902, that the investment company had subscribed and paid for and was entitled to receive \$20,000,000 of its first general mortgage 4 per cent. gold bonds, said bonds to be delivered as soon as the mortgage to secure the same should have been executed and delivered and the bonds

thereof created, engraved, and issued. Brown Bros. & Co. subsequently, in April, 1902, entered into negotiations with Mr. I. W. Hellman of San Francisco for the sale of \$2,500,000 of the bonds subsequently increased to \$3,500,000. The deed of trust or mortgage was recorded on June 7, 1902, and on June 16, 1902, \$3,500,000 of the bonds which had been duly certified were delivered to the San Francisco syndicate represented by Mr. Hellman. The bonds were thereafter sold and purchased almost daily in the San Francisco market. One shipment of \$100,000 was made to the plaintiffs' firm, and reached them in New York on June 23, 1902. The plaintiffs' firm meantime had become parties to the syndicate agreement, and as such had received a number of participation receipts; but it does not appear that any of these receipts came into their hands until March 27, 1902, after the principal contracts with the defendants had been made.

The feature of the contract in controversy (and I shall speak of only one contract, as all the agreements were alike in this respect) which has given rise to the difference between the parties and to this litigation as a consequence thereof is the phrase "when, as and if issued." The defendants insist that no obligation arose under the contract on their part to deliver any bonds whatever to the plaintiffs until the whole \$20,000,000 of bonds had been issued, or, at all events, until February 1, 1903, up to which date Brown Bros. & Co. were authorized to market the bonds under the syndicate agreement. The plaintiffs, on the other hand, contend that a contract to deliver bonds when issued is a contract to deliver them when they shall have been issued in such reasonable quantities as to render it possible for the promisor with the exercise of due diligence to procure them. This time had arrived, they say, when \$3,500,000 of the bonds had been sold and actually delivered by the direction of Brown Bros. & Co. to the Hellman syndicate in San Francisco. On that day, June 16, 1902, the bonds were procurable in the San Francisco market, which was readily accessible by telegraph from New York, in quantities amply sufficient to have enabled the defendants to deliver the amount called for by the contract. This issue of the bonds, although less than the whole issue eventually contemplated, is asserted to have been the issuance of such a reasonable amount as to enable the defendants with due diligence to procure the bonds and make delivery. The trial court, after finding that the contract was made as alleged in the complaint, found that "thereafter and before the commencement of this action the said bonds were duly issued by the said corporation, the United Railroads of San Francisco." There was a further finding made at the request of the defendants as to the certification and delivery to Hellman as the manager of the San Francisco syndicate of the \$3,500,000 of bonds on June 16,

1902. Considering these findings together, they must be deemed equivalent to a finding that the \$3,500,000 of bonds thus actually issued was an amount sufficient to enable the defendants to comply with the conditions of the contract on their part.

I think that this issue made the contract in suit operative against the defendants. A bond is issued when it comes into the hands of the holder so executed and delivered as to bind the obligor. That was the case with these \$3,500,000 of bonds when they were acquired by the San Francisco syndicate. The ordinary mortgage bond of a railroad corporation represents a loan of money from the holder to the borrower. It becomes a valid obligation, and must be regarded as having been issued by the corporation when it is actually delivered for a valuable consideration. *Brownell v. Town of Greenwich*, 114 N. Y. 518, 530, 22 N. E. 24, 4 L. R. A. 685. Although completely executed in due form to be used as security for borrowed money, such bonds acquire no validity before delivery, and do not constitute property capable of seizure under attachment or execution. *Coddington v. Gilbert*, 17 N. Y. 489; *Sickles v. Richardson*, 23 Hun, 559. After delivery, however, they become valid and effective obligations enforceable at the instance of the lender or whoever else may lawfully acquire them.

I can find no basis either in the language of the contract itself or in that of the syndicate agreement, even if the plaintiffs are to be deemed chargeable with a knowledge of the contents of that agreement by reason of the fact that they subsequently became holders of participation receipts, for the proposition that the contract was not to become effective or bind the defendants at all until the whole \$20,000,000 of bonds had been issued. If that were the correct construction, it would constitute no binding obligation upon them, even if \$19,000,000 of bonds had been put upon the market right in New York, where the defendants would not have had the slightest difficulty in acquiring the amount which they had undertaken to sell to the plaintiffs. It seems to me that the most that they could properly insist on was what the learned counsel for the appellants frankly conceded upon the argument of the appeal to have been their right, namely, that the issue should be sufficiently large to permit compliance in the exercise of due diligence. When, however, they were asked to perform, they assumed no such position. If, when the plaintiffs demanded fulfillment of the contract, the defendants had asserted that in view of the fact that the bonds had been issued in San Francisco while they were called upon to make delivery in New York the time allowed was not sufficient, then and there, under all the circumstances, a very different question would be presented. The defendants, however, did nothing of the sort. They denied any liability whatsoever

under the contract unless and until \$20,000,000 of bonds should be issued. In my opinion this position was wholly untenable. Assuming, as I do, that the issue of bonds contemplated by both parties to the contract was one reasonably large enough to make fulfillment practicable to the seller at the time when delivery should be called for, if the defendants had then insisted that such was not the case and had asked for more time until a larger amount of bonds had been issued, a question of fact would have been presented to the trial court upon which the defendants might have prevailed. As I have already pointed out, however, the findings made by the trial court are equivalent to a finding that the issue of \$3,500,000 was the issue of such an amount as would have enabled the promisors to obtain the bonds and make the delivery of the same at the time when the request was made. The Appellate Division has reversed on the law only, and therefore this finding of fact, having some support at least in the evidence, remains unassailed. If, as I think, the Appellate Division erred in holding as matter of law that an issue of all the bonds was necessary in order to charge the defendant at all, this finding suffices to sustain the judgment of the trial court.

I cannot perceive how any knowledge which the plaintiffs may have acquired through the participation receipts or otherwise as to the contents of the syndicate agreement can be held to affect the construction or interpretation of the contract between them and the defendants. There was nothing in that agreement which postponed the issuance of the bonds till February 1, 1903; on the contrary, it distinctly contemplated the right on the part of the managers to sell them before that date either at public issue or private sale at the best price obtainable in the judgment of the managers, provided it should not be less than 90 per cent., with accrued interest. In that event the participants were to receive the proceeds of such sales in lieu of the bonds. It seems to me, therefore, that undue importance has been attached to the question as to how much the plaintiffs knew about the contents of this agreement.

No error was committed at the trial as to the measure of damages. The plaintiffs' loss was estimated with reference to the price of the bonds at San Francisco at the date of the breach, and it was expressly found that the city of San Francisco was the best available market for the bonds. It is true that there are some indications in the record of an intention on the part of the plaintiffs at one time to seek a recovery based on fictitious sales in a New York market—by which the amount of the defendants' liability would have been greatly increased. If this was in fact attempted, that circumstance would amply justify the animadversions made upon the conduct of the plaintiffs in this re-

spect, not only by the Stock Exchange, but by the counsel for the defendants on the argument of the present appeal. No court could or would allow such an effort to succeed. It is deserving of the most emphatic condemnation. It is only fair, however, to counsel who represented the plaintiffs upon the trial and in this court to say that they disavowed any claim to recover on the basis of the New York sales to which reference has been made.

The order of the Appellate Division should be reversed and the judgment of the Trial Term affirmed, with costs in both courts to the appellants.

CULLEN, C. J., and HAIGHT, WERNER, and CHASE, JJ., concur. GRAY and HISCOCK, JJ., dissent.

Order reversed, etc.

(193 N. Y. 570)

**UNITED MERCHANTS' REALTY & IMPROVEMENT CO. v. ROTH.**

(Court of Appeals of New York. Dec. 15, 1903.)

**1. LANDLORD AND TENANT (§ 77\*)—CREATION AND EXISTENCE OF RELATION.**

An owner leased land to defendant for a specified term, and subsequently leased to plaintiff, for a term to begin at the expiration of the first lease. Defendant, before the expiration of his term, requested plaintiff to allow him to continue to occupy the premises after plaintiff's term began. Plaintiff refused, but told him that, if he held over, plaintiff would elect to hold him as tenant for another year on the terms of the original lease. *Held* that, on defendant's holding over, he became liable to plaintiff as tenant; the law implying from the occupancy assent to the terms stated.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 236; Dec. Dig. § 77.\*]

**2. LANDLORD AND TENANT (§ 77\*)—CREATION OF RELATION.**

Real Property Law (Rev. Stat. [9th Ed.] p. 3573) § 193, provides that the grantee of leased real property, or of a reversion thereof, or of any rent, the devisee or assignee of the lessor of such a lease, etc., has the same remedies for the nonperformance of any agreement in the assigned lease for the recovery of rent, for the doing of any waste, etc., as his grantor or lessor would have had if the reversion had remained in him. *Held* that a new lessee, whose lease begins at the termination of a prior lease, can, at his option, treat the prior lessee, in case he holds over, as his tenant under the terms of the original lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 236; Dec. Dig. § 77.\*]

Vann and Gray, JJ., dissenting in part.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the United Merchants' Realty & Improvement Company against Max J. Roth. From an order of the Appellate Division (122 App. Div. 628, 107 N. Y. Supp. 511), affirming in part and reversing in part an interlocutory judgment of the Special Term (53

Misc. Rep. 92, 103 N. Y. Supp. 1112), overruling a demurrer to the complaint, both parties, by permission, appeal on questions certified. Modified, and questions answered.

This action was brought to recover rent for a part of certain premises in the city of New York for the months of May to September, inclusive, in the year 1906. The complaint contains 10 counts, 2 for each month, 1 alleging a right to recover because the defendant held over after the expiration of his term, and the other an express contract. The following is a specimen of the first series: "(1) That the plaintiff is, and at all times hereinafter mentioned was, a domestic corporation; (2) upon information and belief that, on or about the 6th day of April, 1904, Henry Gerken, being owner of the building known as 1498 Third avenue, borough of Manhattan, city of New York, leased to the defendant, Max J. Roth, and the defendant hired from him, the two stories, one on the first floor, and one on the second floor, together with front basement of the said building, for the term of two years, from May 1, 1904, at the yearly rent of \$2,800, payable in equal monthly installments in advance on the first day of each month; (3) upon information and belief that the defendant entered into the demised premises and occupied the same according to the terms of said lease; (4) that thereafter for valuable consideration the said Henry Gerken assigned and set over to the plaintiff herein, from and after May 1, 1906, the said lease and all his rights in and to the same, and all his rights to the control, occupancy, and possession of the said premises for a period of five years beginning May 1, 1906, and that the plaintiff on May 1, 1906, became entitled to the possession and control of the said demised premises; (5) that on and after the 1st day of May, 1906, the said defendant continued and remained in the possession and occupancy of the said premises without the consent of the plaintiff, and the plaintiff thereupon duly elected to hold the defendant as tenant of said premises for another year commencing the 1st day of May, 1906, upon the same terms and at the same rent payable as was in and by the said lease provided for, of all of which the defendant had due and timely notice." Each count in the second series repeats paragraphs 1 to 4 inclusive, of the counts in the first series, and then continues as follows, except that the name of the month for which rent is claimed is changed to accord with the fact: "That before the 1st day of May, 1906, defendant requested plaintiff herein to permit and allow him to continue to occupy and use said premises on and after May 1, 1906, the time at which his lease of said premises expired, but plaintiff refused to so consent, and informed this defendant that plaintiff would

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not permit or allow him to continue to use and occupy said premises on and after May 1, 1906, and further informed him that if he (defendant) should remain over his term, which expired May 1, 1906, or should continue to use or occupy said premises on and after May 1, 1906, that plaintiff herein would elect to hold him as a tenant of said premises for one year from May 1, 1906, and would consider, interpret, and regard his remaining over after May 1, 1906, and the continued use and occupancy of said premises by defendant on and after May 1, 1906, as a consent, agreement, and contract, on the part of said defendant, to occupy and lease said premises from plaintiff for one year from May 1, 1906, upon the same terms and at the same rent per annum as was in and by said lease between defendant and said Gerken provided for. That defendant, well knowing the plaintiff's aforesaid terms and conditions in connection with his continuing to occupy and use said premises on and after May 1, 1906, did remain over and hold over on and after May 1, 1906, and did continue to use and occupy said premises, and thereby did agree and contract to lease said premises for one year from May 1, 1906, upon the same terms and at the same rent per annum as was in and by said lease between defendant and said Gerken provided for." The defendant demurred to each count, separately, upon the ground that it did not state facts sufficient to constitute a cause of action. The court at Special Term overruled all the demurrers, but the Appellate Division reversed as to counts 1 to 5, inclusive, and affirmed as to the others, one of the Justices dissenting as to the last five counts. Permission having been given, each party appealed to this court from so much of the judgment as was against himself, and the following questions were certified to us for decision: "(1) Does the complaint, in the causes of action therein numbered and designated as first to fifth, inclusive, state facts sufficient to constitute a cause, or causes, of action? (2) Does the complaint, in the causes of action therein numbered and designated as sixth to tenth, inclusive, state facts sufficient to constitute a cause, or causes, of action?"

Solomon M. Stroock and H. L. Moses, for plaintiff. George V. Mullan, for defendant.

CULLEN, C. J. (after stating the facts as above). I concur in the opinion of my Brother VANN as to the last five counts in the complaint, but I think that the first five are also good. The question presented by the demurrer to these counts is whether a new lessee, whose lease begins at the termination of a prior lease, can, at his option, treat the prior lessee, in case he holds over, as his tenant under the terms of the original lease. That the landlord could do so, if he had not made the second lease, is unquestionable.

Schuyler v. Smith, 51 N. Y. 309, 10 Am. Rep. 609. While it is true that in such case the agreement is only an implied one, it is one that the tenant cannot repudiate. As said by Judge Earl in the case cited: "The law sometimes steps in and makes agreements for parties which they did not mutually intend. \* \* \* And hence a tenant who has obtained possession of real estate cannot dispute the title of his landlord; and, having obtained possession from his landlord, he should not be permitted to hold over, deny his tenancy, and convert himself, at his option, into a wrongdoer." While there may be no privity of contract between the new tenant and the old one, there is privity of estate. Taylor on Ejectment, p. 165. If the new tenant sued in ejectment to recover possession of the premises, the old tenant could not put in issue his landlord's title, but could only defend by showing that such title had not devolved on the new tenant. Privity of contract is not necessary to confer the right of election on the new tenant, for, as shown in the case cited, the right of the landlord to treat the hold-over as a tenant for a new term does not spring from the contract of the parties, but is the penalty imposed by law upon the trespassing tenant. It is an incident of the landlord's estate, and that estate and possession under such estate he has conferred upon the new tenant. It is undisputed that if, during the term of the first lease, the landlord had conveyed his reversion, the conveyance would have carried to his grantee the right of election. But it must be borne in mind that the landlord's right to an election could not accrue or come into existence during the term of the first demise, but only after its expiration. When, therefore, this right first accrued, the new tenant was entitled to the estate in possession as successor of the landlord. It seems to me, therefore, that the case clearly falls within section 193 of the real property law (Rev. St. [9th Ed.] vol. 5, p. 3573): "The grantee of leased real property, or of a reversion thereof, or of any rent, the devisee or assignee of the lessor of such a lease, or the heir or personal representative of either of them, has the same remedies, by entry, action or otherwise, for the nonperformance of any agreement contained in the assigned lease for the recovery of rent, for the doing of any waste, or for other cause of forfeiture as his grantor or lessor had, or would have had, if the reversion had remained in him." There is every reason why the doctrine for which I contend should prevail with us. The situation of a lessee is very different in this state, and most of the other states in this Union, from that in England. There the landlord is bound to give possession to his tenant. *Coe v. Clay*, 4 Bing. 440. "He who lets agrees to give possession, and not merely to give a lawsuit." Here the law seems the reverse. In *Gardner v. Keteltas*, 3 Hill, 330,

38 Am. Dec. 637, it was held: "It is not the duty of the landlord, when the demised premises are wrongfully held by a third person, to take the necessary steps to put his lessee into possession. The latter being clothed with the title by virtue of the lease. It belongs to him to pursue such legal remedies as the law has provided for gaining it, whether few or many." The new lessee, and not the landlord, being thus subjected to all the inconveniences and damage occasioned by the holding over, he ought to have the same right that the landlord would possess were it not for the new lease. I think the section which I have quoted not only justifies us in holding, but requires us to hold, that he has that right.

The orders of the Appellate Division and Special Term should be modified so as to overrule the demurrer to all the causes of action set forth in the complaint, with costs in all courts, and with usual leave to defendant to withdraw the demurrer and answer within 20 days on payment of such costs, and both questions certified should be answered in the affirmative.

VANN, J. (dissenting). In order to avoid confusion it will be convenient to consider each series of counts by itself, treating them as if there were two counts, one on either theory, and care should be taken to apply the language used in the discussion only to the facts alleged in the count to which it relates.

1. If the relation of landlord and tenant existed between the plaintiff and defendant under the lease which expired on the 1st of May, 1906, the former had the right to treat the latter as a tenant for another year upon the same terms, for the law implies an agreement to that effect under those circumstances. *Schuyler v. Smith*, 51 N. Y. 309, 10 Am. Rep. 609; *Haynes v. Aldrich*, 133 N. Y. 287, 31 N. E. 94, 28 Am. St. Rep. 636. That relation, however, did not exist between the parties during the continuance of that lease, because no part of the term was assigned to the plaintiff by the owner of the reversion. The assignment of the lease, which was "from and after May 1, 1906," took effect only after the term had expired, and the defendant's estate for years had ended. At no time had he been a tenant of the plaintiff; and, as he had not held under him, he could not hold over as to him, because he never had possession from him nor attorned to him. The assignment of a lease that has expired conveys no term, because there is no term left to convey. Form cannot create substance, and the most formal transfer of a term that has passed is like the sale of gunpowder that has exploded. There is nothing left for the assignment to act upon, and it passes no estate, for it does not touch the reversion. *Demarest v. Willard*, 8 Cow. 206. Clearly the naked status of landlord cannot be assigned. It matters not that some rights may pass by the assignment of a lease with no

term left, such as the right to recover unpaid rent, because, unless some part of the term passed, the defendant did not hold under the plaintiff, but under the owner of the reversion on the 1st of May, when the term ended. While the plaintiff, under his lease from the owner, the term of which commenced May 1, 1906, has the right to possession after that date, no part of that term coincided with any part of the term of the defendant which ended on that day. No part of the estate held by the defendant under the first lease ever met any part of the estate of the plaintiff under either lease, for he took no estate under the former, as it expired before the assignment to him took effect, and his estate under the latter did not begin until the other term had ended. The parties had successive, but not concurrent, estates. Neither held under the other, and both did not hold under the owner of the reversion at the same time, the one as tenant and the other as subtenant.

On the 1st of May, 1906, there was no privity of contract or estate between the plaintiff and defendant. While the former then became entitled to possession, and the latter remained in possession without right, such possession, according to the facts alleged in the first count, was that of a trespasser, not of a tenant of the plaintiff. The right to elect that a tenant, holding over after the expiration of his term, shall be liable for another year upon the terms of the lease, was not created by statute, but existed at common law. The right on the one hand and the obligation on the other belonged only to those recognized by the common law as landlords and tenants. There must be a withholding of possession by a tenant from his landlord, and the defendant was not the tenant of the plaintiff when the question under discussion arose. While a lessee may become the landlord of his subtenant, it can only be when the lease of the former overlaps that of the latter. The owner of the reversion, whether it is a fee or a term, is the one to whom the law gives the right of election, and the plaintiff was an owner in neither sense. A tenant holding over from his landlord without leave is liable for rent at the election of the latter upon the theory of a renewal of the lease by implication. Owing to the previous relations between the parties, the law implies a renewal of the obligations dependent on those relations, which measure every detail of the new contract. The amount of the rent reserved is thus ascertained. In the case before us the rent cannot be thus fixed, because neither party sustained any relation to the other with reference to the first lease, because the plaintiff was not a party to it. Resort cannot be had to a lease between other parties for this purpose, as the law will not imply that, because A. agreed to pay B. rent at a certain rate, he also agreed to pay C. at the same rate, when C. sustained no relation to A. while the lease was in force. To so hold would extend the rule with neither

principle nor authority to support it. Section 193 of the Real Property Law does not apply, because the plaintiff never had a right of reversion, and that section, like its English prototype, gives a grantee or assignee the rights that his grantor or lessor "would have had if the reversion had remained in him." 32 Henry VIII, c. 34; 1 R. L. 363; 1 R. S. 747; Fowler's Law of Real Property, 91. The object of such legislation, as the title of the original act stated, was to enable "grantees of reversions to take advantage of the conditions to be performed by the lessees." I think that each of counts one to five, inclusive, fails to state a cause of action.

2. In the second series of counts the pleader proceeds upon a different theory. He alleges that before the lease to the defendant expired, and after the lease to the plaintiff had been given, the defendant requested the plaintiff to allow him to continue to use and occupy the premises after his right had ended, and that of the plaintiff had begun; that the plaintiff refused, but told him that, if he should remain over his term, the "plaintiff herein would elect to hold him as a tenant of said premises" for a year, and "would consider, interpret and regard his remaining over \* \* \* as a consent, agreement and contract \* \* \* to occupy and lease said premises" for another year on the terms of the lease between himself and the owner of the reversion; that the defendant, knowing the terms of the plaintiff, remained over after the expiration of his lease, and thereby agreed to take the premises upon those terms. These facts constitute a cause of action, because the law implies, from the fact of occupancy under the circumstances alleged, that the defendant assented to the terms stated. This has been held in several cases which we regard as controlling in principle. *Despard v. Walbridge*, 15 N. Y. 374; *Coit v. Planer*, 51 N. Y. 647; *Preston v. Hawley*, 139 N. Y. 296, 34 N. E. 906. Notwithstanding the refusal of the plaintiff to accede to the defendant's request that he might continue in possession, the facts alleged, if proved upon a trial, would present a question for the jury whether the continued occupation of the defendant was not a virtual assent to the terms prescribed by the plaintiff. A jury could find that the plaintiff made a proposition, and that the defendant accepted it according to its terms and by the method therein provided. He had requested leave to occupy, and was informed that if he did occupy, the plaintiff, who was entitled to possession on the day named, would elect to hold him as a tenant, and would regard that act as a consent to lease for another year. It is a reasonable inference from these facts, and hence a jury could find that the plaintiff made a proposition, and that the defendant accepted it by doing an act which both parties intended should amount to an acceptance, because it was the method of accepting provided in

the proposition. Aside from the acceptance of benefits, which implies an assent to obligations, it is well settled that the concurrence of the minds of the parties upon a proposition by one manifested by an overt act of the other makes a contract. *Mactier v. Frith*, 6 Wend. 103, 21 Am. Dec. 262; *Trevor v. Wood*, 36 N. Y. 307; *Dent v. North American Steamship Company*, 49 N. Y. 390. In the case last cited Judge Rapallo said: "Although the resolution of the board of directors of the defendant, ratifying the purchase of the steamship by Mr. Webb on the terms and conditions set forth in the letter, may not have been communicated to the plaintiffs, yet, after the receipt of the letter by Mr. Webb the defendant took possession of the vessel without any dissent from the terms stated in the letter. This constituted an acceptance of and acquiescence in the terms expressed in the letter, and the plaintiffs had the right to rely upon it as an assent to those terms." Retaining possession in this case had the same effect as taking possession in that, because each was an overt act which could not lawfully have been done unless it constituted an acceptance of the terms proposed. At least a jury might so find.

I think that each count in the second series sets forth a good cause of action; that the order appealed from should be affirmed; that the first question certified should be answered in the negative and the second in the affirmative. As both parties appeal costs should be allowed to neither.

HAIGHT, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur with CULLEN, C. J. GRAY, J., concurs with VANN, J.

Ordered accordingly.

(193 N. Y. 481)

## PEOPLE v. WEINSTOCK.

(Court of Appeals of New York. Dec. 8, 1908.)

### 1. GAME (§ 7\*)—STATUTES—CONSTRUCTION—SALE OF FOREIGN GAME.

Forest, Fish, and Game Law (Laws 1900, p. 29, c. 20), § 27, provides that grouse taken in the state shall not be sold within the state or carried without the state, that possession of grouse is presumptive evidence that the same was taken in the state, provided that the presumption shall not attach to the possession of grouse by one who has executed a bond conditioned on his not knowingly having in his possession grouse taken in the state, and containing provisions as to the inspection of grouse possessed by him, and evidence that the same were taken without the state by way of bill of sale, waybill, or otherwise. Laws 1905, p. 611, c. 335, amends the section by providing that grouse taken without the state shall not be sold within the state, except pursuant to the provisions of the section. *Held*, that the failure to give the bond only raises a presumption that grouse in a person's possession were taken within the state, which may be overcome by proof that they were taken without the state, and one selling grouse in the state taken outside the state and presenting to the inspector the evi-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

dence mentioned in the statute does not violate the statute, though he did not give the specified bond.

[Ed. Note.—For other cases, see Game, Cent. Dig. §§ 6, 7; Dec. Dig. § 7.\*]

2. STATUTES (§ 241\*)—PENAL STATUTES—CONSTRUCTION.

The court in construing a statute which is highly penal should not attempt to create an offense not clearly indicated by the ordinary meaning of the words used in the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.\*]

Chase, J., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the People of the state of New York against Leon C. Weinstock. From a judgment of the Appellate Division (117 App. Div. 168, 102 N. Y. Supp. 349), unanimously affirming a judgment for plaintiff entered on a decision on an agreed statement of facts, defendant appeals. Reversed, and complaint dismissed.

S. John Block, for appellant. Robert C. Beatty, for respondent.

HAIGHT, J. This action was brought to recover penalties imposed by the forest, fish, and game law of the state of New York for violations of its provisions. It appears from the facts agreed upon that the defendant sold in the borough of Manhattan during the open season, on the 16th day of November, 1905, six grouse, and that on the 24th day of November he also sold six grouse. It was further agreed that the grouse so sold were not taken within the state of New York nor within 25 miles of the state line, and that the defendant had not given the bond specified in section 27 of the forest, fish, and game law (Laws 1900, p. 29, c. 20) at the time of such sale. Thereupon the trial court found as conclusions of law that the defendant was liable for two penalties, one for each sale, and to an additional penalty for each bird sold, amounting to \$420, under the provisions of section 39 of that law.

Section 27 of the forest, fish, and game law, as amended by chapter 335, p. 611, Laws 1905, provides that "grouse and woodcock taken in this state shall not be sold or offered for sale within this state, or carried without the state, *nor shall grouse or woodcock taken without the state be sold or offered for sale within the state except pursuant to the provisions of this section*. Possession of grouse or woodcock by any person shall be presumptive evidence that they were taken in this state, provided that such presumption shall not attach to the possession of grouse or woodcock by any person who shall have given to the commissioner a bond to the People of the state, as hereinafter provided, approved by him as to form, amount and sufficiency of sureties, so long

as the same shall be in force. The bond shall be for a specified time, and shall continue in force for that time unless sooner disapproved by the commissioner for breach of its conditions or failure of sureties. Such bond shall be conditioned that such person shall not knowingly have in his possession or sell, grouse or woodcock taken in this state, and shall contain such other provisions as to inspection of grouse or woodcock possessed by him, evidence that the same were taken without the state, by way of bill of sale, waybill or otherwise, and generally such requirements as the commissioner may deem necessary to secure the enforcement of this section; nor shall presumption attach to possession of grouse and woodcock by any person purchasing the same for consumption from a person whose bond is in force as aforesaid. But no presumption that grouse or woodcock are possessed free from the presumption that they were taken in this state, as herein provided, shall arise in any action or legal proceeding until it affirmatively appears that the provisions of this section have been complied with. Any person violating any of the provisions of such bond shall be denied the privilege of giving another bond under this section." The words italicized show the amendment that was made to chapter 291, p. 597, Laws 1903. It consequently appears that under the former statute no limitation was placed upon the sale of grouse taken without the state other than that the possession of grouse shall be presumptive evidence that they were taken within the state unless a bond was given to the commissioner in accordance with the provisions of the act. The question now presented for determination is as to the effect that should be given to the amendment. The construction given to it by the learned Appellate Division is that it provides a penalty, not for the sale of grouse taken without the state, but for the failure to give the bond provided for. If this be so, then this anomaly in the construction of the statute arises: If a person is charged with the offense of selling grouse taken within the state, the fact that he has not given a bond raises a presumption of fact that the grouse so sold were taken within the state, and the burden is cast upon him of showing that they were taken elsewhere. But, if he is charged with selling grouse taken without the state, he is not liable to the penalties for making the sale, but is liable for his failure to give the bond. We do not think that this was the intention of the Legislature. The purpose of the bond is plainly stated in the statute. It is that the possession of grouse raises a presumption of fact that they were taken within the state, unless the bond prescribed has been given. The failure to give the bond casts upon the person charged the burden of removing the presumption by showing

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that the grouse were taken elsewhere. No further penalty is provided in the statute for the failure to give the bond. It is claimed that this construction of the statute would leave the amendment meaningless. While we think that the intention of the Legislature might have been more clearly expressed, its purpose in making the amendment is apparent. As we have seen, the provision is that grouse taken without the state shall not be sold or offered for sale within the state "except pursuant to the provisions of this section." What are the provisions of the section that the Legislature had in mind? Evidently those as to the inspection of grouse possessed by the dealer and the preservation of the "evidence that the same were taken without the state by way of bill of sale, way-bill, or otherwise" and the regulations of the commissioner with reference to disclosing such evidence to the inspector. The preservation and the exhibiting of such evidence by the dealer to the inspector enables the official to determine at once whether the dealer is complying with the provisions of the statute under which he is permitted to make sales of grouse taken without the state. It is true that this provision of the statute is required to be entered into the condition of the bond provided for, but that emphasizes the importance given to it by the Legislature, and does not, in our minds, mitigate its force and effect.

The statute is highly penal, imposing a penalty for each transgression, a further penalty for each bird disposed of, and, in addition, it makes the person guilty of a misdemeanor. In construing such statutes, we should not attempt to spell out the creation of an offense which is not clearly indicated by the ordinary meaning of the words used in its provisions. By these provisions the failure to give the bond raises a presumption that grouse found in the possession of any person were taken within the state. Nothing further. The presumption can be overcome by showing the fact that they were taken without the state. In this case there is no claim that the defendant did not preserve and exhibit to the inspector when called for the evidence mentioned in the statute. The facts, as we have seen, are conceded that the grouse sold were not taken within the state, and consequently no offense has been committed by the defendant for which a penalty could be imposed against him.

The judgment of the Appellate Division and that of the trial court should be reversed, and, inasmuch as the facts have been agreed upon, the complaint should be dismissed, with costs in all courts.

OULLEN, C. J., and GRAY, VANN, WILLARD BARTLETT, and HISCOCK, JJ.,

concur. CHASE, J., dissents on opinion of SCOTT, J., below, reported in 117 App. Div. 168, 102 N. Y. Supp. 849.

Judgment reversed, etc.

(193 N. Y. 526)

### TRIEST v. CITY OF NEW YORK.

(Court of Appeals of New York. Dec. 15, 1908.)

#### 1. MUNICIPAL CORPORATIONS (§ 378\*)—PUBLIC IMPROVEMENTS—DAMAGES—CHANGE OF GRADE—STATUTE GOVERNING LIABILITY.

Greater New York Charter (Laws 1897, p. 337, c. 378), § 951, as amended by Laws 1901, p. 400, c. 466, provides that, where a change of grade of any street has been made prior to the taking effect of the act, the right of an abutting owner to damages for such change of grade shall be governed by the law in force at the time the grade was changed, that after the taking effect of such act, an abutting owner shall not be entitled to damages for the original establishment of a grade, or for changing an established grade, except where such owner has erected buildings in reliance on the former grade, and that a grade shall be deemed established where it was originally adopted, or where the street has been used by the public as of right for 20 years and been improved as such. A county road, which, prior to its improvement by the city in 1902, had been used as a public highway for 20 years, but had not been used as of right or been improved, was on April 14, 1897, adopted as a county road by the county supervisors, pursuant to County Road Law (Laws 1890, p. 979, c. 555), and on October 29, 1890, a map was filed with the clerk of the village in which the road was situated showing the existing natural grade and a proposed new grade, but no physical change was made by the village, and the map was never formally adopted. Plaintiff, on September 9, 1897, purchased property abutting on such road containing buildings erected 50 years before. The village having been taken into the city of New York in 1898, that city in 1902 established a grade for such street and improved the same. Held, that the plaintiff's right to damages was governed by the provisions of the city charter, and the prior proceedings being insufficient to establish the grade, and plaintiff not having erected buildings on his property in reliance on the grade established by the city, he was not entitled to damages.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 916; Dec. Dig. § 378.\*]

#### 2. APPEAL AND ERROR (§ 1094\*)—REVIEW—DECISIONS OF INTERMEDIATE COURTS—FINDINGS—CONCLUSIONS OF LAW.

On appeal to the Court of Appeals from a judgment for plaintiff, in an action against a city for damages on account of an original establishment of the grade of a street, a finding that defendant wrongfully, and without authority in law, entered on such street and excavated and changed the grade is insufficient to show that the proceedings were defective, so as to warrant the Court of Appeals in holding, as a matter of law, that plaintiff was entitled to recover on account of such defective proceedings irrespective of a provision in the city charter denying damages to abutting owners for the original establishment of the grade of a street.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4324; Dec. Dig. § 1094.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

### 3. MUNICIPAL CORPORATIONS (§ 378\*)—PUBLIC IMPROVEMENTS—DAMAGES—PROCEEDINGS—NOTICE.

Greater New York Charter (Laws 1897, p. 337, c. 378), § 951, as amended by Laws 1901, p. 400, c. 466, providing that, on changing the grade of a street, notice shall be given to persons injured by such change to present their claims for damages to the board of assessors, is not applicable to a proceeding for the original establishment of the grade of a street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 916; Dec. Dig. § 378.\*]

### 4. TRIAL (§ 392\*)—TRIAL BY COURT—FINDINGS—DUTY OF PREVAILING PARTY.

It is the duty of the plaintiff, not only to prove his cause of action, but to procure findings by the court which will sustain the judgment rendered in his favor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 916; Dec. Dig. § 392.\*]

### 5. MUNICIPAL CORPORATIONS (§ 402\*)—PUBLIC IMPROVEMENTS—DAMAGES—PROCEEDINGS—DEFECTS AND OBJECTIONS.

An abutting owner who, under Greater New York Charter (Laws 1897, p. 337, c. 378), § 951, as amended by Laws 1901, p. 400, c. 466, is not entitled to damages for an original establishment of the grade of a street, cannot complain of a failure to give notice of proceedings for the assessment of damages on account of establishment of the grade and the improvement of the street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 972; Dec. Dig. § 402.\*]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Hans Triest against the City of New York. From a judgment of the Appellate Division (126 App. Div. 984, 110 N. Y. Supp. 1148), unanimously affirming a judgment of the Trial Term (55 Misc. Rep. 459, 105 N. Y. Supp. 571) for plaintiff, defendant appeals. Reversed, and new trial ordered.

Francis K. Pendleton, Corp. Counsel (James D. Bell, of counsel), for appellant. William D. Gaillard, for respondent.

**HAIGHT, J.** This action was brought to recover damages for the alleged wrongful entering upon Marion avenue, between Occident and Cebra avenues, in front of the plaintiff's premises, and excavating and changing the existing grade and lowering the level thereof in places from six to eight feet. It appears from the findings that the plaintiff became the owner of the premises in question on the 9th day of September, 1897, fronting on St. Paul avenue, on which there was erected a dwelling house 50 years ago and that the lands also abutted upon Marion avenue, but no buildings of any kind were erected thereon except a small rustic summer house open at the sides, located upon an elevated piece of ground, on the southerly corner of the premises bounding on Marion avenue, commanding a prospect and evidently designed to furnish a place for rest or shade; that the plaintiff had never built any building upon Marion avenue, and had never done

anything with his property upon that avenue in regard to improving the same. Greater New York Charter (chapter 378, p. 1, Laws 1897) went into effect on the 1st day of January, 1898, and thereupon Marion avenue, together with the premises of the plaintiff, became a part of the city of New York. The avenue up to 1901 was a common, unpaved, unimproved country road or back street, which had been used as a public highway for more than 20 years without any substantial alteration in the grade thereof, but had not been used by the public as of right for 20 years and been improved by the public authorities at the expense of the public, or of the abutting owners. On the 29th day of October, 1890, a map was filed in the office of the clerk of the village of Edgewater, showing the existing natural surface of Marion avenue in that village, and a proposed new grade therefor, averaging from three to four feet lower than the natural surface, but no physical change of grade was made by the village of Edgewater in front of plaintiff's premises, to conform to such new grade, and that Marion avenue as theretofore used was not adopted by the board of trustees of the village by direct official action establishing the grade thereof, and the village at no time ever graded, worked, or improved the avenue, or expended any public moneys upon it. On the 14th day of April, 1897, prior to the date on which the plaintiff acquired title to the premises, the board of supervisors of the county, pursuant to the provisions of County Road Law (chapter 555, p. 979, Laws 1890), adopted Marion avenue as a county road, subject to the consent of the trustees of the village of Edgewater, and thereupon the board of trustees of the village, on May 4, 1897, adopted a resolution consenting to the adoption of Marion avenue as a county road, and thereupon said avenue became a county road. On the 15th day of April, 1902, the board of assessors of the city of New York gave public notice to the owners of all property that assessments had been completed and lodged in its office for examination by all persons interested in the regulating, grading, etc., with macadam pavement of Marion avenue from Cebra avenue to Occident avenue, and requesting all persons whose interests were affected by said proposed assessment, and who were opposed to the same, to present their objections in writing to the secretary of the board of assessors at a time and place specified, when said objections would be heard and testimony received in reference thereto. The plaintiff did not present objections to the proposed assessment of his property pursuant to said notice, nor did he, during the progress of the work of grading and macadamizing Marion avenue, or at any time prior to the commencement of this action, make any formal or other pro-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

test against the execution of the work of reconstruction of the avenue. Neither the plaintiff nor the defendant made any application to the court for the appointment of commissioners to ascertain and determine the amount of damages sustained by the plaintiff by reason of the change of the grade complained of, pursuant to chapter 118, p. 100, Laws 1883.

Section 951 of the Greater New York charter (Laws 1897, p. 337, c. 378), as amended by chapter 466, p. 400, Laws 1901, provides as follows: "All cases where a change of grade of any street or avenue has been made prior to the taking effect of this act, shall, as to the liability to make compensation for damages caused by such change of grade, be governed by the laws in force at the time such change of grade was made. After the taking effect of this act there shall be no liability to abutting owners for originally establishing a grade; nor any liability for changing a grade once established by lawful authority, except where the owner of the abutting property has subsequently to such establishment of grade built upon or otherwise improved the property in conformity with such established grade, and such grade is changed after such buildings or improvements have been made. In such cases damages occasioned by such change of grade to such buildings and improvements shall be ascertained and assessed in connection with and as a part of the expenses of grading or otherwise improving the street or avenue in conformity with the grade as changed. A grade shall be deemed established by lawful authority within the meaning of this section where it was originally adopted by the action of the public authorities, or where the street or avenue has been used by the public as of right for twenty years and been improved by the public authority at the expense of the public or of the abutting owners. All laws inconsistent herewith are hereby repealed. In case the grade of any such street shall be changed, and the same shall have been regulated and graded according to the new grade, after the certificate of the cost of such regulating and grading shall have been received by the board of assessors, it shall be the duty of the said board to cause to be published in the City Record and the corporation newspapers, for at least ten days successively, a notice which shall contain a request for all persons claiming to have been injured by the said change of grade to present, in writing, to the secretary of the board of assessors, their claims, specifying a place where and a time when the said board will receive evidence and testimony of the nature and extent of such injury. After hearing and considering the said testimony and evidence the board of assessors shall make such awards for such loss and damage, if any, as it may deem proper. The amount of the said awards shall be included in the assessment for the regulating

and grading of the street in question, as a part of the expense thereof, and the said award, and the proceedings of the assessors in relation thereto, shall be subject to review by the board of revision of assessments." It will be observed that, under the first clause of this statute, where a change of grade of a street or avenue has been made prior to the taking effect of this act, the liability to compensation for damages sustained by such change of grade is governed by the laws in force at the time such grade was changed. The provisions of this section were not changed by the Revision of 1901, but remained the same as originally enacted in the Greater New York Charter of 1897. As we have seen from the findings referred to, there was no change in the grade of the avenue until after the provisions of this statute became of force, and it consequently follows that the liability to make compensation for damages sustained by change of grade is governed by the provisions of this statute, and not by that previously existing for the village of Edgewater or for county roads. It will further be observed that, under the provisions of this statute, a grade shall be deemed established by lawful authority where it was originally adopted by the action of the public authorities, or where the street or avenue has been used by the public as of right for 20 years, and has been improved by the public authorities at the expense of the public or of the abutting owners, and that all laws inconsistent herewith are hereby repealed. By again referring to the facts as found, it will be recalled that, while the public authorities of the county, and of the village, in 1897 adopted Marion avenue as a county road, they did not establish or fix any grade therefor, nor was there any grade ever officially established prior to the improvement complained of, unless it was established by acquiescence, and upon that subject we have the finding that, although it had been used as a public highway for more than 20 years, it was not used by the public as of right for 20 years, and had not been improved by the public authorities, at the expense of the public, or of the abutting owners. It is therefore apparent that, under the provisions of this statute, there was never any grade established for Marion avenue prior to 1901. There was an attempt made in October, 1890, to establish a grade. As we have seen, a map was filed showing the natural surface and the proposed new grade, but the village of Edgewater, through its board of trustees, failed to adopt the grade so established, and did not physically change the grade as it had theretofore existed. It, consequently, follows that the filing of the map did not operate to establish a grade of the avenue. It will further be observed that, after the taking effect of this act, there shall be no liability to abutting owners for originally establishing a grade, nor any liability

for changing a grade once established by lawful authority, except where the owners of the abutting property have, subsequently to such establishment of grade, built upon or otherwise improved the property in conformity with such established grade, and such grade is changed after such buildings or improvements have been made. As we have seen, there has been no establishing of grade until that for which this action was brought. The establishing of the grade then made was the original grade, and under the express provision of the statute no damages are recoverable for the establishing of an original grade. Again, as we have seen, the plaintiff has never built upon or otherwise improved his property upon Marion avenue prior to the establishing of the grade for which he here complains. It, consequently, follows that he has not brought himself within the provisions of this statute under which he is entitled to have his damages ascertained and assessed.

The contention is further made on behalf of the plaintiff that there was a defect in the proceedings on the part of the city, by which Marion avenue was improved, and that by reason of such defect the change of grade was wrongful and without authority in law, and that consequently he may recover damages notwithstanding the provisions of the statute. The difficulty with this contention is that there is not a finding of a single fact tending to show that the proceedings were defective in any particular. There is the finding that, during the year 1901, the defendant wrongfully, and without authority in law, entered upon said Marion avenue, and excavated and changed the grade. The finding that it entered wrongfully and without authority in law is purely a conclusion depending upon the facts found with reference to the proceedings under which the change was made. These are not set forth, and no findings were made thereon under which we can determine whether the entry was wrongful and without authority.

The trial court did find as a fact that, after the commission of the wrongful acts aforesaid, the defendant neglected to publish the notice required by section 951 of its charter for the presentation of claims by persons claiming to have been injured by a change of grade, and that said defendant took no steps whatever to comply with its duty in that regard or to reimburse or compensate the plaintiff for the damages sustained by him. The answer to this finding is that under the express provisions of the statute the notice for the presentation of claims, etc., is only required in cases where the grade of the street has been changed, regulated, and graded according to the new grade. It consequently follows that the notice is not required where the only change is the establishing of an original grade. In this case, as we have seen, no grade of the avenue had ever been established until that for which this action was brought. And it fur-

ther appearing that no buildings had ever been constructed by the plaintiff upon the avenue, according to any grade that had been established, it follows that the notice referred to was not required in this case.

While the foregoing findings, to which we have referred, fail to show any defect in the proceedings, our attention is called to the evidence for the purpose of showing that the proceedings, under which the improvement of the street was made, were unauthorized. It appears that the proceedings were instituted by a petition of taxpayers, residents on Marion avenue, who respectfully directed the attention of the local board of the borough of Richmond and the department of highways for the city of New York to the unimproved condition of the avenue, and asked that the improvement of the said street and highway by macadamizing the same be made. This is signed by a number of taxpayers, but not by the plaintiff. This petition was delivered, first, to the local board of the borough, and at a meeting of that board the following resolution was unanimously adopted: "Resolved, that the local board, first district, borough of Richmond, the city of New York, hereby recommends to the board of public improvements, that proceedings be initiated to macadamize Marion avenue in the second ward of the borough." Thereupon the matter was brought before the municipal assembly, which passed the following resolution: "Resolved by the board of public improvements that, in pursuance of sections 413 and 422 of the Greater New York Charter the macadamizing of Marion avenue in the second ward of the borough of Richmond under the directions of the commissioner of highways be and the same hereby is authorized and approved, there having been presented to said board an estimate in writing of such detail as the said board has directed of the cost of the proposed improvement and a statement of the assessed value according to the last preceding tax roll of the real estate included within the probable area of assessment, the estimated cost of said work being \$2,000." Thereupon an assessment roll appears to have been prepared and the public notice given, in which it is stated that the assessment roll had been prepared for regulating the grade and paving with macadam pavement Marion avenue, and inviting all persons interested, or who were opposed, to present their objections, as already stated. It will be observed that by this notice each person interested is given the opportunity to appear and oppose, not only the proposed assessment roll, but to oppose the improvement that is to be made for which the roll had been prepared. The plaintiff, therefore, was given an opportunity to be heard upon the subject; but, as we have seen from the findings, he neglected to appear or to make any objections whatever, even upon the day fixed for hearing such objections by the as-

sessors or at the time the work was actually done upon the street. This notice specifically called his attention to the fact that the assessment was for regulating, grading, and paving, and yet he remained silent. Whether a notice was given of the presentation of the petition to the local board we are not advised by the evidence, and, as we have seen, there is no finding upon the subject. It was the duty of the plaintiff to not only prove his cause of action, but to procure findings which would sustain the judgment rendered; and if his right to recover depends upon his showing that the proceedings instituted by the city did not conform to the statute, he should have caused that fact to appear in the findings. But assuming for the sake of the argument that there was a failure on the part of the officials of the city to give such notice, it is not apparent that the plaintiff was harmed thereby. The plaintiff did have timely notice in which he could have opposed the grading of the avenue in front of his premises. He was invited to offer objections to the assessment roll before the work had been done, but he did not appear to oppose. Neither did he appear to object when the work was actually being done upon the avenue. We are therefore of opinion that, if there was an omission to give this notice, it was an irregularity merely, and does not operate to give the plaintiff the right to recover in a case in which he would have had no claim for damages had the statute been complied with.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, WERNER, HISCOCK, and CHASE, JJ., concur.

Judgment reversed, etc.

(193 N. Y. 535)

**MAYER v. CITY OF NEW YORK.**

(Court of Appeals of New York. Dec. 15, 1908.)

**MUNICIPAL CORPORATIONS (§ 378\*)—PUBLIC IMPROVEMENTS—DAMAGES—CHANGE OF GRADE—STATUTE GOVERNING LIABILITY—"ESTABLISHED."**

Where prior to the adoption of Greater New York Charter (Laws 1901, p. 400, c. 466) § 951, providing that, in all cases where a change of grade of any street has been made prior to the taking effect of this act, the right of abutting owners to damages shall be governed by the laws in force when the change was made, and that a grade shall be deemed "established" within the section, where it was originally adopted by the action of the public authorities, or where a street has been used by the public, as of right, for 20 years, and been improved by the public authority at the expense of the public or of the abutting owners, a street, the grade of which had been established

by user, was improved, and the established grade changed, the right of an abutting owner, who had erected buildings according to the old grade, to damages for the change was governed by the county and village law, and not by the charter provision.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 916; Dec. Dig. § 378.\*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2469-2473.]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Charles Mayer against the City of New York. From a judgment of the Appellate Division, affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

Francis K. Pendleton, Corp. Counsel (James D. Bell, of counsel), for appellant. William D. Gaillard, for respondent.

HAIGHT, J. This case was submitted in connection with that of *Triest v. City of New York*, 193 N. Y. —, 86 N. E. 549, in which we have written an opinion reaching the conclusion that the judgment in that case should be reversed, but in this case the findings are very different. The plaintiff's premises were located on Catlin avenue, which was found, not only to be a public street and highway, but that there had been a grade established by user, and that the plaintiff had constructed three buildings abutting upon the avenue, conforming to such grade, before the change of grade of 1897 was made. It appears that in that year a change of grade was authorized, and the contract let for the making of the same before the Greater New York Charter went into effect. We are therefore of the opinion that, in that case, the rights of the parties are to be determined by the county and village law in force, and not by section 951 of the Greater New York Charter (Laws 1901, p. 400, c. 466); for, under the provisions of that act, "all cases where a change of grade of any street or avenue has been made prior to the taking effect of this act, shall, as to the liability to make compensation for damages caused by such change of grade, be governed by the laws in force at the time such change of grade was made." That being the case, the further provision of section 951 to the effect that "a grade shall be deemed established by lawful authority within the meaning of this section where it was originally adopted by the action of the public authorities, or where a street or avenue has been used by the public as of right for twenty years and been improved by the public authority at the expense of the public or of the abutting owners," has no application. Under the laws then in force the plaintiff had the right to have his damages ascertained and determined, but he was deprived thereof by reason of the failure of the authorities to give the notice required by the statute.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It consequently follows that, in this case, the judgment should be affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, VANN, WILLARD BARTLETT, and CHASE, JJ., concur.

Judgment affirmed.

(193 N. Y. 531)

PEOPLE v. GOVERNALE

(Court of Appeals of New York. Dec. 18, 1908.)

1. HOMICIDE (§ 244\*) — EVIDENCE — SUFFICIENCY.

In a prosecution for killing one of two officers who were pursuing accused to arrest him for a crime, evidence *held* to sustain a finding that neither of the officers shot at accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 244.\*]

2. HOMICIDE (§ 230\*)—EVIDENCE—SUFFICIENCY—INTENT.

In a homicide case, evidence *held* to show that accused shot decedent with intent to kill him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 230.\*]

3. CRIMINAL LAW (§ 369\*)—EVIDENCE—OTHER OFFENSES.

As a general rule, evidence of a crime independent of that charged is inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.\*]

4. HOMICIDE (§ 159\*)—EVIDENCE—OTHER OFFENSES.

Where accused, after shooting a person, ran some 500 feet and entered a building, where he shot a pursuing officer, in a prosecution for killing the officer, evidence of the previous shooting was inadmissible to show that he shot the officer or that it was done in the commission of a felony; the former shooting being an independent crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 297, 299; Dec. Dig. § 159.\*]

5. ARREST (§ 64\*)—CRIMINAL CHARGES—AUTHORITY TO ARREST WITHOUT WARRANT—PRIVATE PERSONS.

Under the direct provisions of Code Cr. Proc. § 183, a private person may arrest without a warrant for any crime committed in his presence and for a felony, though not committed in his presence, and by section 184 he need not inform accused of the cause of the arrest or require him to submit where the arrest is made while accused is in the actual commission of the crime or on fresh pursuit.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 157-160; Dec. Dig. § 64.\*]

6. CRIMINAL LAW (§ 369\*)—EVIDENCE—OTHER OFFENSES—INTENT—HOMICIDE.

Accused shot a person in a park in a quarrel, and ran about 550 feet, and entered a building a few minutes thereafter, where he shot two officers in plain clothes who pursued him to arrest him. In a prosecution for killing one of the officers, his defense was that he believed the officers were friends of the person with whom he quarreled in the park, and shot in self-defense. *Held*, that evidence of the shooting in the park was admissible to show the occasion of accused's fleeing from the park and the purpose of the pursuing officers, since his right of self-defense would be different if he shot the officer while the latter was lawfully attempting to ar-

rest him than if he was being unlawfully pursued.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 369.\*]

7. HOMICIDE (§ 116\*)—JUSTIFIABLE HOMICIDE—SELF-DEFENSE—APPREHENSION OF DANGER.

Under Pen. Code, § 205, making homicide justifiable if in self-defense, when there is reasonable ground to apprehend a design to do great bodily injury and imminent danger thereof, accused must believe that he is in danger and have reasonable ground to apprehend great bodily injury, and in such case he may kill if necessary to avoid the danger, even though there was neither design to do him serious injury nor danger that it would be done.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158-163; Dec. Dig. § 116.\*]

8. HOMICIDE (§ 235\*) — EVIDENCE — SUFFICIENCY.

In a prosecution for killing one who pursued accused to arrest him for a crime committed shortly prior thereto in a park, evidence *held* to sustain a finding that accused committed a felony in the park.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 235.\*]

9. HOMICIDE (§ 276\*)—TRIAL—QUESTION FOR JURY—SELF-DEFENSE.

In a prosecution for killing one who was attempting to arrest accused, whether accused had reasonable ground to believe that decedent intended to injure him so that the killing was in self-defense, *held* for the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 569; Dec. Dig. § 276.\*]

10. CRIMINAL LAW (§ 822\*)—TRIAL—RECEPTION OF EVIDENCE — RESTRICTION TO SPECIAL PURPOSE—INSTRUCTIONS.

In a prosecution for killing one who was attempting to arrest accused after he had shot another in a park and fled, the admission of evidence of such shooting, on the issue of self-defense, did not mislead or confuse the jury, where the court charged that it was admitted to show that a felony had been committed and that accused was liable to arrest if it had been, and that it was not admissible to prove accused guilty of the crime charged, but only for the purpose stated.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 822.\*]

11. HOMICIDE (§ 22\*)—MURDER—DELIBERATION—TIME REQUIRED.

Deliberation and premeditation to effect another's death need not be for any specified period to constitute murder in the first degree; and, where accused ran 550 feet and entered a hallway to evade arrest after committing a crime, and shot his pursuers who followed him into the hall, he could deliberate and fix a design to kill his pursuers after entering the hall, and while removing his gun from his pocket.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 37, 38; Dec. Dig. § 22.\*]

12. HOMICIDE (§ 282\*)—TRIAL—QUESTION FOR JURY—DEGREE OF OFFENSE.

Where the commission of a homicide is proved, unless the evidence clearly negatives deliberation or premeditation, the character of the act and degree of the crime is for the jury to determine.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 574; Dec. Dig. § 282.\*]

13. HOMICIDE (§ 203\*) — EVIDENCE — DYING DECLARATION—ADMISSIBILITY.

Where decedent, shortly after being shot, and while mortally wounded, after stating that

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

he believed he was about to die and could not recover, gave an account of the shooting, and died shortly thereafter, the statement was admissible as a dying declaration, in the prosecution of his slayer.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.\*]

**14. HOMICIDE (§ 338\*) — APPEAL — HARMLESS ERROR — ADMISSION OF EVIDENCE — FACTS OTHERWISE ESTABLISHED.**

Even if statements were inadmissible as a dying declaration, their admission was not prejudicial where accused afterward testified to substantially the same facts.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 711; Dec. Dig. § 338.\*]

Appeal from Court of General Sessions, New York County.

Salvatore Governale was convicted of murder in the first degree, and he appeals. Affirmed.

Charles E. Le Barbier, for appellant. Wm. Travers Jerome, Dist. Atty. (Robert C. Taylor, of counsel), for the People.

**CHASE, J.** The defendant was indicted for the crime of murder in the first degree. On the trial he was sworn as a witness in his own behalf, and testified that he shot George M. Sechler while in the hallway hereinafter mentioned. He further testified: "I fired to kill."

On Sunday afternoon, April 14, 1907, about 5:45 o'clock, two young Italian men entered a small building maintained as a urinal near the south end of Washington Square Park in the city of New York. The defendant and his brother were then in the building, but the defendant's brother had started to leave the building as the young men entered, and one of the young men accidentally "bumped against him," whereupon a quarrel ensued, and defendant's brother backed the young man against an iron railing. The defendant passed out of the building and 10 or 20 feet from the entrance thereof, and stood on a grass plot near some shrubbery. The companion of the young man who had been pushed against the railing went to his assistance, and, after some fighting, all came out of the building. The two young men mentioned were leading, and the defendant's brother was a short distance behind them. As the young men turned in the direction where the defendant was standing, he immediately fired a revolver three times in the direction of the young men, one shot from which entered the left leg of the young man that had been to the aid of his companion. As the young man who was shot staggered back, the defendant's brother ran up Fifth avenue, and the defendant placed his revolver in his pocket and ran across the lawn to and across Fourth street and down Thompson street. One Fogarty, a lieutenant of the New York police force, then in plain clothes, was about 100 yards north of where the firing took place. He heard the shots, and turned in the direc-

tion of the noise and saw the defendant turn and run, and he followed him. Several persons in the park followed, and the crowd increased as they went south. Fogarty called out: "Stop that man." About 50 feet north of Third street, Sellick, a patrolman on duty in plain clothes, attempted to stop the defendant. Defendant was then running in the middle of the street, and, to avoid Sellick, he ran upon the sidewalk and jumped over an open cellar way and passed Sellick. Sellick turned and followed him. At about Third street Sechler, a patrolman on duty in plain clothes, attempted to stop the defendant, and failed to do so. Sechler immediately turned and followed the defendant. The crowd increased in numbers, and at 232 Thompson street the defendant ran into a hallway. Sellick and Sechler followed him. The hall extends back about 21 feet from the street entrance, and then turns to the left at a right angle to a stairway commencing 6 feet from the angle. There is a passage-way along the right hand side of the stairway leading to a door which opens into a yard or court. The defendant stopped by the stairway. The hallway was quite dark, except that the defendant, looking from the interior thereof toward the open doorway, could see his pursuers at the street. When Sellick and Sechler approached within seven or eight paces of the defendant, he shot them both; the shots being fired in rapid succession. Sellick fell, but Sechler ran to and grabbed the defendant, not appreciating that he had been mortally wounded. Fogarty followed, and Sechler and Fogarty took the defendant to the doorway, when Sechler exclaimed: "God, I'm shot!" Help was obtained for Sechler, and he was taken to a hospital, where he died about 10:30 that evening.

No. 232 Thompson street is about 550 feet from where the shooting took place in the park. The defendant in his testimony says that his brother's assailants during the quarrel fired two shots, and that "because they were beating my brother I fired two shots, and then I ran." He further said that the shots fired by him in the park were fired at the ground to scare his brother's assailants and not at any particular person, and that he ran away to save himself. The young men in the park each testified that he did not have a revolver. The defendant did not produce his brother as a witness nor explain his absence.

In explanation of the shots fired in the hallway defendant says that he supposed the people that followed him were friends of the young men in the park that had the altercation with his brother, and that both of the men who entered the hallway had revolvers in their hands, and one of them fired at him, and that he fired to kill because they fired at him. No one heard more than two shots in

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the hallway, and after the shooting the revolver taken from Sellick, which was a five shooter, contained four unexploded shells and one empty chamber. It did not contain an exploded shell. The revolver taken from the deceased was a five shooter, and contained five unexploded shells. The jury could have found that the defendant testified falsely in saying that either Sellick or Sechler fired at him. The defendant's revolver was a five shooter, and contained five exploded shells. So far as the testimony taken on the trial is in conflict with that given by the people, it was such that the jury could have, and they probably did, believe the people's testimony as against that given by the defendant and the witnesses produced on his behalf.

The testimony offered on behalf of the people supplemented by the admissions of the plaintiff prove beyond controversy that the defendant shot and killed Sechler, and that he intended to kill him. It was necessary for the jury to determine two important and seriously controverted questions, viz.: (1) Did the defendant shoot Sechler with a deliberate and premeditated design to effect his death? (2) Did the defendant shoot Sechler in the lawful defense of himself? The jury determined these questions against the defendant.

The defendant's principal contention on this appeal is that the trial court erred in allowing testimony of what occurred in the park to be received and considered by the jury in determining whether the defendant was guilty of the crime of murder in the first degree. It is a general rule that evidence of a crime which is distinct and independent of the one of which the defendant stands indicted cannot be received on his trial. The commission of one crime is not in itself any evidence to be considered by a jury in determining a defendant's guilt of another crime in no way connected therewith. A person cannot be convicted of one offense upon proof that he committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or, indeed, of any character; but the injustice of such a rule in courts of justice is apparent. It would lead to convictions, upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one. *Coleman v. People*, 55 N. Y. 81; *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193. Evidence of the occurrences in the park was not proper to be considered by the jury in determining whether the defendant shot Sechler, neither was it proper for their consideration for the purpose of determining that the shooting of Sechler was done by the defendant while engaged in the commission of a

felony in the park. The shooting in the park was an independent crime. *People v. Huter*, 184 N. Y. 237, 77 N. E. 6. There are exceptions to the general rule excluding all evidence of crimes alleged to have been committed by a defendant other than the one for which he is being tried. *People v. Molineux*, supra. The important questions for the jury in this case were the two that we have hereinbefore enumerated. The occurrences disclosed in the record beginning at a time when the shots were fired in the park and ending with the defendant's arrest include but a very few minutes of time, and they all have a distinct relation to and bearing upon the defendant's apprehension of great personal injury by his pursuers and upon his intent in shooting Sechler. A private person as well as a peace officer may without a warrant arrest a person for a crime committed in his presence, and when the person arrested has committed a felony, although not in his presence. Code Cr. Proc. § 183. If the defendant committed a felony in the park, any of the persons present or those that followed him had express statutory authority to arrest him. Even the statutory requirement that, before making an arrest, a private person must inform the person to be arrested of the cause thereof and require him to submit, does not apply to a case where the person arrested is in the actual commission of the crime or is arrested on pursuit immediately after its commission. Code Cr. Proc. § 184. The intent and purpose of the defendant's pursuers and their rights in regard to interfering with the defendant were very material. If the defendant was wholly innocent of any crime and not liable to arrest, and he was pursued by a mob intent upon taking his life or of doing him great personal injury, his rights in self-defense would have been entirely different from what they were as a criminal fleeing from justice. It was material, therefore, to show the occasion for the defendant's fleeing from the park and the purpose of his pursuers or some of them in following him into the hallway.

The defendant's right to defend himself is stated in section 205 of the Penal Code which says: "Homicide is also justifiable when committed, either (1) In the lawful defense of the slayer, \* \* \* when there is reasonable ground to apprehend a design on the part of the person slain \* \* \* to do some great personal injury to the slayer \* \* \* and there is imminent danger of such design being accomplished. \* \* \* Any person committing violence in his personal defense must not only believe that he is in danger of personal violence, but he must in fact have reasonable ground to apprehend that he is in imminent danger. When one who is without fault himself is attacked by another in such a manner or under such circumstances as to furnish reasonable ground for apprehending a design to take away his

life or do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, he may safely act upon appearances and kill the assailant if that be necessary to avoid the apprehended danger, and the killing will be justifiable, although it may afterwards turn out that the appearances were false, and there was in fact neither design to do him serious injury nor danger that it would be done. *Shorter v. People*, 2 N. Y. 193, 51 Am. Dec. 286; *People v. Taylor*, 177 N. Y. 287, 69 N. E. 534. The jury could have found that the defendant committed a crime amounting to a felony in the park. The defendant was, therefore, not, without fault on his part. Had he any reasonable ground under the circumstances disclosed to apprehend that Sechler designed to do some great personal injury to him, and that there was imminent danger of such design being accomplished? If the defendant had committed a crime in the park amounting to a felony, he knew that he was subject to arrest. The jury could have found that the defendant stated subsequent to his arrest that he was running away because he had shot somebody in the park and did not want to be arrested. His pursuers at no time shouted any words of menace. He heard them calling out: "Catch him! catch him!" and others shouted, "Stop that man!" It is shown beyond controversy that his pursuers did not desire to kill or injure him, but to arrest him. The defendant testified that he thought his pursuers and those that followed him into the hallway were friends of his brother's assailants determined upon doing him personal injury. One of his brother's assailants had staggered back at the time that he was shot by the defendant, and his companion remained with him. It does not appear that the defendant saw any friends of his brother's assailants in the park. Sechler and Sellick were on Thompson street, more than a block away from the scene of the occurrences in the park. Defendant by special effort dodged them in the street in running toward the hallway, and they were the two that first entered the hallway following him. The jury could have found from this testimony that the defendant ran from the park and into the hallway to avoid arrest, and that at the time he shot Sechler there was no reasonable ground to apprehend a design on the part of Sechler to do the defendant great, or any, personal injury. The question as to whether the defendant in shooting Sechler was acting in self-defense was clearly one for the jury. *People v. Constantino*, 153 N. Y. 24, 47 N. E. 37; *People v. Filippelli*, 173 N. Y. 509, 66 N. E. 402; *People v. Rodawald*, 177 N. Y. 408, 70 N. E. 1; *People v. Broncado*, 188 N. Y. 150, 80 N. E. 935.

The jury were in no way misled or confused by the testimony of what occurred in the park. The reason for admitting such tes-

timony was stated by the court from time to time as it was received, and in the charge to the jury the court say: "I have allowed the people to prove that the defendant discharged a loaded firearm at a human being in Washington Park for the purpose of showing that a felony had been committed and that the defendant was liable to an arrest if such a crime had been committed by him. The people claim that this evidence is material for the purpose of showing the motive and the intent of the defendant at the time that he was endeavoring to escape arrest. That is to say, that he intended to shoot any person who attempted to prevent his escape. It was not admitted for the purpose of proving this defendant guilty of the particular crime charged so that act should militate against him upon this charge, but it was admitted for the purposes indicated by me and for no other purpose." It is not necessary to constitute murder in the first degree that a person should deliberate and premeditate upon his design to effect the death of another for any specified period of time. The defendant had evaded capture by running 550 feet. From his own testimony it appears that he chose his position behind the angle in the hallway and near the staircase and afterwards took his revolver from his pocket. Assuming that the defendant did not decide to shoot and kill his pursuers until he stopped in the hallway, there was time for him, though brief, to deliberate and meditate upon his design after he concluded to stop and while he removed the revolver from his pocket and in his deliberately aiming for the purpose and with the intent of killing Sechler. *Leighton v. People*, 88 N. Y. 117; *People v. Majone*, 91 N. Y. 211; *People v. Schuyler*, 106 N. Y. 298, 12 N. E. 783; *People v. Ferraro*, 161 N. Y. 365, 55 N. E. 931; *People v. Bogliano*, 179 N. Y. 267, 72 N. E. 101; *People v. Conroy*, 97 N. Y. 62; *People v. Johnson*, 139 N. Y. 358, 84 N. E. 920; *People v. Rodawald*, 177 N. Y. 408, 70 N. E. 1; *People v. Kennedy*, 159 N. Y. 846, 54 N. E. 51, 70 Am. St. Rep. 557; *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690. The court in the charge to the jury says: "Now, if you find from the evidence beyond a reasonable doubt that the defendant realizing that he had fired several shots from a loaded pistol at a human being, and that he was liable to arrest therefor, and that he was endeavoring to escape from a lawful arrest, and that his intention was to kill any person who should attempt to prevent his escape, and that he deliberated and premeditated upon that intent to effect the death of any person pursuing him for the purpose of lawfully arresting him, and that in discharging the loaded pistol at Sechler he did so from a deliberate and premeditated design to effect the death of Sechler, then you may find the defendant guilty of murder in the first degree." When the commission of a homicide by the person accused has been

shown, it is the province of the jury to say from the facts and circumstances surrounding it, unless they clearly repel the idea of deliberation and premeditation, what the character of the act really was and the degree of crime which should be attached to it. *People v. Conroy*, supra.

After Sechler arrived at the hospital, he made a statement in which he said that he believed that he was about to die and that he had no hope of recovery, and then briefly described the pursuit of the defendant and the shooting by him. Oral testimony of such statement was received subject to objections and an exception by the defendant. When the statement was made, Sechler was mortally wounded. It clearly appears that he appreciated that recovery was impossible and that his death was imminent, and he did in fact die shortly after such statement was made. Such a statement is admissible as a dying declaration. *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690. The statement so made by Sechler was given in evidence before it was known that the defendant would take the stand in his own behalf. The defendant as a witness testified to substantially everything related by Sechler, and the defendant was therefore not prejudiced by Sechler's statement even if it had been improperly received. During the evening after the shooting the defendant was questioned by an assistant district attorney and his answers were taken by a stenographer with the aid of an interpreter. Before he was questioned, he was told that anything that he said could be used against him. There was nothing in his answers materially different from the testimony given by him on the trial, except that in his answers to the assistant district attorney he repeatedly stated that he ran away from the park and into the hallway to avoid arrest, and he did not then assert or claim that any one shot at him in the hallway. Oral evidence of the defendant's statements to the assistant district attorney were given in evidence in rebuttal after the defendant gave his testimony on the trial. No objection was made to the introduction of such oral evidence, and the stenographer's minutes of the interview were received in evidence after the court referring to the minutes said to the defendant's counsel: "You make no objection except that you dispute that what is contained in this record was stated by the defendant?" And to which question the defendant's counsel answered, "Yes, sir; that is all."

Other alleged errors are urged by the defendant. A careful examination of the record, however, satisfies us that no error was committed on the trial, and that the verdict is supported by the evidence.

The judgment of conviction should be affirmed.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, and HISCOCK, JJ., concur.

Judgment of conviction affirmed.

(193 N. Y. 564)

FLAHERTY, Sheriff of Kings County, v. MILLIKEN et al.

(Court of Appeals of New York. Dec. 15, 1908.)

1. OFFICERS (§ 11\*)—APPOINTMENT—RESTRICTIONS OF CIVIL SERVICE LAWS—DEPUTY SHERIFFS.

Though the office of sheriff is, by Laws 1901, p. 1750, c. 705, made a salaried one, his deputies, assistant deputies, and other appointees are, so far as they discharge his duties relating to civil process, in the service of him personally, and not in that of the county, he being liable for their default, and they for such default being liable to him, and to no one else, though they are public officers, and liable to criminal punishment as such for official misconduct; and therefore their positions are not within Const. art. 5, § 9, and Laws 1899, pp. 795, 797, c. 370, §§ 2, 6, as to rules in appointments to the civil service of the state and its civil divisions.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 13; Dec. Dig. § 11.\*]

2. OFFICERS (§ 11\*)—APPOINTMENT—RESTRICTIONS OF CIVIL SERVICE LAWS—SHERIFF'S APPOINTEES.

Appointees of a sheriff whose duties relate exclusively to the functions of his office in criminal matters are in the service of the public, and not of the sheriff personally, and therefore are subject to the civil service regulations; the doctrine of respondeat superior not applying between him and them in their discharge of such duty.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 13; Dec. Dig. § 11.\*]

3. OFFICERS (§ 11\*)—APPOINTMENT—RESTRICTIONS OF CIVIL SERVICE LAWS—SHERIFF'S APPOINTEES.

Appointees of a sheriff whose duties relate to both civil and criminal prisoners are not subject to civil service regulations; the sheriff being liable for escape of civil prisoners.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 13; Dec. Dig. § 11.\*]

Appeal from Supreme Court, Appellate Division, Third Department.

Application of Michael J. Flaherty, as Sheriff of the County of Kings, for a mandatory writ of mandamus to Charles J. Milliken and others, Civil Service Commissioners of the state. From an order of the Appellate Division (111 N. Y. Supp. 1119), affirming an order of the Special Term, denying, as matter of law and not in discretion, the application, the sheriff appeals. Reversed in part.

Henry F. Cochrane, for appellant. Wm. S. Jackson, Atty. Gen. (Timothy I. Dillon, of counsel), for respondents.

CULLEN, C. J. This proceeding was instituted by the sheriff of the county of Kings to compel the respondents, the state civil service commissioners, to certify to the pay roll of certain assistant deputy sheriffs, jail keepers, van drivers, and matrons in his of-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

office. The application was resisted on the ground that these subordinates had been appointed in violation of the rules and regulations of the civil service commission. By chapter 705, p. 1750, Laws 1901, the office of sheriff was made a salaried one from the 1st of January then ensuing, and by section 2 of the act the sheriff was authorized to appoint various subordinates in his office at specified salaries. All the appointees whose rights are in controversy in this proceeding hold positions which under the statute the sheriff was authorized to fill. In 1900 the jurisdiction of the civil service commission was extended to the sheriff's office of Kings county, the rules of which commission placed in the exempt class 24 subordinate officers or employes who are paid wholly from the salary or official emoluments of the sheriff, no part of which is to be returned or accounted for as public funds. When the office became a salaried one the rules of the commission were amended so as to read: "Resolved, that the classification of positions in the exempt class in Kings county be amended by striking out therefrom the following: 'In the office of the sheriff twenty-four subordinate officers and employes who are paid wholly from the salary or official emoluments of the sheriff, no part of which is to be returned or accounted for as public funds. \* \* \*' and by inserting in lieu thereof the following: 'In the office of the sheriff one under sheriff, eight deputy sheriffs and counsel, one chief clerk, one secretary and one jail warden.'" The other positions in the office, which included all those now before us, were made subject to be filled by competition, in the ordinary method. The relator ignored the action of the civil service commission, and made appointments to these positions solely of his own volition, and the question presented is as to the validity of such appointments. The Special Term held the appointments invalid, and denied the relator's application. That decision has been affirmed at the Appellate Division by a divided court. By section 9, art. 5, of the present Constitution it is ordained that: "Appointments and promotions in the civil service of the state, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive." By Civil Service Law (Laws 1899, p. 797, c. 370) § 6, the state civil service commission is empowered to prescribe, amend, and enforce suitable rules and regulations for carrying into effect the provisions of the act and of the section of the Constitution quoted. By section 2 of the statute the civil service of the state "or any of its civil divisions or cities includes all offices and positions of trust or employment in the service of the state or of such civil division or city," with

certain exceptions immaterial to this discussion.

The question which lies at the threshold of this controversy is whether the deputies, assistant deputies, and other appointees of the sheriff are, as far as they discharge the duties of the sheriff relating to civil process, in the service of the county, or in the service of the sheriff personally, though they are undoubtedly public officers and liable to criminal punishment as such for official misconduct. If they are not in the service of the county, but in that of the sheriff, the positions held by them fall neither within the constitutional provision, nor within the purview of the statute. The office of the sheriff is of great antiquity and peculiar. Before the office in Kings county was made a salaried one, what I may term the "civil business" of the sheriff was plainly and exclusively his own. He, not his deputies or subordinates, was responsible for their negligence or misconduct in the execution of civil process, except in the case of independent torts on the rights of third parties, where both he and his deputies were liable as joint tortfeasors. It is said in Crocker on Sheriffs (page 147): "The sheriff is identical, in contemplation of law, with all his officers, and is civilly and directly responsible for their acts, defaults, torts, extortions, or other misconduct, whether it be willful or inadvertent, in the course of the execution of their duties. He is liable to the party aggrieved for any neglect in the execution of process or in returning the same, for an escape, or for not paying over money collected on execution in the same cases, and to the same extent as if the fault was his own." But not only is the sheriff liable for the negligence or misconduct of his subordinates, but he alone is liable, not the culpable deputy or subordinate. This has been the settled law of this state for many years. As early as the case of Tuttle v. Love, 7 Johns. 470, it was held that an action would not lie against an undersheriff for a breach of duty in his office, and that for money collected by him the action must be brought against the sheriff. In Colvin v. Holbrook, 2 N. Y. 126, it was again sought by a judgment creditor to recover from a deputy sheriff money received and collected by him on an execution. It was held that the action would not lie. It was there said by the court: "The rule, it is believed, is universal that a known agent is not responsible to third persons for acts done by him in pursuance of an authority rightfully conferred upon him. The very notion of an agency proceeds upon the supposition that what a man may lawfully do by a substitute, when performed, is done by himself, and the individuality of the agent is so far merged in that of the principal. It is also settled, if anything can be established by authority, that an agent is not liable to third persons for an omission or neglect of duty

in the matter of his agency, but that the principal is alone responsible." Now there are cases where by statute an officer is made responsible for the default of his subordinates, and it may be that in such cases the subordinate is in the service of the public despite of such liability on the part of his superior. But the cases cited show that the relation between a sheriff and his appointees is much more intimate. It is not merely that the sheriff is liable for the default of his appointee, but that the appointee for such default is liable to the sheriff, and to no one else, and the ground on which these decisions proceed shows exactly the nature of the relations between the two, that the appointee is regarded merely as the agent for the sheriff, and that the same rule applies as between principal and agent in ordinary private business.

Nor has the statute which makes the office of sheriff a salaried one changed the nature of the relation between the sheriff and his appointees. It is true that what may be called the "profits" of the business—that is, the receipts, over and above the expenses and salaries—are required to be paid into the county, but that does not make the county the principal in the business. Such a result is expressly forbidden by section 1, art. 10, of the Constitution, which provides that "the county shall never be made responsible for the acts of the sheriff," a provision which has existed since the Constitution of 1822. Doubtless the statutory provision making the office salaried, and providing that the surplus shall be paid to the county is valid, but that does not, and cannot, make the county liable for losses in the business. It may also be that the Legislature might by an appropriate statute change the nature of the relation between the sheriff and his appointees so that the latter would no longer be strictly agents of the former, but independent public officers, liable for misconduct directly to any one injured by the same. Assuming, however, such power in the Legislature, no such intent should be ascribed to a statute, except where such intent is very plainly indicated. It would throw the whole law, upon the subject of the liability of a sheriff and his deputies or his appointees, as it has existed for centuries, into confusion, and make one rule applicable in one county and another rule in another.

Under the doctrine I have asserted the positions of the eight assistant deputy sheriffs are clearly not subject to the civil service law; but as under the statute, to enable them to receive their salary, it is necessary that the civil service commissioners should certify to their pay roll, a mandamus should issue directing such certification. The cases of the other appointees of the sheriff require further consideration. We think that the relation which the appointees of the sher-

iff bear to that officer in the discharge of the criminal duties of the office differs essentially from that borne in the discharge of the civil duties of the office. While in some cases the sheriff may be punished by way of contempt for the default of his appointees in criminal proceedings, as a rule he is subject to such punishment only where to some extent he has been personally responsible for the default. The relation of the parties is not strictly that of principal and agent, nor does the doctrine of respondeat superior apply. In the county of New York there is a separate jail or prison for the detention of persons charged with crime, the warden or keeper of which is not appointed by the sheriff. We think, therefore, that all appointees of the sheriff whose duty relates exclusively to the functions of the sheriff's office in criminal matters should be considered in the service of the public, and not of the sheriff personally, and are subject to the civil service regulations. The difficulty in the present case is that there are not separate jails or prisons in Kings county for detention under civil process and detention under criminal process, though persons detained under the differing processes are required to be held in different parts of the jail. The duties of the jail keepers and matrons, as shown by the affidavits, relate to both civil and criminal prisoners. For the escape of a civil prisoner the sheriff is personally liable. Hence, so long as there is no separation of the duties, we think those subordinates must also be held exempt from the civil service regulations. The duties of the drivers of the vans relate solely to the transportation of criminal prisoners. Therefore they are not mere personal agents, and must be appointed in accordance with the civil service rules.

The orders of the Special Term and Appellate Division should be reversed, and the application for mandamus granted so far as relates to the several appointees named in the moving papers, with the exception of the van drivers, and, as to them denied, without costs to either party in any court.

GRAY, HAIGHT, VANN, WILLARD  
BARTLETT, HISCOCK, and CHASE, JJ.,  
concur.

Orders reversed, etc.

(199 N. Y. 531)

#### PURDY v. CITY OF NEW YORK.

(Court of Appeals of New York. Dec. 8, 1908.)

#### 1. APPEAL AND ERROR (§ 927\*)—REVIEW—PRESUMPTIONS—DISMISSAL OF COMPLAINT.

In reviewing an order dismissing the complaint, the plaintiff is entitled to the view of the facts most favorable to him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8748; Dec. Dig. § 927.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**2. MUNICIPAL CORPORATIONS (§ 812\*)—TORTS—INJURIES FROM DEFECTS IN STREETS—NOTICE OF INJURY.**

Under Laws 1886, p. 801, c. 572, § 1, providing that cities having a population of 50,000 or over shall not be liable for injuries unless notice "of the time and place at which the injuries were received" is served on the corporation counsel, a notice that plaintiff was injured "whilst walking along the sidewalk on M. street, borough of Brooklyn," by falling into an "opening, gully, or trench running across said sidewalk," did not sufficiently designate the place of the accident, it appearing that M. street is at least a mile long.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1702; Dec. Dig. § 812.\*]

**3. MUNICIPAL CORPORATIONS (§ 812\*)—TORTS—NOTICE OF INJURIES—WAIVER.**

The act of the corporation counsel of a municipality in failing to return a notice required by Laws 1886, p. 801, c. 572, § 1, to be given to such corporation counsel as a condition precedent to the liability of the municipality for injuries, does not amount to a waiver of defects in such notice.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1700; Dec. Dig. § 812.\*]

Cullen, C. J., and Haight, J., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by William J. Purdy against the City of New York. From a judgment of the Appellate Division (110 N. Y. Supp. 822), reversing a judgment dismissing the complaint, defendant appeals. Reversed.

Francis K. Pendleton, Corp. Counsel (James D. Bell, of counsel), for appellant. Martin S. Lynch, for respondent.

WERNER, J. This action was brought to recover damages for injuries sustained by the plaintiff as the result of a fall upon a defective sidewalk which, it is alleged, the defendant negligently permitted to remain in a defective condition. The trial court submitted the questions of fact to the jury, subject to the opinion of the court. The jury reported a disagreement, and then the court dismissed the complaint upon the ground of the insufficiency of the notice served by the plaintiff in attempted compliance with the provisions of chapter 572, p. 801, of the Laws of 1886. Judgment was entered dismissing the complaint. Upon appeal to the Appellate Division, that judgment was reversed and a new trial granted. Upon the defendant's appeal to this court, the only questions presented relate to the sufficiency of the notice required by the statute referred to, and to the defendant's right to insist upon strict compliance therewith.

As the complaint was dismissed, the plaintiff is entitled to the view of the facts most favorable to him. These facts, so far as material to the questions here involved, establish that the plaintiff, on July 8, 1904, received the injuries complained of by falling into an opening, gully, or trench extending

across the sidewalk of Milford street, borough of Brooklyn, city of New York. The opening or trench varied in depth from three to four feet, and was about three feet wide. Milford street is from a mile to a mile and a quarter in length. About a month after the accident, the plaintiff caused to be served upon the corporation counsel of the defendant the following notice: "You will please take notice that I hereby, pursuant to chapter 572 of the Laws of 1886, notify you of my intention to commence suit against the city of New York, to recover damages to the amount of five thousand dollars for injuries which I received on or about the 8th day of July, 1904. Whilst walking along the sidewalk on Milford street, borough of Brooklyn, in the nighttime, I was caused to fall into an opening, gully or trench running across said sidewalk, whereby I was caused to sustain bodily injuries which I fear are permanent." This notice was received and retained without objection by the then corporation counsel of the defendant. The statute under which this notice was served (Laws 1886, p. 801, c. 572, § 1) provides that no action to recover damages for personal injuries shall be maintained against any city of the state, having a population of 50,000 or over, on the ground of the negligence of any of the city's officers or agents "unless notice of the intention to commence such action and of the time and place at which the injuries were received shall have been filed with the counsel to the corporation or other proper law officer thereof within six months after such cause of action shall have accrued." The only specification contained in the notice served by the plaintiff as to the place where he met with the accident of which he complains is that it occurred at an opening, gully, or trench extending across the sidewalk of Milford street. Milford street is at least a mile in length.

The first question to be determined is whether the plaintiff's notice sufficiently describes the place where the accident happened. The plain purpose of this statute, and of similar provisions in the charters of the various municipalities throughout the state, is to guard them against imposition by requiring notice of the circumstances of an injury upon which a claim for damages is made, so that its authorities may be in a position to investigate the facts as to time and place, and decide whether the case is one for settlement or litigation. The statute before us, reasonably construed, does not require those things to be stated with literal nicety or exactness, but it does require such a statement as will enable the municipal authorities to locate the place and fix the time of an accident. When a notice contains the information necessary for that purpose, it is a substantial compliance with the statute, but when it falls short of that test it is

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
86 N.E.—36

insufficient. In *Beyer v. City of North Tona-wanda*, 183 N. Y. 338, 76 N. E. 214, the notice stated that the plaintiff was injured by tripping on a decayed plank on the easterly side of Paynes avenue, "about halfway between Schenck street and Robinson street." The proof tended to show that the place was about 80 or 100 feet from the center between these two streets, and the notice was held sufficient. In the case at bar the notice does not state upon which side of the street the accident happened. The street is at least a mile in length, but the notice fixes no point. The bare naming of the street cannot be held to be a compliance with the statute, unless we are ready to hold that any notice, no matter how vague and indefinite, is a compliance with the requirements of the statute. If a mere reference to a street a mile in length is enough, it would be equally good in a case where the street is many miles long.

The notice also stated that the place of the accident was at an opening, gully, or trench extending across the sidewalk. The proof tended to show its dimensions. There was no other such opening on the street. Upon these facts the learned counsel for the respondent contends that the place was sufficiently identified. It may be assumed that the reference to the place was such that the city authorities might have been able to locate it, but it would have been by conjecture rather than proof. This is not enough. Given a case in which there were several or more such places as were referred to in the notice, the authorities might be deceived and misled rather than informed by such a notice. This case is not like that of *Werner v. City of Rochester*, 77 Hun, 33, 28 N. Y. Supp. 226, affirmed 149 N. Y. 563, 44 N. E. 300. There the pile of dirt at which the accident happened was described and located with an exactness that is not to be found in the notice now before us.

It is further contended in behalf of the respondent that the retention of the notice by the city authorities without objection as to its sufficiency constitutes a waiver on its part of the right to rely upon the defects in the notice as a defense to the action. The statute imposes no active duty in this behalf upon the law officer of the city. It would doubtless have been an act of courtesy had he called attention to the defect in time to have enabled plaintiff or his counsel to have remedied the defect, but it would be going too far to hold that the failure to do so effected a waiver by the city of its right to object to the insufficiency of the notice. In *Forsyth v. City of Oswego*, 191 N. Y. 441, 84 N. E. 392, the claim required to be filed by the plaintiff was defective in failing to state the time of the accident. There the written claim was not only retained without objection, but the claimant was examined by the city attorney before the claims commit-

tee of the common council. Although the facts there were much stronger for the plaintiff than the facts in the case at bar, we held that there was no waiver of the city's rights.

None of the other questions presented need to be discussed. We think the judgment of the trial court dismissing the complaint was right, and should have been affirmed at the Appellate Division.

The order of the Appellate Division should be reversed, and the judgment of the Trial Term affirmed, with costs to the appellant in all courts.

GRAY, WILLARD BARTLETT, HIS-  
COCK, and CHASE, JJ., concur. CULLEN,  
C. J., and HAIGHT, J., dissent.

Order reversed, etc.

(193 N. Y. 560)

#### WOODRUFF v. PEOPLE et al.

(Court of Appeals of New York. Dec. 15, 1908.)

#### 1. SUBMISSION OF CONTROVERSY (§ 3\*)—CON- TROVERSIES SUBJECT TO SUBMISSION.

Under Code Civ. Proc. § 1279, authorizing submission of a controversy that might be the subject of an action, and section 1280, making the controversy an "action" on filing of the record of submission, and section 1281, prohibiting the allowance of certain provisional remedies in such action, and requiring the action to be tried upon the case alone, a controversy cannot be submitted unless it can be determined in an action as distinguished from a special proceeding.

[Ed. Note.—For other cases, see Submission of Controversy, Cent. Dig. §§ 4, 5; Dec. Dig. § 3.\*]

#### 2. APPEAL AND ERROR (§ 19\*) — CERTIFIED QUESTIONS—QUESTIONS ANSWERABLE.

The Court of Appeals cannot answer abstract questions of law to aid determination of actions not commenced, but is limited to questions controlling the decision of pending actions and proceedings, when certified by the Appellate Division according to law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 64, 66; Dec. Dig. § 19.\*]

#### 3. SUBMISSION OF CONTROVERSY (§ 7\*)—REC- ORD—MATTER TO BE SET FORTH.

Under Code Civ. Proc. § 1281, the record of a submission of controversy should set forth the relief demanded by the parties, and the general nature of the judgment to be entered by the Appellate Division as the court of first instance, if the action is in the Supreme Court.

[Ed. Note.—For other cases, see Submission of Controversy, Cent. Dig. § 8; Dec. Dig. § 7.\*]

#### 4. SUBMISSION OF CONTROVERSY (§ 3\*)—CON- TROVERSIES SUBJECT TO SUBMISSION—REM- EDY BY SPECIAL PROCEEDING.

Code Civ. Proc. § 1279, authorizing submission of a controversy that might be the subject of an action, a controversy cannot be submitted where, if the questions are answered in plaintiff's favor, judgment is to be entered directing defendant highway commissioners to lay out a highway petitioned for by plaintiff, such relief being properly granted through mandamus, and where, if the questions are answered in defendant's favor, a judgment is to be entered affirming defendant's order denying plain-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tiff's petition—relief properly awarded on certiorari.

[Ed. Note.—For other cases, see Submission of Controversy, Dec. Dig. § 3.\*]

Appeal from Supreme Court, Appellate Division, Third Department.

Submitted controversy between Timothy L. Woodruff and the People of the State of New York and others. From the judgment of the Appellate Division, Third Department (127 App. Div. 934, 111 N. Y. Supp. 1150), plaintiff appeals. Reversed and dismissed.

Julius M. Mayer and George N. Ostrander, for appellant. Ellis J. Staley and John K. Ward, for respondents.

VANN, J. This was an attempt to submit a controversy pursuant to section 1279 of the Code of Civil Procedure. All that the record of submission shows is that on the 9th of May, 1908, the plaintiff presented a petition to the highway commissioners at the town of Arietta, Hamilton county, alleging certain facts and asking those officers to lay out a highway in said town. They refused to do so, upon the ground that they had no jurisdiction, because some of the lands through which the proposed highway was to be opened constituted part of the forest preserve. Some other facts were set forth in the stipulation for submission relating to certain letters patent, deeds, etc., but nothing to show an existing controversy between the parties other than as stated. The stipulation, which is signed by the plaintiff, the forest, fish, and game commissioner, and the highway commissioners of said town, closes as follows: "The questions presented to this court for decision are: (1) Whether the letters patent constitute a dedication of 5 acres out of every 100 acres over which the highway commissioners of the town of Arietta, Hamilton county, could exercise jurisdiction for the purpose of laying out a highway therein, as provided by section 80, Highway Law (Laws 1890, p. 1192, c. 568)? (2) If said letters patent constitute a dedication of 5 acres out of every 100 acres over which the highway commissioners of the town of Arietta, Hamilton county, can exercise jurisdiction for the purpose of laying out a highway, are said commissioners deprived of jurisdiction for said purpose by reason of the lands being situate in and constituting a part of the Forest Preserve of the state of New York?"

The parties apparently intended that the submission should perform the function of a writ of certiorari to review the determination of the highway commissioners, or of a writ of mandamus to compel them to lay out the proposed road. No controversy, however, can be the subject of a submission, under the Code of Civil Procedure, unless it "might be the subject of an action." Section 1279. Upon filing the record of submission "the con-

troversy becomes an action." Section 1280. Certain provisional remedies "cannot be granted in such an action," and "the action must be tried by the court upon the case alone." Section 1281. Thus the statute indicates that, unless the controversy can be determined by an action as distinguished from a special proceeding, the parties have no right to submit to the court any question to be determined. We are not authorized to answer abstract questions of law in order to aid the determination of actions not yet commenced. We can only answer questions which control the decision of pending actions or proceedings, and then only when they are certified to us by the Appellate Division according to law. Moreover, the record of submission should set forth the relief demanded by either party, and the general nature of the judgment to be entered by the Appellate Division, as the court of first instance, "if the action is in the Supreme Court." Section 1281. Thus it has been held that "a case must be presented in which a judgment may be rendered in favor of one and against the other of the parties to the submission, and the case must indicate what judgment is asked for." *Williams v. City of Rochester*, 2 Lans. 169. The Code "does not mean that the opinion of the Appellate Division can be obtained in a proceeding of this character, upon a mooted question of law merely because the answer thereto would, or might be, a guide to the determination of a lawsuit between the parties interested, to be instituted upon other and further facts than those stated. The Code contemplates the existence and presentation of a state of facts, upon which the person named as plaintiff in the submission could bring an action at law or in equity against the person named therein as defendant, and which of themselves, if established by proof in such an action, would entitle the person named as plaintiff to some sort of a judgment against his adversary, if the court agreed with the plaintiff as to the law applicable to the facts." *Clapp v. Guy*, 31 App. Div. 535, 52 N. Y. Supp. 33. In a purported submission the court was asked for its opinion upon three formulated questions, but no authority was given to direct judgment. The Appellate Division said: "Until the parties stipulate that a judgment may be directed herein, and also what the nature of the judgment shall be, in view of the contentions of the respective parties, we cannot exercise any jurisdiction in the matter." *Marshall v. Hayward*, 67 App. Div. 137, 73 N. Y. Supp. 592.

Since the argument the parties have filed with us a stipulation "that the record in the above-entitled case be amended by inserting therein, at the end of the submitted controversy, \* \* \* the following additional statement: 'Wherefore judgment is demanded, with costs as follows: (1) In the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

event of the questions submitted being determined in favor of the plaintiff, that judgment be made directing the highway commissioners of the town of Arietta, Hamilton county, to lay out the highway applied for in the petition of said plaintiff herein; or (2) in the event of the questions submitted being determined in favor of the defendants, that a judgment be made affirming the order dated May 9, 1908, of the highway commissioners of the town of Arietta, Hamilton county, denying said application of the plaintiff.' We have often held that we can review the determination of the Appellate Division only upon the record that was before that court, but perhaps we may refer to the stipulation as part of the argument of counsel, in order to learn the position of the parties, because it shows conclusively that the function which they sought to have the submission perform is such only as could be attained through one or more special proceedings. If we answer the questions in favor of the plaintiff, the relief now demanded is such as should be sought by a writ of peremptory mandamus, and if we answer them in favor of the defendants, the relief sought should be reached by a writ of certiorari. We can award neither form of relief upon a submission under section 1279 of the Code. Whether any statute authorizes the submission of a controversy in behalf of the state we do not consider.

The judgment of the Appellate Division is reversed, and the submission dismissed, without costs to either party.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT, and CHASE, JJ., concur.

Judgment reversed, etc.

(193 N. Y. 551)

**BROOKLYN DISTILLING CO. v. STANDARD DISTILLING & DISTRIBUTING CO.**

(Court of Appeals of New York. Dec. 15, 1908.)

**CORPORATIONS (§ 428\*)—OFFICERS—ACTING ADVERSELY—LIABILITY ON LEASE—MONOPOLIES.**

Where the president of one corporation is also actively interested in the affairs of another corporation, and in the furtherance of the interest of the latter, and without notice to the former, and in order to create a monopoly, procures from the first corporation a lease in furtherance of the monopoly, which he himself executes, the second corporation cannot defend an action for rent on the ground of the monopolistic purpose of the lease, since the rule that an agent's knowledge will not be imputed to the principal where the agent acts adversely to the principal applies so that the wrongful purpose of the lessor's president cannot be imputed to the lessor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1749, 1760, 1761; Dec. Dig. § 428.\*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Brooklyn Distilling Company against the Standard Distilling & Distributing Company for rent. From a judgment of the Appellate Division (120 App. Div. 237, 105 N. Y. Supp. 204) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Charles W. Pierson, for appellant. Herbert Parsons, for respondent.

**WILLARD BARTLETT, J.** This is an action to recover rent claimed to be due under a three years' lease of the plaintiff's distillery premises in the borough of Brooklyn, executed on the 28th day of June, 1898. The defendant entered into possession of the property and paid the installments of rent due thereon until November 1, 1899, since which date it has refused to pay on the ground that the lease was made in furtherance of a plan to create a monopoly, and was, therefore, contrary to public policy, and not enforceable in law. This was the sole defense relied upon on the trial, and is the sole defense presented for our consideration upon the appeal.

The defendant corporation, according to the findings of the trial judge, was organized for the purpose of controlling and fixing the price of spirits and alcohol in the state of New York and throughout the United States, and it acquired a large number of properties, including the lease sued on, in furtherance of that purpose.

Mr. F. O. Matthiessen was the president of the plaintiff corporation, and executed the lease in its behalf. He was also actively interested in the affairs of the defendant corporation, as appears from the twelfth finding of fact, which is as follows:

"Twelfth. On June 27, 1898, on which date the defendant was incorporated, and pursuant to arrangements previously made by those interested in the incorporation of the defendant, including F. O. Matthiessen, the said F. O. Matthiessen was elected one of its fourteen directors, and was constituted one of the seven members of its executive committee. He took part in the proceedings for the organization of the company, and prior to its organization became one of the underwriters to supply the money to be provided for working capital."

The trial court further found that there was no contract between the defendant company and the plaintiff company except the lease; that there was no contract, nor was anything said to the effect that either the plaintiff or the defendant should not be at liberty to distill spirits at will when and where they liked; that the plaintiff company did not participate in the formation of the defendant company or in any arrangement preliminary thereto; that the plaintiff company had no notice of the arrangement for the formation of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the defendant company, unless such knowledge as was possessed by Mr. F. O. Matthiessen constituted notice to it; and, finally that "such knowledge as was possessed by the said F. O. Matthiessen came to him by reason of his relation to the defendant company as one of the parties concerned in the arrangement for its formation as an underwriter, as a member of its board and its executive committee, and by reason of the efforts which he made to procure the lease in question for the defendant company."

Assuming that the scheme in aid of which the defendant corporation procured this lease was a combination in restraint of trade, was Mr. Matthiessen's knowledge of its nature imputable to the lessor under the circumstances? We think that this question must be answered in the negative, and that the defendant's appeal must, therefore fail. The case clearly falls within the doctrine declared by this court in *Benedict v. Arnoux*, 154 N. Y. 715, 728, 49 N. E. 326, where it was held that when an agent forms the purpose of dealing with his principal's property for his own benefit and advantage, or for the benefit and advantage of other persons who are opposed in interest, he ceases in fact to be an agent acting in good faith for his principal, and the presumption that he has disclosed all the facts that have come to his knowledge no longer prevails. It is plain from the findings that what Mr. Matthiessen had at heart were the interests of the lessee in opposition to those of the lessor. His information, therefore, to the effect that the lessee's purpose was an unlawful one, assuming it to have been such, did not charge the lessor with knowledge of the fact.

This view is decisive of the appeal, and it seems so clearly applicable to the facts of the case that we do not deem it necessary to discuss the other points or review the numerous cases presented in the briefs of counsel.

The judgment should be affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, WERNER, HISCOCK, and CHASE, JJ., concur.

Judgment affirmed.

(183 N. Y. 543)

CITY OF NEW YORK v. NEW YORK CITY RY. CO. (three cases).

(Court of Appeals of New York. Dec. 15, 1908.)

# 1. STREET RAILROADS (§ 69\*)—REGULATION AND OPERATION—LICENSES.

The charter of a street railroad company (Laws 1860, p. 1042, c. 513) provides that the company should be subject "to the payment to the city of the same license fees annually for each car run thereon as is now paid by other city railroads in said city." When the fran-

chise was granted no railroad in the city paid license fees on each car run by it during the year, but licenses were paid on the basis of the greatest number of cars in daily use at the busiest season of the year, and for over 40 years after the granting of the franchise in question, the company paid license fees upon that basis. Two years before the franchise was granted the city council had passed an ordinance requiring each passenger railroad car running in the city below a street specified to pay \$50 annually. *Held* that, as the terms of the charter were vague, the construction adopted by the parties interested for a number of years, should be adopted by the court, and the company held liable for the specified fee on each car of the greatest number in daily use at the busiest season of the year.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 69.\*]

# 2. STREET RAILROADS (§ 14\*)—SPECIAL CHARTERS—OPERATION AND EFFECT.

A special charter to a city railway company, when accepted and acted upon by the company, becomes a contract.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 14.\*]

# 3. CONTRACTS (§ 170\*)—CONSTRUCTION BY PARTIES.

When the parties to a contract of doubtful meaning enforce it for a long time by a consistent and uniform course of conduct, so as to give it a practical meaning, the courts will treat it as having that meaning, even if, as an original proposition, they might have given it a different one.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 753; Dec. Dig. § 170.\*]

# 4. STATUTES (§ 219\*)—CONSTRUCTION.

When the meaning of a statute is doubtful, a practical construction by those for whom the law was enacted, or by public officers whose duty it was to enforce it, acquiesced in for a long period of time, is entitled to great, if not controlling, influence, but the ambiguity must not be captious, but should be so serious as to raise a reasonable doubt in a fair mind, reflecting honestly upon the subject.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 236; Dec. Dig. § 219.\*]

# 5. CONSTITUTIONAL LAW (§ 12\*)—CONSTRUCTION.

A practical construction of a doubtful provision in a Constitution should be given controlling weight in its interpretation.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 9; Dec. Dig. § 12.\*]

# 6. JUDGMENT (§ 701\*)—CONCLUSIVENESS—PARTIES CONCLUDED.

Judgment against a street railroad company, in an action by the city to collect license fees on its cars, in which the court construed the charter provision as to license fees as authorizing the city to collect license fees on the number of cars run during its busiest season, is conclusive, in an action brought by the city under the same charter provision against the company's successor for the collection of license fees on its cars, as the law once laid down upon a specified state of facts is binding upon the parties to the controversy and their privies for all time.

[Ed. Note.—For other cases, see *Judgment*, Dec. Dig. § 701.\*]

Appeal from Supreme Court, Appellate Division, First Department.

Three actions by the City of New York against the New York City Railway Company for license fees on cars. In the first action plaintiff recovered a verdict, and in

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the second and third actions the verdict was in favor of defendant. Plaintiff appeals from judgments in all the cases, as it deemed the judgment in the first case insufficient in amount. Judgments (124 App. Div. 836, 109 N. Y. Supp. 1126) affirmed.

See, also, 55 Misc. Rep. 134, 106 N. Y. Supp. 293.

The first of the above-entitled actions was brought to recover the sum of \$115,150 "for passenger car license fees," alleged to be due from the defendant as the final successor of the Broadway & Seventh Avenue Railway Company, incorporated by chapter 513, p. 1042, Laws 1860, for the years 1902 to 1905, inclusive. Upon the trial of that action a verdict was directed in favor of the plaintiff for the sum of \$22,850, and judgment was entered accordingly. The defendant did not appeal, but the plaintiff, deeming the amount of the recovery too small, appealed to the Appellate Division, which unanimously affirmed the judgment. The second action was brought to recover the sum of \$15,800 for like fees alleged to be due from the defendant as the successor of the Dry Dock & East Broadway Railroad Company, incorporated by chapter 512, p. 1038, Laws 1860, for the years involved in the first action. The third action was brought to recover the sum of \$11,300 for like fees alleged to be due from the defendant as the successor of the Bleecker Street & Fulton Ferry Railroad Company, incorporated by chapter 514, p. 1046, Laws 1860, for the same years. Upon the trial of the second and third actions a verdict was directed in each in favor of the defendant, and the respective judgments entered accordingly were affirmed by the Appellate Division. The plaintiff appealed to this court from the judgments rendered by the Appellate Division in all of said actions, and the appeals were argued together. The issues were the same in each, except that no plea of former suit in bar was interposed in the third. The charters of all the original companies involved in the three actions contained the same provision in relation to the payment of license fees.

Francis K. Pendleton, Corp. Counsel (Theodore Connolly, of counsel), for appellant. Joseph P. Cotton, Jr., for respondent.

VANN, J. (after stating the facts as above). The questions of law involved in these appeals are the same in each action, with one exception to be noted thereafter, and for convenience the discussion will be confined in form to the first action, although what is said is equally applicable to all except as otherwise specified. The charter of the defendant's predecessor was granted by a special statute entitled "An act to authorize the construction of a railroad in Seventh avenue, and in certain other streets and avenues of the city of New York," which

became a law on the 17th of April, 1860, "notwithstanding the objections of the Governor." Laws 1860, p. 1042, c. 513. By the first section of that act, certain persons and their assigns were authorized to construct, operate, and use the railroad in question upon certain designated streets and avenues. The second section thereof is as follows: "Said railroad shall be constructed on the most approved plan for the construction of city railroads, and shall be run as often as the convenience of passengers may require, and shall be subject to such reasonable rules and regulations in respect thereto as the common council of the city of New York may from time to time by ordinance prescribe; and to the payment to the city of the same license fee annually for each car run thereon as is now paid by other city railroads in said city; and the said persons and their assigns are hereby authorized to charge the same rate of fare for the conveyance of passengers on said railroad as is now charged by other city railroads in said city." Upon the trial it was stipulated by the parties that on the 17th of April, 1860, the day when the franchise was granted, no city railroad in the city of New York paid car license fees computed "on the basis of each and every car run by it during the year," but all that paid any license at all paid "on the basis of the greatest number of cars in daily use by the company at the busiest season of the year," and that for over 40 years prior to 1902, which is the first of the years now involved, the defendant and its lessors paid license fees for cars operated under said franchise upon the latter basis only. No question was raised as to the amount of the fee, and the only question litigated related to the proper method of computation. The defendant claimed that its obligation was to pay what other railroads were in fact paying when the act of 1860 was passed. The plaintiff claimed that the obligation of the defendant was not to pay what other city railroads were in fact paying at that date, but what they ought to have paid according to law.

The main reliance of the city is an ordinance passed by the common council on the 31st of December, 1858, which, among other things, provided that "each and every passenger railroad car running in the city of New York below One Hundred and Twenty-Fifth street shall pay into the city treasury the sum of fifty dollars annually, a certificate of the payment to be procured from the mayor," etc. If we assume that the Legislature had this ordinance in mind when it passed the act of 1860, should we further assume that it considered the letter thereof only, or the ordinance as then construed and enforced by the city authorities? Did it extend to exact a license fee for a car running but one day in a year to take the place of a disabled car, or a car borrowed

for a special occasion, that had already paid the fee under another franchise, or for open cars substituted in the summer for the closed cars of winter? If the statute and ordinance are to be read together, both should receive a reasonable construction. It is insisted that it would not be reasonable to hold that all the cars, whether run regularly or not, were to be included, but those only that were used in conducting the ordinary business of the road as distinguished from those used rarely or for special purposes. The charter, when accepted and acted upon by the company, became a contract, and there was doubt as to what the contract meant. The terms of the grant were ambiguous. The Legislature by the act of 1860 did not directly fix the fees, either as to amount or the method of computation, but referred to an existing fact, and made that the basis of both. That fact was the amount paid for each car by other city railroads. Some of those roads paid no license fees, and others paid at the rate of \$50 per car for the greatest number in daily use during the busiest season. That was the rate actually paid, as contrasted with the theoretical rate of \$50 for "each and every passenger railroad car running in the city of New York," which the plaintiff now claims should have been paid by those other roads according to the ordinance.

Under these circumstances the practical construction of the parties by a uniform course of conduct under all administrations of the city government for more than 40 years is of controlling importance. When the parties to a contract of doubtful meaning, guided by self-interest, enforce it for a long time by a consistent and uniform course of conduct, so as to give it a practical meaning, the courts will treat it as having that meaning, even if as an original proposition they might have given it a different one. *Woolsey v. Funke*, 121 N. Y. 87, 92, 24 N. E. 191; *Syms v. Mayor, etc.*, of N. Y., 105 N. Y. 153, 157, 11 N. E. 369; *French v. Carhart*, 1 N. Y. 98, 102; *Livingston v. Ten Broeck*, 16 Johns. 14, 22, 8 Am. Dec. 287. So, when the meaning of a statute is doubtful, a practical construction by those for whom the law was enacted, or by public officers whose duty it was to enforce it, acquiesced in by all for a long period of time, in the language of Mr. Justice Nelson, "is entitled to great, if not controlling, influence." *Chicago v. Sheldon*, 9 Wall. 50, 54, 19 L. Ed. 594. In *People ex rel. Williams v. Dayton*, 55 N. Y. 367, the practical construction of a doubtful statute by the legislative and executive departments, continued for many years, was held to have "controlling weight in its interpretation." To the same effect is the case of *Power v. Village of Athens*, 99 N. Y. 592, 2 N. E. 609. It is held to have great weight even in the construction of the Constitution itself. *People*

*v. Home Insurance Co.*, 92 N. Y. 328, 337; *People ex rel. Einsfeld v. Murray*, 149 N. Y. 367, 376, 44 N. E. 146, 32 N. E. 344. As the statute and the ordinance are not clear as to the method of computing the license fees, we give effect to the practical construction of the parties continued for so long a period and hold that the basis of the greatest number of cars in daily use at the busiest season of the year is the method that is now binding upon both parties. This was the position taken by the courts below, and we will not repeat their reasoning.

The circumstances under which the doctrine of practical construction is applied or withheld by the courts is well illustrated by comparing the three appeals now under consideration with the appeals in three other actions brought by the city against certain other railroad companies for the recovery of license fees. In those cases the doctrine was not applied by the courts below, and yet we are about to affirm the judgments rendered therein. 193 N. Y. 679, 680, 87 N. E. 1117. The controlling distinction between the two series of cases is that in the one there was an ambiguity in the grant, and in the other there was not. In the first series we have tried to show in what respect the meaning was doubtful. In the second series the franchise provided, in substance, that each passenger car used on the road should be licensed every year by the mayor, and that the company should pay for such license such sum as the common council should thereafter determine. By an ordinance subsequently passed by the common council and approved by the mayor, the license fee was fixed at a certain sum for each and every passenger car run on the road during the year, and it was further provided that a certificate of payment of the fee should be posted in each car used on the road, under a penalty for operating any car unless a certificate was posted therein. Under these circumstances it was held by the Supreme Court that, notwithstanding the fact that said companies for many years had paid on the basis of the greatest number of cars run during the busiest season, the doctrine of practical construction should not be applied, because there was no room for its application, inasmuch as there was no ambiguity in the grant. We think that position is sound, for the doctrine is never applied unless the door is opened by an ambiguity, which is the foundation of the principle upon which the doctrine is founded. It goes without saying that the ambiguity must not be captious, but should be so serious as to raise a reasonable doubt in a fair mind, reflecting honestly upon the subject, before the principle of practical construction can be applied.

In the first series of cases, now under direct consideration, with the exception of the third, the defendant pleaded, among other defenses, a former suit in bar, in that on the 25th of October, 1875, the plaintiff or its

predecessor commenced an action against the Broadway & Seventh Avenue Railway Company the defendant's ultimate lessor, to recover the amount alleged to be due for car license fees during the years 1864 to 1874, inclusive, under the statute and ordinance involved herein. It is alleged that the question at issue, litigated and determined therein, was upon what number of cars said company was each year obliged to pay car license fees, and that the judgment rendered at the trial court and affirmed in this court was that said company should pay fees, not on each and every car operated by it during each year, but on the greatest number of cars in daily use by it during the busiest season of the year. The record, which was read in evidence, sustained the plea in every respect, and judgment was rendered accordingly. The parties to the present action are privies to the parties in that, and the proof in that was similar in character to the proof in this. The method adopted of establishing the facts by stipulation, at least in the absence of fraud which is not claimed, does not differ in its effect from the method of establishing the facts by evidence introduced in the ordinary manner. The facts having been established, the court announced the law applicable to those facts; and, even if the decision was wrong, it is as binding on the parties in this action, as it was on the parties in that, upon the principle of *res adjudicata*. The law once laid down upon a specified state of facts is binding upon the parties to the controversy and their privies for all time. *Brown v. Mayor, etc.*, of N. Y., 66 N. Y. 885, 890; *Williams v. Barkley*, 165 N. Y. 48, 58 N. E. 765.

The judgments appealed from should be affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT, and CHASE, JJ., concur.

Judgments affirmed.

(237 Ill. 402)

#### GILMORE v. LEE.

(Supreme Court of Illinois. Dec. 15, 1908.)

#### 1. GIFTS (§ 82\*)—CAUSA MORTIS—UNDUE INFLUENCE—EVIDENCE.

In an action by an heir to set aside a gift causa mortis made by deceased to his spiritual adviser, evidence held sufficient to show that the gift was procured by undue influence.

[Ed. Note.—For other cases, see Gifts, Dec. Dig. § 82.\*]

#### 2. GIFTS (§ 80\*)—CAUSA MORTIS—UNDUE INFLUENCE — PRESUMPTIONS — BURDEN OF PROOF.

The relation of priest or spiritual adviser and parishioner is one of confidence, and a gift causa mortis by a parishioner to her priest is in and of itself *prima facie* void, and the burden of proof rests on such priest to show that

the gift was freely and voluntarily made, and that it was not the result of undue influence.

[Ed. Note.—For other cases, see Gifts, Dec. Dig. § 80.\*]

#### 3. CHARITIES (§ 16\*)—VALIDITY OF PURPOSE—PRAYERS OR MASSES.

A gift causa mortis to a priest for masses for the repose of the donor's soul is valid as a charitable gift.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 40; Dec. Dig. § 16.\*]

Scott, J., dissenting.

Appeal from Appellate Court, Third District, on Error to Circuit Court, Jersey County; J. A. Creighton, Judge.

Action by Margaret Gilmore against Bernard W. Lee. From a judgment of the Appellate Court (137 Ill. App. 498), reversing a decree of the chancellor setting aside a gift causa mortis as to personal property, defendant appeals. Modified and affirmed.

Thomas F. Ferns, David E. Keefe, and Roy A. Nutt, for appellant. Hamilton & Hamilton and H. W. Pogue, for appellee.

CARTWRIGHT, C. J. Mary J. Knapp, a widow, 68 or 69 years of age, living alone in Jerseyville, Jersey county, became suddenly and severely ill at her home on the evening of Thursday, the 21st day of April, 1904, and was found lying on the floor in an unconscious condition by Mrs. Kinsella, a neighbor. She recovered consciousness in 15 or 20 minutes but pneumonia developed, and from this disease she died on the morning of the following Tuesday. She was ignorant, illiterate, superstitious, a very devout member of the Roman Catholic Church, and a regular attendant upon church services. Bernard Lee, the appellant, was a Catholic priest residing in Jerseyville and officiated at the church which she attended. Mrs. Knapp had been acquainted with him during the time of his residence at that place which, however, covered but a few months, and had for him a very high regard. After recovering consciousness at the time of the beginning of her illness, Mrs. Kinsella asked whether a doctor should be sent for, and Mrs. Knapp requested that the priest be first summoned. Accordingly a message was sent to him, and he came the next morning. During that day, Friday, April 22, 1904, Mrs. Knapp made to the priest a deed for her real estate in Jerseyville, of the value of about \$1,600, and delivered to him promissory notes and a certificate of deposit in a bank, all of which, in the aggregate, were of the value of a little more than \$1,200. On the next day, Saturday, April 23d, she executed a will, in and by which she devised and bequeathed all her property, both real and personal, to Father Lee, the priest. Her only surviving heir was her daughter, Margaret Gilmore, the appellee, a married woman residing at Winona, Minn., who shortly after her birth was taken into the family of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a cousin of Mrs. Knapp and who resided in that family until the time of her marriage, which occurred in the seventeenth year of her age. The relations between mother and daughter were not very intimate, but they corresponded, and Mrs. Knapp made several visits to her daughter during the married life of the latter. Mrs. Knapp could not write, and her letters were written by Mary Freeman for her. The daughter had never been in Jerseyville during the time of her mother's residence there—a period of 39 years—but there was no ill feeling or unfriendliness between her and her mother, and Mrs. Knapp told several persons before her sickness that she wanted to sell her property in Jerseyville, and, if she could do so, would go north and live with her folks. After Mrs. Knapp's death the daughter, Margaret Gilmore, filed a bill against Father Lee to set aside the deed and the transfer of the personal property. The bill alleged the existence of a confidential relation between the priest and the deceased, in which the former was the dominant or controlling party and the latter the dependent or yielding one, and charged that the conveyance of the real estate and the delivery of the personal property were obtained by fraud and undue influence exercised by him. Afterward, the will having been admitted to probate, a supplemental bill was filed by Mrs. Gilmore against the priest and the person named as executor to contest the will, on the ground that it, too, had been obtained by the exercise of fraud and undue influence on the part of Father Lee. The priest by his answer denied the existence of any confidential relation, denied that either the transfer of the property or the execution of the will was obtained by fraud or undue influence, and denied that appellee was the daughter of Mrs. Knapp. To the answers general replications were filed. The question whether appellee was the daughter of the deceased was separately tried, and resulted in a decree in favor of the daughter. The validity of the will was tried by a jury and resulted in a disagreement. Thereafter a jury was waived, and the issue as to the validity of the will was submitted to be tried by the court without a jury. The will was offered in evidence, and the proponents then refused to introduce proof to show its validity and refused to further propose the writing as the will of the deceased, for the reason, as appears from the decree, that the proponents alleged that Father Lee had released and relinquished all his right, title, and interest under the said last will and testament. Thereupon, for want of evidence to establish *prima facie* the validity of the will, a decree was entered adjudging that the instrument was not the last will and testament of Mary J. Knapp, deceased. Evidence was then taken in open court in reference to the validity of the gifts of real estate and personal property; the contention of Father Lee being that the transfers were made to him by Mrs. Knapp in expectation of death

and were valid gifts *causa mortis*. The chancellor decreed that the transfer of the personality was a valid gift *causa mortis* to Father Lee. He also adjudged that the deed was void on the theory that real estate cannot be conveyed as a gift of that kind. Mrs. Gilmore appealed to the Appellate Court for the Third District, where the decree of the circuit court was reversed as to the personal property. From that judgment of the Appellate Court Father Lee prosecuted an appeal to this court, and contends that the Appellate Court erred in failing to affirm the decree of the circuit court.

The evidence clearly established the existence of the confidential relation of priest and parishioner, and showed that the transfer of the personality, if valid, was a gift *causa mortis*. On the morning after Mrs. Knapp was taken ill, Father Lee, after calling on her, sent a physician to her at her request. Dr. Barry, who was called in consultation before her death, had been her physician, and there is evidence that she wanted him, but for some reason which does not appear in the evidence Father Lee sent Dr. Dugan. Father Lee then went to a notary that morning, and had a deed drawn for the purpose of conveying to himself the real estate of the sick woman. He did not have the numbers of the lots, and, at the suggestion of the notary, went to the courthouse and got them. He then left the notary and returned at 1 or 2 o'clock, and told the notary that he thought it would not be best for them to go to the house together—that he would go first and the notary might follow. The notary shortly went to Mrs. Knapp's residence, and found her in bed and Father Lee by the bed. Mrs. Knapp recognized the notary, and he said to her that he had there a deed conveying her property to the priest, and she replied: "That is what I want." She signed the deed by her mark, the notary holding the pen, but she trembled so that the notary was unable to get the pen down to the paper, and the priest laid his hand over hers to steady it, and the mark was made. The notary had filled up the acknowledgment before coming to the house and the deed was delivered to the priest. Afterward, on the same day, the priest made arrangements to, and did, administer the final rites of the church to Mrs. Knapp. During the morning he had requested Mrs. Nellie Cope, who lived in a distant part of Jerseyville, to come to the Knapp house to help care for the sick woman, and, when he reached the house, to administer the sacrament. Mrs. Cope and Mrs. Kinsella were there. The others left the priest alone with Mrs. Knapp, and after the sacrament Mrs. Cope returned to the sick room. Henry Sandehouse, the father of Mrs. Cope, testified that he was also there, and Mrs. Cope and Sandehouse both testified that as soon as they came in after the sacrament was administered Mrs. Knapp took certain papers from under the mattress

upon which she was lying and handed them to the priest, saying to him that they were notes and mortgages and that she gave them to him; that he opened and read them, and said they were no good unless properly indorsed before witnesses; that she told him to write her name, and she would make her mark; that he wrote her name on the back of each of the notes, and in each instance she touched the pen and made her mark in that way; that they signed as witnesses to her signatures; that afterwards she handed to the priest the certificate of deposit for \$250 and said to him that she gave him that certificate of deposit "to use for masses for me," and that the certificate was indorsed in the same manner as the notes, but the signature was not witnessed and the papers were taken away by the priest. Sandehouse admitted, on his cross-examination, that he testified as a witness in the county court upon the probate of the will, which was executed on Saturday, that he had never been in Mrs. Knapp's house but once before the time the will was executed, and that said occasion was four years before. If that testimony was true, he was not present when the gift was made. Mrs. Cope testified that she came to the Knapp home between 1 and 2 o'clock on Friday, and that Mrs. Knapp was then standing on the floor, barefoot, and in her night clothes, with some keys in her hand, where she remained three or four minutes looking for something; that when she turned around she had some papers in her hand; that she then went to the bureau and unlocked the bureau drawer, and put her pocketbook in it and locked it; and that she then went to the bed and put the papers under the mattress and the notes under her pillow and got into bed. She further testified that when she came in she asked Mrs. Knapp how she was, and she said she was not very well; that she spoke distinctly, and the witness did not notice any difference in her voice; that she was apparently as strong as she had ever been; that she further said she was feeling well only that she had a pain in her side; and that after she got into bed she told the witness to prepare the table, as Father Lee was coming down to give her holy communion. Mrs. Kinsella, Miss Freeman, and Annie Shearin, who assisted in caring for the sick woman and saw her frequently, testified that she was very sick, that she was too ill to have any conversation and could not raise herself in bed, and, when they gave her medicine, they had to lift her. The evidence was that the last rites of the church are only administered to a person in the last illness, when there is no present hope of recovery.

On Saturday, April 23d, the next day after the note transaction, Father Lee went to the office of the circuit clerk and wrote a will for Mrs. Knapp, in which he was the sole beneficiary. He had some discussion with the deputy, and at the suggestion of

the deputy he went to the office of the county clerk to get a form for the will, and he dictated it to the deputy in that office, who wrote it on a typewriter. The will as then drawn only included the personal property, and the priest already had the notes and certificate of deposit, but the will was afterward written on another typewriter and the real estate was added. Father Lee took the will to Mrs. Knapp's home on Saturday and it was executed by her.

The relation of priest or spiritual adviser and parishioner is a confidential one. *Dowie v. Driscoll*, 203 Ill. 480, 68 N. E. 53; 2 *Pomeroy's Eq. Jur.* § 963; 14 *Am. & Eng. Ency. of Law* (2d Ed.) 194, 1013. That relation existed between Father Lee and Mrs. Knapp when the efforts were made to transfer to him as gifts, and without consideration, all of her property. To effect that object different methods were employed: First, the deed of the real estate; second, the indorsement and delivery of the notes and certificate of deposit; and, third, the execution of the will. Father Lee was active in having the deed prepared and executed and he also drew the will and procured its execution, and, in the absence of contradictory evidence, the only justifiable inference from these facts would be that the gifts were procured by his influence, and that the attempts to transfer the property by the different methods constituted but one transaction. The natural conclusion would be that Father Lee was equally active in obtaining the gift of the personal property by indorsement and delivery as he was to obtain the same property by will or the real estate by the deed. Mrs. Knapp had a daughter, who was her only heir and in poor circumstances, and on Friday, when she was so ill, a telegram was given to Dr. Dugan to send to the daughter, or he agreed to send one, and did not do it. The evidence is contradictory as to whether the failure to send it was at the instance of Father Lee or not. The evidence would justify a conclusion that there was undue influence in fact exercised by Father Lee. It is not necessary, however, that such a conclusion should rest upon the facts proved. It is a universal rule, founded upon public policy, that where a confidential relation exists, if a gift is made to the person in whom the confidence is reposed by reason of the relation, it is *prima facie* void. The law will presume, from the mere existence of the relation, that the gift was obtained by undue influence or improper means, and the burden of proof rests upon the donee to show that it was the free and voluntary act of the donor. Every confidential relation implies a condition of superiority by one of the parties over the other, and if the superior obtains a benefit, such as a gift, equity raises a presumption against its validity, and casts upon the donee the burden of proving affirmatively good faith, full knowledge, and independent action on the part of the donor.

Thomas v. Whitney, 186 Ill. 225, 57 N. E. 806; Sayles v. Christie, 187 Ill. 420, 58 N. E. 480; Michael v. Marshall, 201 Ill. 70, 66 N. E. 273; Dowie v. Driscoll, supra; 2 Pomeroy's Eq. Jur. § 956; 14 Am. & Eng. Ency. of Law (2d Ed.) 194, 1011; 29 Am. & Eng. Ency. of Law (2d Ed.) 119. Gifts causa mortis, being donations not made in conformity to the Statute of Wills, but made without the safeguards cast around the execution of wills, are not favored in the law. 20 Cyc. 1246. The presumption arising from a confidential relation does not arise from evidence, and, if there is undue influence in fact, the existence of any fiduciary relation is immaterial. Any gift proved to have been obtained by undue influence in fact will be set aside without the aid of any presumption, but, where a confidential relation exists, no other element is necessary to cast the burden of proof upon the beneficiary. Pomeroy says (section 955): "Nothing can tend more to produce confusion and inaccuracy in the discussion of the subject than the treatment of actual undue influence and fiduciary relations as though they constituted one and the same doctrine"—and this statement was quoted by this court in Thomas v. Whitney. The donee must prove the absence of undue influence, and in England the rule is that, in order to uphold a gift made to a person standing in a confidential relation, it must be shown that the donor had competent and independent advice in making it. This court has not adopted that rule as the only test, but in Thomas v. Whitney, supra, it was said that the burden is on the one receiving the benefit to show an absence of undue influence by establishing the fact that the party acted upon competent and independent advice of another or such other facts as will satisfy the court that the dealing was at arm's length, or he must show that the transaction was had in the most perfect good faith on his part, and was equitable and just between the parties. Father Lee was bound to show, under these rules, that the intention to give him the property originated with Mrs. Knapp without his influence, and that was not done.

The witnesses Mrs. Cope and Sandehouse were both discredited, he by his previous testimony that he had not been in the house for four years before the Saturday when the will was made, and she by the contradiction by three witnesses as to the material fact that Mrs. Knapp was up and around the room in April, barefoot and in her night-clothes, getting her papers together, and stating that she was not very ill when she was about to receive the rites administered to persons in their last illness. If the other witnesses and the circumstances are to be credited, Mrs. Cope's testimony that Mrs. Knapp got the papers from the wardrobe could not be true. The chancellor, however, heard the witnesses testify, and great

weight is to be given to his conclusion as to their credibility. It is not necessary to disagree with his conclusion, for the reason that, taking the statements of Mrs. Cope and Sandehouse at their face value, their testimony wholly failed to overcome the presumption against the transaction. It showed only that Mrs. Knapp, when she gave the papers to Father Lee, had an intention to make a gift to him. But that is not the question. It is not sought to set aside the alleged gift on the ground that Father Lee obtained the papers without the consent of Mrs. Knapp or against her will or that she did not intend to give them to him, and, of course, there could be no dispute of the fact that she indorsed them voluntarily, but the question upon which the rights of the parties depend is how that intention was produced. The law presumes from the existence of the confidential relation that the intention was produced by the undue influence of Father Lee, and it is no answer to show that Mrs. Knapp intended to give him her property when she indorsed the papers and handed them over, because it must be admitted that she had that intention. There was no proof that Mrs. Knapp acted upon competent and independent advice, or any affirmative proof of good faith or the absence of undue influence on the part of Father Lee.

So far as the certificate of deposit is concerned, if we accept the testimony of Mrs. Cope and Sandehouse, it was handed to the priest to be used for masses for the repose of the soul of the donor. That gift was for a charity and in support of the form of worship of the church to which Mrs. Knapp belonged. Hoeffler v. Clogon, 171 Ill. 462, 49 N. E. 527, 40 L. R. A. 730, 63 Am. St. Rep. 241. If the priest accepted the certificate of deposit for that purpose, he would be bound to perform the religious services to which it was to be applied, and, as a priest, would earn the money by so doing. We regard the disposition of the certificate of deposit as valid.

The judgment of the Appellate Court is modified so far as to sustain the transaction as to the certificate of deposit and to permit it to be used for the purpose designated by Mrs. Knapp, and, as so modified, the judgment is affirmed.

Judgment modified and affirmed.

SCOTT, J. (dissenting). It is to be observed that there is no direct evidence of any witness to any fraud practiced or undue influence used by Father Lee. If the execution of the deed, the transfer of the notes, and certificate of deposit and the execution of the will be regarded as one transaction, then the evidence of his activity in securing the execution of the deed and of the will and the evidence of the fiduciary relation raise the only valid presumption against the legal-

ity of the gift of personal property. If, however, the testimony of Mrs. Cope and Henry Sandehouse be true, Mrs. Knapp deliberately and of her own free will gave to the priest the notes and certificate of deposit. Their evidence as to what occurred at the Knapp residence is not contradicted; and, so far as the personal property is concerned, the only question seriously considered either by the circuit court or by the Appellate Court was as to whether this evidence of these two witnesses overcame the presumption which both the chancellor and the Appellate Court held existed against the validity of the transfer, and enabled the chancellor to say rightfully that the charge of fraud and undue influence was not established by a preponderance of the evidence. No attack was made upon the reputation of either of these witnesses for truth and veracity. They seem to have testified frankly. Their statements were not unreasonable, and do not appear to me to have been unworthy of belief. Certain circumstances were sworn to by other witnesses which tended to cast discredit upon their testimony as to immaterial matters, and it appears that Sandehouse upon a previous trial had made a statement which was inconsistent with his evidence given upon this trial, to the effect that he was at the Knapp house on Friday, April 22, 1904, the day upon which it is claimed the gift was made. Mrs. Kinsella, who was called by Mrs. Gilmore, however, testified that Mr. Sandehouse was there on the day and at the time when it is contended the notes and certificate were transferred. It is therefore not improbable that his earlier statement was a mistaken one. The chancellor, moreover, heard and saw these witnesses, and it seems to me that he was better able than either the Appellate Court or this court to say whether the testimony of Mrs. Cope and Mr. Sandehouse was false.

In *Beall v. Dingman*, 227 Ill. 294, 81 N. E. 386, we used language as follows: "The rule in chancery cases tried without a jury upon oral evidence is, as has been often stated by this court, that great weight should be attached to the findings of the chancellor, and his findings will not be reversed unless clearly and palpably contrary to the weight of the testimony." I think the decree entered by the chancellor could not be reversed if due regard was given to the law so stated. He based his finding upon the testimony of two witnesses, whose reputations were not attacked, one of whom was not contradicted at all as to material matters, and the other of whom was contradicted as to such matters only by proof of an earlier statement of his own, which may have been a mistaken one. For us to say that their testimony was wholly untrue when the chancellor placed credence therein is to fail to apply the rule that requires us to give weight to his finding upon

the facts where the witnesses testify before him.

The judgment of the Appellate Court should be reversed, and the decree of the circuit court should be affirmed.

(237 Ill. 164.)

PEOPLE ex rel. HARBERG, County Collector, v. WAITE.

(Supreme Court of Illinois. Dec. 15, 1908.)

1. APPEAL AND ERROR (§ 268\*)—REVIEW PRECLUDED—FAILURE TO EXCEPT.

The Supreme Court cannot inquire into the sufficiency of the evidence to support a judgment, where no exception is preserved to the finding and judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1596-1608; Dec. Dig. § 268.\*]

2. APPEAL AND ERROR (§ 500\*)—REVIEW—GROUND FOR REVIEW—SUFFICIENTLY PRESERVED—RECORD.

Rulings admitting evidence are properly preserved for review where they are assigned for error and exceptions thereto are preserved by bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2297; Dec. Dig. § 500.\*]

3. APPEAL AND ERROR (§ 232\*)—OBJECTIONS TO EVIDENCE—SUFFICIENCY.

A general objection to the admission of a document was properly refused, being insufficient to preserve an objection on the ground that the document was secondary evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 218; Dec. Dig. § 232.\*]

Appeal from Henry County Court; Albert E. Bergland, Judge.

Application by the People, on the relation of J. A. Harberg, county collector, for judgment of sale of Hattie N. Waite's land. From a judgment sustaining objections to the application, the People appeal. Affirmed.

Henry Waterman and George S. Skinner, for appellant. George W. & Joseph L. Shaw, for appellee.

DUNN, J. This is an appeal from the judgment of the county court sustaining objections to an application for judgment of sale of certain real estate for an assessment levied thereon by the commissioners of Green River Special Drainage District. The district was organized under the farm drainage act (Hurd's Rev. St. 1908, c. 42). Five objections were filed to the assessment, of which the second was overruled and the other four were sustained. The first of these was that due notice was not given to the objector of the hearing by the commissioners of objections to the classification of her lands. No exception is preserved to the finding and judgment of the court. The sufficiency of the evidence to support the judgment cannot therefore be inquired into. *Climax Tag Co. v. American Tag Co.*, 234 Ill. 179, 84 N. E. 873; *People v. O'Gara Coal Co.*, 231 Ill. 172, 83 N. E. 140.

The assignments of error question the ac-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion of the county court in sustaining the first, fourth, and fifth objections and in admitting improper evidence in support of the fourth objection. The only exceptions preserved in the bill of exceptions are to the admission of evidence. The rulings of the court on the admission of evidence are therefore properly preserved for review so far as they have been assigned for error. *Climax Tag Co. v. American Tag Co.*, supra.

No assignment of error is made as to the admission of evidence, except evidence admitted in support of the fourth objection. In their reply brief, however, the appellants say: "While the first objection presented a proper question of fact for the consideration of the court, no competent evidence was introduced in support of the same. The order of the commissioners correcting and confirming the classification, containing a recital of the notice given of the hearing on the classification, was admitted in evidence over objections and an exception duly noted. This evidence was not competent. The notice itself should have been offered." No objection was made to the admission of the order of confirmation on the ground that it was secondary evidence. The objection was general, and it was not error to overrule it. No other exception is preserved in connection with the first objection. Whether the court erred in sustaining it depends upon an examination of the evidence, and the absence of an exception to the finding and judgment of the court precludes such examination. No error is shown in sustaining the first objection. It is unnecessary to inquire into the others.

The judgment is affirmed.

Judgment affirmed.

(227 Ill. 272)

PEOPLE v. LEE et al.

(Supreme Court of Illinois. Dec. 15, 1908.)

**1. PROSTITUTION (§ 5\*)—TRIAL—VERDICT.**

In a prosecution under *Hurd's Rev. St. 1905, c. 38, § 57d*, prohibiting the keeper of a house of prostitution or assignment house from permitting any unmarried female under the age of 18 years to live, board, stop, or room in such house, etc., the jury returned a verdict finding defendant "guilty of harboring a female under the age of 18 years in a house of prostitution, in manner and form as charged in the indictment." *Held*, that the verdict was not defective for using "harboring" as an equivalent of "suffering or permitting to live, board, stop, or room," but was defective, in that it did not find that defendant was the keeper of a house of prostitution, and that the female harbored was unmarried, and that a verdict finding defendant guilty or guilty as charged in the indictment would have been sufficient.

[Ed. Note.—For other cases, see *Prostitution*, Dec. Dig. § 5.\*]

**2. PROSTITUTION (§ 5\*)—"HARBORING."**

"Harboring," is defined by the International Dictionary, as giving refuge, shelter, or protection to; to furnish lodging for; and its use in a verdict in a prosecution for permitting an unmarried female to remain in a house of pros-

titution as the equivalent of the statutory description of the crime, "shall suffer or permit any unmarried female \* \* \* to live, board, stop, or room in such house," is allowable.

[Ed. Note.—For other cases, see *Prostitution*, Dec. Dig. § 5.\*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3213, 3214.]

**3. CRIMINAL LAW (§ 881\*)—VERDICT.**

The plea of not guilty puts in issue all essential elements of the offense charged, and the verdict must, either by direct findings or reference, be responsive to all the issues.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2093; Dec. Dig. § 881.\*]

**4. CRIMINAL LAW (§ 893\*)—VERDICT.**

Verdicts are not to be construed as strictly as pleadings, but are to have a reasonable intendment and receive a reasonable construction, and should not be set aside unless from necessity originating in doubt as to their meaning, or from the immateriality of the issues found, or a failure to find on some material issue.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2089; Dec. Dig. § 893.\*]

**5. PROSTITUTION (§ 4\*)—EVIDENCE.**

In a prosecution for permitting an unmarried female to remain in a house of prostitution, a book in which the names of various inmates of the alleged house of prostitution were kept, together with the accounts of such inmates with the keeper of the premises, was not inadmissible in evidence as being immaterial.

[Ed. Note.—For other cases, see *Prostitution*, Dec. Dig. § 4.\*]

**6. CRIMINAL LAW (§ 1169\*)—APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

The error in admitting evidence in a prosecution against two defendants which was admissible only as against one of them is rendered harmless by an instruction limiting the jury in its consideration of that evidence to the case of the defendant as against whom it was inadmissible.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3141; Dec. Dig. § 1169.\*]

**7. CRIMINAL LAW (§ 792\*)—INSTRUCTIONS—ACCESSORIES.**

An instruction defining accessories given in the language of the statute is not objectionable.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1820; Dec. Dig. § 792.\*]

**8. CRIMINAL LAW (§ 789\*)—INSTRUCTIONS—REASONABLE DOUBT.**

A refusal to instruct that, "If any one of the jury, after having considered all the evidence in the case and after having consulted with his fellow jurymen, should entertain a reasonable doubt of the defendant's guilt, then the jury cannot find the defendants guilty," is not error, as, regardless of its correctness as an abstract proposition, its tendency is to discourage agreements of juries.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 789.\*]

Hand and Carter, JJ., dissenting.

Error to Criminal Court, Cook County; George Kersten, Judge.

Bessie Lee and Leona Garrity were convicted of permitting an unmarried female under the age of 18 years to remain in a house of prostitution, and bring error. Reversed and remanded.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Burres & McKinley (Felix J. Streycckmans, of counsel), for plaintiffs in error. W. H. Stead, Atty. Gen., and John J. Healy, States Atty. (Benedict J. Short, James J. Barbour, and Joel C. Fitch, of counsel), for the People.

VICKERS, J. Leona Garrity and Bessie Lee were indicted, tried, and convicted in the criminal court of Cook county for a violation of section 3 of "An act to prevent the prostitution of females," which reads as follows: "Whoever, being the keeper of a house of prostitution, or assignation house, building or premises in this state where prostitution, fornication or concubinage is allowed or practiced, shall suffer or permit any unmarried female under the age of eighteen years to live, board, stop or room in such house, building or premises, shall, on conviction, be imprisoned in the penitentiary not less than one year nor more than five years." Hurd's Rev. St. 1905, p. 686, c. 38, § 57d. The indictment consists of 10 counts, and charges, in the language of the statute, that the defendants suffered and permitted one Belle Winters, an unmarried female under the age of 18 years and of the age of 16 years, to live, board, stop, and room in a certain house of prostitution located at 75 South Peoria street, in the city of Chicago, county of Cook, of which the defendants were then and there the keepers. The jury found a separate verdict as to each of the defendants, which verdicts were in the same words, except that Leona Garrity is named in one of the verdicts and Bessie Lee in the other. The verdict as to Leona Garrity was as follows: "We, the jury, find the defendant Leona Garrity guilty of harboring a female under the age of 18 years in a house of prostitution, in manner and form as charged in the indictment." After overruling motions for a new trial and in arrest of judgment, the court sentenced the defendants to imprisonment in the penitentiary at Joliet for an indeterminate term. The defendants have sued out a writ of error to obtain a review of these judgments by this court.

The plaintiffs in error contend that the verdicts are insufficient to support the judgment. The statute defining the offense of which the plaintiffs in error were convicted is leveled against the keepers of houses of prostitution or assignation, and the offense consists in suffering or permitting an unmarried female under the age of 18 years to live, board, stop, or room in such house. The plea of not guilty put in issue all of the essential elements of the offense with which plaintiffs in error were charged, and the verdict of the jury, in order to support a judgment of guilty, must, either by direct findings or by reference, be responsive to all the issues thus formed. *Mai v. People*, 224 Ill. 414, 79 N. E. 633. In *Donovan v. People*, 215 Ill. 520, 523, 74 N. E. 772, 773, this court said: "To authorize a judgment

against a defendant the verdict in a criminal case must respond to the issues submitted to the jury. Its sufficiency is determined by ascertaining whether it is responsive to and covers the offense charged in the indictment. 12 Cyc. 690. It must contain, either in itself or by reference to the indictment, every material element of the crime. 22 Ency. of Pl. & Pr. 873." By reference to the verdict it will be seen that the jury found plaintiffs in error guilty of harboring a female under the age of 18 years in a house of prostitution, in manner and form as charged in the indictment. It will be noted that the verdict employs the word "harboring," which is not found in the statute defining the offense. The plaintiffs in error contend that harboring is not equivalent to suffering or permitting one to live, board, stop, or room, and that in this respect the verdict finds plaintiffs in error guilty of an act not made criminal by the statute. If this were the only objection, under the rules of law applicable to the construction of verdicts we think the verdict might be sustained. Verdicts are not to be construed as strictly as pleadings, but are to have a reasonable intendment and to receive a reasonable construction, and should not be set aside unless from necessity originating in doubt as to their meaning, or from the immateriality of the issues found, or a failure to find upon some material issue involved. 29 Am. & Eng. Ency. of Law (2d Ed.) 1022; *Donovan v. People*, supra. The word "harboring" is defined by the International Dictionary as giving refuge, shelter, or protection to; to furnish lodging for. Applying this meaning to the word "harboring," we think that it might well be held sufficiently accurate in the verdict to clearly indicate the intention of the jury.

But there is here a much more serious objection to the verdict. The verdict does not find, directly or by necessary implication, that plaintiffs in error were the keepers of the house of prostitution, or that the female harbored therein was unmarried. These were both essential elements of the offense and constituted material facts in issue at the trial. If the verdict had been simply, "We, the jury, find the defendants guilty," without specifying of what the defendants were found guilty, under the authority of *Armstrong v. People*, 37 Ill. 459, and *Davis v. People*, 50 Ill. 199, it would be sufficient; or, if the verdict had found the defendants guilty as charged in the indictment, it would clearly be sufficient under the authority of *People v. Murphy*, 188 Ill. 144, 58 N. E. 984, *Donovan v. People*, supra, and many other cases. But the difficulty with the verdict in the case at bar is that it finds plaintiffs in error guilty, and, following the word "guilty," the verdict specifically states of what they are found guilty; that is to say, they are found guilty of "harboring a female under the age of 18 years in a house of prostitu-

tion." This language is not broad enough to embrace the finding upon all the essential elements of the offense. Nor could it be said that the reference to the indictment would aid this finding. The plain meaning of the verdict is that the defendants are found guilty of harboring a female under the age of 18 years in a house of prostitution, as those specific facts are charged in the indictment. The clause in the verdict, "in manner and form as charged in the indictment," refers to the indictment for the facts which are specially found in the verdict, and cannot be held to incorporate, by reference, other facts upon which there is no finding. The verdict is insufficient to authorize a judgment of guilty.

It is next insisted by plaintiffs in error that the court erred in admitting in evidence a book in which the names of various inmates of the alleged house of prostitution were kept, together with the accounts of such inmates with the keeper of the premises. The objection made to this evidence is that it was immaterial. We fail to see the force of this objection. The book had a direct tendency, in connection with the other evidence, to prove some of the material issues under investigation. There was no error in admitting this book.

It is next objected that the court erred in allowing evidence of conversations between a man by the name of Mansfield and the witness Belle Winters, and a telephone communication between Mansfield and the plaintiff in error Bessie Lee. This evidence was proper as against plaintiff in error Bessie Lee, and the court, by instruction No. 6 given on behalf of plaintiffs in error, expressly limited the consideration of this evidence to the case of Bessie Lee and directed the jury to disregard it entirely in determining the case against Leona Garrity. This instruction cures the error complained of in the admission of this evidence.

Plaintiffs in error complain of instruction No. 3 given on behalf of the prosecution. This instruction is substantially in the language of the statute defining accessories. We see no valid objection to it.

Plaintiffs in error complain also of the refusal of the court to give instruction No. 4, which was submitted by the plaintiffs in error and refused by the court. That instruction is as follows: "If any one of the jury, after having considered all the evidence in the case and after having consulted with his fellow jurymen, should entertain a reasonable doubt of the defendants' guilt, then the jury cannot find the defendants guilty." Whatever may be said of this instruction as an abstract proposition, it ought not to be given in any case, since its inevitable tendency is to discourage agreements of juries. It amounts to little more than an invita-

tion to the jury to disagree. There was no error in refusing this instruction.

Plaintiffs in error also complain of the refusal of the court to give instructions 6, 7, 8, 9, and 9½. We have examined these instructions, and, in view of the instructions that were given to the jury, we do not think there was any error in refusing them.

The judgment of the criminal court of Cook county is reversed for the error pointed out in rendering judgment on an insufficient verdict and the cause remanded for a trial de novo.

Reversed and remanded.

HAND and CARTER, JJ., dissent.

(236 Ill. 636)

VILLAGE OF DONOVAN v. DONOVAN et al.  
(Supreme Court of Illinois. Dec. 15, 1908.)

1. MUNICIPAL CORPORATIONS (§ 506\*)—SPECIAL ASSESSMENTS—PROCEEDINGS—JURISDICTION OF COURT.

The court in special assessment proceedings may, without losing jurisdiction, refer the assessment roll filed by the commissioner back to him, with leave to make a new assessment in accordance with the order for the original assessment, requiring him to make an impartial assessment in accordance with the law and the ordinance providing for the local improvement.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 506.\*]

2. MUNICIPAL CORPORATIONS (§ 508\*)—SPECIAL ASSESSMENTS—CONFIRMATION—APPEAL.

Where the court in special assessment proceedings referred the assessment roll filed by the commissioner back to him with leave to make a new assessment in accordance with the order for the original assessment, and no objections were raised to the filing of the new assessment roll or to its remaining on file, the question whether the court erred in permitting such new assessment roll to be made and filed in lieu of the original assessment could not be raised in the Supreme Court on appeal from the confirmation thereof.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1181; Dec. Dig. § 508.\*]

3. MUNICIPAL CORPORATIONS (§ 296\*)—LOCAL IMPROVEMENTS—ESTIMATE OF COST.

An estimate of the cost of a local improvement need not contain a complete inventory of every article that is to enter into the construction of the improvement, and an estimate containing the substantial component elements of the improvement is sufficient.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 793; Dec. Dig. § 296.\*]

4. MUNICIPAL CORPORATIONS (§ 296\*)—LOCAL IMPROVEMENTS—ESTIMATE OF COST.

An estimate of the cost of a system of water mains with hydrants which included the cost of labor and material necessary to properly lay, connect, and place in position the pipes, hydrants, etc., and was so itemized that an experienced contractor could, from the data furnished, determine the cost of items omitted from the estimate, was sufficiently itemized.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 793; Dec. Dig. § 296.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**5. EVIDENCE (§ 330\*)—LOCAL IMPROVEMENTS—ASSESSMENTS—CONFIRMATION—EVIDENCE.**

The record of a village board which shows that an ordinance for a local improvement was passed is sufficient to render the ordinance admissible in evidence in proceedings to confirm the special assessment for the cost of the improvement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1234; Dec. Dig. § 330.\*]

**6. MUNICIPAL CORPORATIONS (§ 497\*)—LOCAL IMPROVEMENTS—ORDINANCE—SUFFICIENCY.**

In an ordinance providing for a system of water mains, mistakes in designating streets in which the mains are to be laid are not ground for refusing confirmation of an assessment for the cost of the improvement, where the location of such streets is made certain by parol evidence.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 497.\*]

**7. MUNICIPAL CORPORATIONS (§ 120\*)—ORDINANCES—CONSTRUCTION.**

Where an ordinance is susceptible of two constructions, one of which will defeat and the other support it, the latter construction will be adopted.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 275; Dec. Dig. § 120.\*]

Appeal from Iroquois County Court; John H. Gillan, Judge.

Proceedings by the Village of Donovan for the confirmation of a special assessment, in which James H. Donovan and others appeared and filed objections. From a judgment of confirmation, the objectors appeal. Affirmed.

J. W. Kern and O. G. Hirschl, for appellants. Pallissard & Perigo and Kay, Saum & Kay, for appellee.

**HAND, J.** This was an application in the county court of Iroquois county to confirm a special assessment levied for the purpose of raising a fund with which to pay the cost of a system of water mains, with hydrants, proposed to be laid by the appellee in the streets of the village of Donovan. The appellants appeared and filed objections as to their property, which objections were overruled and judgment of confirmation was entered, and they have prosecuted an appeal to this court.

On March 28, 1907, the court ordered Fred W. Tovy, as commissioner, to make a true and impartial assessment of the cost of said improvement upon the said village and the property benefited by said improvement, in accordance with the law and the provisions of the improvement ordinance. On October 21, 1907, said commissioner filed an assessment roll, and the court fixed the hearing thereon for November 11, 1907. On that day the village of Donovan, by its attorneys, and the commissioner appointed to make the assessment, moved the court to refer said assessment roll back to said commissioner with the privilege of spreading a new assessment, whereupon the court set

aside the orders entered in the case subsequent to March 28, 1907, and referred said assessment roll back to said commissioner, and leave was given said commissioner to spread a new assessment, and to proceed, in so doing, in accordance with the order of the court theretofore entered on March 28, 1907.

The contention of counsel for the appellants is that the court was powerless to refer said assessment roll back to said commissioner, with leave to make a new assessment without specific directions as to the manner in which the new assessment should be spread, and to sustain this position reliance is placed upon the case of *Chicago & Western Indiana Railroad Co. v. City of Chicago*, 230 Ill. 9, 82 N. E. 399. The case referred to, we think, is clearly distinguishable from the case at bar. In that case, after certain objections had been filed to the assessment roll, the court referred the assessment roll back to the commissioners, with directions to recast the assessment on the face thereof with red ink but without directing the manner in which the assessment roll should be recast. When the roll was recast and refiled, the objectors appeared and moved the court to strike said assessment roll from the files, which motion was denied and proper exceptions were preserved thereto. Here the roll was referred back to the commissioner with leave not to recast the assessment upon the face of the roll, but with leave to make a new assessment roll. It was held in the case referred to that the court should have given the commissioner express directions as to the manner in which the roll should be recast. The effect of the order of the court in this case was to permit the commissioner, upon the motion of the village and his own motion, to withdraw the assessment roll and to make a new roll, and the new roll was filed on February 28, 1908, to which the appellants filed numerous objections, but they nowhere, by their objections or otherwise, in the trial court, as they concede in their brief, made the point that the first assessment roll was improperly referred back to the commissioner or improperly permitted to be withdrawn by the commissioner with leave to him to make a new assessment. We are of the opinion the court could, if it saw fit, refer the assessment roll filed upon October 21, 1907, back to the commissioner with leave to make a new assessment in accordance with the order of March 28, which provided that the commissioner should make a true and impartial assessment in accordance with the law and the ordinance, without losing jurisdiction of the case, and if, when the new roll was filed, no objections were raised to its being filed or to its remaining upon the file by the objectors by motion to strike or otherwise, that the question as to whether the court erred in permitting the new assessment roll to be made and to be filed in

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lien of the first assessment cannot be raised in this court for the first time.

It is next contended that the estimate of the cost of the improvement was not sufficiently itemized, in this: that it does not contain an item showing the estimated cost of the lead and twine which will be necessarily used in calking the joints of the water mains, or an item showing the estimated cost of the stones or brick upon which the 13 hydrants provided for by the ordinance are to be placed. The cost of this improvement is very fully itemized, and the evidence shows that an experienced contractor could from the data furnished readily determine the cost of the items which it is claimed are omitted from the estimate. It is not necessary that the estimate contain a complete inventory of every article that is to enter into the construction of the improvement. If it contains the substantial component elements of the improvement, it is sufficient. *Clark v. City of Chicago*, 214 Ill. 818, 78 N. E. 858; *City of East St. Louis v. Davis*, 233 Ill. 553, 84 N. E. 674. The estimate included the cost of "labor and material necessary to properly lay, connect, and place in position the water main pipes, hydrants," etc. We think the estimate of the cost of the improvement was sufficiently itemized.

It is further contended that the ordinance providing for this improvement was not properly proven. The appellee introduced in evidence the record of the village board of Donovan, which shows the ordinance was passed on March 6, 1907, and no reason is pointed out why this record of the board of trustees was not sufficient to establish the ordinance to have been duly passed. Our conclusion is that the ordinance was properly proven before it was admitted in evidence.

It is also contended that two of the streets of the village in which water mains are to be laid are misnamed and that the point where one hydrant is to be placed is improperly described. The two streets referred to run substantially across the village. In the original town they are designated upon the plat as avenues while in the addition to the village they are designated as streets, and the ordinance as to where one hydrant is to be located is somewhat ambiguous. We think the location of the streets where the improvement was to be laid was made certain by the parol proof introduced in evidence (*McChesney v. City of Chicago*, 173 Ill. 75, 50 N. E. 191; *Ewart v. Village of Western Springs*, 180 Ill. 318, 54 N. E. 478), and that, when the entire ordinance is considered, there is no uncertainty as to the location of said hydrant. Where an ordinance is susceptible of two constructions, one of which will defeat and the other support the ordinance, the construction that supports the ordinance will be adopted. *Gage v. Village of Wilmette*, 230 Ill. 428, 82 N. E. 656.

Finding no reversible error in this record, the judgment of the county court will be affirmed.

Judgment affirmed.

(236 Ill. 608.)

PEOPLE ex rel. PLOTKE v. LOWER et al.  
(Supreme Court of Illinois. Dec. 15, 1908.)

1. STATUTES (§ 263\*)—CONSTRUCTION—RETROACTIVE OPERATION.

A statute will be given a prospective operation only unless its language is so clear that it will admit of no other than a retroactive construction.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 344; Dec. Dig. § 263.\*]

2. MUNICIPAL CORPORATIONS (§ 176\*)—OFFICERS—CIVIL SERVICE—STATUTES—CONSTRUCTION.

Under the civil service act (Act March 20, 1895, p. 85; *Hurd's Rev. St.* 1905, c. 24, p. 393), regulating the civil service of cities, and providing that the head of each principal department of the city government shall not be included in the classified service, and the city and village act (*Hurd's Rev. St.* 1903, c. 24, p. 305, par. 73), authorizing the city council to provide for the appointment of officers, the office of chief smoke inspector of the city of Chicago, created in 1907, and made the head of a principal department of the city government for the inspection and abatement of smoke, is not included in the classified service, the city civil service act not operating retroactively so as to apply only to the heads of such principal departments of the city government as existed at the time of its adoption.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 176.\*]

Appeal from Branch Appellate Court, First District, on Appeal from Superior Court, Cook County; George A. Dupuy, Judge.

Mandamus by the People, on the relation of Fred Plotke, against Elton W. Lower and others, as civil service commissioners of Chicago, to compel defendants to hold a civil service examination for an official position. From a judgment of the Appellate Court, affirming a judgment dismissing the petition, relator appeals. Affirmed.

Fred Plotke, for appellant. Edward J. Brundage, Corp. Counsel, Clyde L. Day, and Emil C. Wetten, for appellees.

HAND, J. A petition was filed in the name of the people, upon the relation of Fred Plotke, in the superior court of Cook county, for a writ of mandamus to compel the appellees, as civil service commissioners of the city of Chicago, to advertise and hold a civil service examination for the position of chief smoke inspector for the city of Chicago. The appellees interposed a general demurrer to the petition, which was sustained, and, the appellant having elected to stand by his petition, the superior court entered a judgment dismissing the petition, which judgment has been affirmed by the Appellate Court for the First District, and a further appeal has been prosecuted to this court.

It appears from the petition that on July 8, 1907, the city council of the city of Chicago, by a vote of two-thirds of all the aldermen elected, passed an ordinance creating a principal department of the city government of the city of Chicago for the inspection and abatement of smoke, and providing for the appointment of a chief smoke inspector as the head of said department; that, in pursuance of the provisions contained in said ordinance, the mayor, by and with the concurrence of the city council, appointed Paul P. Bird chief smoke inspector of the city of Chicago. Appellant contends that the position of chief smoke inspector of the city of Chicago, falls within the classified service provided for in the city civil service act (Laws 1895, p. 85), which is in force in the city of Chicago, while the appellee claims it does not, and that is the only question for decision on this appeal.

Section 11 of "An act to regulate the civil service of cities," in force March 20, 1895 (Laws 1895, p. 88; Hurd's Rev. St. 1905, c. 24, p. 393), provides in express terms that the head of each principal department of the city government in cities where said act is in force shall not be included in the classified service under the city civil service act, and paragraph 73 of the city and village act (Hurd's Rev. St. 1905, c. 24, § 2, p. 305) provides that the city council in cities may, from time to time, by ordinance passed by a vote of two-thirds of all the aldermen elected, provide for the election by the legal voters of the city, or the appointment by the mayor with the approval of the city council, of a city collector, a city marshal, a city superintendent of streets, a corporation counsel, a city comptroller, or any or either of them, and such other officers as may by said council be deemed necessary or expedient.

The appellant urges, however, that the city civil service act should be given a retroactive operation, and should be held to apply only to the heads of such principal departments of the city government of the city of Chicago as were in existence at the time the act went into effect in said city, and as the office of chief smoke inspector was created subsequent to March 20, 1895, the classified service under the city civil service act should be held to include such office. We do not think this contention can be sustained. To so hold would be to hold that the heads of some of the principal departments of government in the city of Chicago, such as chief of police, fire marshal, commissioner of health, commissioner of public works, commissioner of buildings, corporation counsel, etc., were not under the classified service created by the city civil service act, while all other heads of the principal departments of government in the city which might be created by the city council under the provisions of the city and village act subsequent to March 20, 1895, were under said city civil service act. The general rule

to be applied in the construction of statutes is that a statute should be given a prospective rather than a retroactive operation, unless there is language found in the statute which is so clear that it will admit of no other than a retroactive construction. In the case of *People v. Hummel*, 215 Ill. 43, on page 48, 74 N. E. 68, on page 60, it was said: "It has been repeatedly held in this state that a statute will be presumed to operate prospectively only, and will not be construed to have a retroactive operation unless the language employed is so clear that it will admit of no other construction. *Bauer Grocer Co. v. Zelle*, 172 Ill. 407, 50 N. E. 238; *Rock Island Nat. Bank v. Thompson*, 173 Ill. 593, 50 N. E. 1089, 64 Am. St. Rep. 137; *Richardson v. United States Mortgage & Trust Co.*, 194 Ill. 259, 62 N. E. 606."

The appellant relies upon the case of *People v. Kipley*, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775, as sustaining his position. An examination of that case will show that it is not like the case at bar. It was there held that the classified service created by the city civil service act did not include the heads of the principal departments of the government of a city where it was in force, but did apply to all city officers of a lower grade than that of the heads of the principal departments of the city government, unless they were expressly exempted by section 11 of the city civil service act, and that the city council did not have the power to exempt an office of such inferior grade, by ordinance, from the operation of said city civil service act. The question here raised, however, was not there before the court, and is not there discussed or decided. The office of chief smoke inspector having been created by the city council, and being a head of one of the principal departments of the city government of the city of Chicago, is not included in the classified service or subject to the provisions of the city civil service act, and said office was properly filled by the mayor with the concurrence of the city council, and the demurrer to the petition was therefore, we think, properly sustained and the petition dismissed.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(236 Ill. 640)

#### MORRALL v. MORRALL

(Supreme Court of Illinois. Dec. 15, 1908.)

#### 1. WILLS (§ 490\*)—DESCRIPTION OF PROPERTY—EXPLANATION BY ORAL TESTIMONY.

The rule allowing parol testimony to show the legal description of property described by testator as his "homestead" is designed to permit the giving of effect to his intention as expressed in the will, and does not infringe the rule prohibiting resort to extrinsic circumstances to show an intention not expressed in the will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1052; Dec. Dig. § 490.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

## 2. WILLS (§ 561\*)—DESCRIPTION OF PROPERTY—EXPLANATION.

A testamentary description, "the homestead that is part lot (16) Rosmans sub Division of No. (95.32-100 acres in the city of Morris also the strip on the north line (7) ft. wide and (130) ft. long in same block," was not a misdescription, but an imperfect description, which the court, on a bill involving conflicting claims to the land, could cure in its decree.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1221; Dec. Dig. § 561.\*]

## 3. WILLS (§ 660\*)—COMPLIANCE WITH CONDITIONS—EVIDENCE—SUFFICIENCY.

Evidence held to warrant a finding that complainant substantially complied with his father's will devising a remainder to him on condition that he care for his mother.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1855; Dec. Dig. § 660.\*]

Appeal from Circuit Court, Grundy County; S. C. Stough, Judge.

Bill by Charles Morrall against Bernard Morrall. From a decree for complainant, defendant appeals. Affirmed.

This is an appeal from a decree of the circuit court in favor of complainant, who is appellee here. Said decree found that appellee was the owner of the premises described in the bill, and that he derived title thereto by virtue of the will of his deceased father, James T. Morrall. Said James T. Morrall was in his lifetime the owner of certain real estate in the city of Morris, Grundy county, Ill. He died on the 10th day of April, 1889, leaving surviving him a widow, Sarah Ann Morrall, and Charles Morrall, Bernard Morrall, James Morrall, Edward Morrall, and Josephine Beasley, his children and only heirs at law. Said James T. Morrall made a last will and testament, the second clause of which reads as follows:

"Second—After the payment of such funeral expenses and debts, I give, devise and bequeath to my wife Sarah Ann Morrall all my property both Real and Personal During her lifetime and at her death if my son Charles Morrall is alive and takes care of her in her sickness and berries her hee is to have the homestead that is part lot (16) Rosmans sub Division of No. (95.32-100 acres in the city of Morris also the strip on the north line (7) ft. wide and (130) ft. long in same block but if Charles should not live whoever of my children does, take care of and burrey my wife is to have this property and I give to my son Edward ten dollars \$10 and the Balance to be divided equal between my auther three children James Bernard and Sasephean Beasley after paying all funeral expenses and auther bills contracted during my wifs sickness. I give to Bernard Morrall my photograph and fram."

This is the only provision of the will involved in this case. Mrs. Morrall, the widow, died at the home of Bernard Morrall January 7, 1903. She had resided with appellee, Charles Morrall, from the date of her husband's death until about the middle of

April, 1902, when she was taken to the home of her daughter, Mrs. Beasley, and remained there about two months, and was then removed to the home of appellant, Bernard Morrall, where she remained until she died, in January following. Bernard Morrall afterwards set up a claim to the homestead premises upon the ground that he was entitled to them under the terms of the will, having taken care of and buried his mother. Appellee, Charles Morrall, thereupon filed the bill in this case, in which he alleged that he had complied with the provisions of the will of his father by taking care of the widow during her lifetime and paying the burial expenses after her death. The bill alleged that the widow made her home with appellee for more than twelve years after her husband's death, and until appellee moved to Chicago, in May, 1902; that the widow refused to go to Chicago to live with appellee, although he requested her so to do, and that for about six months prior to her death she resided with appellant, Bernard Morrall; that appellee offered to pay appellant board for said widow and for his trouble in caring for her, but that said Bernard refused to accept it, and claimed he was entitled to the real estate in controversy for caring for his mother during said six months. The bill prayed that the complainant be decreed to be the owner of the homestead premises, and that the defendant be ordered by decree of the court to make conveyances thereof to him; that an account be stated between complainant and Bernard Morrall for the amount due the latter for taking care of his mother during the last six months of her illness.

The answer of Bernard Morrall denies that complainant took care of the widow from April 10, 1889, to the date of her death, and denies that he is entitled to the homestead premises or any part thereof; denies that the widow refused to go to Chicago in 1902 with complainant, and avers that he abandoned his mother about the 1st of May and refused longer to support and provide for her, whereby he forfeited all his right, title, and claim to the homestead premises under the will. The answer further avers that the complainant, Charles Morrall, made a verbal agreement with defendant, Bernard Morrall, by which the latter was to support and provide for their mother during her lifetime and bury her after her death, in consideration for which Bernard was to have the homestead in fee simple; that in pursuance of said agreement Charles turned over to Bernard possession of the said premises and title papers thereto, including the will of their father, and that said Bernard thereafter supported the widow during her lifetime, and paid the costs and expenses of her last illness and of her burial; that said Bernard had made lasting and valuable im-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

provements upon said premises after taking possession in pursuance of said agreement, had paid the taxes thereon, and was the lawful owner of said premises. Bernard Morrall has prosecuted this appeal from the decree of the circuit court granting the relief prayed in the bill.

J. W. Rausch, for appellant. E. L. Clover, for appellee.

FARMER, J. (after stating the facts as above). The only provision of the will involved in the controversy is the second clause thereof, which is set out in the statement preceding. The premises in controversy were described in the will as "the homestead that is part lot (16) Rosemans sub Division of No. (95.32-100 acres in the city of Morris also the strip on the north line (7) ft. wide and (130) ft. long in same block." The court found by the decree that the correct description of the homestead premises was: "All that portion of lot sixteen (16) of Roseman's subdivision of 95.37 acres of the northeast quarter of section four (4), in township thirty-three (33), north of range seven (7), east of the third principal meridian, commencing at a point thirty-three (33) feet west of the southeast corner of said lot, and running from thence west one hundred and thirty (130) feet, thence north sixty (60) feet, thence east one hundred and thirty (130) feet, and thence south sixty (60) feet to the place of beginning; and also commencing at the northeast corner of lot No. sixteen (16), in the subdivision of original lot No. sixteen (16), of Roseman's subdivision of ninety-five (95) and thirty-two (32) one hundredths (95.32) acres; thence running north seven (7) feet and eight (8) inches, thence west one hundred and thirty (130) feet, thence south seven (7) feet and eight (8) inches, then east one hundred and thirty (130) feet to the place of beginning, all situated in the city of Morris, Grundy county, and state of Illinois, which said above-described real estate was the homestead of the said James T. Morrall at the time of his death and had been for many years prior thereto."

It is first contended that the court had no power to find and decree the description of the homestead premises; that this amounted to a reformation of the will, and that courts have no power to reform such instruments. The proof shows that James T. Morrall owned two pieces of property in the city of Morris—one on the east side and one on the west side of Division street, in said city—and that his homestead was the property on the west side of said street; that his widow and appellee, Charles Morrall, continued to reside on said property until Charles went to Chicago, in 1902. The homestead property at the time of testator's death was worth about \$500. At the time of testator's death his wife and his son Charles were the only members of his family living with him upon the homestead. The answer of appellant admits

that the "said homestead, as described in the said will, is part of lot 16 of Roseman's subdivision of No. 95.32 acres in the city of Morris; also the strip on the north line seven feet wide and one hundred and thirty feet long, in the same block." The description following the word "homestead" is not a misdescription, but an imperfect one. The homestead was a part of lot 16 of Roseman's subdivision of 95.32 acres. If the property had been simply designated as the homestead of the testator, it would have been sufficient, and parol testimony in such case is competent to prove the legal description of the homestead premises. This is allowable in order that effect may be given to the intention of the testator as expressed in his will, and is clearly not in violation of the rule that extrinsic circumstances cannot be resorted to for the purpose of injecting into the will an intention not therein expressed by the testator. In *Emmert v. Hays*, 89 Ill. 11, the devise was of "my estate and property," 195 acres in township 3, north, range 9, west of the third principal meridian, "being 145 acres of the north part of the northwest quarter of section 9, and the northeast quarter of the northeast quarter of section 8, township 3, range 9, being what is known as the Hays farm." The lands were located in the town and range mentioned, but some of them were in sections different from those mentioned in the will. The court held that if the land had been described as 195 acres in township 3, north, range 9, west of the third principal meridian, "being what is known as the Hays farm," it would have been sufficient, and that, if the rest of the description in the will were rejected as surplusage, it would leave a perfect description of the property devised. Other decisions to the same effect are cited in the opinion in that case and in *Decker v. Decker*, 121 Ill. 341, 12 N. E. 750, and, so far as we are advised, the same rule has been adopted by all the courts of this country.

It is further contended by appellant that appellee did not care for his mother as required by his father's will; that in June, 1902, he agreed with appellant, Bernard Morrall, if he would keep and care for the mother he (Bernard) should have the homestead, and that in pursuance of that agreement Bernard thereafter cared for her until her death, about six months later, and paid the doctor bills and funeral expenses. About a year and a half after her husband's death Mrs. Morrall suffered a paralytic stroke, which left one side paralyzed during the remainder of her life. Her condition was such that she required a great deal of care and attention. Appellee was a single man when his father died, and so remained until May, 1899—a period of ten years—when he was married. He and his mother lived together in the homestead until the mother went to Beasley's, in 1902. They were dependent on the labor of Charles for their support. He

worked at different times on the railroad, in a tileyard, and in a tannery. His wages were from \$1.10 to \$1.50 per day. Out of these earnings he supported the household. When able to procure a servant girl at wages he could afford to pay he did so, but much of the time he was unable to secure help. In addition to doing the housework when he could not get help, he at all times gave his mother the best care he was able to, and performed his daily task of labor. The proof shows his conduct toward and care for his mother to have been most exemplary. In April, 1902, he asked Beasley, his sister's husband, to take his mother to his house and care for her awhile, and agreed to give him \$2 per week therefor. Appellee testified that at that time he did not know he was going to Chicago, but that afterwards he received an offer of steady employment at \$2 per day and decided to accept it. He moved there May 25, 1902. He testified that two weeks after moving to Chicago he returned and went to Beasley's to see his mother, and asked her if she would go to Chicago to live with him when he procured a house to live in; that she said she would if they would take her there in a buggy, and that he told his mother he would come and get her just as quick as he could get a house. Appellee testified that when he heard his mother had been taken to Bernard's he went to see him and inquired why that had been done, and that Bernard told him it was none of his business; that he talked with his mother, and she said she did not want to go to Bernard's, but they told her he (Charles) had given her up and she would have to go to Bernard's. The proof is uncontradicted that Mrs. Morrill objected to being taken to Bernard's. She appears to have been satisfied to stay at Beasley's, but Mr. Beasley was unwilling to keep her longer for \$2 per week. Bernard Morrill testified that, while their mother was at Beasley's, Charles came to Morris from Chicago and said he could not take care of his mother any more; that his wife objected; that he said if he (Bernard) would take her and care for her he could have the homestead place, and that in pursuance of that agreement he took his mother to his house in June, 1902, and kept her until her death, in January following, and paid doctor bills and funeral expenses, amounting to \$65.50. Charles denied there was ever any such agreement made, and, while no one else testified to knowing anything about any such agreement, other facts and circumstances proven, to say the least, tended as strongly to corroborate Charles as they did Bernard. The evidence upon this question justified the conclusion that the alleged agreement had not been proven. Nor can we say the finding of the chancellor that Charles was ready and willing and offered to take his mother to his home in Chicago and care for her, and that it was not his

abandonment of her or refusal to take care of her that caused her to remain at Bernard's, was clearly contrary to the weight of the evidence. It is not a matter of surprise that after Charles had cared for his mother more than twelve years in her helpless condition, remaining so constantly with her during all that time when he was not at work, that, as said by one witness, he never attended a dance, ball game, or other place of amusement; the court held the evidence insufficient to prove that he then abandoned and refused to care for her. The court found that Bernard had paid doctor bills and funeral expenses amounting to \$64, and that he was entitled to \$100 compensation for care and attendance upon Mrs. Morrill from June 13, 1902, to January 7, 1903, and ordered Charles to pay these sums. Previous to beginning the suit Charles had offered Bernard a larger sum, but he refused to accept it. We see no reason he has for complaining of the decree, and we cannot say that under the evidence the court was not justified in finding that Charles had substantially complied with the terms of the will and was therefore entitled to the premises. The decree is therefore affirmed.

Decree affirmed.

(236 Ill. 629)

#### MCINTYRE v. HARTY.

(Supreme Court of Illinois. Dec. 15, 1908.)

##### 1. WATERS AND WATER COURSES (§ 157\*)—LICENSES FOR DITCHES—REVOCABILITY.

A parol permission of an owner of land for a drainage ditch through the land is a mere license revocable at the will of the owner, though the ditch has been dug and maintained in reliance on the permission.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 185; Dec. Dig. § 157.\*]

##### 2. WATERS AND WATER COURSES (§ 157\*)—LICENSES FOR DITCHES—REVOCATION.

A revocable license for a drainage ditch through the land of the licensor is revoked by a conveyance of the land, executed prior to the act of 1889, relating to drainage ditches constructed by mutual license or agreement of the owners of adjacent lands.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 185; Dec. Dig. § 157.\*]

##### 3. WATERS AND WATER COURSES (§ 157\*)—LICENSES FOR DITCHES—REVOCATION.

An owner of land permitted plaintiff to construct through the land a drainage ditch along the line of a natural depression. The dirt was to be thrown back from the banks of the ditch so as not to obstruct the flow of the surface water into the ditch. Plaintiff concentrated the waters from his land through a system of tile drains into the ditch, and discharged them through the ditch on the owner's land. The ditch was dug by plaintiff, who, at his own expense, built, as he agreed, a bridge across it for the owner's convenience at a point designated by the owner. It was not shown that any water was carried off the owner's land by the ditch, and plaintiff was the only person benefited by it. *Held* to show a mere license for the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

benefit of plaintiff, which license was revoked by the owner conveying the land prior to the act of 1889, relating to drainage ditches constructed by mutual license or agreement of the owners of adjacent lands.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 185; Dec. Dig. § 157.\*]

**4. WATERS AND WATER COURSES (§ 157\*)—PRIVATE RIGHTS OF DRAINAGE—STATUTES—CONSTRUCTION.**

Act June 4, 1889 (Laws 1889, p. 116) providing that, when a drain has been constructed by mutual license or agreement of the owners of adjoining lands, the drain shall be deemed one for the mutual benefit of all the lands, etc., applies to ditches under licenses and agreements in effect when the act became a law, and such as might thereafter be made, and it does not revive licenses revoked before the act went into effect.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 185; Dec. Dig. § 157.\*]

**5. WATERS AND WATER COURSES (§ 157\*)—PRIVATE RIGHTS OF DRAINAGE—STATUTES—CONSTRUCTION—VALIDITY.**

Act June 4, 1889 (Laws 1889, p. 116), relating to drains constructed by mutual license or agreement of the owners of adjacent lands, if construed to revive licenses revoked before the act went into effect, would violate the constitutional rights of the landowners.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 185; Dec. Dig. § 157.\*]

Appeal from Circuit Court, La Salle County; Edgar Eldredge, Judge.

Suit by Nathaniel McIntyre against James Harty. From a decree for complainant rendered after the overruling of a demurrer to the bill, defendant appeals. Reversed and remanded.

L. W. Brewer and Lester H. Strawn, for appellant. McDougall & Chapman, for appellee.

**FARMER, J.** This is an appeal from a decree of the circuit court of La Salle county awarding an injunction on a bill filed by appellee against appellant. The bill alleged that appellee was in 1883 the owner of certain lands in La Salle county, and that one James P. Clark was the owner and in possession of an 80-acre tract joining appellee's land on the east, and that on or about the 28th day of February, 1889, Clark sold and conveyed his said land to James Harty, who was made defendant to the bill and is appellant here. It was further alleged that while Clark was the owner of said land he and appellee entered into an oral agreement by which Clark gave appellee the right to make an open ditch across a part of his land, of such width and depth as might be necessary to receive and carry freely water from the termination of a tile drain then about to be laid by appellee upon his land; that the ditch was to be along a line of natural depression or old prairie water course to the most convenient point of discharge into a large pond or slough near the center

of Clark's said land; that it was agreed between the parties that the dirt taken from the ditch in its construction should be spread far enough back from the bank not to prevent surface water from flowing into the ditch, and that appellee should construct a bridge across said ditch at a place to be designated by Clark, sufficient for said Clark to cross upon in the cultivation of his land; that in 1883 appellee laid a system of tile on a part of his land, converging at a point where the water was discharged into a natural depression or old prairie water course near the west line of Clark's land; and that in said year of 1883, pursuant to the agreement with Clark and with his knowledge, appellee constructed an open ditch from the point where the water was discharged from his tile drain along the said natural depression, in an easterly and northerly direction, through and across a portion of Clark's land, to the pond or slough near the middle thereof. The bill alleged that the ditch at the surface was of a width of about 16 feet, and was of sufficient depth to draw the water from the place of its discharge through appellant's tile and carry it into the pond or slough on Clark's land; that in constructing it the dirt was thrown back from the banks so as to not obstruct the flow of surface water into the ditch, and afterwards the appellee built a bridge across it at the point designated by Clark; that after the ditch was completed the water from appellee's land flowed through it freely, and was discharged into the pond or slough upon Clark's land, but that since that time the ditch has become partially filled and obstructed by dirt washing into it, and by grass, weeds, and willows growing upon the banks and in the line of the ditch, and by reason of cutting willows down and laying them across the ditch, thereby damming the water in the appellee's tile so that for a long time it has not fully and freely flowed through said open ditch into the pond on appellant's land; that appellee desired to clean it out and restore it to its original depth substantially the same as when it was first constructed, but appellant, who is now the owner of the land, refuses to allow this to be done, and refuses to allow appellee to enter upon his premises for that purpose, by reason whereof appellee claims he has suffered, and continues to suffer, great and irreparable damage. The bill prayed for a writ of summons in chancery and a writ of injunction restraining appellant from in any manner interfering with appellee in entering upon the premises and cleaning out said ditch and removing obstructions therefrom. Appellant demurred to the bill, but the court overruled the demurrer, and, appellant abiding thereby and failing to answer, a decree was entered awarding the writ of injunction.

Appellee's contention is that the ditch was

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

constructed in 1883 by mutual agreement between himself and Clark, who then owned the land now owned by appellant; that there was never any revocation of the license or agreement by Clark while he owned the land, nor by appellant within one year after the taking effect of the act of June 4, 1889 (Laws 1889, p. 116), in regard to ditches constructed by mutual consent of the parties, and that appellee has a perpetual easement in appellant's land for the purpose of draining his water through said open ditch, with a right to enter upon said land for the purpose of repairing and cleaning out said ditch.

Section 1 of the act of 1889 provides that whenever any ditch or drain had been or should thereafter be constructed by mutual license, consent, or agreement of the owners of adjoining lands, so as to make a continuous line upon or across the lands of the several owners, such drain should be held to be a drain for the mutual benefit of all the lands so interested therein. Section 3 provides that drains so constructed shall not be filled up or obstructed without the consent of all the parties. Said section also provides that the license, consent, or agreement mentioned in the act need not be in writing, but shall be valid and binding if in parol. Section 4 provides that the act shall not have the effect to deprive any owner of the right he may have under existing laws to revoke any parol license before made for the construction of a drain across his lands, but the right to make such revocation is required to be exercised and suit to enforce the same commenced within one year from the time the act takes effect, otherwise the right to make such revocation is forever barred.

The appellant contends that when Clark sold the land to him, several months before the act of 1889 went into effect, the sale operated as a revocation of the license by Clark, and that there was therefore no license in existence to be revoked by appellant after the act of 1889 went into effect. The permission given the appellee by Clark to dig the ditch through a part of his land was a mere license, and was revocable at the will of the licensor. *Woodward v. Seely*, 11 Ill. 157, 50 Am. Dec. 445, and subsequent cases following the rule therein announced. The statute of 1889 not being in effect at the time of the sale from Clark to appellant, the conveyance operated to revoke the license. *Forbes v. Balenseifer*, 74 Ill. 183; *Wessels v. Colebank*, 174 Ill. 618, 51 N. E. 639; *Kamphouse v. Gaffner*, 73 Ill. 453; *Lambe v. Manning*, 171 Ill. 612, 49 N. E. 509.

There is no allegation in the bill from which it appears that the ditch was of any benefit to appellant's land. It is contended in appellee's argument that the averment that the dirt was to be thrown back from the banks so as to not obstruct the flow of surface water into the ditch is an averment that appellant's land was benefited. The bill alleges that the ditch was constructed along

the line of a "natural depression or old prairie water course." Unless obstructed in some way, surface water would naturally flow into this depression or water course before the ditch was constructed, and we cannot infer from the allegation that the dirt taken out of the ditch was to be so placed as not to obstruct the water from flowing into it is equivalent to an allegation that the ditch was a benefit to appellant's land. It does not appear from the allegations of the bill that any water was carried off of appellant's land by the ditch. It was carried to a pond or slough near the middle of appellant's land and there discharged. Appellee concentrated the waters from his land through a system of tile drains into this ditch, and discharged them through it into and upon appellant's land. It does not appear from the bill that Clark did anything whatever in the construction of the ditch, but the work was wholly done by appellee, who at his own expense agreed to, and did build a bridge across it for Clark's convenience in cultivating his land, at a point designated by Clark, and there was no mutual benefit resulting to the parties from the construction of the ditch, but appellee appears to have been the only person benefited by it. The case made by the bill is one of a mere license for the benefit of the licensee, and was revoked by the sale of the land to appellant before the act of 1889 was in effect.

Great reliance is placed on *Wessels v. Colebank*, supra, by appellee. That was an action of trespass *quare clausum fregit* against the defendants for breaking and entering the plaintiff's close. Defendants filed a special plea averring, in substance, that in 1887 a number of landowners adjoining the property owned by defendants at the time of the commission of the supposed trespasses, by mutual license, consent, and agreement, constructed an open drain over and across the land of the plaintiff, which was then the property of one Egley, who joined in the construction and maintenance of the drain for the benefit of his own land; that said drain had ever since then been maintained, cleaned out and repaired by the town authorities and the landowners affected, and that this was done with the license and consent of the owner of the plaintiff's close; that neither Egley nor any of his grantees, prior to July 2, 1890, ever revoked the parol license given in 1887, and that thereby the drain became and was, prior to July 3, 1890, and continued to be according to the statute, a continuous open drain for the mutual benefit of all the lands affected. A demurrer was sustained to that plea, and defendants abided by their plea. This court held the plea stated a good defense, and that the trial court erred in sustaining a demurrer to it. There is a very clear distinction between that case and this one. There was no averment in the plea in the *Wessels* Case that the owner of the land in 1887 conveyed

it prior to the taking effect of the act of 1889. It appears from the plea that at the time the ditch was constructed the plaintiff's land belonged to Egley, but when it was conveyed to the plaintiff does not appear. It further appears from the plea that the ditch had been maintained, cleaned out, and repaired, from the time of its construction, partly by the owners of the land affected and with their license and consent. The case made by the plea is one where a ditch for the mutual benefit of the parties existed by their mutual license, consent, and agreement when the act of 1889 went into effect and was not revoked within one year thereafter. Here it appears from the bill that the license to appellee was revoked before the act of 1889 went into effect. There was therefore no license to revoke after the act of 1889 became a law, and there is no allegation in the bill that appellant in any way, after he became the owner of the Clark land, ever recognized the right of appellee to maintain, or have maintained or kept in repair, the ditch through his land. On the contrary, he obstructed it by cutting and throwing willow trees into it. When this was done does not appear from the averments of the bill. It was not the purpose of the act of 1889 to revive licenses for the construction of ditches that had been revoked before the act went into effect. The Legislature would have no constitutional right to enact such a law. The purpose of the act was to apply to ditches constructed by license and mutual agreement between the parties, where such license and agreement were in effect at the time the act became a law, and such as might thereafter be made. Any other construction would violate the constitutional rights of the landowners.

We are of opinion that under the averments of this bill appellee has no right to insist on cleaning out and keeping the ditch open on the ground that under the law it is a drain for the mutual benefit of the lands interested and was constructed by the mutual license, consent, and agreement of the owners of the adjacent lands, and that such license is still in force and effect.

The demurrer to the bill should have been sustained, and for the error in overruling it the decree of the circuit court is reversed and the cause remanded, with directions to sustain the demurrer.

Reversed and remanded, with directions.

(237 Ill. 348)

# PEOPLE v. FEINBERG et al.

(Supreme Court of Illinois. Dec. 15, 1908.)

## 1. RECEIVING STOLEN GOODS (§ 1\*)—NATURE OF OFFENSE.

Under Cr. Code, §§ 239, 241, prohibiting the receiving or buying of stolen property or aiding in concealing the same, with knowledge

that it has been stolen, such offense is a substantive crime, subject to punishment, without reference to the trial or conviction of the person committing the larceny.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. § 3; Dec. Dig. § 1.\*]

## 2. RECEIVING STOLEN GOODS (§ 1\*)—ACCESSORY BEFORE THE FACT.

When the proof showed that defendant, indicted for receiving stolen goods, was also an accessory before the fact, but was not present at the actual conversion of the goods by the thief, the defendant could be held for receiving, the offense of larceny being so distinct from that of receiving that one cannot merge into the other, nor the defendant's conviction of the one prevent a conviction of the other.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. §§ 1, 3; Dec. Dig. § 1.\*]

## 3. CRIMINAL LAW (§ 510\*)—EVIDENCE OF ACCOMPLICES—SUFFICIENCY.

The rule that the uncorroborated testimony of accomplices is insufficient to sustain a conviction does not obtain in Illinois.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124-1126; Dec. Dig. § 510.\*]

## 4. CRIMINAL LAW (§ 1159\*)—WRIT OF ERROR—REVIEW OF EVIDENCE.

A conviction will only be set aside on a writ of error, because unsustained by the evidence, when from a careful consideration of the whole testimony it is not sufficient to show guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3076; Dec. Dig. § 1159.\*]

## 5. CRIMINAL LAW (§ 761\*)—INSTRUCTIONS—ASSUMED FACTS.

In a prosecution for receiving stolen goods, an instruction that if it appears from the evidence beyond a reasonable doubt that the circumstances present and manifest to the defendant at the time of the acceptance of the goods in question were such as would have induced him or any man of ordinary observation to believe, and that he did believe and know, that the goods were stolen, etc., he might be convicted, was erroneous as assuming that defendants had received the stolen goods.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 761.\*]

## 6. CRIMINAL LAW (§ 761\*)—ERRONEOUS INSTRUCTIONS—PREJUDICE.

Where, in a prosecution for receiving stolen goods, the evidence was conflicting on the question as to whether defendants in fact received any stolen property as alleged, an instruction which assumed that defendant had done so was prejudicial, and its effect was not neutralized by the rule that the instructions should be considered as a series, nor by a provision that, for the necessary elements to establish guilt other than knowledge, the jury's attention was directed to other instructions.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 761.\*]

## 7. WITNESSES (§ 406\*)—CONTRADICTION.

Where defendant in a prosecution for receiving stolen pig iron testified that he had never had any pig iron in his possession, evidence that on one occasion he sought to sell pig iron to witness which he said he expected to receive from Indiana was competent to contradict him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1276, 1277; Dec. Dig. § 406.\*]

Error to Criminal Court, Cook County; Theodore Brentano, Judge.

Samuel Feinberg and another were convicted of receiving stolen pig iron, and they bring error. Reversed and remanded.

James T. Brady and Edwin J. Raber, for plaintiffs in error. W. H. Stead, Atty. Gen., and John J. Healy, State's Atty. (Hobart P. Young, of counsel), for the People.

CARTER, J. Plaintiffs in error were indicted in the criminal court of Cook county on the charge of unlawfully buying and receiving 6,000 pounds of pig iron, of the value of one cent a pound, knowing that it had been stolen. They were found guilty in said court and sentenced to the penitentiary, and the case is brought here by writ of error.

The Crane Company is a corporation doing business at 219 Jefferson street, Chicago, and handles large quantities of pig iron. William Gallagher and Peter Briody were teamsters for the company during the year 1905; their principal duty being to haul pig iron from the railways to the foundry. Plaintiffs in error during that year were partners, engaged in the scrap iron and metal business at 197 West Taylor street, in Chicago. Gallagher testified that some time in August, 1905, while he was hauling a load of pig iron belonging to the Crane Company, the plaintiff in error Shaffer met him on the street and asked him if he did not wish to get rid of a part of the load; that he replied that he did not mind if he did, and was directed by Shaffer to drive through an alley and into the rear of the plaintiffs in error's place of business on Taylor street; that Shaffer opened the gates and witness threw out several pieces of pig iron, for which he was paid by Feinberg a dollar, which, upon his objection, was increased to \$1.50. Gallagher further testified that from August to December 21, 1905, at least four or five different times he drove a load of pig iron into the rear of plaintiffs in error's yard and sold a few pieces of the iron, getting from \$1 to \$2 a time; that he knew that Briody during these months did the same thing, and on various trips they were together; that on December 22, 1905, they were driving together from the railway yards, each with a load of pig iron; that some two blocks away from plaintiffs in error's place of business they left one of the wagons and drove with the other through the alley to the rear of plaintiffs in error's yard and sold the entire load, receiving therefor \$10 from plaintiffs in error, the iron being unloaded into a manure pile in the yard, and covered up. He further stated that Briody left the yard before he did, and drove the other load of iron down and unloaded it at the Crane Company's plant, and that he waited on the street with his empty wagon until Briody came, and then they went for another load. Briody also testified for the state and agreed substantially with the testimony of Gallagher. They both also testified that plaintiff in error Feinberg gave

Gallagher a bottle of wine and Briody a box of cigars for a Christmas present in December, 1905. The testimony shows that Gallagher had been employed by the Crane Company for about four years previous to December 22, 1905, and left in February, 1906; that Briody had been in its employ about 20 years previous to December 22, 1905. Some time in 1906 plaintiffs in error dissolved partnership. Briody testified that in November, 1906, he went to 197 West Taylor street with a wagon load of pig iron and was told by Feinberg to drive out at once, that he did not want to buy any pig iron, and that witness then drove out and took the iron to the Crane Company. Shortly thereafter, on the same day, he was called into the office of the company, and, having been accused of having taken and disposed of pig iron at various times, confessed to the facts as above stated, and was then discharged. Gallagher was thereafter called in, and he also admits that he confessed to the entire transactions, the same as he testified on this proceeding. The state also proved by one Novatny that he had been employed by the Bar Foundry Company in Chicago, and that during November, 1906, he had a conversation with Feinberg in which the latter offered to sell the Bar Foundry Company some pig iron which he claimed he expected to obtain from Indiana, but that no pig iron was ever sold or delivered by said Feinberg to said company. Feinberg testified that he had never seen Briody until the occasion in November, 1906, when he drove in the yard and wanted to sell pig iron and was ordered out, and that he had never seen Gallagher until the time of the trial, and that he had never bought any pig iron, either on December 22, 1905—the time charged in the indictment—or at any other time, from either of them. Shaffer testified that he had never seen either of the defendants until the trial and that he had never bought any pig iron from either of them. The bookkeeper of the firm, Miss Anna Sandler, testified that she was working for them in their office during 1905, and that the office window was so situated that she could see into the yard; that she was there during the day of December 22, 1905, and did not see either Briody or Gallagher, or anyone else, drive in with a load of pig iron on that day or any other day during that year. Several witnesses testified as to the previous good reputation of both plaintiffs in error, and no attempt was made by the state to show the contrary.

Plaintiffs in error contend that there is a variance between the indictment and the proof; that, even admitting the testimony of Briody and Gallagher to be true, it shows that the plaintiffs in error were guilty of larceny, and not of receiving stolen property. Under sections 239 and 241 of the Criminal Code, the offense of receiving or buying stolen property, or aiding or concealing the

same, for gain, or to prevent the owner from repossessing himself thereof, with knowledge that it has been stolen, is made a substantive crime and subject to punishment, without reference to the trial or conviction of the person committing the larceny. *Huggins v. People*, 135 Ill. 243, 25 N. E. 1002, 25 Am. St. Rep. 357. The argument is made that the proof shows, if it proves anything, that Feinberg and Shaffer planned the taking of the property before its conversion, and that, therefore, if the state's testimony were true, they were guilty of larceny as principals, or at least as accessories before the fact, and were not guilty of the offense of receiving stolen property; that the principal cannot be held as receiver, as one cannot be guilty of receiving stolen goods from himself. 2 Bishop on New Crim. Law, § 1140. The evidence is not entirely clear regarding the load alleged to have been sold on December 22, 1906, as to whether there was any previous talk that day before the load was drawn into the yard. Gallagher says that Feinberg and Shaffer suggested some days before that a whole load be sold, and that he then said it was too risky. Briody testified that they went in and talked first with the plaintiffs in error and then drove in with one of the loads afterwards. We think it may be fairly said from this record that Gallagher and Briody were the only ones that were guilty of larceny of the load in question, and that the conversion took place when they started to drive out of their direct route into the alley and towards the premises of the plaintiffs in error. Be that as it may, we think the correct rule is laid down in 1 Wharton on Criminal Law (9th Ed.) § 986, that when, on indictment for receiving stolen property, the proof shows that the defendant was also an accessory before the fact, but was not present at the actual time of the conversion of the goods, in such case the defendant can be held for receiving stolen property; the offense of larceny being so distinct from that of receiving stolen goods that one cannot be held to merge in the other, nor the defendant's conviction of one be incompatible with conviction of the other. *State v. Coppenburg*, 2 Strob. (S. C.) 273; 25 Cyc. 59. On this record we do not think there is any variance between the indictment and the proof.

The plaintiffs in error also insist that the only evidence against them was that of self-confessed accomplices, and that, therefore, it was not sufficient to justify a conviction. While it has been held in some jurisdictions that the uncorroborated testimony of accomplices could not sustain a conviction (1 Wharton on Crim. Law [9th Ed.] § 982a), still in this state a contrary rule has been laid down (*Friedberg v. People*, 102 Ill. 160). The authorities, however, agree that such evidence is liable to grave suspicion and should be acted upon with the utmost caution. *Hoyt v. People*, 140 Ill. 588, 30 N. E.

315, 16 L. R. A. 239. Whether the evidence is sufficient to sustain a conviction is largely a question for a jury, and it is only when the court is satisfied, from a careful consideration of the whole testimony, that it is not sufficient to sustain the guilt of the accused that it will interfere with the verdict of a jury on that ground. *McCoy v. People*, 175 Ill. 224, 51 N. E. 777; *Miller v. People*, 229 Ill. 376, 82 N. E. 391. We are not prepared to say that this record would justify the court in setting aside the verdict on the ground of a lack of evidence to support it, but we think it is so conflicting on material points that the instructions should have stated the law applicable to the facts with accuracy. *People v. McGinnis*, 234 Ill. 68, 84 N. E. 687; *Adams v. People*, 179 Ill. 633, 54 N. E. 296; *Miller v. People*, *supra*.

Plaintiffs in error insist that instruction 3 given for the people was erroneous. The instruction reads: "As to what constitutes knowledge on the part of the defendants in this case, the court instructs the jury as a matter of law that to prove a person guilty of receiving stolen property or aiding in concealing stolen property from its rightful owner, knowing the same to have been stolen, it is not necessary to the conviction of the defendant that the people should show that the defendant saw the goods stolen or was told that they were stolen. If it appears from the evidence, beyond a reasonable doubt, that the circumstances present and manifest to the defendant *at the time of the acceptance of the goods in question* were such as would have induced him or any man of ordinary observation to believe, and that he did believe and know, that the property was stolen and was being offered to him, or those acting in concert with him, by one who had no right so to do, such evidence is sufficient. For necessary elements in proving guilt other than knowledge your attention is directed to other instructions." The italics are ours. It is insisted that by these italicized words the court assumed that defendants had received the stolen property in question. This was undoubtedly a vital point in the case and sharply controverted. No stolen property was ever found in the possession of plaintiffs in error, and the only testimony to that effect other than that of Briody and Gallagher, who confessed that they stole iron from their employer, and who, as the record shows, had not been indicted for their offense at the time of the trial, was by Novatny that Feinberg told him he wanted to sell him some pig iron in November, 1906, and the further fact, if it can be held to be any evidence of crime on the part of plaintiffs in error at all, that Feinberg admitted that Briody drove into his yard with a load of pig iron in November, 1906, which he refused to buy. As to plaintiff in error Shaffer, there were absolutely no facts corroborating the confessions of Briody and Gallagher.

Counsel for defendant in error insist that

instructions in the identical language of this one were approved by this court in *Lipsev v. People*, 227 Ill. 364, 81 N. E. 348, and in *Delahoyde v. People*, 212 Ill. 554, 72 N. E. 732. The instructions in those cases are not set out in the opinions, and there is nothing therein to indicate that the instructions were identical in language with the one here; but assuming, for the sake of the argument, that they were, the proof shows clearly and without controversy in each of those cases that the person charged with receiving stolen property did actually have the stolen property in his possession, so that, as was said in *Delahoyde v. People*, 212 Ill. 565, 72 N. E. 737, while the criticism of the instruction that it assumed that plaintiff in error had received the goods in question was well founded, yet "under the proof it could do no harm to plaintiff in error, for the reception of the goods by him in our judgment was abundantly proven, and we think practically conceded by plaintiff in error." Substantially the same condition of facts existed in the *Lipsev* Case, *supra*. But in this case the situation is entirely different. Here were two plaintiffs in error, who had previously borne good reputations, who flatly denied that they ever received any of the stolen property in question, and were corroborated in some degree by their bookkeeper, and the only direct testimony against them was that of those who confessed that they had stolen the property from their employers—testimony of a nature which must be received by the jury with great caution. Where facts are controverted and the evidence is conflicting, it has been frequently held by this court that it is error for the trial court, in instructing the jury, to assume that certain facts are true. *Miller v. People*, *supra*; *Foglia v. People*, 229 Ill. 286, 82 N. E. 262. In view of the conflicting nature of the testimony on this vital question, we do not think the rule that the instructions should be taken as a series, or the insertion of the last sentence in this instruction, neutralized the harm that may have been done by the italicized sentence, which clearly assumed that the goods in question had been accepted by the plaintiffs in error. The giving of this instruction was reversible error.

We cannot agree with the contention of plaintiffs in error that the admission of Novatny's testimony was erroneous. That evidence tended to contradict Feinberg as to his statement that he had never had any pig iron in his possession. The jury should have every fact before them which may enable them to come to a satisfactory conclusion, and much discretion is allowed the trial court in the admission or exclusion of evidence. 3 Ency. of Evidence, 110, 116; *Miller v. People*, *supra*.

Plaintiffs in error also complain of certain statements made by counsel during the trial

and in the closing argument. We do not think there is any prejudicial error in this regard. Neither do we consider that there is any basis for the contention that the court made improper remarks during the trial.

For the error committed in giving the third instruction set out above, the judgment is reversed and the cause remanded to the circuit court.

Reversed and remanded.

(237 Ill. 372)

#### BARTLETT v. LUMAGHI COAL CO.

(Supreme Court of Illinois. Dec. 15, 1908.)

#### APPEAL AND ERROR (§ 1094\*)—REVIEW—INTERMEDIATE COURT—QUESTIONS OF FACT—INFERENCES.

A determination by the Appellate Court in an action for death of lack of negligence and assumption of risk is not reviewable by the Supreme Court, as the inference to be drawn from evidentiary facts is for the Appellate Court, and its conclusion is final.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4322; Dec. Dig. § 1094.\*]

Error to Appellate Court, Fourth District, on Appeal from Circuit Court, Madison County; B. R. Burroughs, Judge.

Action by Charles A. Bartlett, administrator, against the Lumaghi Coal Company for death. From a judgment of the Appellate Court (128 Ill. App. 275), reversing a judgment for plaintiff, plaintiff brings error. Affirmed.

C. H. Burton, for plaintiff in error. Wise, McNulty & Keefe (L. R. Brokaw, of counsel), for defendant in error.

DUNN, J. The plaintiff in error recovered a judgment in an action on the case against the defendant in error for damages on account of the death of Rudolph J. Novosat, his intestate, which was reversed by the Appellate Court, with a finding of fact that the death of the deceased was not caused by the negligence of the defendant, but was brought about by one of the ordinary risks and hazards of his employment which he assumed. The plaintiff in error has sued out a writ of error to reverse the judgment of the Appellate Court, and has argued only questions of fact.

The deceased was an experienced driver engaged in hauling coal in the mine of the defendant in error. While he was driving a mule hauling two loaded cars down a steep grade in an entry of the mine, the hook by which the front car was attached to the mule came out of the coupling and caught in one of the ties, the mule was stopped, and the cars running down the grade ran against the mule. Deceased was thrown from the car by the collision, and killed. The negligence charged was that the roadway was full of holes, so that the ties were exposed and the hook by which the mule was attached to the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cars was likely to catch on them; that the track was too steep and the rails so smooth that the cars would run down as fast as the mule could run; and that the hook by which the mule was attached to the cars was not safe but would come unhooked from the car. Evidence was introduced showing the condition of the track and rails and of the hook. The questions whether the track and rails were in a reasonably safe condition, whether it was practicable to change the grade or to maintain a smooth track, whether the hook was reasonably safe, and whether any defects which existed were so apparent that the deceased ought to have seen and known them were all questions of fact toward which the evidence was directed. The plaintiff had the affirmative of all the issues, and the burden of proving one or more of the counts of his declaration rested upon him.

Whether the defendant was guilty of negligence and whether the deceased assumed the risk were the ultimate questions of fact, to be determined from a consideration of all the evidentiary facts in the case. The inference to be drawn from such evidentiary facts must be determined by the Appellate Court, and its determination is final and conclusive on this court. *Berkowitz v. Terminal Railroad Co.*, 234 Ill. 450, 84 N. E. 1058; *Manthel v. Belt Railway Co.*, 232 Ill. 568, 83 N. E. 1063; *Roemheld v. City of Chicago*, 231 Ill. 467, 83 N. E. 291. The judgment is affirmed. Judgment affirmed.

(237 Ill. 390)

#### PEOPLE v. PROBST.

(Supreme Court of Illinois. Dec. 15, 1908.)

##### 1. RAPE (§ 51\*)—ASSAULT WITH INTENT TO RAPE—EVIDENCE—SUFFICIENCY.

In a trial for assault with intent to commit rape, evidence held sufficient to support a conviction.

[Ed. Note.—For other cases, see *Rape*, Cent. Dig. §§ 71-77; Dec. Dig. § 51.\*]

##### 2. CRIMINAL LAW (§ 1172\*)—APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTIONS—ASSUMPTION OF FACT.

The assumption, in an instruction, of a fact proven by uncontradicted testimony is harmless.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3156; Dec. Dig. § 1172.\*]

##### 3. CRIMINAL LAW (§ 789\*)—INSTRUCTIONS—REASONABLE DOUBT.

In a criminal case, the court should instruct that a reasonable doubt on the entire case will acquit, and not a reasonable doubt on some particular fact in the case.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1922; Dec. Dig. § 789.\*]

##### 4. CRIMINAL LAW (§ 941\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

A conviction will not be set aside on the ground of newly discovered evidence, unless diligence is shown, especially where the evidence is cumulative.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2328-2330; Dec. Dig. § 941.\*]

Error to Circuit Court, Madison County; B. R. Burroughs, Judge.

William Probst was convicted of assault with intent to commit rape, and he brings error. Affirmed.

Brown & Geers, for plaintiff in error. W. H. Stead, Atty. Gen., and J. F. Gillham, State's Atty. (Joel C. Fitch and F. E. Sebastian, of counsel), for the People.

**HAND, J.** William Probst was indicted and convicted in the circuit court of Madison county of an assault with intent to commit rape upon Pearl Rider, a girl 13 years of age, and sentenced to the penitentiary, and he has sued out a writ of error from this court to review said judgment of conviction.

The first contention urged as a ground for reversal is that the verdict is not supported by the evidence. From the record it appears that plaintiff in error was 27 years of age, and Pearl Rider was 13 years of age. Pearl Rider lived with her father, Samuel Rider, and her two brothers, who were of the ages of 5 and 2 years, respectively, in the city of Edwardsville. The prosecutrix testified that on the evening of the 23d of March, 1908, her father was away from home; that shortly after 7 o'clock on that evening the plaintiff in error came to the front gate of the lot upon which they lived, and inquired of her little brothers where they kept the rabbits; that after talking to them a short time he passed around to the side of the lot next to the railroad, and jumped over the fence into their yard; that he then came around the north side of the house to where she was standing, and caught her by the arm and around the waist, and pushed or dragged her to the rear of the house; that he then threw her down, and placed his hand under her clothing and made improper proposals to her; that she pulled his hair, kicked, called out, and threatened to tell her father, when he let her up; that on being released she ran into the kitchen; that he pursued her into the kitchen, and again caught hold of her and repeated what he had done in the yard; that she did all she could to get away; that finally, without accomplishing his purpose, he left the house and went uptown. Two neighbor women by the name of Schumacher, who lived immediately across the street, testified they saw a man, shortly after 7 o'clock on the evening in question, go past the house where Mr. Rider lived and stop near the gate leading to the poorhouse; that he shortly returned, and they saw him in the Rider yard, near the front of the house; that he took hold of Pearl and pulled her around to the rear of the house; that they heard her holler, and threaten to tell her father; and that the man then left the yard and hurried off uptown. And a witness by the name of Levora testified that on the evening in ques-

\*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes

tion, about the time the assault took place, he saw the plaintiff in error in the vicinity of the Rider home, going hurriedly in the direction of uptown. After the plaintiff in error was indicted, he was arrested by a deputy sheriff. He asked the officer to permit him to see his father. The officer went to his father's home with him, when the plaintiff in error escaped from the officer, and fled to the state of Missouri. He was rearrested in the city of St. Louis, and the deputy sheriff who made the arrest testified that on the way to Edwardsville, from St. Louis, the plaintiff in error said: "They can't stick me. I was on one side of the fence and the girl on the other. That is all those kids seen." The plaintiff in error filed his affidavit in support of a motion for a continuance, in which he stated that he was not at the Rider house on the night of the 23d of March, and that he was on that evening in the company of one Jerry Stubbs, and could establish by Stubbs, were he present, that the plaintiff in error was not at the Rider house that evening. On the trial he did not call Stubbs, but claimed he was mistaken as to the evening in which he was in company with Stubbs. The plaintiff in error, upon the trial, did not attempt to deny that Pearl Rider had been assaulted, but interposed the defense of an alibi, to establish which he called a number of witnesses, none of whom testified positively that they saw the plaintiff in error on the evening of the assault near the time when the assault took place, except one Jack Clark, who testified positively that he was with plaintiff in error, and fixed the date when he was in company with the plaintiff in error from the fact that he was suffering from a venereal disease and consulted a physician on the following morning. The prosecutrix knew the plaintiff in error, and he admitted that he was within two or three blocks of the Rider home on the evening of the assault, and she could not well have been mistaken as to his identity, and, corroborated as she was by other witnesses and facts and circumstances in evidence, the jury were clearly justified in finding the plaintiff in error guilty, and the judgment of conviction should be affirmed, unless, in the rulings of the court in the course of the trial and in passing upon instructions, there occurred errors which should work a reversal of the case.

It is next contended that the court erred in giving to the jury the people's ninth instruction, in this: That it assumed the age of the prosecutrix to have been under that of 16 years. There was no such assumption in the instruction; and if there had been, it would have been harmless, as there was no conflict in the evidence as to the age of the girl. She and her father both testified she was only 13 years of age at the time of the trial, and their testimony was not contradicted.

It is also contended that the tenth instruction, given on behalf of the people, is erroneous, in this: That it informed the jury that, to render evidence of an alibi satisfactory, it should cover the entire time of the transaction, so that it would have been impossible for the defendant to have committed the offense. This instruction, as given, was in paragraphs. The first paragraph was given as a single instruction in *Briggs v. People*, 219 Ill. 330, 7 N. E. 499, and standing alone, as it did in that case, it was criticised. It was, however, held not to be reversible error. When the entire instruction is taken together, as it was given in this case, it stated the law correctly, and could not have misled the jury. *Creed v. People*, 81 Ill. 565. The plaintiff in error's offered instruction, the refusal of which is complained of, was subject to the criticism that it selected out of the case one question and gave that question undue prominence. A jury, in a case like this, should be instructed a reasonable doubt upon the entire case will acquit, and not a reasonable doubt upon some particular fact in the case. The court did not err in its ruling upon the instruction.

The plaintiff in error filed an affidavit in support of his motion for a new trial, in which he claimed to have found a new witness who would testify that the man who was seen in the vicinity of the Rider house on the evening of the assault was not the plaintiff in error. The witness resided within a few feet of where the assault occurred, and should have been discovered by the plaintiff in error prior to the trial. And the evidence was, at most, only cumulative. A judgment of conviction will not be set aside on the ground of newly discovered evidence unless diligence has been shown, and especially is this true where the evidence is only cumulative.

We have examined this record with care and are of the opinion a correct result was reached in the circuit court, and that the judgment of that court should be affirmed.

Judgment affirmed.

(287 Ill. 196)

# PEOPLE v. YOUNG.

(Supreme Court of Illinois. Dec. 15, 1908.)

## 1. INTOXICATING LIQUORS (§ 147\*)—LOCAL OPTION—PLACE OF SALE.

The place of contract of sale of intoxicating liquor is in "wet" territory, the order being received and accepted there, though it was telephoned from "dry" territory, and accepted in the course of the same telephonic conversation.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 162; Dec. Dig. § 147.\*]

## 2. INTOXICATING LIQUORS (§ 147\*)—LOCAL OPTION—PLACE OF DELIVERY.

Delivery of intoxicating liquors by the seller to the purchaser was in "wet" territory; the express company, to which it was there delivered to take to the buyer in "dry" territory, as it did, being the agent of the buyer, and the

\*For other cases, see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

law in this respect not being changed by Local Option Law (Laws 1907, p. 302) § 13, declaring the giving away or delivery of intoxicating liquor for the purpose of evading the law, or the taking of orders or the making of agreements in antisaloon territory for the sale or delivery of such liquor, or other shift or device to evade the law, to be an unlawful selling.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 162; Dec. Dig. § 147.\*]

**3. INTOXICATING LIQUORS (§ 147\*)—LOCAL OPTION — EVASION OF LAW — "SHIFT OR DEVICE."**

One is not guilty of practicing a shift or device to evade the Local Option Law (Laws 1907, p. 302) § 12, making it an offense to sell intoxicating liquors in antisaloon territory, within section 13, declaring the practicing of such a shift or device to be a selling, where a person from "dry" territory arranged with him in "wet" territory that he might telephone orders from dry territory and have them filled, and subsequently telephoned such an order, which was filled by delivery to an express company in wet territory.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 162; Dec. Dig. § 147.\*]

Error to Circuit Court, Vermillion County; James W. Craig, Judge.

C. J. Young was convicted of violating the local option law, and brings error. Reversed.

On June 10, 1908, an indictment in four counts was returned by the grand jury of Vermillion county against C. J. Young, the plaintiff in error, charging him with having violated sections 12, 13, Local Option Law 1907 (Laws of 1907, p. 302). To the indictment plaintiff in error pleaded not guilty. A jury was waived, and on July 6, 1908, a trial was had in the Vermillion county circuit court, which resulted in a general finding of guilty against defendant. After overruling the motion of plaintiff in error for a new trial the court imposed a fine of \$20 and costs, and ordered that he be imprisoned in the county jail for a period of 10 days. To review that judgment a writ of error has been sued out of this court. The people contended and the court found the facts to be as follows, to wit: The township of Georgetown is antisaloon or "dry" territory. The township of Danville is not antisaloon territory, and is denominated "wet" territory. Both townships are in Vermillion county. Young was a licensed saloonkeeper, engaged in business in the city of Danville, in Danville township. The Terre Haute Brewing Company was engaged in the brewery business in the township last mentioned. Andres resided in the township of Georgetown. Some days prior to the finding of the indictment he was at Young's saloon, in Danville. He there had a conversation with a porter in the employ of Young, and made an arrangement with the porter, so that, if he wanted beer in Georgetown, he could telephone the order to Young's saloon and those in charge of the saloon would order the beer from the brewery for Andres. Some days later Andres, being then in Georgetown, called up Young's saloon by

telephone, and told the employé in the saloon who answered the telephone that he wanted one case and three kegs of beer sent to him at a point in Georgetown that evening by express. Young telephoned the order to the brewing company, and it delivered the beer to an express company, a common carrier, in the township of Danville, consigned to Andres at a point in the township of Georgetown. The express company delivered the actual possession of the beer to Andres in the township of Georgetown on the same day. On the books of the brewing company the beer was charged to Andres, and he paid the express charges when he received the beer in Georgetown. Under the construction which was placed upon section 13, supra, by the court, and for which defendant in error now argues, the facts so stated constituted a violation of the statute. The position taken by plaintiff in error is that, if the construction of the statute adopted by the court be correct, the statute is not valid, and, further, that when the statute is properly construed, the facts as above stated do not constitute a violation thereof.

Lindley, Penwell & Lindley, for plaintiff in error. W. H. Stead, Atty. Gen., and J. W. Keeslar, State's Atty. (W. T. Gunn, of counsel), for the People.

SCOTT, J. (after stating the facts as above). Sections 12, 13, Local Option Act (Laws 1907, p. 302), provide:

"Sec. 12. Whoever shall by himself or another, either as principal, clerk or servant, directly or indirectly, sell, barter or exchange any intoxicating liquor in any quantity whatever within the limits of any political subdivision or district in this state, while the same is antisaloon territory, shall be fined not less than twenty dollars (\$20), nor more than one hundred dollars (\$100), or imprisoned in the county jail for not less than ten (10) days nor more than thirty (30) days, or both, in the discretion of the court. If any person shall be convicted of violating any provision of this section and shall subsequently violate any provision of this section he shall upon conviction thereof, be fined not less than fifty dollars (\$50), nor more than two hundred dollars (\$200), and imprisoned in the county jail for not less than ten (10) days, nor more than thirty (30) days. And in like manner, if he shall subsequently violate any provision of this section, for such third and each subsequent violation he shall upon conviction thereof be fined not less than one hundred dollars (\$100), nor more than two hundred dollars (\$200), and imprisoned in the county jail for not less than thirty (30) days, nor more than ninety (90) days.

"Sec. 13. The giving away or delivery of any intoxicating liquor for the purpose of evading any provision of this act, or the taking of orders or the making of agreements

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

at or within any political subdivision or district while the same is antisaloon territory, for the sale or delivery of any intoxicating liquor, or other shift or device to evade any provision of this act, shall be held to be an unlawful selling."

The theory of the prosecution in the first place is that the series of acts by which the beer passed into the possession of Andres was a violation of section 13, *supra*, in which Young participated, because the beer actually was given into the manual possession of Andres in dry territory. It is fundamental that the place of making this contract of sale was in the township of Danville, because the brewing company received and accepted the order of Andres in that township. 1 Beach on Contracts, § 66; 2 Parsons on Contracts, 536. This is the case even though the order was received and accepted by telephone. *Bank v. Sperry Flour Co.*, 141 Cal. 314, 74 Pac. 855, 65 L. R. A. 90.

In *City of Carthage v. Duvall*, 202 Ill. 234, 66 N. E. 1099, an action was brought by the city of Carthage against Duvall to recover a penalty for selling intoxicating liquors in violation of an ordinance which made it unlawful to sell intoxicating liquors in less than five gallon quantities in that city. Skidmore, in Carthage, ordered one gallon of whisky from a liquor dealer in Burlington, Iowa. The latter filled the order by delivering the whisky to an express company at Burlington, consigned to Skidmore at Carthage, C. O. D. When the whisky reached Duvall, who was the agent of the express company at Carthage, he delivered it to Skidmore in that city, and collected from him the price thereof, with the express charges. This court held that this was not a sale in Carthage, but was a sale in Burlington; that the liquor, when delivered to the carrier in Burlington, was, in legal effect, delivered to the purchaser in Burlington, and that the transaction was therefore not a violation of the ordinance of the city of Carthage. Under the law as stated in that case—and that case, so far as here material, is, we think, in harmony with all the decisions on the subject—the liquor involved in this case was sold and delivered to Andres in the town of Danville. Defendant in error answers to this that section 13, *supra*, changes the law in this respect, so that the place of the delivery of the liquor is the place where it actually comes into the hands of the purchaser, and that, the beer having been so received by Andres in Georgetown, the statute has been violated. Without entering at all into the question, much discussed by counsel, concerning the power of the Legislature to change, by its enactment, the place at which the delivery is, in legal effect, made in a case such as this, it is sufficient to say that this law does not indicate any attempt, on the part of the Legislature, to make such a change. It is to be observed that section 13 does not define or create an independent offense. It merely denounces shifts and devices

made use of to evade other provisions of the act, and its meaning can only be ascertained by an examination of such other provisions. The local option statute is penal, and must be strictly construed, although a construction so unreasonably strict as to defeat the true intent of the enactment should not be adopted. *Hamer v. People*, 205 Ill. 570, 68 N. E. 1061. It is apparent from the various provisions of this law that its purpose was to prevent the sale, barter, and exchange of intoxicating liquors in dry territory, except under certain conditions not necessary to be here pointed out. There is nothing in the language of the act to indicate that the words "sell," "barter," "exchange," and "delivery," used therein, were used in any other than their ordinary sense. No word can be found in this statute indicating any purpose to alter the legal effect of any act of a common carrier, or any purpose to change the law relative to the rights and duties of such a carrier. The word "delivery" must be regarded as pertaining to sell, barter, or exchange, and as meaning a delivery having the same legal effect as a delivery by a person selling, bartering, or exchanging to or with another, according to the significance of the term "delivery" as fixed by the law in existence at the time of the passage of the act. Giving it such meaning, the delivery contemplated was a delivery in dry territory by the person disposing of the liquor (by sale, barter, or exchange) to the person acquiring the same, or other delivery of like legal effect in dry territory, while under the law the delivery made in this case by the seller to the buyer was made in wet territory. So far as the question of delivery between the seller and purchaser is concerned, this case is exactly as though Andres, being in Danville township, had received the beer from the brewing company, and had then himself hauled or carried it into Georgetown.

It is next suggested that, if the law as to the place of delivery has not been changed by this statute, Young has been guilty of practicing a shift or device other than making a delivery, which was in itself unlawful, to evade some provision of this act, and, being so guilty, is to be punished as for an unlawful selling. The act does not in any of its provisions attempt to prohibit a sale and delivery of liquor in wet territory, nor is there any attempt to prevent one who has become the owner of intoxicating liquor in wet territory from bringing that liquor into dry territory. Such transactions as the two last mentioned have none of the unlawful elements of a sale, barter, or exchange of intoxicating liquor in dry territory. It is true that the transaction in this case enabled the purchaser to have the beer delivered to him in dry territory by a common carrier, pursuant to a sale and shipment made by the brewer in wet territory, and enabled him to own the beer, and to have it in his immediate possession, in dry territory; but these things

the statute has not forbidden. We think there is no evidence of any attempt to evade any of the provisions of the act by the use of a shift or device of any kind.

Placing upon this enactment the meaning which we have above indicted it should bear, there is no ground upon which it can be concluded that Young is guilty of any offense charged by this indictment. We, therefore, refrain from a consideration of the questions which have been argued bearing upon the validity of section 13, *supra*.

The judgment of the circuit court will be reversed.

Judgment reversed.

(237 Ill. 167)

**THOMAS et al. v. OLENICK.**

(Supreme Court of Illinois. Dec. 15, 1908.)

**1. FORCIBLE ENTRY AND DETAINER (§ 6\*)—NATURE OF REMEDY—TRIAL OF TITLE.**

In actions of forcible detainer, the title to the premises cannot be inquired into for any purpose.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 31; Dec. Dig. § 6.\*]

**2. COURTS (§ 219\*)—APPELLATE JURISDICTION—CASES INVOLVING FREEHOLD—FORCIBLE DETAINER.**

Where plaintiffs in forcible detainer sued as heirs of a lessor for failure to pay rent, under Hurd's Rev. St. 1905, c. 80, § 14, giving heirs and personal representatives of a lessor the same remedy as the lessor would have had, and another claimed the premises under a will of the lessor, the lessee could not litigate therein the validity of such will, and no freehold was involved which could give the Supreme Court jurisdiction of an appeal from the judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 568; Dec. Dig. § 219.\*]

Appeal from Appellate Court, First District, on Error to Municipal Court of Chicago; of Mancha Bruggemeyer, Judge.

Action of forcible detainer by Aaron Thomas and others against Joseph Olenick. From a judgment of the Appellate Court for the First District (140 Ill. App. 385), reversing a judgment for plaintiffs, they appeal, and defendant moves to dismiss the appeal. Dismissed.

J. Marion Miller and John M. Humphrey, for appellants. Ernest B. Cresap and Frank H. Graham, for appellee.

VICKERS, J. Aaron Thomas and others, claiming to be the legal heirs of Jane Ottman, brought an action of forcible detainer against Joseph Olenick in the municipal court of Chicago to recover the possession of certain premises in the possession of Joseph Olenick under a lease executed to him by Jane Ottman in her lifetime. The ground upon which the action is based was a breach of the lease by failure to pay, after demand in writing, \$60 rents upon the premises. Judgment having gone against the de-

fendant, an appeal was taken by him to the Appellate Court for the First District, where the judgment of the municipal court was reversed but the cause was not remanded. From this judgment of reversal plaintiffs below have appealed to this court.

Appellee has entered a motion in this court to dismiss the appeal for want of jurisdiction, and that motion has been taken with the case. There is here no certificate of importance, and the amount involved is less than \$1,000. Jane Ottman, the lessor, was at the time of her death the owner of the premises involved. She left a writing purporting to be her last will and testament, by which the premises involved were devised to one John T. Schofield. The validity of the will of the lessor is disputed by appellants, and litigation is pending between the heirs and devisee to determine the validity of the will. If the will shall be sustained, it will relate back to the time of the death of the lessor, and Schofield, as devisee, will succeed to the premises involved, together with the rents, issues, and profits thereof. On the other hand, if the will is found to be invalid, then the premises will descend to the heirs of the lessor and the devisees will have no interest in the premises. Assuming that the court in this action will determine the conflicting claims of the heirs and devisees to the premises involved, appellants contend that there is a freehold involved, and that, therefore, this court has jurisdiction of this appeal. This is a misapprehension as to the law applicable to actions of forcible detainer. In actions of forcible detainer the title to the premises cannot be inquired into for any purpose. *Johnson v. Baker*, 88 Ill. 98, 87 Am. Dec. 298; *Huftalin v. Mismar*, 70 Ill. 205; *McGuirk v. Burry*, 93 Ill. 118; *Kepley v. Luke*, 106 Ill. 395; *McDole v. Shepardson*, 156 Ill. 383, 40 N. E. 953; *Moore v. Richardson*, 197 Ill. 437, 64 N. E. 330. Upon the death of the lessor, under the express provisions of section 14 of chapter 80 of Hurd's Revised Statutes of 1905, the right of action on the lease survives to "the heirs and personal representatives of the lessor." Assuming that appellants are the legal heirs of the lessor, and that they were entitled to regain possession of the demised premises for a breach of the conditions of the lease, the lessee could not be permitted in this action to litigate the question as to the validity of the will, under which some one else claimed the premises. This is apparently the theory upon which appellants brought this suit, from which it is very clear that no freehold could in any view be involved.

The motion to dismiss the appeal will be sustained.

Appeal dismissed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(237 Ill. 401)

**THOMAS et al. v. OLENICK.**

(Supreme Court of Illinois. Dec. 15, 1908.)

Appeal from Appellate Court, First District, on Error to Municipal Court of Chicago; Man-cha Bruggemeyer, Judge.

Forcible detainer by Aaron Thomas and others against Joseph Olenick. From a judgment of the Appellate Court (140 Ill. App. 888), reversing a judgment for plaintiffs, plaintiffs appeal. Dismissed.

J. Marion Miller and John M. Humphrey, for appellants. Ernest B. Cressap and Frank H. Graham, for appellee.

**PER CURIAM.** This case is between the same parties and is in all respects the same as *Thomas v. Olenick*, 88 N. E. 592, except that the premises here involved are the second floor instead of the first floor of the building at No. 46 North Paulina street, and the amount involved was less than \$1,000.

The appeal is dismissed.

Appeal dismissed.

(237 Ill. 332)

**PEOPLE ex rel. CARRELL, Tax Collector, v. BELL et al.**

(Supreme Court of Illinois. Dec. 15, 1908.)

**1. MINES AND MINERALS (§ 55\*)—"MINES"—"MINING RIGHT"—DEFINITION.**

A "mine" is an excavation in the earth to obtain minerals, an excavation, properly under ground, to take out some useful product, and a mining right is a right to excavate in the earth to obtain minerals or other useful products.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 55.\*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4511, 4512, 4522.]

**2. TAXATION (§ 63\*)—MINING RIGHT—"PROPERTY."**

A mining right to drill for oil and gas in certain described premises in consideration of a fixed royalty, etc., is "property," and should be taxed.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 147; Dec. Dig. § 63.\*

For other definitions, see *Words and Phrases*, vol. 6, pp. 5693-5723; vol. 8, pp. 7768-7770.]

**3. TAXATION (§ 63\*)—"MINING RIGHT"—OIL AND GAS LEASE—"MINERAL."**

Hurd's Rev. St. 1905, p. 1399, c. 94, §§ 6, 7, declare that any mining right or the right to dig for or obtain iron, lead, copper, coal, or other mineral from land may be conveyed by deed or lease, which may be acknowledged and recorded in the same manner as deeds and leases of real estate, and that when the owner of land shall convey, by deed or lease, any mining right therein, the conveyance shall be considered as so separating such right from the land as to be separately taxable. *Held* that, since petroleum is a mineral, the right of the lessee to mine for oil and gas on certain specified premises is a mining right, and separately taxable under such sections.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 147; Dec. Dig. § 63.\*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4513-4515; vol. 8, p. 7722.]

Appeal from Cumberland County Court; A. L. Ruffner, Judge.

Action by the People, on the relation of Thomas B. Carrell, county tax collector,

against William Bell and others. Judgment for relator, and defendants appeal. Affirmed.

Golden, Scholfield & Scholfield, for appellants. Walter Brewer, State's Atty., for appellee.

**CARTER, J.** This is an appeal from a judgment of sale entered in the county court of Cumberland county for taxes levied on a mining right in 80 acres of land in that county. The right is based on a certain instrument known as an "oil and gas lease," dated October 27, 1906, signed by Charley M. and Rachel E. Queen, granting to one Priddy, his heirs, successors, and assigns, in consideration of \$1 and the covenants of said lease, "all the oil and gas in and under the following described premises, together with the exclusive right to enter thereon at all times for the purpose of drilling and operating for oil, gas or water, and to erect, install and maintain all buildings and structures, machinery and appliances, and lay all pipes necessary for the production, storage and transportation of oil, gas or water upon and from said premises. Excepting and reserving, however, to the lessor the one-eighth (1/8) part of all oil produced and saved from said premises, to be delivered in the pipe line with which the lessee may connect his wells.

\* \* \* To have and to hold the above premises for the term of one year, and so long thereafter as oil or gas is found on said premises in paying quantities." The lease also contains provisions, among others, as to the payment of rent in case only gas is found or in case the well is not completed within 60 days. It appears from the stipulation of facts filed by the parties hereto in the trial court that the lease had been duly assigned to and was owned by the Campbell Oil Company, the members of which are appellants herein, and that said company had drilled a well on said land which was then producing oil in paying quantities; also, that the owner of the fee had paid the taxes on the fee, amounting to \$14.10.

Sections 6 and 7 of chapter 94 (Hurd's Rev. St. 1905, p. 1399), in relation to taxing mining rights in this state, are as follows:

"Sec. 6. Any mining right, or the right to dig for or obtain iron, lead, copper, coal, or other mineral from land, may be conveyed by deed or lease, which may be acknowledged and recorded in the same manner and with like effect as deeds and leases of real estate.

"Sec. 7. When the owner of any land shall convey, by deed or lease, any mining right therein, such conveyance shall be considered as so separating such right from the land that the same shall be taxable separately, and any sale of the land for any tax or assessment shall not include or affect such mining right."

Appellants contend that the term "other mineral," in said section 6, only includes

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

such minerals as are ejusdem generis with iron, lead, copper, and coal, and does not include oil and gas. They also contend that as this statute was passed in 1861, and as oil and gas had not at that time been the subject of legislation or court action, the Legislature could not have intended those products to be included in the term "other mineral." We are unable to agree with these contentions. Section 6, above quoted, provides that "any mining right" may be conveyed by lease, and section 7 provides that, when such mining right has been conveyed, it shall be considered as so separated from the land that it is taxable separately. Does this oil lease properly come within the term "mining right"? A mine is an excavation in the earth for the purpose of obtaining minerals (2 Bouvier's Law Dict. [Rawle's Ed.] 413), an excavation, properly under ground, for the purpose of taking out some useful product (Standard Dict.). A mining right may properly be deemed a right to excavate in the earth for the purpose of obtaining minerals or other useful products. In some of the states petroleum forms a very valuable part of the natural wealth and has been given careful consideration by the courts, and they have uniformly held, so far as the authorities we have examined show, that it should be classed as a mineral. Appeal of Stoughton, 88 Pa. 198; Murray v. Allred, 100 Tenn. 100, 43 S. W. 355, 39 L. R. A. 249, 66 Am. St. Rep. 740; Gill v. Weston, 110 Pa. 312, 1 Atl. 921; Williamson v. Jones, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222; Wilson v. Youst, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292; Kelly v. Ohio Coal Co., 57 Ohio St. 817, 49 N. E. 399, 39 L. R. A. 765, 63 Am. St. Rep. 721; Blakely v. Marshall, 174 Pa. 425, 34 Atl. 564; 2 Bouvier's Law Dict. 545. The case of Dunham v. Kirkpatrick, 101 Pa. 36, 47 Am. Rep. 696, is cited by appellants as tending to uphold the contrary view. While it holds that the reservation of "other minerals" in a deed did not include petroleum in that instance, it expressly states "it is true that petroleum is a mineral. No discussion is needed to prove that fact." This court has recently decided that oil and gas are classed as minerals, though they may have peculiar attributes not common to other minerals which have a fixed and permanent situs. Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46; Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 84 N. E. 53. It is true that, when the statute above quoted was passed, petroleum was not as extensive an article of commerce in this state as it has since become. That, however, does not exclude it from the act any more than it would gold mica, or some other mineral that might be discovered. In Gill v. Weston, supra, the same argument was advanced, and the court there said: "It matters not that the act of 1855 was passed before petroleum was discovered. It is a mineral substance obtained from the earth by

the process of mining, and the land from which it is obtained may with propriety be called mining land."

Manifestly, the mining right created by this lease is property and should be taxed. Appellants have cited authorities holding that it is not such a right that it can be taxed as real estate. State v. South Penn Oil Co., 42 W. Va. 80, 24 S. E. 688; Kansas Natural Gas Co. v. Board of Commissioners, 75 Kan. 335, 89 Pac. 750; Kitchen v. Smith, 101 Pa. 452; Wood v. Jones, 54 Ohio St. 627, 47 N. E. 1119. Some of these authorities tend to hold that it cannot be taxed at all except as the oil and gas are taken from the land, and then they must be taxed as personal property. It should be noted that, although the leases in those cases are substantially like the one here in question, the statutes in those states are quite different from the one here under consideration. The West Virginia court holds in the case just cited from that state that the lease does not convey a freehold interest. This court has held, under provisions in a lease substantially like this, that it conveyed a freehold interest. Bruner v. Hicks, 230 Ill. 536, 82 N. E. 888, 120 Am. St. Rep. 332; Poe v. Ulrey, supra. In discussing the above sections of the statute in Re Major, 134 Ill. 19, 24 N. E. 973, we have held that, even though there was no evidence that coal existed under the land, whatever there was of coal or mineral underlying certain land was reserved by the conveyance there in question, and the lease could be taxed. Similar leases affecting rights as to coal have been held to so separate a mining right therein that it should be taxed separately. Consolidated Coal Co. v. Baker, 135 Ill. 545, 26 N. E. 651, 12 L. R. A. 247; Sholl Bros. v. People, 194 Ill. 24, 61 N. E. 1122; In re Maplewood Coal Co., 213 Ill. 283, 72 N. E. 786. Oil and gas, like salt water and other liquids and gaseous bodies, are different in their action from solid minerals, such as coal and iron, and this difference might, under certain conditions, require the application of different rules as to solid minerals than as to liquid or gaseous ones. Watford Oil & Gas Co. v. Shipman, supra. But such is not the case here. Whatever may have been decided in other jurisdictions, it is clear under the decisions in this state that this lease conveys such a mining right in the land here in question that it can properly be taxed separately, and that as it involves a freehold it should be assessed as real property.

Appellants contend that the board of review improperly assessed the entire mining right to appellants. So far as the record discloses, there is nothing to show that the board did not assess to appellants only what was considered the fair value of the mining right obtained by them under the lease. As to whether the one-eighth of oil reserved by the owners of the fee did or should cause

the tax on the fee to be made higher is a question not raised on this record.

The judgment of the county court will be affirmed.

Judgment affirmed.

(287 Ill. 394.)

**TOWN OF SCOTT et al. v. ARTMAN et al.**  
(Supreme Court of Illinois. Dec. 15, 1908.)

**1. PARTIES (§ 96\*)—OBJECTIONS—WAIVER.**

Where parties having substantial rights were petitioners in a mandamus proceeding, defendants by answering to the merits, waived the objection that the people were not made the nominal plaintiff.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 167, 168; Dec. Dig. § 96.\*]

**2. PARTIES (§ 96\*)—RIGHT TO SUE—OBJECTIONS—WAIVER.**

Where defendants did not stand by their demurrer to the amended petition after it was overruled, but answered to the merits, they waived an objection that the plaintiffs had no capacity to sue as commissioners of highways for their respective towns.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 167, 168; Dec. Dig. § 96.\*]

**3. APPEAL AND ERROR (§ 183\*)—DEMURRER.**

Where petitioners moved to carry a demurrer to a replication back to the answer, but defendants did not move to carry it back to the amended petition, the court did not err in omitting to do so.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1240; Dec. Dig. § 193.\*]

**4. COURTS (§ 90\*)—PREVIOUS DECISION AS LAW OF THE CASE—RULING ON DEMURRER.**

Where a demurrer to the amended petition had been overruled, and there had been no change therein in respect to questions raised, defendants were not entitled to have a demurrer to the replication carried back to such amended petition.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 90.\*]

**5. ABATEMENT AND REVIVAL (§ 45\*)—PRESENTATION OF GROUNDS—PLEADINGS.**

Where mandamus was brought against defendants as commissioners of highways to compel them to open a road, their duty in the premises rested on them as a body without regard to the individuals composing the board, so that the suit was not affected by changes in the board's membership during its pendency.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 226-234; Dec. Dig. § 45.\*]

**6. APPEAL AND ERROR (§ 518\*)—BILL OF EXCEPTIONS—NECESSITY.**

A motion to strike an answer from the files and the decision thereon does not become a part of the record, unless preserved by bill of exceptions, and, in the absence of such bill, will be conclusively presumed on appeal to have been correct.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 518.\*]

**7. COURTS (§ 219\*)—APPELLATE COURT—JURISDICTION—OBJECTIONS—WAIVER.**

Since the question of the existence or non-existence of a public highway constituting a perpetual easement involves a freehold which the appellate court has no jurisdiction to determine, such question raised in mandamus to

compel highway commissioners to open the road was waived by an appeal to the Appellate Court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 219.\*]

**8. APPEAL AND ERROR (§ 1082\*)—INTERMEDIATE APPEAL—APPEAL TO SUPREME COURT—SCOPE OF REVIEW.**

On appeal to the Supreme Court from the decision of the Appellate Court, only such errors can be reviewed as were properly assigned in the Appellate Court, and on which it had jurisdiction to pass.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4281; Dec. Dig. § 1082.\*]

**9. COURTS (§ 219\*)—INTERMEDIATE APPEAL—WAIVER OF ERRORS.**

By an appeal to the Appellate Court and submission of the case for decision on errors which that court may rightfully consider, appellant waives any assignment of error reviewable only on a direct appeal to the Supreme Court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 219.\*]

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, Piatt County; W. G. Cochran, Judge.

Mandamus by the Town of Scott, by its commissioners of highways and others, against Hiram Artman and others. From a decree for complainants, affirmed by the Appellate Court, defendants appeal. Affirmed.

Herrick & Herrick and Reed & Reed, for appellants. Ray & Dobbins, for appellees.

**CARTWRIGHT, C. J.** On September 17, 1906, the commissioners of highways of the towns of Scott and Mahomet, in Champaign county, and of the town of Sangamon, in Piatt county, acting as a joint board under the road and bridge law, made and signed a final order laying out and establishing a public highway along the boundary line between said towns, which was also the county line; all of the commissioners being present and signing the order. The order recited at length the petition for the road and the successive steps for laying out the same, and it was filed within five days, together with the report of the surveyor, petition, releases, agreements, or assessments in respect to damages, in accordance with the statute. On September 29, 1906, said joint board of highway commissioners of the three towns at a meeting divided the expense and damage accruing from the establishment of the road, allotting one-third to each town. This agreement was reduced to writing and signed by all the commissioners, except the appellant Hiram Artman, one of the commissioners of the town of Sangamon, who refused to sign it. The commissioners also entered into an agreement allotting to each of the towns the part of the road which each should open and keep in repair, and this agreement was also signed by all the commissioners except Artman. On October 20, 1906, at a meeting of the joint board, when all were present, a resolution was adopted that each town should

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

issue orders, payable to the landowners, to the amount of their portion of the damages assessed and agreed on, payable out of the tax to be levied and collected for that purpose, when collected. Orders were drawn, which the commissioners of the towns of Scott and Mahomet, and J. C. Furnish, one of the commissioners of the town of Sangamon, were ready and willing to sign, but Artman and A. J. Pike, the other commissioners of the town of Sangamon, refused to join in drawing orders or to take any steps toward laying out the highway or paying any part of the damages. On January 30, 1907, the commissioners of highways of the towns of Scott and Mahomet, and J. C. Furnish, one of the commissioners of the town of Sangamon, filed their petition against Artman and Pike as commissioners of highways of the town of Sangamon, praying for a writ of mandamus commanding them to join with J. C. Furnish, the other commissioner, in paying the portion of that town of the damages out of any funds on hand applicable to that purpose, and, in case there were not sufficient funds on hand, then to draw orders on their treasurer, payable only out of the tax to be levied for such highway when the moneys should be collected and received, and to proceed with all lawful diligence to do all acts and things necessary and lawful to be done for the opening of the road. Furnish afterward withdrew from the suit, and his name was stricken out of the petition. The defendants Artman and Pike first demurred to the petition as amended, and, their demurrer being overruled, they answered, denying every allegation of the petition and each step set forth in the petition and the order signed by them for the laying out of the highway, and admitting that they refused to draw any order or participate in opening the highway. Pike afterward filed a plea setting up that his term of office had expired, and that the appellant Harry Clark was his successor. Clark was made a party and filed an answer, which was stricken from the files. The petitioners filed a replication to the answer, which was demurred to, and the petitioners moved to carry the demurrer back to all of the answer except certain paragraphs. The court sustained the motion, carried the demurrer back, and sustained it to the portions of the answer referred to in the motion. The petitioners demurred to the plea of Pike, and the court sustained the demurrer and Pike stood by his plea. There was a trial before the court without a jury, resulting in a finding of the issues in favor of the petitioners. The court awarded a peremptory writ of mandamus against Artman and Clark, commanding them to join with Furnish in paying one-third of the damages for the laying out of the road if they had the funds on hand for that purpose, and, if they had not sufficient funds on hand, that they draw orders on their treasurer payable out of the tax to be levied for the road, and

that they proceed to do all things necessary and lawful for the speedy opening of the road. The defendants as commissioners of highways, prayed for and were allowed an appeal to the Appellate Court for the Third District, and that court affirmed the judgment. This further appeal was prosecuted from the judgment of the Appellate Court.

The order laying out the road was signed by all the commissioners of the three towns, and the resolutions dividing the expense and damage equally between the three towns and allotting the parts of the road which each town should open and keep in repair were signed by all commissioners except the defendant Artman, one of the commissioners of the town of Sangamon. Afterward Artman and another commissioner of the town of Sangamon, the defendant Pike, became refractory, and refused to comply with the law by paying the proportion of damages allotted to their town and opening the road. When they were brought into court to answer the petition for a writ of mandamus, they had no meritorious defense, and their plan of action was to throw every possible obstacle in the way, and to offer every available excuse for their refusal to perform their duty. They say now that the suit should have been brought in a different manner.

The petition was in the name of the town of Scott, in the county of Champaign, by certain named persons as commissioners of highways, and the town of Mahomet, in said county, by certain other persons as commissioners of highways, against the defendants as commissioners of highways of the town of Sangamon, and it is insisted that the judgment should be reversed because the suit should have been brought in the name of the people, on the relation of the parties having a right to the writ. If the defendants were not satisfied with the manner in which the right to compel the performance of their duty was being enforced, they ought not to have answered to the merits. The parties having the substantial rights were petitioners, and the objection that the people were not made the nominal plaintiff was waived.

Another objection of the same character is that the commissioners of highways were not authorized to sue in the names of their respective towns. There is nothing in the record raising any question of that kind which should have been raised by motion before answering. Defendants demurred to the amended petition, but, when their demurrer was overruled, they did not stand by it, but answered, and the objections now made were thereby waived.

The defendants' demurrer to the replication was carried back to the answer; and it is insisted that it ought to have been carried back to the petition because the suit was not in the name of the people, and for want of authority to sue in the names of the towns. The petitioners moved to carry the demur-

rer back to the answer, but there was no motion of the defendants to carry it back to the petition, and the court did not err in failing to do what it was not asked to do. Moreover, it could not be so carried back, if there had been any merit in the points made, for the reason that the defendants had already had the judgment of the court on demurrer to the amended petition, and there had been no change in the petition in respect to the questions raised. *City of Chicago v. People*, 210 Ill. 84, 71 N. E. 816. The court sustained a demurrer to the plea of Pike, alleging that his term of office had expired and that Clark had been elected his successor, and Pike stood by his plea. The court did not err in sustaining the demurrer. The suit was against the defendants as commissioners of highways, and it made no difference what changes occurred in the membership of the board. The duty to open the road did not rest upon particular persons, but on the commissioners as a body, without regard to the individuals. *Sheaff v. People*, 87 Ill. 189, 29 Am. Rep. 40. Clark was summoned as a defendant and filed a separate answer, which was stricken from the files, and the record kept by the clerk says that Clark excepted to the order. Neither the answer nor the ruling of the court, nor any exception thereto, was preserved in a bill of exceptions, and there is nothing in the record showing for what cause the answer was stricken from the files. Without a bill of exceptions the motion to strike the answer from the files and the decision do not become a part of the record, and it is conclusively presumed that the court had sufficient cause to justify its action. *Barger v. Hobbs*, 67 Ill. 592; *Fanning v. Russell*, 81 Ill. 398; *Gaynor v. Hibernia Savings Bank*, 166 Ill. 577, 46 N. E. 1070.

The only offered defense on the merits was that the road was not legally laid out because of supposed irregularities. The decision of the circuit court was against the claims of the defendants, and they appealed to the Appellate Court. Upon the further appeal to this court the burden of the argument is that the road did not become a legal highway. But all questions of that character were waived by the appeal to the Appellate Court. A public highway is a perpetual easement, and the question of its existence or nonexistence involves a freehold. The Appellate Court has no jurisdiction to review a decree where the question to be determined is whether a highway has been legally laid out or not. *Taylor v. Pierce*, 174 Ill. 9, 50 N. E. 1109. This court can review the decision of the Appellate Court only as to errors which were properly assigned in that court and upon which the court had jurisdiction to pass. Appealing to the Appellate Court and submitting the case for decision upon errors which that court might lawfully con-

sider is a waiver or abandonment of any assignment of error, which that court could not pass upon and which can be reviewed only by this court on a direct appeal. *Indiana Millers' Fire Ins. Co. v. People*, 170 Ill. 474, 49 N. E. 304; *Robson v. Doyle*, 191 Ill. 566, 61 N. E. 435; *Case v. City of Sullivan*, 222 Ill. 56, 78 N. E. 37; *Poe v. Ulrey*, 233 Ill. 58, 84 N. E. 46. This consideration eliminates most of the argument, and leaves out of view the question of the capacity of the defendants to dispute the facts set out in the order signed by them laying out the road or to question the validity of their own acts. They gave no valid reason for refusing to comply with the statute or to carry out the orders and resolutions in which they took part.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(357 Ill. 15)

ZEIGLER et al. v. BRENNEMAN et al.

(Supreme Court of Illinois. Dec. 15, 1908.)

1. ESTOPPEL (§ 54\*)—EQUITABLE ESTOPPEL—IGNORANCE OF RIGHTS.

No estoppel arises to assert an interest in premises or to object to their being operated for oil because of silence and acquiescence while others expended large sums and demonstrated the great value of the property, where during the time of their silence such parties did not know that they had an interest, and within a reasonable time after its ascertainment gave notice thereof.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 129; Dec. Dig. § 54.\*]

2. TENANCY IN COMMON (§ 49\*)—RIGHTS AS TO THIRD PERSONS—LEASES.

An oil and gas lease made by a tenant in common to a stranger is void as against his co-tenants.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 123; Dec. Dig. § 49.\*]

3. TENANCY IN COMMON (§ 49\*)—RIGHTS AS TO THIRD PERSONS—LEASES.

An oil and gas lease made by a tenant in common to a stranger, though void as against his co-tenants, is valid as between the parties even while the premises remain undivided.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 123; Dec. Dig. § 49.\*]

4. PARTITION (§ 12\*)—ESTATES SUBJECT.

Where a tenant in common leased the lands held in common to another to drill and operate for oil and gas, and thereafter all the co-tenants joined in a like lease to a different person, neither of the lessees could maintain partition to secure the interest granted him.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 46; Dec. Dig. § 12.\*]

5. MINES AND MINERALS (§ 73\*)—LEASES—CONFLICTING LESSEES.

Nor had either of them a right to operate without the other's consent.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 201; Dec. Dig. § 73.\*]

Appeal from Circuit Court, Crawford County; El. E. Newlin, Judge.

Bill by George Zeigler and others against

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

L. A. Brenneman and another. From a decree in favor of a part of the complainants, defendants appeal. Reversed and remanded, with directions.

This is an appeal by L. A. Brenneman and A. T. McDonald from a decree of the circuit court of Crawford county which cancels and sets aside as clouds upon the title of Edgar D. Zeigler, Ernest Zeigler, Anna Price, and Charles A. Rapp a lease executed to appellants by George Zeigler and Rachel Zeigler, his wife, and the assignments thereof, upon 18.825 acres of gas and oil land located in Crawford county. The decree also enjoins appellants or their agents or servants from in any manner interfering with the said Charles A. Rapp or his assigns in drilling or operating for oil or gas on said premises, or from entering thereupon for the purpose of prospecting or drilling for oil or gas, or from doing any other act tending to the production of oil therefrom.

George Zeigler, Rachel Zeigler, Edgar D. Zeigler, Drucilla Zeigler, Ernest Zeigler, Julia Zeigler, Anna Price, John Price, and Charles A. Rapp, the appellees, were the complainants and appellants were made defendants in the bill, which was filed on August 23, 1907. Later a supplemental and an amended supplemental bill were filed. Defendants answered, a replication was filed, and on April 10, 1908, upon a hearing before the court, a decree was entered, finding, among other things, that George Zeigler, Edgar D. Zeigler, Ernest Zeigler, and Anna Price are now, and have been for nine years prior to the filing of said bill, the owners in fee simple, as tenants in common, of the land in question, and that George Zeigler is the owner of the undivided one-half, and that Edgar D. Zeigler, Ernest Zeigler, and Anna Price are each the owner of the undivided one-sixth thereof; that said premises are in what is known as gas and oil territory, and that on June 25, 1907, said George Zeigler and Rachel Zeigler, his wife, Edgar D. Zeigler and Drucilla Zeigler, his wife, Ernest Zeigler and Julia Zeigler, his wife, Anna Price and John Price, her husband, executed a lease to said premises for oil and gas purposes to Charles A. Rapp, but that through the mistake of the scrivener who drew the lease the premises were misdescribed, and that on February 17, 1908, upon learning of the said mistake, the said lessors re-executed said lease with the proper description therein; that said Charles A. Rapp, immediately upon the execution of the first-mentioned lease, took possession of said land, and placed thereon machinery, a derrick, and material, and with his employes began the construction of a well for oil and gas, and that shortly after the said Rapp began said operations the defendants, without any right, unlawfully went in the nighttime and entered upon said premises, and with force removed the said machinery,

tools, and derrick, and greatly injured and damaged the property of said Rapp, and with force attempted to prevent him from operating upon the said premises for oil or gas; that Rapp again placed his machinery, tools, and derrick upon said premises and constructed thereon a well and succeeded in producing oil on said premises, and placed a tower thereon for the purpose of operating said well, and continued to operate the said well until the appointment of a receiver by the said court pending the determination of this cause, and that since said appointment the said receiver has been operating the said premises for oil.

The decree further finds that on June 9, 1905, the said George Zeigler and Rachel Zeigler attempted to execute what is called an "oil and gas lease" upon the premises in controversy to one W. W. Seybert, and that said instrument was filed for record in the recorder's office of Crawford county on February 13, 1906; that on April 3, 1906, the said Seybert assigned and transferred all his right, title, and interest in his lease covering the land in question to one I. E. Ackerly, trustee, and that on April 20, 1906, the said assignment was filed for record in the recorder's office of Crawford county; that on January 29, 1907, the said Ackerly, as trustee, assigned and transferred all his right, title, and interest in and to said premises and said lease to the said McDonald and Brenneman, defendants, and that the said assignment was filed for record in the recorder's office of that county on February 1, 1907, and that the lease executed to Seybert, the assignments, and the records thereof are clouds upon the title of Edgar D. Zeigler, Ernest Zeigler, Anna Price, and Charles A. Rapp, and should be canceled and removed as to their interests.

The decree finds that Edgar D. Zeigler, Ernest Zeigler, and Anna Price had no knowledge of the execution of said lease to Seybert at the time it was executed, and that, when they were apprised of the fact and of their rights in the premises, they objected to the pretended lease and refused to join in the execution of the same, and notified defendants not to enter upon said premises for the purpose of operating for oil or gas, and have not at any time recognized the right of defendants to so operate thereon under said lease; that the said lease executed to Seybert by George and Rachel Zeigler gave to Seybert or his assigns no right to operate upon the said premises for oil or gas so long as the interest of said Zeigler remained unassigned to him; and that said lease is void as to the interests of Edgar D. Zeigler, Ernest Zeigler, and Anna Price, but that it is binding upon the interest of George Zeigler in the said premises should the same be assigned and set off to him during the life of said lease, and that in case such assignment is made

appellants shall have the right to go upon the portion of said premises so set off to said George Zeigler and operate thereon for oil or gas, according to the terms and conditions of said lease. The decree further finds that Edgar D. Zeigler, Ernest Zeigler, Anna Price, and Charles A. Rapp are entitled to the relief prayed for by them, except that said Rapp has no right to operate for oil or gas upon that portion of said premises which may hereafter be set off to the said George Zeigler or his grantees if said interest be set off during the term of said lease executed to appellants.

It is ordered and decreed that Charles A. Rapp shall have the right to go upon said premises and each and every part thereof, during the term of the lease executed to him and to drill and operate for oil or gas, which right shall continue during the life of said lease, provided that, if the interest of said George Zeigler shall be set off as hereinbefore set forth, the said Rapp shall have no right to go upon the portion of the premises so set off, and shall have no right to interfere in any manner with the developing and operating of such portion of the said premises by the appellants, provided, however, that, if the lease now owned by the defendants shall have expired and the lease now owned by Rapp be in full force and effect, then the said Rapp shall have the right to go upon any part of the said premises to develop and operate the same according to the terms and conditions of his lease. It is then ordered that defendants, their agents and employes, be perpetually enjoined from entering upon said premises for the purpose of operating for oil or gas so long as the interest of George Zeigler remains unassigned, and from in any manner interfering with Charles A. Rapp or his assigns in operating upon said premises for oil or gas or from interfering with the well drilled by themselves on said premises; that the said lease executed by George Zeigler and Rachel Zeigler to the said Seybert, and the several assignments and records thereof covering the premises in controversy, are clouds upon the title of Edgar D. Zeigler, Ernest Zeigler, Anna Price, and Charles A. Rapp, and the same are canceled and held for naught in so far as they apply to their interests in the land in question.

It appears from the record that on February 11, 1885, George Zeigler and Martha V. Zeigler, his first wife, each became the owner of an undivided one-half of the land in question. About nine years before the filing of the bill Martha V. Zeigler died seised of her interest in this property, leaving no will, and leaving surviving her her husband and Edgar D. Zeigler, Ernest Zeigler, and Anna Price, her children and only heirs at law. After her death her husband continued to occupy the premises, and up until a short time prior to the beginning of this suit man-

aged and controlled the same as if they were his own property. On June 9, 1905, George Zeigler and Rachel Zeigler, his second wife, executed a gas and oil lease to the premises in question to one W. W. Seybert for a term of three years, and so long thereafter as oil or gas was produced from the land and royalties and rentals paid by the lessee therefor, giving to the said Seybert or his assigns the exclusive right to mine for and produce oil and natural gas from said tract of land. Seybert's rights passed to defendants, and Seybert's lease and the instruments effecting its transfer were recorded as recited by the decree. During the month of February, 1907, appellants began drilling on the land, and about March 11, 1907, completed a productive and paying oil well. A pump was placed in the well, tanks erected on the ground, and the well was operated by them until the beginning of this suit, when a receiver was appointed, who has since operated the well. Shortly after the completion of this well appellants hauled material on the ground to begin the construction of a second well. After the second rig had been erected by appellants Edgar D. Zeigler gave notice to their agent, who was actually operating the land, that he and his brother and sister had an interest in the land and warned the agent that appellants should not operate further. On June 25, 1907, George Zeigler, Edgar D. Zeigler, Ernest Zeigler, together with their wives, and Anna Price and her husband, attempted to execute a gas and oil lease to the premises in question to Charles A. Rapp for a term of 10 years, and as long thereafter as oil and gas, or either of them, was produced from the land. By a mistake of the scrivener who drew the instrument the land was misdescribed, and on February 17, 1908, upon learning of the mistake, the lease was re-executed and the land properly described. Shortly after the execution of the lease, in June, 1907, Rapp went upon the premises with his employes and began the erection of a derrick for the purpose of drilling a well, but, before he had accomplished much toward that end, appellants removed his tools and machinery from the land. Rapp then procured a force of men, replaced his appliances on the land, and proceeded to dismantle and destroy the machinery of appellants. About this time a truce was arranged between the various parties, and it was agreed that the matter should be submitted to the courts. Rapp then constructed a well, and during the pendency of these proceedings a receiver appointed by the court has operated both that well and the one drilled by the appellants. It is apparent from the evidence that Edgar D. Zeigler, Ernest Zeigler, and Anna Price were aware of the operations of appellants upon the land from the time they began work, and made no objection thereto until after the first well

was completed and in operation. Each of them testify, however, that they did not know that they had any interest in the land until shortly before the notice was given to appellant's agent by Edgar D. Zeigler. The rental reserved by the Seybert lease, under which appellants operated, was one-eighth of the oil produced, delivered in pipe line. The rental reserved by the Rapp lease was one-sixth of the oil produced, delivered in pipe line, an additional sum of \$1,200 to be paid out of Rapp's share of the oil produced and certain additional rentals not necessary to be here specified, which additional rentals were payable only upon condition that certain things specified in the lease should occur.

It is contended by appellants that the decree of the circuit court is erroneous and should be reversed.

Golden, Scholfield & Scholfield and A. Leo Well, for appellants. Eagleton & Weaner and Parker & Newlin, for appellees.

SCOTT, J. (after stating the facts as above). George Zeigler and Martha V. Zeigler, his first wife, owned each an undivided one-half of the real estate covered by the oil and gas leases here involved as tenants in common. Upon the death of the wife, intestate, her title in the land passed to their three children, burdened with the dower right of the husband. At the time of the execution of the Seybert lease George Zeigler was, as he had been for many years, in the sole possession of the real estate, claiming and apparently believing himself to be the holder of the entire title. The heirs of Martha V. seem to have shared his belief as to the condition of the title. After the lease had been assigned to appellants, they, with the knowledge of the three children, operated the land for oil and developed a paying well. Up to that time the children made no objection to appellants' proceedings, but by their silence acquiesced in what was being done. Shortly after a paying well was brought in by appellants, however, the children served notice upon them to the effect that they owned an interest in the land and warned appellants to proceed no further.

It is contended by appellants that these children, by their silence and acquiescence while appellants expended large sums of money and demonstrated the great value of the property, are estopped to assert, as against the appellants, their title to the premises or to object to appellants operating the land for oil. There is evidence which tends to show, and the court found, that these children were ignorant of the fact that they owned any interest in this land until after appellants' well was brought in. With this finding of fact we are not disposed to interfere. Within a reasonable time after they so ascertained that they owned an interest in the land, they gave notice to appellants. No estoppel arises against them, because during

the time of their silence they were ignorant of the fact that they owned an interest in the land. *Mullaney v. Duffy*, 145 Ill. 559, 33 N. E. 750; *Bradley v. Lightcap*, 202 Ill. 154, 67 N. E. 45. The parties to this litigation agree that one tenant in common may not operate for oil against the protest or without the consent of the other tenants in common. Appellants contend, however, that the lease from George Zeigler to Seybert was binding, as between the parties thereto, so far as the interest of George Zeigler in the oil and gas was concerned; while appellees' position is that the Seybert lease, having been made by one tenant in common without the other tenants in common joining therein, is wholly and entirely void so long as the lands remain undivided, and that during that time the owners of the land, including the lessor of appellants, may have the land operated for oil and enjoy the profits precisely as though the Seybert lease had never been made, but that in the event of a partition of the land, then the Seybert lease will become operative, and give to the holder thereof the sole right to operate for oil the portion of the real estate set off to George Zeigler.

Appellees by their brief quote and rely upon section 198 of *Freeman on Co-Tenancy*, which in our judgment states the law correctly, in these words: "A conveyance of the minerals in a tract of land, reserving his interest in the land itself, made by a co-tenant to a stranger, is regarded as void as against the co-tenants of the grantor, 'because it is an attempt to create a new and distinct tenancy in common between one co-tenant and the others in distinct parts of the common estate, which is contrary to the rules of law.'"

The lease is void as against the grantor's co-tenants; that is to say, in determining their rights in the property, no consideration is to be given to the existence of that lease. But it does not follow therefrom that it is of no effect as between the lessor and the lessee, even while the premises remain undivided. On the contrary, as between them it is just as valid as a lease of property owned entirely by the lessor. *Freeman on Co-Tenancy and Partition*, § 253. The law is that one tenant in common may not prejudice the rights of his co-tenants by a conveyance of any specific part, or of any interest, right, or license in any specific part, of the common property, but such a conveyance is valid as against the grantor, at least by way of estoppel. It is only where, and as far as, it comes in conflict with the interests of the co-tenants, that it is void. *Fredrick v. Fredrick*, 219 Ill. 568, 78 N. E. 836; *Finch v. Green*, 225 Ill. 804, 80 N. E. 318. In the present case, after the execution of the lease to Seybert, he and George Zeigler together held and possessed all the privileges, right, title, and interest in the land, including the oil and gas, that George Zeigler had before possessed, and the rights of George Zeigler's

co-tenants remained precisely as they were before that lease was made. For example, if there was a partition of the land, then the Seybert lease would follow the interest of George Zeigler and be operative only upon the land set off to him, but, as between George Zeigler and Seybert, the latter had the same right in reference to operating the land for oil and gas that George Zeigler had prior to the execution of the lease, subject only to such burdens as were imposed upon Seybert by that instrument. It follows, therefore, that nothing was conveyed to Rapp by George Zeigler when he joined in the lease which Rapp took. Rapp has no greater right than if his lease was alone with the children of Martha V. Zeigler; the Seybert lease having been recorded and operations having been in full swing on the land under that instrument when Rapp took his lease. Neither of the lessees can maintain partition (*Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 84 N. E. 53), and neither of them has the right to operate without the consent of the other (*Murray v. Haverly*, 70 Ill. 318), but either of the lessors can maintain partition, and in that way give to his lessee the sole right to operate for oil and gas in the portion of the land which may be set off to such lessor. If appellants and Rapp can agree upon the method by which this land shall be operated then they may operate it, one-half of the oil going to Rapp, out of which he shall pay to each of the children of Martha V. Zeigler one-eighteenth part of that half as rent or royalty, the other half of the oil going to appellants, out of which they shall pay one-eighth part of that half to George Zeigler as rent or royalty. If, however, appellants and Rapp cannot so agree, neither can rightfully operate the land for oil unless some one of the tenants in common elect to have the land partitioned, in which event the rights of each lessee will attach to the land set off to his lessor or lessors. It is true that this view requires the children of Martha V. Zeigler or their lessee to agree upon the operation of the land for oil and gas, in case they so desire to operate while the land remains undivided, with appellants instead of with George Zeigler; but in law this is not to be regarded as prejudicial to their interests, as it cannot be said that George Zeigler's lessees will be less ready to join with the children or their lessee in operating the land than would George Zeigler himself.

No question respecting the dower right of George Zeigler has been presented by the parties.

The decree herein must be reversed and the cause remanded to the circuit court. Upon the cause being redocketed, the court will enter a decree providing that the lease from George Zeigler to Seybert and its assignments shall be canceled and set aside and

for naught held in so far as they appear to convey any right, privilege, or license in and to the interest in the real estate which Martha V. Zeigler's children inherited from her, but leaving that lease and its assignments in full force and effect so far as they purport to convey any right, privilege, or license with respect to the interest of George Zeigler in the real estate. The decree shall also provide for the division of the oil already produced or its proceeds in the manner following: The oil produced before June 25, 1907 (which was the date of the first lease made to Rapp), or its proceeds, shall be divided, without any charge for production, in the manner following: The one-sixteenth to George Zeigler, the seven-sixteenths to appellants, and to each of the three children of Martha V. Zeigler the one-sixth part. All the oil produced on and after June 25, 1907, down to the time of the appointment of the receiver, or its proceeds, without any charge for production, shall be divided in the manner following: To George Zeigler the three forty-eighths, to appellants the twenty-one forty-eighths, to each of the three children of Martha V. Zeigler the one thirty-sixth, and to Rapp the twenty forty-eighths part. The oil produced since the time of the appointment of the receiver, or its proceeds, after his disbursements and charges have been provided for out of the oil so produced, shall be divided in the same manner as the oil above mentioned which was produced on and after June 25, 1907, down to the time of the receiver's appointment. For the purpose of effecting such division of the oil, or its proceeds, as is hereby awarded, the decree shall provide for any party hereto accounting and making payment to any other party hereto as may be necessary. If desirable for the purpose of effecting such division, additional proof may be taken, either in open court or upon a reference to a master. The costs of the circuit court other than the charges and disbursements of the receiver shall be adjudged one-half against the complainants and one-half against the defendants. The receiver shall be discharged, and the cause shall be stricken from the docket.

Reversed and remanded, with directions.

(237 Ill. 26)

#### MORTON v. PUSEY.

(Supreme Court of Illinois. Dec. 15, 1908.)

#### 1. STATUTES (§ 85\*)—LOCAL OR SPECIAL LAW —PRACTICE IN COURTS.

Hurd's Rev. St. 1905, c. 37, § 300, authorizing a judge of the municipal court in his discretion to instruct the jury orally or in writing, is not invalid as a violation of Const. art. 4, § 22, forbidding the passage of any local or special law, regulating practice in courts of justice.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 94; Dec. Dig. § 85.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

## 2. STATUTES (§ 74\*)—UNIFORMITY OF OPERATION—PRACTICE IN COURTS.

Under Const. art. 4, § 34, providing that the jurisdiction and practice in municipal courts shall be such as the General Assembly shall prescribe, Hurd's Rev. St. 1905, c. 37, § 300, authorizing a judge of the municipal court to charge the jury orally or in writing in his discretion, is not in violation of Const. art 6, § 29, requiring that all laws relating to courts shall be general and of uniform operation, and that practice in all courts of the same class or grade, so far as regulated by law shall be uniform.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 76; Dec. Dig. § 74.\*]

## 3. CONSTITUTIONAL LAW (§ 61\*)—LEGISLATIVE POWER—DELEGATION.

Hurd's Rev. St. 1905, c. 37, § 300, authorizing the judge of a municipal court to charge the jury orally or in writing in his discretion, is not invalid as a delegation of legislative power to the judge to determine whether or not, in any particular case, the jury shall be instructed by one method or the other.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 103; Dec. Dig. § 61.\*]

## 4. COURTS (§ 187\*)—MUNICIPAL COURT—JURISDICTION.

The Legislature has no power to make any provision concerning the jurisdiction of or practice in municipal courts, which will effect such a change in the organization or functions of the court that it can no longer be regarded as a municipal or city court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 187.\*]

## 5. TRIAL (§ 259\*)—INSTRUCTIONS—REFUSAL OF REQUEST—FORM.

Where the court advised counsel in the beginning that he would charge the jury orally, instructions requested in writing were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 648; Dec. Dig. § 259.\*]

## 6. APPEAL AND ERROR (§ 758\*)—DUTY TO POINT OUT ERROR.

Where the sufficiency of plaintiff's amended statement was challenged, but plaintiff in error did not point out in his brief wherein the statement was deficient, the Supreme Court would not make an independent investigation to ascertain wherein the statement was objectionable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8093; Dec. Dig. § 758.\*]

## 7. DAMAGES (§ 158\*)—PERSONAL INJURIES—STATEMENT OF CLAIM—SUFFICIENCY.

Plaintiff, in a statement of claim, alleged injuries in a collision with defendant's automobile. She stated that she was injured externally and internally, was struck, bruised, and wounded on the left side, and that since the accident she had had fainting spells, headaches, pains in and about her head and eyes, and that the shock and fall had impaired her internal organs, and their functions, and her general health. *Held*, sufficient to authorize evidence of irregular menstruation.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 441; Dec. Dig. § 158.\*]

## 8. DAMAGES (§ 130\*)—PERSONAL INJURY—CONCLUSIVENESS.

Plaintiff, prior to her injury in a collision with an automobile, was employed as a stenographer. She was compelled to give up work on account of her injury. Her left ankle and left arm were severely injured, and for a considerable length of time she suffered other bodily

ailments occasioned by the shock. *Held*, that a verdict for \$500 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 358, 361; Dec. Dig. § 130.\*]

## 9. APPEAL AND ERROR (§ 762\*)—BRIEFS—OBJECTIONS AND REPLY.

A constitutional question, suggested for the first time in the reply brief of plaintiff in error, will be disregarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8097; Dec. Dig. § 762.\*]

Error to Municipal Court of Chicago; Stephen A. Foster, Judge.

Action by Rena Morton, by Elizabeth Morton her next friend, against Evan Pusey. Judgment for plaintiff, and defendant brings error. *Affirmed*.

On May 20, 1908, Rena Morton, a minor, the defendant in error, by her next friend, recovered a judgment for the sum of \$500, in the municipal court of Chicago, against Evan Pusey, plaintiff in error, for personal injuries alleged to have been sustained by her through the negligence of plaintiff in error in the operation of an automobile at the corner of Sixty-Fourth street and Stony Island avenue, in the city of Chicago, on the evening of August 4, 1907. To review that judgment plaintiff in error has sued out a writ of error from this court. The amended statement of claim filed by defendant in error avers that the injuries complained of were occasioned through the negligence of the plaintiff in error in operating and driving a certain automobile at an undue or high rate of speed across a busy thoroughfare, by failing to sound any horn or other warning of his approach, and by running his machine down the wrong side of the street, past and around a certain street car then standing at said crossing, at an undue speed, by reason of which defendant in error was unable to see or escape from said automobile; that the plaintiff in error failed to properly manage and control his said machine and to apply brakes and stop the same within a proper time and distance, and was careless and unskillful in the management and control of said automobile, by reason of which negligence defendant in error, while in the exercise of due care, was struck by said automobile and injured, both internally and externally, and by reason of said injuries she incurred large expense for doctor's bills and medicine, and sustained financial loss of wages and salary during a period of three months; that said internal and external injuries aforesaid consisted of the striking, bruising, and wounding the left side of defendant in error, and the injuring and hurting of her left arm and left leg, by reason of which she sustained great pain, and her left ankle and left knee were rendered sore and stiff and permanently weak, injured, and impaired; that the head of defendant in error was also injured, bruised, and cut, and since said accident she has had fainting

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

spells and headaches, pains in and about her head and eyes, and the shock and fall also impaired the internal organs and functions of defendant in error, and have impaired her general health. Sixty-Fourth street runs east and west. Stony Island avenue runs north and south, and crosses the end of Sixty-Fourth street just west of an entrance to Jackson Park. Running east toward Stony Island avenue on Sixty-Fourth street are three street car tracks, the south track turning to the south and the other two turning to the north on Stony Island avenue. On this south track east-bound cars are operated, and at the junction of the two streets this track is laid within three or four feet of the curb on the south side of Sixty-Fourth street. On the track immediately north west-bound cars are operated. The accident occurred about 8:30 o'clock on the evening of August 4, 1907, at the junction of these two streets. A car running east on the south track on Sixty-Fourth street had just arrived at the corner, and had stopped to let passengers off before turning south on Stony Island avenue. At this time there were a number of persons on the west side of the avenue immediately south of Sixty-Fourth street, some of them waiting to take the car, and others intending to cross the railway tracks. For some distance plaintiff in error had followed the car on the south track with his automobile, and when the car slowed down to make the stop at the corner, the plaintiff in error turned his machine to the left, and ran on east along the north side of and close to the car. Just as he reached the east end of the car, defendant in error, who was crossing Sixty-Fourth street, walking to the north on the west line of Stony Island avenue, and who had passed just in front of the street car after the motorman on the car had motioned her to do so, stepped in front of plaintiff in error's machine, and was struck by it and knocked down. On the trial plaintiff in error testified that he was running his machine, at the time of the accident, on second speed, and that he was travelling less than six miles an hour, and that when the machine was operated at first speed it could be run as slow as three miles an hour; that the machine was stopped by him 13 or 14 feet east of the point where the accident occurred; that when he turned out to go around the car he saw no one on the street ahead of him, and that he did not see defendant in error until the instant before she was struck, and it was then too late to apply the emergency brake; that just as he was leaving the car track to go around the street car, he sounded his horn, and at the moment defendant in error stepped in front of his machine he shouted to her. When struck by the machine defendant in error's left knee and left arm were quite severely injured, and it appears from the evidence that for a considerable length of time afterward she suffered from other bod-

ily ailments occasioned by the shock. Prior to the injury the defendant in error was employed as stenographer, but, on account of the condition of her health following the accident, she was obliged to give up this work. At the close of all the evidence the court denied plaintiff in error's motion for a peremptory instruction.

Charles A. Phelps, for plaintiff in error.  
John E. Erickson (Willis H. Hutson, of counsel), for defendant in error.

SCOTT, J. (after stating the facts as above). Pursuant to section 300, c. 37, Hurd's Rev. St. 1905, the judge of the municipal court instructed the jury orally, and it is contended by plaintiff in error that this section 300, giving the judge discretion to deliver his charge orally or to deliver it in writing, is in violation of section 22, art. 4, of the Constitution, which forbids the passage of any local or special law regulating the practice in courts of justice, and it is urged that it also violates section 29, art. 6, of the Constitution, which reads as follows: "All judicial officers shall be commissioned by the Governor. All laws relating to courts shall be general, and of uniform operation; and the organization, jurisdiction, powers, proceedings and practice of all courts, of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments and decrees of such courts, severally, shall be uniform." These objections to the section of the statute in question are based on the fact that it gives discretion to the judge of the municipal court to instruct the jury either orally or in writing, while a like discretion is not conferred upon the judge of any other court. The amendment to the Constitution adopted by the voters in 1904, and which is section 34, art. 4, of the fundamental law of the state, provides that, in the event of the creation of municipal courts in the city of Chicago, "the jurisdiction and practice of said municipal courts shall be such as the General Assembly shall prescribe." If plaintiff in error's contention is correct, the words just quoted are entirely without meaning. We do not think they should be so regarded. One purpose of the Legislature and of the people unquestionably was to authorize the creation of a code of practice for the municipal court of Chicago which might apply to that court alone. Such a code cannot take away from a litigant any right given him by the Constitution as it stood prior to this amendment in reference to any matter other than practice in that court, but as the question of instructing orally or of instructing in writing is solely a matter of practice, we think that the statute in question is warranted by section 34, supra. Nor can it be said, as here contended, that this section delegates to the judge legislative power to determine whether or not, in any particular case, the jury shall be instructed by one method or another. Statutes

vesting like discretionary powers in judges of courts of record have never been regarded in this state as conferring legislative power upon the judges. It is, however, beyond the power of the Legislature to make any provision in reference to the jurisdiction of or practice in the municipal court which would effect such a change in the organization or functions of the court that it could no longer be regarded as a municipal or city court. *Miller v. People*, 230 Ill. 65, 82 N. E. 521.

After the court had disposed of a motion made at the close of all the evidence the attorney for plaintiff in error asked that the jury be instructed in writing, and presented certain written instructions, and requested that the court give the same. These were all refused, for the reason that the court had elected to instruct the jury orally. At the conclusion of the oral charge the judge inquired whether there were any objections to the instructions as given. Counsel for plaintiff in error did not make any objection nor take any exception to the charge, so far as the law, stated or omitted, was concerned, but asked that two of the written instructions which he had before passed up, and which two he then again presented, should be given. The court refused both. One of them contained a proper element which went to the measure of damages, the substance of which should have in some manner been given to the jury, but as offered these instructions were properly refused, for the reason that they were in writing when the court had determined to charge the jury orally, and had so advised counsel before beginning to instruct.

The sufficiency of the amended statement of plaintiff's cause of action was challenged. Plaintiff in error has not in his brief pointed out wherein that statement fails to meet the requirements of the statute. We will not enter upon an independent investigation ourselves for the purpose of ascertaining whether the alleged error exists.

Evidence was received tending to show that prior to the time of the injury the menses of the injured girl had occurred at regular intervals, and that afterward the periods at which they occurred were irregular, indicating derangement, which it was claimed resulted from the accident. It was objected that the statement of claim was not broad enough to permit the admission of such testimony. We have examined that statement, and are of opinion the evidence was admissible.

It is also complained that the court erred in refusing to instruct the jury to find for the defendant at the close of all the evidence. The statement preceding this opinion shows that the evidence tended to prove plaintiff's statement of her claim. The motion was without merit. The verdict was not against

the weight of the evidence, nor was the amount of damages allowed excessive.

Plaintiff in error, by his reply brief and argument, raises a constitutional question not suggested by his original brief and argument. The portion of his reply brief dealing with this proposition has been disregarded by us.

The judgment of the municipal court will be affirmed.

Judgment affirmed.

(237 Ill. 318)

#### DONALDSON v. DONALDSON.

(Supreme Court of Illinois. Dec. 15, 1908.)

##### 1. APPEAL AND ERROR (§ 931\*)—REVIEW—PRESUMPTIONS—FINDINGS OF REFEREE.

In an action for an accounting of a partnership business, there being no books of account in existence covering the first seven years of the partnership, and no other evidence to supply such books, it will be presumed on appeal that a finding of the referee that there was a settlement between the partners at the end of such seven-year period was based on the absence of evidence as to the state of the accounts, and such finding will be disregarded.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 931.\*]

##### 2. EVIDENCE (§ 354\*)—PARTNERSHIP BOOKS—WHAT CONSTITUTE.

While books of account kept by one of the members of a partnership, but which were at all times open to the inspection of the other partners, are to be considered as partnership books, and entitled to credit as such, loose sheets of paper, in the handwriting of the partner who kept the books, but not a part of the account books, will not be so regarded.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 354.\*]

##### 3. PARTNERSHIP (§ 331\*)—ACCOUNTING—ACTIONS—UNCERTAINTY AS TO ACCOUNTS—DISMISSAL.

Where the partnership books and accounts are in such a state of uncertainty as to render it a matter of conjecture as to whether anything is due from one partner to another, a bill for an accounting will be dismissed.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 789; Dec. Dig. § 331.\*]

Appeal from Appellate Court, First District, on appeal from Circuit Court, Cook County; Lockwood Honore, Judge.

Action by Sarah E. Donaldson, executrix of Samuel H. Donaldson, against Oliver Donaldson. From a judgment of the Appellate Court reversing a decree of the circuit court in favor of plaintiff, defendant appeals. Affirmed.

George W. Barker, for appellant. Francis E. Croarkin, for appellee.

CARTWRIGHT, J. In June, 1885, three brothers, Robert Donaldson, Samuel H. Donaldson, and Oliver Donaldson, formed a partnership in the city of Chicago to carry on the business of ship smith and ship carpenter, and that partnership continued until the death of Robert Donaldson, in September, 1888. After his death the two surviv-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing brothers purchased his interest from the administratrix, and they continued the business as partners until November 5, 1901, when the partnership was ended, except as to collecting some outstanding accounts and paying some bills. There does not appear to have ever been any settlement of the partnership affairs, or any account stated between the partners. After the dissolution no claim was made by either partner against the other. Samuel H. Donaldson died in January, 1903, and Oliver Donaldson filed a claim in the probate court against the estate on a note given to him by Samuel for \$1,500. After the allowance of that claim Sarah E. Donaldson, the appellant, as executrix of the will of Samuel, filed the bill in this case in the circuit court of Cook county for an accounting of the partnership affairs, and alleging that there was a balance due her, as executrix, from Oliver. Oliver Donaldson answered the bill, denying that there was anything due from him on the settlement of the partnership accounts, and he also filed a cross-bill claiming that there was a balance due him, and praying for an accounting and payment to him of such balance. The complainant in the original bill answered the cross-bill. The evidence of the parties was taken before a master in chancery, who was directed to take and report the evidence, together with his conclusions. The executrix produced before the master a book of the partnership, beginning in January, 1891, more than seven years after the partnership was formed, purporting to show the expenses paid, the cash receipts, and withdrawals of money by Oliver Donaldson, and inclosed in this book there were seven loose sheets purporting to show Oliver Donaldson's withdrawals of partnership profits. Oliver Donaldson introduced three books of the partnership, three bank passbooks showing deposits in bank and canceled checks and paid bills, but there was no evidence of the state of accounts or the business of the partnership up to January, 1891. The master began his statement of account at that date, and reported that there was no evidence that any books or memoranda of the business were kept prior to that time; that no account of the withdrawals of Samuel was shown to have been kept; that he found from the bank passbook there was a balance in bank to the credit of the firm on December 29, 1890, of \$1,224.71, and on January 10, 1891, a further credit of \$2,320.70, neither of which was entered on the books; that these credits could only be accounted for as collections for work done prior to January, 1891, and that it was impossible to reconcile the passbooks with the accounts on any other hypothesis than that the moneys were from time to time withdrawn by check and divided without keeping any memorandum. He found the books in an unsatisfactory condition; that a number of bills of the firm marked "paid" had been entered on the collection account,

and some were not found in the collection account, and some bills for expenses shown to have been paid were omitted from the expense account, but he concluded that the books were honestly kept by persons not versed in proper methods, and that they were designed to and did show a substantial condition of the accounts, or furnish data from which a fairly accurate account might be stated, during the period covered by the books. He, therefore, stated an account during that period, and found a balance of \$1,921.94 against Oliver Donaldson, and recommended a decree in favor of the executrix, and against Oliver, for such sum. The court heard the cause on exceptions to the report and overruled the exceptions and entered a decree in accordance with the recommendations of the master. Oliver Donaldson appealed to the Appellate Court for the First District, and that court, being of the opinion that the evidence left the partnership accounts in such doubt and uncertainty that it was impossible to determine the true state of the account or to do justice between the parties, reversed the decree, and dismissed both the bill and cross-bill for want of equity. From the judgment of the Appellate Court this appeal was prosecuted.

There is no evidence with respect to the accounts or books of the firm from September, 1883, to January, 1891, and there is nothing in the record from which the master could determine that the accounts had been settled and adjusted up to that time. There is nothing to indicate that books or accounts were not kept, but they were not produced, and the master reported that it was assumed by both parties that, prior to January, 1891, the business had been settled between the parties. The fifth exception to the report recited that statement of the master and made it the basis for an exception, on the ground that there was nothing in the record to justify such an assumption. We are unable to find any stipulation or agreement sustaining the statement, and must assume that it was made merely because no evidence of books or accounts was introduced prior to that time. The books and accounts which were offered were kept by Samuel Donaldson and his son, and the executrix, after the death of Samuel, had innocently destroyed a large number of checks, paid bills, and papers of the partnership. There was a balance in the bank, as found by the master, of \$1,224.71 on December 29, 1890, and a further credit of the partnership on January 10, 1891, of \$2,320.70, and on February 1, 1891, the bank books showed a balance belonging to the partnership of \$3,298.47. There is no evidence what became of that money, and no ground for the assumption that it was drawn out by check from time to time and divided between the partners. The seven loose sheets consisted of bill heads and letter heads of the partnership, and purported to show the withdrawal of moneys by Ol-

iver Donaldson from December 10, 1898, to the close of the partnership. The books of the firm, although kept by Samuel and his son, were the books of the partnership, and were admissible in evidence. *O'Brien v. Hanley*, 86 Ill. 278. The books of a partnership, to which all the partners have, or are entitled to have, access at all times, are equally binding on all the partners, and as between them they are presumed to be correct, and to contain a true history of the business and a true record of the transactions between the partners. The books were open to the inspection of Oliver at all times, and he knew, or might have known, whether the charges were correct, and they are presumed to be true and correct until the contrary is shown, and to form a proper basis for stating the partnership account. *Stuart v. McKichan*, 74 Ill. 122. That rule, however, does not apply to these loose sheets, which were not a part of any book, and which were not shown to have been in the book during the existence of the partnership. They were in the writing of Samuel, and it does not appear that any one saw them until after the partnership was closed. A son of Samuel saw them some time afterward, before the death of his father; and, so far as appears, they may have been made before or after the partnership ended, or taken from some other book not produced. There were blank pages in the book where the entries might have been made, and where it would be natural to make the entries if they were designed as a book account. There was not sufficient evidence to justify the admission of the loose sheets in evidence.

While the books of account were *prima facie* correct, they were not conclusive, and a great many errors were shown resulting in stipulations between the counsel as to the items. The master found that there were many errors in the books, both in the amounts of entries and in addition; moneys collected sometimes in the name of the vessel for which the work was done, sometimes in the name of the owner, and at other times in the name of the captain or some other party in interest, thus leading to confusion in the examination of the books. It is apparent that the master did the best that could be done towards stating an account from January, 1891, to the dissolution of the partnership, but it is equally apparent that his final conclusion as to a balance due from Oliver on the whole account was a matter of mere conjecture. The books only covered a part of the business of the partnership, and the bank books showed a large amount of money on hand to the credit of the partnership at the time the books began, which does not appear in any way on the books. What became of that money was not shown, and, furthermore, the books and accounts were so full of errors, which

were pointed out, as to destroy confidence in their correctness as a proper basis for a decree. In a case of this kind, if the evidence leaves the state of the account in such doubt and uncertainty that a court is unable to say whether anything is due from either partner, and how much, it is manifestly impossible to do justice between the parties, and the only course open is that adopted by the Appellate Court. *Vermillion v. Bailey*, 27 Ill. 230. If the loose sheets are omitted the decree cannot be sustained, and they were in the handwriting of Samuel, and there was not the slightest evidence that they were kept as accounts of the firm while it was in existence, or were treated as such accounts, or that Oliver ever saw them. Further evidence was necessary to give them the standing of books of accounts, and they must be rejected as evidence. The assumption that there was a settlement to January, 1891, has no support in the record, but, on the contrary, there was then a considerable balance in bank, which is only disposed of by an hypothesis that it might have been divided.

The Appellate Court did not err in dismissing the bill and cross-bill, and the judgment of that court is affirmed. Neither party sustained the claim made of a balance due, and each will pay half the costs.

Judgment affirmed.

(237 Ill. 140)

#### CASEY v. CHICAGO CITY RY. CO.

(Supreme Court of Illinois. Dec. 15, 1908.)

##### 1. EVIDENCE (§ 548\*)—EXPERT TESTIMONY—COMPETENCY OF EXPERT.

In an action for personal injuries, the testimony as to subjective conditions by a physician who made an examination of plaintiff for the sole purpose of testifying in the case is not admissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2365; Dec. Dig. § 548.\*]

##### 2. APPEAL AND ERROR (§ 1051\*)—REVIEW—HARMLESS ERROR—ADMISSION OF TESTIMONY.

In an action by a passenger for injuries, error of the court in admitting the testimony of a medical expert who was incompetent to testify to subjective condition of plaintiff by reason of the fact that he examined plaintiff for the sole purpose of testifying as to her condition was harmless, where the evidence clearly showed that defendant was guilty of the negligence charged in the declaration, and testimony of other experts and of persons who had observed plaintiff clearly established that the injuries were of the character as related by the incompetent expert.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4161; Dec. Dig. § 1051.\*]

##### 3. EVIDENCE (§ 528\*)—OPINION EVIDENCE—EFFECT OF EXPOSURE OF PERSON.

In an action for injuries to a female child 13 years of age, it was proper for the court to refuse to permit defendant's medical expert to answer a question as to whether the exposure of the person of a girl of plaintiff's age would tend to produce nervousness, timidity, and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

shrinking on the part of such girl, as such question did not call for expert testimony.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 528.\*]

**4. WITNESSES (§ 398\*)—CONTRADICTION—REBUTTING TESTIMONY AS TO CONVERSATION.**

Where a school teacher testified for defendant on direct examination that she had noticed nothing in the appearance of plaintiff, one of her pupils, that indicated that plaintiff had suffered from the injury for which the action was brought, and on cross-examination denied that on a particular occasion, while plaintiff's mother was visiting the school, she had a conversation with the mother relative to plaintiff's condition, an objection that the testimony of the mother in rebuttal that she and such teacher did have such conversation was incompetent, because the teacher's attention had not been called to the particular occurrence in question, was not well taken.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1274; Dec. Dig. § 398.\*]

**5. DAMAGES (§ 210\*)—INSTRUCTIONS—RESULTS OF PERSONAL INJURIES.**

Where, in an action for personal injuries, defendant's medical expert testified that plaintiff had suffered from catarrh and adenoids, and that, in his opinion, hemorrhages from plaintiff's nose was caused thereby, and plaintiff's expert testified that the hemorrhage might have been caused by the injury, the weight of such evidence being for the jury, it was not error for the court to refuse to instruct that there was no evidence that the hemorrhage was caused by the injury, and that the jury could allow no damages on that account, especially where the court further instructed that the burden of proving by a preponderance of the evidence that plaintiff's disability resulted from the injury was on plaintiff.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 337; Dec. Dig. § 210.\*]

**6. TRIAL (§ 295\*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.**

In an action for personal injuries, an instruction that, if plaintiff had proved that material allegations of her declaration by evidence producing conviction in the minds of the jury, she was entitled to recover, though incorrect in that it failed to indicate what the material allegations of the declaration were, it was not misleading where the declaration contained but a single count in simple form, and the instructions otherwise informed the jury as to what plaintiff was required to prove.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 706; Dec. Dig. § 295.\*]

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; Theodore Brentano, Judge.

Action by Nellie Casey against the Chicago City Railway Company. From a judgment of the Appellate Court (139 Ill. App. 655), affirming a judgment for plaintiff, defendant appeals. Affirmed.

John E. Kehoe and Watson J. Ferry, for appellant. C. S. O'Meara, for appellee.

FARMER, J. Appellee recovered a judgment in the superior court of Cook county for personal injuries alleged to have been caused by the negligence of appellant. Appellee was between 11 and 12 years old when injured, August 1, 1904, and was a passenger riding on one of the cars of appellant. The

declaration, which contains but one count, charges that while she was in the exercise of due care and caution the car was carelessly and negligently run "through the gates which were lowered, breaking said gates, smashing same, and onto the steam car tracks, where the said car was struck by a train approaching and thrown from the tracks, and the said Nellie Casey was knocked down from said street car upon her head, and her body and head were bruised and hurt and injured, and she was internally hurt and disabled, and suffered from hemorrhages of the mouth and ears, and she became sick and sore and disabled, and so remained for a long space of time from thence hitherto, and avers that the said Nellie Casey is permanently injured and disabled in mind and body." The judgment in appellee's favor for \$4,500 has been affirmed by the Appellate Court, and a further appeal prosecuted to this court.

The errors assigned here relate to the rulings of the trial court in the admission of testimony offered by appellee and the rejection of testimony offered by appellant; also to the giving of one instruction offered by appellee and the refusal of one offered by appellant.

The testimony that it is claimed was improperly admitted in behalf of plaintiff was that Dr. Patrick, whose education and experience in nervous and mental diseases qualified him to testify as an expert upon those questions. He testified that he examined plaintiff about three weeks before the trial occurred. She was sent to him by her attorney for the purpose of procuring his opinion of her condition. At the time nothing was said about his testifying, but the doctor knew the lawyer who sent her to him had charge of her case, and said he knew it was quite common for attorneys to expect a doctor to testify in such cases after he had made an examination. Dr. Patrick did not give the plaintiff any treatment. He testified he first questioned the plaintiff and her mother, but was told by the court not to testify to anything that he "heard from the plaintiff." He testified her mother undressed her; that she showed general nervousness, timidity, and fright, trembled and shook and looked scared; that she shrank away from him, notwithstanding he assured her he would do her no harm; that there was a tremor or fine quivering or a shaking of her body and extremities; that the knee jerk was absent and that the ankle jerk and achilles were very faint; that she had a perforation of the left ear drum; that her urine was very pale and of low specific gravity; that, when he pressed along her spine, she winced and cried, and did the same thing when he pressed her on either side. The doctor gave it as his opinion, from his examination, that she had an inflammation of the middle ear on

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the left side and was suffering from extreme nervousness, best described as hysteria, but he could not tell from his examination what was the cause of it. He further testified that hysteria leads to invalidism, poor health, and suffering; that the cataleptic state appears in hysteria, and neurasthenia is frequently associated with it; and that this is sometimes curable and sometimes not. Appellant objected to the doctor testifying to the plaintiff showing nervousness, timidity, and fear, and to trembling and shaking and shrinking away from the doctor, and to her crying and acting in a frightened manner, but the court overruled the objection and admitted the testimony. We think the examination made by Dr. Patrick must be considered as having been made with a view to testifying in the case, and under the rule announced in *Greinke v. Chicago City Railway Co.*, 234 Ill. 564, 85 N. E. 327, and cases there cited, appellant's objection should have been sustained. It remains to be considered whether this ruling of the court was so prejudicial to appellant as to require a reversal of the judgment.

The liability of appellant is not disputed, and could not well be, for the proof shows that the gates where the street car tracks crossed the steam railroad tracks of the Grand Trunk Railway were down as the car approached the railroad track, but that the car was run through the gates, breaking them down, and upon the railroad track, without being stopped. Dr. Kirby, a witness called by appellee, testified he was the surgeon of the Grand Trunk Railroad Company, and by direction of his company went to see the plaintiff at her home the same evening the accident happened. He was also the family physician of the plaintiff's family. He testified the plaintiff was in bed and unconscious when he visited her; that her extremities were cold, the pupils of her eyes small, pulse rather weak and rapid; that there was a bruise on the left shoulder and a small one on her neck; that no bones were broken, but that she was suffering, in his opinion, from a concussion of the brain. Plaintiff was confined to the house about two weeks after her injury, during which time Dr. Kirby saw her frequently—he thought perhaps every day. After that he saw her frequently, either at her mother's house or at his office, and has treated her ever since. The doctor gave it as his opinion plaintiff was suffering from minor epilepsy and stated that he had seen her in two "spells," on which occasions she was "lying in bed unconscious and the head rotated to one side, the pupils dilated. There was no reaction to light. The light reflexes—her reflexes—were below normal. She was cyanotic—that is, her face had that bluish appearance in both spells"—but he observed no convulsive movement. The testimony of a number of neighbors was that the girl had been healthy before her injury, but had not been since. The testimony of Dr.

Patrick that plaintiff had a perforation of the left ear drum and that her urine was very pale and of very low specific gravity was competent. In *Greinke v. Chicago City Railway Co.*, supra, while the testimony of an expert similar in character to that of Dr. Patrick was held to have been incompetent, it was also held that in view of the other evidence in the case it would not justify a reversal of the judgment, and the court quoted from *West Chicago Street Railroad Co. v. Maday*, 188 Ill. 308, 310, 58 N. E. 933, 934, where it was said: "When the court can see from the record that an error committed by the trial court in the progress of the case was a harmless one, or that its injurious effect or harmful character was obviated, so as not to affect injuriously, in the final judgment, the rights of the party against whom the error was committed, it should not be allowed to work a reversal. It is more important in the administration of justice that litigation should end in the attainment of substantial justice than that a record of the proceedings should be built up which is without flaw or blemish." For the same reasons we are of opinion the error in this case should not reverse the judgment.

Appellant complains of the ruling of the court in refusing to permit a hypothetical question asked one of its medical experts to be answered. The question related to the probable effect of removing the clothes from a girl in ordinary health, of the age of 13 years, for examination by a strange physician, and whether it would not tend to produce nervousness, timidity, and shrinking in the patient. In our opinion this was not a subject for expert testimony, and the court did not err in not allowing the question to be answered.

It is also complained that the court erred in admitting testimony of plaintiff's mother in rebuttal. Miss Cox testified, for appellant, that she was plaintiff's teacher in the school she attended in September and October, 1905, and that she saw nothing in her appearance to indicate that she was not in good health. On cross-examination she was asked if she had ever seen the plaintiff's mother at school, and replied that she had seen her there once. She was then asked if she and complainant's mother had not had a talk about the plaintiff's health, in which certain things were said between them about plaintiff's health and her remaining in school and being allowed to go home when she felt badly. She answered they had not had such talk. In rebuttal plaintiff's mother was permitted to testify that they did have the talk which Miss Cox said they had not had. It is contended this testimony was incompetent, for the reason that Miss Cox's attention was not directed to the specific conversation, and no time or place specified when and where it occurred. We do not think this objection well taken. Miss Cox testified that she remembered plaintiff's mother being at school

on one occasion, and it was at that time she was asked if she had not had a certain conversation with her, and it was at that time the witness testified in rebuttal that the conversation occurred.

The proof showed that appellee began, soon after her injury, having frequent and profuse hemorrhages from the nose and throat. Dr. Kirby testified he examined her nose and throat and found she had adenoids, and that the hemorrhage came from the adenoids, and that in his opinion the adenoids resulted from catarrhal irritation, and not from the injury plaintiff received. In this he was supported also by the testimony of medical experts called by appellant. Dr. Patrick gave it as his opinion, on cross-examination, that the shaking up appellee received on the occasion of her injury might have the effect of causing or influencing, to some extent, the condition of plaintiff's nose and throat. Appellant asked the court to instruct the jury that there was no evidence tending to show that the bleeding from the nose complained of by plaintiff was the result of the accident, and that they should allow plaintiff nothing on that account. The court refused to give the instruction, and this, it is urged, was erroneous. It appears from the substance of the testimony above set out that there was some evidence upon which to submit to the jury the question whether the injury plaintiff received had anything to do with her bleeding from the nose. Its weight and sufficiency are not subjects for our determination. Besides, in a number of instructions given on behalf of appellant the jury were told that the plaintiff could only recover for disabilities which the preponderance or greater weight of evidence showed resulted from the accident; that the burden was not on appellant to show that plaintiff's disabilities arose from other causes than from the accident, but, as to every disability for which she claimed damages, it was incumbent upon her to prove that such disability was proximately caused by the accident, and that as to any disability which she did not so prove by a preponderance of the evidence she could not recover. In view of the evidence and the instructions given for appellant, we are of opinion no error was committed in refusing the instruction complained of.

In one instruction given for appellee the jury were told that, if plaintiff had proven the material allegations of her declaration by such weight of evidence as satisfied and produced conviction in the minds of the jury, she had proven her case by a preponderance of the evidence. It is urged that this instruction was erroneous, in that it left the jury to determine what the material allegations of the declaration were. Such an instruction has been held to be incorrect but is not always ground for reversal. In *Baker & Reddick v. Summers*, 201 Ill. 52,

66 N. E. 302, an instruction of similar character was held erroneous. There were also other instructions given in that case that were held erroneous, and that judgment was reversed. In *Toledo, St. Louis & Kansas City Railroad Co. v. Bailey*, 145 Ill. 159, 33 N. E. 1089, such an instruction was held erroneous, but it was also held, as the instructions given on behalf of the defendant fully informed the jury what was necessary to be proven to entitle plaintiff to recover, it was impossible that the jury could have been misled, and giving the erroneous instruction could not have prejudiced the defendant. In *Harvey v. Chicago & Alton Railway Co.*, 221 Ill. 242, 77 N. E. 569, there was a judgment for the defendant. On appeal to this court it was urged as grounds for reversal that the court instructed the jury at defendant's request that the plaintiff was required to prove the truth of the material allegations of the declaration, or some count thereof, by a preponderance of the evidence, and, if he failed to do so, the jury should find the defendant not guilty, and it was held giving such instruction would not justify a reversal of the judgment. There doubtless are cases where such an instruction would require a reversal. In this case, however, the declaration contained but a single count in very simple form, and the instructions given very fully told the jury what plaintiff was to prove in order to entitle her to a verdict. We can see no possibility of the jury having been misled or confused by the instruction.

This record is not free from error, but the errors considered, in view of the whole case, are in our opinion not sufficient to justify the reversal of this judgment, and it is therefore affirmed.

Judgment affirmed.

(237 Ill. 83)

#### FLANAGAN v. WELLS BROS. CO.

(Supreme Court of Illinois. Dec. 15, 1908.)

##### 1. NEGLIGENCE (§ 136\*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence, in an action for injuries from negligence, held to warrant submitting the question of negligence to the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 303; Dec. Dig. § 136.\*]

##### 2. TRIAL (§ 94\*) — MOTION TO STRIKE EVIDENCE ON GROUND OF VARIANCE.

A motion to strike out evidence as being at variance with the declaration must point out the particular variance.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 247; Dec. Dig. § 94.\*]

##### 3. NEGLIGENCE (§ 139\*)—ACTIONS—INSTRUCTION.

In an action for injuries from the negligence of defendant in building a platform, an instruction that, if the jury believed from the evidence that the platform was built by defendant for its own use, and not for the use of others, in such a way that it could be, and was, safely used by defendant, and that afterwards another company, or one or more of its em-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ployés, used the platform for their own purposes, without permission or license from defendant, and while so using it caused certain materials to fall from the platform and injure plaintiff, plaintiff cannot recover for such injuries from defendant, was properly refused, as it assumed that, though defendant was guilty of negligence in the construction of the platform, without which the accident could not have happened, yet if the concurring act of another contributed to cause the injury, appellant would not be liable.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 371; Dec. Dig. § 139.\*]

**4. NEGLIGENCE (§ 44\*)—ACTS CONSTITUTING NEGLIGENCE—PERSONS LIABLE—INDEPENDENT CONTRACTORS.**

One engaged in the construction of a building owes to another engaged in the same work, and exercising due care for his own safety, the duty of exercising care to do his work in such a way as not to negligently injure the other.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 59; Dec. Dig. § 44.\*]

**5. NEGLIGENCE (§ 110\*)—ACTIONS—DECLARATION.**

A declaration, in an action for injuries caused by defendant's negligence, which alleges that defendant and plaintiff's employer were both subcontractors, engaged in the construction of a building, and that while plaintiff was so employed, working in and about said building, and exercising due care for his own safety, defendant negligently caused a piece of timber to fall from a position above where the plaintiff was working, and strike and injure him, is not insufficient for failure to state acts showing any duty owing by defendant to plaintiff.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 177; Dec. Dig. § 110.\*]

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; George A. Dupuy, Judge.

Action by William Flanagan against Wells Bros. Company. From a judgment of the Appellate Court (139 Ill. App. 237), affirming a judgment for plaintiff, defendant appeals. Affirmed.

Ralph F. Potter, for appellant. B. J. Wellman, for appellee.

DUNN, J. Appellee, in an action on the case for personal injuries alleged to have been sustained through appellant's negligence, recovered a judgment, which the Appellate Court affirmed, and the appellant has appealed to this court.

The accident in which the injuries complained of were received, occurred during the erection of an addition to a building, in which appellant was contractor for the mason work, and the Oscar Daniels Company for the iron and steel work. The addition was north of the old building, and the steel framework on the south of the addition was 6 or 8 feet north of the north wall of the old building. In order to connect the framework of the old building with the new it was necessary to cut out parts of the north wall of the old building. The duty of cutting these holes in the old wall devolved upon the mason contractor, the appellant, and in order to protect the workers on the lower floor it was necessary

to construct platforms to hold the material taken out of the wall. The appellant had constructed such platforms as the work progressed from the second floor up. All below the sixth floor had been removed at the time of the accident. It was in connection with one of these platforms on the sixth floor that the accident happened to appellee. The floor of the platform was composed of planks about 18 feet long, laid parallel with the north wall of the old building. This floor was supported upon planks 3 inches thick, 12 inches wide, and about 18 feet long, extending from the brick wall north across the open space and resting upon the girder in the south wall of the addition, but not reaching the second girder. There were three of these planks, the south end of the east one of which was let into an opening in the brick wall. The middle one only reached the south wall, but did not rest in it. The west plank was inserted in a hole in the brick wall, but upon it, and covering its entire width, rested the sill of a derrick, which was also inserted into the hole in the wall and wedged there. To the east side of this west plank was nailed a cleat 3 inches thick, to which the floor planks of the platform were nailed. When the platform was built, there was a temporary flooring in that part of the sixth floor of the addition adjoining it on the north, and heavy planks were piled on the end of the planks of the platform projecting north of the iron girder. The flooring and the piles of plank had been removed at the time of the accident. The plank to which was nailed the cleat, on which the west end of the platform rested, belonged to the Oscar Daniels Company, and had been placed there to support the derrick with which that company hoisted the beams it was using in its work. Appellant completed its work in connection with this platform, and then the Oscar Daniels Company moved its derrick to a floor higher up, leaving the plank on which the derrick had rested. The Oscar Daniels Company had nothing to do with this scaffold, and the duty of removing it was that of the appellant. Though there was no contract between appellant and the Oscar Daniels Company, it was customary for the employes of each to go upon the scaffolds of the other. On the day of appellee's injury the riveting gang of the Oscar Daniels Company was working on the sixth floor, near this platform. There was a bucket of water on the plank on which the derrick had rested, near its north end, and one of the riveters stepped on the plank to get it, when the end of the plank went down with him. He then ran south toward the other end, when that went down, the plank acting as a seesaw. He finally succeeded in reaching a solid beam, but the southwest corner of the platform sagged down, and a piece of timber fell on and injured the appellee, who was working

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in the basement for another subcontractor. After the accident the timber to which the cleat was nailed was found turned up on its edge, with the cleat underneath. It is contended that the jury should have been instructed to find a verdict for the defendant; that there is a variance between the declaration and the proof; that two instructions asked by the appellant were improperly refused; and that the declaration is not sufficient to sustain the verdict.

The object of the platform was to protect the workers below. It was appellant's duty to use care to see that it was sufficient for the purpose, to remove it when its purpose was accomplished, and not to permit it to remain in an unsafe condition. There is evidence at least tending to show that, after the removal of the derrick, the scaffold was unsafe, and that appellee knew the derrick would be moved, and that its removal would affect the safety of the scaffold. There is evidence that it was customary for the iron workers to walk on the scaffold of the appellant. There being evidence that the scaffold was in a dangerous condition, that appellant knew or ought to have known that it was in a dangerous condition, and that it was likely to be walked upon by the employes of the Oscar Daniels Company, it might have anticipated that the result would be an injury to some one beneath from the falling of the scaffold. Whether appellant was guilty of negligence which was the proximate cause of the injury was properly left to the jury. At the close of appellee's evidence the appellant moved to strike the evidence out, as being at variance with the allegations of the declaration. No variance was particularly pointed out, no statement made showing the particular objection, to enable the appellee to amend to meet it. The charge was that the appellant caused the piece of timber to fall, striking the appellee. The evidence introduced was for the purpose of showing that appellant negligently permitted the piece of timber to fall. The motion did not call attention to this specific variance. Though the evidence introduced may tend to prove negligence of a different character from that charged in the declaration, it can not be excluded on the ground of variance, unless the particular variance is pointed out. The court did not err in overruling this motion.

The appellant asked the court to give the following instruction to the jury: "If you believe from the evidence that the platform in question in this suit was built by Wells Bros. Company for their own use, and not for the use of others, in such a way that it could be, and was, safely used by them for the purposes for which it was built, and that afterwards Oscar Daniels Company, or one or more of their employes, used the platform for their own purposes, without permission or license from Wells Bros. Company, and while so using it caused certain materials to fall

from the platform and injure the plaintiff, he (the plaintiff) cannot recover for such injuries from Wells Bros. Company, and you must find the defendant not guilty." It was properly refused. It assumes that, though appellant was guilty of negligence in the construction of the platform, without which the accident could not have happened, yet if the concurring act of another contributed to cause the injury, appellant would not be liable. The contrary is true. *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; *Village of Carterville v. Cook*, 129 Ill. 152, 22 N. E. 14, 4 L. R. A. 721, 16 Am. St. Rep. 248. The substance of appellant's refused instruction 16 is contained in instruction 3, given at its request.

It is insisted that the judgment should be arrested because the declaration does not state facts showing any duty owing by the appellant to the appellee. The declaration alleges, in substance, that the appellant and appellee's employer were both subcontractors engaged in the construction of a building, and that, while appellee was so employed, working in and about said building and exercising due care for his own safety, the appellant negligently caused a piece of timber to fall from a position above, where the appellee was working, and strike and injure him. One engaged in the construction of a building certainly owes to another engaged in the same work, and exercising due care for his own safety, the duty of exercising care to do his work in such a way as not to negligently injure the other. If the appellee was engaged in his work and using due care, he was properly at the place where he was injured, and it was appellant's duty to know that he might be there, and to use due care not to injure him. The declaration was sufficient.

The judgment is affirmed.

Judgment affirmed.

(236 Ill. 820)

HOUREN v. CHICAGO, M. & ST. P. RY. CO.  
(Supreme Court of Illinois. Dec. 15, 1908.)

1. RAILROADS (§ 222\*) — OBSTRUCTIONS OF STREETS—INJURIES—PROXIMATE CAUSE.

The act of a railroad company in obstructing the streets of a city in violation of Hurd's Rev. St. 1908, c. 114, § 77, prohibiting a railroad company from obstructing a public highway by cars for more than 10 minutes, is the proximate cause of the destruction of a building by fire when the obstruction prevented a fire department from extinguishing the fire, since a prudent person, if reflecting on the probable consequence of closing up the street, would have foreseen that to do so would obstruct public travel, including a fire department, and that, if the travel of a fire department was obstructed, any fire which the firemen were seeking to reach would do greater damage.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 222.\*]

2. RAILROADS (§ 222\*) — OBSTRUCTIONS OF STREETS—INJURIES—PROXIMATE CAUSE.

A railway company obstructed a street by its cars in violation of Hurd's Rev. St. 1908,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

c. 114, § 77, and thereby delayed a fire department in reaching a building on fire. The firemen, but for the obstruction, could have reached the building and extinguished the fire before it was communicated to a nearby building, which was destroyed. *Held*, that the obstruction of the street was an intervening and concurrent cause of the burning of the nearby building, and in law formed the proximate cause of its destruction.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 222.\*]

### 3. RAILROADS (§ 222\*) — OBSTRUCTIONS OF STREETS—INJURIES—PROXIMATE CAUSE.

A railway company wrongfully obstructed the streets of a city by cars coupled together, to which the brakes were set. On account of the slope of the track, the cars would, on being uncoupled and the brakes released, move off the crossing by force of gravity. City firemen on their way to a fire were obstructed. Policemen with the firemen at the crossing knew that, by uncoupling the cars and releasing the brakes, the cars would move off the crossing. The railway company was notified to remove the cars, which it did after a delay of about 30 minutes. *Held*, that the railway company was not relieved from liability for the destruction of property by the fire because of the inability of the firemen to extinguish it on the ground that the policemen failed to uncouple the cars and release the brakes, and thereby move them from the crossing.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 222.\*]

### 4. RAILROADS (§ 222\*) — OBSTRUCTIONS OF STREETS—INJURIES—PROXIMATE CAUSE.

In an action against a railway company for unlawfully obstructing a street, and thereby preventing city firemen from reaching a building on fire and preventing the fire from spreading to a nearby building which was destroyed by the fire, evidence *held* to support a finding that, if the firemen had not been delayed by the obstruction, they would have extinguished the fire before it spread to the nearby building, authorizing a recovery for its destruction.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 222.\*]

### 5. APPEAL AND ERROR (§ 197\*)—QUESTIONS REVIEWABLE — QUESTIONS NOT RAISED IN TRIAL COURT.

Where the objection to a variance between the proof and the statement of the cause of action for loss of property by fire as to the location of the property destroyed was not pointed out in the trial court, the objection may not be considered in the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 197; \* Pleading, Cent. Dig. §§ 1428-1441.]

### 6. RAILROADS (§ 222\*)—OBSTRUCTING STREETS—NEGLIGENCE.

A railway company obstructing the streets of a city by its cars in violation of law is negligent in so doing as a matter of law.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 222.\*]

### 7. EVIDENCE (§ 32\*)—JUDICIAL NOTICE—ORDINANCES.

Under Hurd's Rev. St. 1908, c. 37, § 317, providing that the municipal court of the city of Chicago shall take judicial notice of the general ordinances of the city, the municipal court may take judicial notice of the existence of an ordinance of the city, general in its nature, which prohibits a railway company from leaving its cars on a street crossing for a period longer than five minutes.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 42; Dec. Dig. § 32.\*]

### 8. APPEAL AND ERROR (§ 219\*)—QUESTIONS REVIEWABLE IN SUPREME COURT ON APPEAL FROM APPELLATE COURT—WAIVER.

Any question of the validity of a statute authorizing an inferior court of a city to take judicial notice of the ordinances of the city is waived by appealing from the judgment of the inferior court recognizing the statute as valid to the Appellate Court on other alleged errors.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 219.\*]

### 9. APPEAL AND ERROR (§ 242\*)—RULINGS IN TRIAL COURT—REVIEW.

Where it does not appear that the trial court was given an opportunity to act on an objection to a statement of counsel for the successful party as to what he would prove made while he was examining a witness, an error based on the statement is not reviewable on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1424; Dec. Dig. § 242.\*]

### 10. TRIAL (§ 260\*)—INSTRUCTIONS — REFUSAL TO GIVE INSTRUCTIONS COVERED BY THOSE GIVEN.

It is not error to refuse an instruction in substance embodied in an instruction given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

Appeal from Branch Appellate Court, First District, on Error to the Municipal Court of Chicago; John W. Houston, Judge.

Action by Thomas F. Houren against the Chicago, Milwaukee & St. Paul Railway Company. From a judgment of the Appellate Court (189 Ill. App. 116) affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an appeal by the Chicago, Milwaukee & St. Paul Railway Company from a judgment of the Branch Appellate Court for the First District affirming a judgment for the sum of \$600 recovered by Thomas F. Houren for his own use and for the use of the Buffalo Commercial Insurance Company, appellee, in the municipal court of Chicago, in an action for damages for the destruction of a dwelling house owned by appellee by fire, which destruction is alleged to have been caused by the negligence of appellant. The Branch Appellate Court granted to appellant a certificate of importance. The negligence of appellant charged by appellee is set out in the following bill of particulars filed in the municipal court: "Plaintiff's claim is for loss and damage by fire sustained by him to his frame building which formerly stood on rear of lot 12, block 21, being the northwest corner of Sixty-Third and Bloomingdale avenues, Chicago, Cook county, Ill. (Galewood), and which was destroyed by fire on the morning of October 8, 1906, through no fault or neglect of the plaintiff, but by reason of the negligence of the defendant in blocking and closing of the crossing at Sixty-Third avenue and said defendant's railroad tracks, in the said city of Chicago, Cook county, Ill., by leaving and permitting to remain across said public highway a train consisting of a large

number of freight cars belonging to or in the charge, custody, and control of the defendant, whereby the fire department of the said city of Chicago were detained and prevented from passing over said public highway for a long space of time, and in the meantime the fire, which was in an adjacent building, was communicated to the plaintiff's building and destroyed and damaged same, whereas, had the said fire department been able to pass over said crossing upon arriving there, the fire would have been extinguished before it was communicated to plaintiff's property, and by reason of such negligence," etc. Ad damnum \$950.

From the record it appears that the building in question was located about 150 feet west of Sixty-Third avenue, on the north side of Bloomingdale road, in the city of Chicago. It was a small frame cottage. On the west side of this cottage were two frame cottages, each of about the same size as this one. The three were separated by spaces of six feet. At about 1:40 o'clock on the morning of October 3, 1906, the building west of the one here involved was discovered to be on fire. The nearest station of the fire department in this part of the city was located about three miles east. Within five minutes after the fire was discovered an alarm was received at this station, and the men of the department, with an engine, hose cart, truck, and other appliances started at once for the fire. Both the burning building and the station of the fire department were located on the south side of the railroad tracks of appellant, which ran east and west through this portion of the city. While the shortest route from the station to the fire would have been at all times on the south side of the railway tracks, in order to secure a better road the firemen drove north on Grand avenue until they reached a street north of appellant's tracks, where they turned west. When they turned south, they came to a crossing of the appellant's tracks a short distance north of the fire. They found this crossing blockaded by box cars to which no engine was attached, extending two blocks east and one block west of the crossing. The cars were coupled together and the brakes were set. Evidence was offered by appellant which tended to show that its track from this point east for some distance was considerably downgrade, and that by uncoupling the train at the crossing and releasing the brakes on the cars those upon and east of the crossing would have moved east without the aid of an engine and the crossing could have thus been opened. With the firemen at the crossing were two policemen, who testified that they knew of these facts and had seen cars moved at this point in that way. The fire apparatus reached the crossing at 10 minutes after 2 o'clock. The firemen immediately notified appellant to remove the cars from the

crossing, and it was about 30 minutes later when the engine of the appellant arrived and made an opening at the crossing to let the firemen through. In the meantime Houren's house had taken fire, and was entirely destroyed before the firemen could control the fire. This house took fire about 2:35 o'clock, and it is not disputed that if the crossing had not been blockaded, the firemen would have reached the scene of the fire about 2:12 o'clock. It was a damp, foggy night, and there was no wind blowing. Immediately east of the burning buildings, on the corner of the same block, was located a two-way fire hydrant, to which the firemen attached hose after they arrived. At the close of all the evidence the court denied the motion of appellant for a directed verdict. A number of errors have been assigned.

O. W. Dynes (John A. Russell, of counsel), for appellant. Bates, Harding & Atkins, for appellee.

SCOTT, J. (after stating the facts as above). In support of the motion for a directed verdict, it is said that there is no evidence tending to show that the obstruction of the street by the appellant was the proximate cause of the destruction of the house owned by Houren. Section 77, c. 114, Hurd's Rev. St. 1908, forbids a railroad company obstructing a public highway, by stopping any train thereon, for a longer period than 10 minutes. Appellant's train was standing over the street in violation of this statute. Appellant regards the damages as being too remote to be considered the proximate result of this violation of the law, and contends that a prudent and experienced man, fully acquainted with all the circumstances which existed at the time the train was left upon the street, would not have thought it reasonable that the house in question would have been destroyed by fire as a consequence of the obstruction of the street, and that for this reason the damages are not such as could be recovered on account of the unlawful act in question. It is not necessary that the burning of this particular house could have been foreseen. It is only damages of the character of those which occurred, to wit, damages by fire, that must have been within the range of the consequences of the act reasonably to be expected. It seems clear to us that, if a prudent man of experience had reflected upon the probable consequences of entirely closing up this street in a great city, he would have foreseen, first, that to so close the street would obstruct and delay public travel thereon; second, that among the travel liable to be so obstructed and delayed would be the passage of teams, engines, and other appliances of the fire department; third, that if the travel of the fire department was so obstructed and delayed any fire which the men of that department were seeking to reach would be

more extensive and do greater damage than if the obstruction and delay had not taken place.

It is then contended that the fire, and not the obstruction of the street, was the proximate cause of the destruction of the building. The fire began in the cottage next to the one here involved, and the fire, in fact, did destroy the Houren building; but if the obstruction occasioned the delay, and if but for the obstruction the fire department would have been able to control and extinguish the fire before it reached this building, then the obstruction is to be regarded as an intervening and concurrent cause of the burning of the building, and in law would with the fire itself form the proximate cause, and appellant, under such circumstances, would be liable even though the fire might be regarded as the primary cause. *City of Rock Falls v. Wells*, 169 Ill. 224, 48 N. E. 440.

It is then said that the policemen who were present at the obstruction when the fire engine reached there knew that by uncoupling the cars and releasing the brakes the cars would, on account of the slope of the track, move off the crossing without any propelling force other than the force of gravity, and that appellant could not be expected to foresee that the policemen, in the event of the fire department's teams and vehicles approaching the crossing, would fail to adopt this measure to get the cars off the street. This is entirely too far-fetched. It was not the business of the police to keep the cars off the street; and, besides, there is nothing in this record to indicate that a reasonable man might not have supposed that the result of so setting the cars in motion would result in greater disaster than would the delay of the fire department. The evidence shows that, when the teams reached the obstruction, they had been running several miles, and were very much exhausted. There is proof which tends to show that, passing to the east or west of the crossings obstructed by this train of cars, another railroad crossing, over which the men with the fire equipment could have passed to the south, would not have been reached until they had gone several blocks from the crossing at which they waited. The firemen might reasonably have expected to be able to obtain the assistance of an engine of appellant within a short time to remove the cars unlawfully upon the street.

It is then contended that there is no proof that the firemen would have been able to prevent the flames destroying the building had the delay not occurred. It is not possible to prove absolutely what the result of the fire department's efforts would have been had the progress of the men not been delayed. The proof is, however, that a fire hydrant belonging to the city was conveniently located, and that the department, had the delay not occurred, would have been fully equipped to fight the fire in the ordinary

way. The men, with the engine and other appliances of the fire department, reached the blockade not later than 2:10 a. m., and but for the obstruction they would have reached the fire in two or three minutes thereafter. The Houren cottage did not take fire earlier than 2:30 a. m., and except for the unlawful act of appellant the fire department would have been on the scene of the fire at least 17 minutes before that cottage began to burn. On account of the weather conditions, the fire burned slowly. The cottages were small wooden buildings, 14 by 20 feet in dimensions, and a story and a half in height. We fail to see how it can be reasonably argued that this proof does not tend to show that the fire department would have been able to prevent the destruction of the building had no delay occurred at the crossing. So far as this particular question is concerned, the case is not different from *Kiernan v. M. C. Co.*, 170 Mass. 378, 49 N. E. 648, where the fire department, in attempting to attach a hose to a hydrant, were unable to do so on account of certain acts of the defendant. In that case a recovery was permitted for property which might have been saved had the firemen been able to promptly connect a hose with the hydrant, and there, as here, it could not be said with absolute certainty that they would have been able to prevent the destruction of plaintiff's property had no interference occurred.

It is urged that there is a variance between the proof and the statement of the cause of action filed in reference to the location of the property which was destroyed. No such variance was pointed out in the municipal court, where the difficulty, if it existed, could have been readily obviated by an amendment. The point will therefore not be considered here.

The violation of the statute was negligence as a matter of law. In this respect the case is distinguished from those upon which appellant principally relies. As was well said by the Branch Appellate Court herein, the case is "as if the defendant had, at the moment when the fire department was about to pour a flood of water on the original fire, interposed by superior force, directly applied, to prevent this being done until too late to save the plaintiff's cottage." The motion for a peremptory instruction was properly denied.

The action of the municipal court in taking judicial notice of the existence of an ordinance of the city, general in its nature, which prohibited appellant leaving these cars on this crossing for a period longer than five minutes, is challenged. Section 317, c. 37, *Hurd's Rev. St.* 1903, provides that the municipal court shall take judicial notice of such ordinances. Any question that might otherwise arise as to the validity of this statute has been waived by appellant by taking the judgment of the Appellate Court upon other alleged errors.

Complaint is made of a statement of counsel for appellee in regard to what he would prove, which statement was made while he was conducting the examination of a witness. It does not appear that the trial court was given opportunity to act upon any objection in relation thereto.

The defendant's refused instruction No. 2 was, in substance, the same as defendant's given instruction No. 7. Defendant's refused instruction No. 3 was designed to advise the jury of the considerations to be given weight in determining whether the blockade of the street was the proximate cause of the injury. It was not in accord with the views which have been above expressed in this opinion and was properly refused.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(237 Ill. 340)

PEOPLE ex rel. BOISVERT et al. v. MAGRUDER et al.

(Supreme Court of Illinois. Dec. 15, 1908.)

1. HIGHWAYS (§ 66\*)—ESTATE OF PUBLIC—FREEHOLD.

The public has a perpetual easement in its highways, and that easement is a freehold.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 66.\*]

2. DRAINS (§ 13\*)—DRAINAGE DISTRICTS—ORGANIZATION—PROCEEDINGS—STATUTES—"DITCH OF AN OWNER OF LAND."

Hurd's Rev. St. 1906, c. 42, § 151, providing that, where two or more parties on adjoining lands requiring a system of combined drainage have voluntarily constructed ditches which form a continuous line or line and branches, and where needed repairs and improvements are not made by voluntary agreement, any owner of part of such ditch may petition the commissioners of highways of the township for the formation of a drainage district to include all lands to be benefited by maintaining these ditches, a ditch constructed by highway commissioners in a highway, draining not only adjoining lands but the highway, and forming a part of a continuous line, is to be regarded as a "ditch of an owner of land," within the meaning of the act, so as to authorize the organization of a drainage district under the act, on petition of any owner of part of the ditch.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 13.\*]

3. DRAINS (§ 15\*)—DRAINAGE DISTRICTS—ORGANIZATION—PROCEEDINGS—STATUTES.

In the petition for formation of such a drainage district, lands which, with other lands, required a system of combined drainage, and which were drained into a ditch constructed by voluntary agreement, both before and after certain improvements were made in the ditch, were properly included, though the owners thereof had contributed nothing toward such improvements.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 15.\*]

4. DRAINS (§ 15\*)—DRAINAGE DISTRICTS—ORGANIZATION—PROCEEDINGS FOR—STATUTES.

It is not fatal to the organization of such a drainage district that certain lands, the owners of which had contributed towards the previous improvement of the ditch constructed by

voluntary agreement, were not included in the petition for organization of the district, nor in the district when organized.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 15.\*]

Appeal from Circuit Court, Kankakee County; Frank L. Hooper, Judge.

Petition by the People, on the relation of Zephir Boisvert and others, for leave to file an information in the nature of a quo warranto against Myron Magruder and others. From an order denying the petition, the relators appeal. Affirmed.

This is a petition filed by the people, on the relation of Zephir Boisvert and others, in the circuit court of Kankakee county, for leave to file an information in the nature of a quo warranto against Myron Magruder, Joseph Leclair, and M. M. Beebe, to require them to show by what authority they hold and exercise the office of drainage commissioners of a certain pretended drainage district known as "Bourbonnais Union District No. 5." The relators question the legality of the organization of the district. In support of the petition the relators filed the affidavits of Zephir Boisvert, Henry Gregoire, and Charles Schilling, in which they aver that in the year 1903 R. W. Wilkinson and others, desiring to deepen a certain ditch running west along the south side of a public highway between sections 22 and 27, and between sections 23 and 26 in the town of Bourbonnais, to Soldier creek, entered into an agreement with the commissioners of highways of that town, whereby each of them was to pay said commissioners a certain sum of money to defray the expense of cleaning out and deepening said ditch, upon the condition that two sewer pipe culverts, extending across the road north and south along the line and north of said ditch, should be taken out; that in pursuance of said agreement the ditch was deepened, and that thereafter the banks caved in, and that Wilkinson thereupon set about to have a tile drain put in said ditch, and with that end in view petitioned for the formation of the above-mentioned drainage district, under the provisions of section 151, c. 42, Hurd's Rev. St. 1906, and that the respondents pretended to organize said drainage district, and since that time have pretended to be commissioners thereof. Affiants aver that they were not parties to the deepening of said ditch, and that the removal of said culverts was detrimental to them; that by removing said culverts the waters, which in the natural course of drainage would have flowed north through said culverts, were forced to the west in said ditch, thereby causing more water to flow in said ditch adjoining affiants' land; that many persons were taken into said drainage district that were not parties to the original agreement to deepen said ditch; and that many persons who were parties to that agreement were not included in the formation of said district, and who still own the lands

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which they then owned. Affiants further state that they are the owners of lands attempted to be taken in and included in the formation of said district, and that an assessment has been levied against their lands, and that the same has been returned as delinquent to the county treasurer. Bolsvert states further that the only purpose of the formation of the said district was to put a tile drain in the ditch in the highway, which Wilkinson and others had, by mutual agreement in writing, deepened and enlarged some three or four years ago; that it was done for the purpose of bringing west along said highway waters, which naturally would have flowed towards the northwest over and across lands owned by Wilkinson and his neighbors, into what is known as "Soldier creek." It appears from counter affidavits filed by respondents that on December 16, 1906, R. W. Wilkinson filed with the town clerk of the town of Bourbonnais a petition praying for the organization of a drainage district under section 151, c. 42, Hurd's Rev. St. 1905. This petition was signed by himself alone, and in it he represented that he and certain others owned adjoining lands which required a system of combined drainage, and that he and such other owners, or their grantors, had theretofore, by voluntary action, constructed open ditches and tile drains, which formed a continuous line and branches through and over and across said lands, and that repairs and improvements were needed on the said drains, and that they could not be made by voluntary agreement of the parties. In this petition Wilkinson included lands belonging to relators Zephir Bolsvert, Henry Gregoire, Henry Fink, Jerry Marcotte, Lille Brule, and Charles Schilling, none of whom were parties to the agreement above referred to for deepening the ditch in 1903. On the other hand, the lands of Louis Savole, Robert Lambert, Joseph O. Rivard, Simon Longtin, and George Gravelin, all of whom were parties to the agreement above referred to, were not included in said petition. The commissioners of highways took the view that the petition of Wilkinson gave them the jurisdiction to organize a district as prayed for, and they organized the district. Their acts after they had effected the organization, or purported organization, are not questioned in this proceeding. Affiants, whose affidavits were filed in behalf of respondents, further state that said open ditch had been constructed more than 20 years prior to the organization of said district, and had been used continuously as a drain after its construction, and that it was constructed by voluntary action of the highway commissioners of the town of Bourbonnais, and extended from a point a few rods east of the east line of the west half of section 26 west to Soldier creek; that it was constructed for the purpose of conveying surface waters naturally flowing into said road directly to Soldier creek. Affiants admit that there were two sewer pipe culverts across said public highway north of section

26 at the time of, and for some time prior to, the making of the subscription agreement heretofore mentioned, and that the highway commissioners of the town of Bourbonnais, after said subscription was paid to them, removed and closed up said culverts, and that by so doing they did not injure the lands of any one. Affiants then aver that each of the relators, after the construction of said ditch in the public highway, and before the organization of said drainage district, laid tiles and constructed drains upon their lands and connected them with said ditch; that at and before the time of the said subscription heretofore mentioned it became evident that the ditch needed repairs and improvements, so as to more adequately drain the lands now embraced in said district, and that Wilkinson and others wanted the highway commissioners of the town of Bourbonnais to clean out and deepen said open ditch at the expense of the town; that the commissioners decided that they would deepen said ditch, provided they could get enough subscriptions to justify them in so doing, and that it was under these circumstances that the said subscription agreement was made; that the lands of certain persons who subscribed to said agreement did not naturally drain into said ditch, nor was their land involved in the same system of combined drainage as the lands in the said drainage district, and that said persons subscribed to said agreement only upon the condition that said culverts would be removed. The court upon a hearing entered an order denying the petition for leave to file, and from that order the relators have prosecuted an appeal to this court. It is contended by them that the leave should have been granted.

J. Bert Miller, State's Atty. (A. L. Granger, of counsel), for appellants. Savary & Ruel and Eben B. Gower, for appellees.

SCOTT, J. (after stating the facts as above). The conclusion of the judge of the circuit court was that the drainage district in question was legally organized under the provisions of section 151, c. 42, Hurd's Rev. St. 1905, which reads as follows: "Where two or more parties owning adjoining lands which require a system of combined drainage, have by voluntary action constructed ditches which form a continuous line, or line and branches, the several parties shall be liable for their just proportion of such repairs and improvements as may be needed therefor, the amount to be determined as near as may be on the same principle as if these ditches were in an organized district. Whenever such repairs and improvements are not made by voluntary agreement, any one or more owning parts of such ditch shall be competent to petition for the formation of a drainage district to include the lands interested in maintaining these ditches. The petitioner or petitioners for the formation of such district must show to the satisfaction of the court that his or their land is damag-

ed through the lack of proper repairs or improvements to said ditch or drain. The form of procedure and the conditions heretofore prescribed in this act shall be observed as near as practicable; but the ditches shall be taken as a dedication of the right of way, and their construction and joining as the consent of the several parties to be united in a drainage district. These ditches, if open, shall be made tile drains when practicable." It is first objected to the validity of the organization that the section set out does not authorize the formation of a drainage district upon the petition of one or more parties owning parts of a ditch and branches, where, as here, the principal ditch is in the highway, where that ditch was originally constructed by the highway commissioners, and where the owners of lands adjoining the highway have merely drained their lands into the ditch in the highway. The portion of the ditch which was in the highway, not only afforded a passageway for waters flowing off the adjoining lands, but also drained the highway, and we think that the commissioners of highways, in their corporate capacity, and as representatives of the public, within the meaning of this section are to be regarded as the owners of land. The public has a perpetual easement in the highway, and that easement is a freehold. *Perry v. Bozarth*, 198 Ill. 323, 64 N. E. 1076. In the case of *Young v. Commissioners of Highways*, 134 Ill. 569, 25 N. E. 689, this court held that, where commissioners of highways undertake to drain a public highway, they possess the same rights, and are to be governed by the same rules, as adjoining landowners who may undertake to drain their own lands, excepting, however, cases in which the commissioners may proceed under the eminent domain law of the state. While that case is entirely dissimilar to this in its facts, we yet think the law as there stated places the public highway and the commissioners of highways in the same category with, and makes them bear the same burdens as, other lands and other landowners, so far as the laws pertaining to drainage are concerned. The situation here is precisely the same as though the lands in the highway were owned by private persons without the burden of the easement.

In 1906, with money furnished by subscription by certain landowners, the highway commissioners deepened the ditch in the highway. Certain owners whose lands drained into the ditch paid nothing toward the expense of this work. These lands are now within the district in accordance with the prayer of the petition for the organization of the drainage district. It is insisted that these owners are not, within the statute, parties who have by voluntary action constructed ditches which form a continuous line or line and branches, because they took no part

in the deepening of the ditch; that no parties can be regarded as having constructed, or helped to construct, the system of drainage as it existed when the petition for the organization of the drainage district was filed, except those who contributed to the deepening of the highway ditch in 1903. This position seems to us untenable. Before the ditch was made deeper, these owners who subscribed nothing to the expense of that work were the owners of lands which, with other lands involved in this suit, required a system of combined drainage—that is, an outlet was required for all the waters flowing off these lands—and a common outlet was found through this ditch in the highway. The deepening of the ditch left the system of combined drainage in existence. It is not denied that the lands of each of these persons who did not help pay for the work in 1903 drained into the ditch both before and after the work of deepening was done. Under these circumstances it seems clear that these lands might properly be included in the petition for the organization of the district, even though the owners thereof contributed nothing toward improving the main ditch in 1903.

It is also complained that certain lands, the owners of which contributed toward the improvement of 1903, were not included in the petition for the organization of the district nor in the district when it was organized. This, is not fatal to the organization. *Barnes v. Drainage Com'rs*, 221 Ill. 627, 77 N. E. 1124.

We have thus disposed of all questions presented by appellants. The order of the circuit court will be affirmed.

Order affirmed.

(237 Ill. 357.)

#### PEOPLE v. KRUEGER.

(Supreme Court of Illinois. Dec. 15, 1908.)

##### 1. INDICTMENT AND INFORMATION (§ 4\*)—FORM OF ACCUSATION.

The Chicago municipal court has constitutional authority and jurisdiction to try on information one charged with a violation of section 2 of the lottery policy act (*Hurd's Rev. St. 1905, c. 38, § 185b*).

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 24; Dec. Dig. § 4.\*]

##### 2. CRIMINAL LAW (§ 1133\*)—WRIT OF ERROR—REVIEW—REHEARING.

A constitutional question relied on on writ of error which was raised for the first time by petition for rehearing in the Appellate Court was waived.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2984; Dec. Dig. § 1133.\*]

##### 3. LOTTERIES (§ 28\*)—INFORMATION—SUFFICIENCY.

Section 2 of the lottery policy act (*Hurd's Rev. St. 1905, c. 38, § 185b*) makes a person guilty of the offense provided for therein who "shall have in his possession knowingly any writing, paper or document representing or be-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing a record of any chance, share or interest in numbers so drawn or to be drawn." The information under the act charged defendant with unlawfully and knowingly having in his possession for the purpose of gaming a certain writing and paper and document representing and being a record of a chance, share, and interest in numbers drawn and to be drawn, commonly called "policy." *Held*, that the act covered not only documents and papers that represented the chance, interest, or share in numbers "sold," but also the chance interest or share in numbers "drawn," and hence the information charged the offense defined by the statute.

[Ed. Note.—For other cases, see *Lotteries*, Cent. Dig. §§ 29-32; Dec. Dig. § 28.\*]

#### 4. INDICTMENT AND INFORMATION (§ 196\*)— DEFECTS—MODE OF OBJECTION.

Objections to an information which go merely to the form, and not to the real merits of the offense charged, are waived if not raised on a motion to quash.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 629; Dec. Dig. § 196.\*]

Error to Appellate Court, First District, on Error to Municipal Court of Chicago; Edwin K. Walker, Judge.

Charles Krueger was convicted of violating section 2 of the lottery policy act (Hurd's Rev. St. 1905, c. 38, § 185b), and from an affirmation of the conviction by the Appellate Court he brings error. *Affirmed*.

Edward H. Morris, for plaintiff in error. W. H. Stead, Atty. Gen., and John J. Healy, State's Atty. (J. Kent Greene and F. L. Barnett, of counsel), for the People.

**PER CURIAM.** This is an information brought in the municipal court of the city of Chicago, charging plaintiff in error with "unlawfully and knowingly" having "in his possession, for the purpose of gaming, a certain writing and paper and document representing and being a record of a chance, share, and interest in numbers drawn and to be drawn, and which papers, writing, and documents aforesaid is commonly called 'policy,' and in the nature of a bet, wager, and insurance upon the drawing and drawn numbers of a public and private lottery," in violation of certain designated sections of the statutes. This information was based particularly on that portion of section 2 of the lottery policy act (Hurd's Rev. St. 1905, p. 709, c. 38, § 185b), which states that a person shall be guilty of the offense if he "shall have in his possession, knowingly, any writing, paper or document, representing or being a record of any chance, share or interest in numbers sold, drawn or to be drawn, or in what is commonly called 'policy,' or in the nature of a bet, wager or insurance, upon the drawing or drawn numbers of any public or private lottery," etc. On a trial in the municipal court a verdict of guilty was rendered, and a judgment entered that plaintiff in error pay a fine of \$500 and costs, and be confined in the house of correction for three months. Writ of error was sued out to the Appellate Court, where the

judgment was affirmed, and the case is brought here by writ of error for further review.

Plaintiff in error contends that the municipal court was without constitutional authority and jurisdiction to try him on information. This question has been decided adversely to plaintiff in error's contention in *People v. Glowacki* (Ill.) 86 N. E. 368. Furthermore, this constitutional question was first raised by petition for rehearing in the Appellate Court, and hence was waived. In *re McWhirter*, 235 Ill. 607, 85 N. E. 918.

It is also contended that the information does not allege that plaintiff in error had in his possession the kind of writing prohibited by the statute in question, the argument being, as we understand it, that the writing, paper, or document must represent a record of a chance, share, or interest of tickets "sold," and that there is no proof in this record that any lottery tickets or numbers were sold. It appears from this record that "policy" is played by a person going to the writer of "policy" and selecting several numbers, usually three, but sometimes two, four, or more, that he wants to play, and putting up the required amount of money that he is to pay for the right to select or guess or wager on those numbers. Three copies of these numbers and amount paid are then recorded on slips of paper by means of carbon paper. The player gets one copy, the policy writer keeps one, and the third is sent to the main office that employs the policy writer. There are different forms of playing policy. Usually there are 78 different numbers to choose from, but in some games there are 80 numbers. In case 78 numbers are selected from, these 78 are supposed to be put in a wheel and mixed up, and then 12 of them drawn and recorded on a slip of paper, copies of which are given to the persons who have wagered on that special drawing of numbers. If the person who has made a wager finds among these 12 numbers drawn the 3 numbers he selected, as shown by his slip, he wins. If all 3 numbers are not among the numbers so drawn, he loses. If there are more than 78 numbers used, or if the player bets on more or less than three, as he may in the different kinds of "policy," the drawings are in a similar way. It appears from this record that the numbers are sometimes drawn otherwise than by wheel, but always by chance. The evidence shows that certain police officers in plain clothes went to defendant's place in the city of Chicago about noon, on July 24, 1907, and found there six persons, the plaintiff in error not then being present; that shortly after 1 o'clock he came in and said he was a little late, but it was all right, and he drew out certain envelopes having certain names written thereon, and distributed them to the persons other than the officers, and, when these persons started to leave, the officers arrested them, finding in their possession these envel-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

opes. Each envelope had in it slips of paper, and some of them also contained money. One was marked with the name of plaintiff in error, having in it both slips of paper and money. Each of the slips had numerous numbers on it. One of the officers testified that he knew how the game of policy was played, and gave a detailed explanation of it. He testified that the slips given out by plaintiff in error in the envelopes to the other persons in the room were records of drawings, and it appears from his evidence the record of the drawing is a necessary part of the game.

The language of the statute is that one is guilty who "shall have in his possession, knowingly, any writing, paper or document, representing or being a record of any chance, share or interest in numbers sold, drawn or to be drawn." Counsel insist that the writing, paper, or document must represent numbers "sold." Manifestly the language not only refers to numbers "sold," but also to documents that contain a record of numbers "drawn or to be drawn." It is true that the witnesses testified that these papers or documents taken from plaintiff in error were not tickets; that they purported to be drawings only; that nothing was paid for these records of drawings. It is argued that the Legislature did not by that portion of the statute intend to cover any documents or papers unless they represented something "sold." The case of *France v. United States*, 164 U. S. 676, 17 Sup. Ct. 219, 41 L. Ed. 595, cited by plaintiff in error, had under consideration a statute worded very differently from the one here in question, and the court held that the statute was not so drawn as to cover a charge of the nature under discussion in this case. Counsel for plaintiff in error does not contend that having in possession knowingly papers of this kind might not be made a criminal offense. Indeed, he argues that the latter part of the section of the policy act quoted from above does have language in it that would cover an offense such as is here proven. By the part of this section upon which the information was particularly based we think the Legislature not only intended to cover documents and papers that represented a chance, interest, or share in numbers "sold," but also a chance, interest, or share in numbers "drawn or to be drawn." From the evidence in this record the plaintiff in error knowingly had in his possession papers containing a record of a chance, share, or interest in numbers "drawn" in a game commonly called "policy," in the nature of a bet. Therefore the allegation and the proof correspond, and the verdict was justified.

The instruction that plaintiff in error contends was erroneously refused by the trial court was based upon the construction that he contended for. Our ruling that that construction of the statute is not the proper one ef-

fectually disposes of his argument that the instruction should have been given.

The further contention is made that the information has the word "have," instead of the word "had," and the word "knowly," instead of "knowingly." These objections go merely to the form, and not to the real merits of the offense charged. They should have been raised, if at all, on a motion to quash. *Crim. Code*, div. 11, § 9 (*Hurd's Rev. St.* 1905, p. 743, c. 38, § 411); *Curtis v. People*, *Breesse*, 256; *Townsend v. People*, 3 *Scam.* 828; *Gitchell v. People*, 146 *Ill.* 175, 33 *N. E.* 757, 37 *Am. St. Rep.* 147.

We do not think the trial court committed reversible error in the admission of evidence.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(237 Ill. 125)

# CONWAY v. CITY OF CHICAGO.

(Supreme Court of Illinois. Dec. 15, 1908.)

## 1. MUNICIPAL CORPORATIONS (§ 372\*)—PUBLIC IMPROVEMENTS—CONTRACTS—PAYMENT OF COMPENSATION—PROCEEDS OF ASSESSMENTS.

The liability of a city to one who has constructed a public improvement to be paid for by a special assessment is limited to the amount of the special assessments actually collected for the improvement and not paid over to the contractor.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 905, 907; Dec. Dig. § 372.\*]

## 2. MANDAMUS (§ 96\*)—PUBLIC IMPROVEMENTS—CONTRACTS—PAYMENT OF COMPENSATION—LEVY OF ASSESSMENTS.

If a city neglects its duty to levy and collect a special assessment provided for by an ordinance for a public improvement, the remedy of a contractor entitled to have such assessment levied and collected is by mandamus to compel the performance of such duty.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 202; Dec. Dig. § 96.\*]

## 3. MUNICIPAL CORPORATIONS (§ 374\*)—PUBLIC IMPROVEMENTS—CONTRACTS—PAYMENT OF COMPENSATION—PROCEEDS OF ASSESSMENTS.

Where a special assessment has been levied and collected by a city, and nothing remains to be done except to pay it over to the party entitled to it, assumpsit is the proper remedy.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 374.\*]

## 4. MUNICIPAL CORPORATIONS (§ 372\*)—PUBLIC IMPROVEMENTS—CONTRACTS—PAYMENT OF COMPENSATION—PROCEEDS OF ASSESSMENTS.

Funds collected by a city from a special assessment levied for the payment of a public improvement constitute a trust fund to pay for the improvement, and the city has no right to transfer them to other funds and draw on them indiscriminately for pay rolls of inspectors, engineers, and other officers and employees of the special assessment department without regard to the improvement as to which the services were rendered or expenses incurred, and, if the city may properly pay out of such funds the necessary expenses for inspection and engineering incurred in connection with the improvement, it

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cannot appropriate more than is necessary for such purpose.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 372.\*]

**5. MUNICIPAL CORPORATIONS (§ 370\*)—CLAIMS AGAINST CORPORATION.**

A city which wrongfully diverts funds collected from a special assessment by transferring them to other funds for other purposes than the payment for the improvement is liable therefor to the contractor as for money had and received.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 370.\*]

**6. INTEREST (§ 31\*)—CLAIMS AGAINST MUNICIPAL CORPORATION—RATE.**

A suit against a city by a contractor holding special assessment bonds issued in payment for a public improvement to recover funds collected from a special assessment and wrongfully transferred by the city to other funds for other purposes than the payment of the bonds being essentially a suit for money had and received, and not a suit on the bonds, the city is only liable for the statutory rate of interest on the amount so diverted and withheld from the contractor, and not the contract rate specified in the bonds.

[Ed. Note.—For other cases, see Interest, Dec. Dig. § 31.\*]

**7. MUNICIPAL CORPORATIONS (§ 254\*)—CLAIMS AGAINST CORPORATION—INTEREST.**

A municipality is not liable on its contracts for interest in the absence of an express agreement to pay it, but where money is wrongfully obtained, or where it is lawfully obtained and unlawfully and wrongfully withheld, the municipality is liable for interest to the same extent as a private person.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 254.\*]

**8. INTEREST (§ 45\*)—CLAIMS AGAINST CORPORATION—INTEREST.**

A contractor's right to interest on funds collected from a special assessment, and wrongfully transferred by the city to other funds for other purposes than the payment of special assessment bonds held by him, accrued on the date the bonds fell due, though the funds were wrongfully diverted on an earlier date.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 94; Dec. Dig. § 45.\*]

**9. MUNICIPAL CORPORATIONS (§ 370\*)—PUBLIC IMPROVEMENTS—CONTRACTS—PAYMENT OF COMPENSATION—PROCEEDS OF ASSESSMENTS.**

A city which has contracted for a public improvement to be paid for by special assessments is not liable to the contractor for unauthorized rebates to the property owners assessed for the improvement, but his remedy is by mandamus to compel the collection of such rebates, and the fact that difficulties caused by lapse of time will prevent the collection of the original assessment or the levying of a supplemental assessment covering the rebates is not ground for extending the city's liability to the contractor for such assessments beyond that which results from its failure to pay over money actually collected thereon.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 370.\*]

**10. MUNICIPAL CORPORATIONS (§ 372\*)—PUBLIC IMPROVEMENTS—CONTRACTS—PAYMENT OF COMPENSATION—PROCEEDS OF ASSESSMENTS.**

A city which has contracted for a public improvement to be paid for by special assessments is not liable to the contractor for delinquent special assessments on which it has ob-

tained proper tax deeds which have been tendered to him.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 372.\*]

**11. APPEAL AND ERROR (§ 845\*)—PRESENTATION OF GROUNDS OF REVIEW.**

Where the cause is submitted to the trial court on a stipulation of facts, no objection for want of proper pleading by either party can be raised on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8344; Dec. Dig. § 845.\*]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; George A. Carpenter, Judge.

Action by Richard F. Conway against the City of Chicago. From a judgment of the Appellate Court (138 Ill. App. 320) reversing a judgment for plaintiff, defendant appeals. Reversed.

This is an action of assumpsit brought by Richard F. Conway against the city of Chicago to recover the balance due on special assessment bonds issued in payment of the cost of paving certain streets in Chicago, known as the "St. Lawrence avenue system." The declaration consisted only of the common counts, to which the city of Chicago pleaded the general issue. By agreement a jury was waived and the cause submitted to the circuit court upon a stipulation of facts. The circuit court found in favor of the plaintiff and assessed the damages at \$20,176.17. From a judgment for this amount against it the city of Chicago prosecuted an appeal to the Appellate Court for the First District. The Appellate Court reversed the judgment of the circuit court, and entered a judgment against the city for \$18,475. From this judgment, the city of Chicago has prosecuted a further appeal to this court.

The Appellate Court disagreed with the trial court as to the amount appellee was entitled to recover, and made an order requiring a remittitur to be entered, whereupon appellant made a motion, which was assented to by appellee, that the Appellate Court set aside its first order and enter final judgment for the amount of \$18,475. This course was adopted in order to facilitate an appeal to this court, and it was stipulated that it was to be without prejudice to the rights of the parties to assign errors in this court.

The facts necessary to an understanding of the questions that are open for consideration in this court, as the same appear from the stipulation of the parties, are as follows:

On June 16, 1896, the city council of Chicago passed an ordinance for the paying of a system of streets, known as the "St. Lawrence avenue system," to be paid for by special assessment. A special assessment was confirmed by the county court of Cook county, except as to the property objected for, on the basis of the estimated cost of said im-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

provement, in the sum of \$148,000, and on July 26, 1896, an assessment of \$115,924.57 was duly certified for collection. Appellee became the contractor, and in due time constructed the improvement in accordance with the ordinance, contract, and specifications and to the satisfaction of the city authorities. Under appellee's contract he was entitled to receive \$104,162.65, payable out of the proceeds of special assessments to be levied to defray the cost of the improvement. The city proceeded to collect the assessment and has collected \$136,545.53, of which \$32,382.88 was the interest and has made sundry payments to appellee on account of his contract, still leaving a balance due, on account of principal, of \$2,865. The city has on hand a balance of \$979.97 of the assessment, which it is admitted ought to be applied on appellee's claim. The stipulation further shows that on December 31, 1896, out of the money which the city collected from the property owners on said special assessment, as aforesaid, the city, by its then officers in charge of the administration of special assessments, transferred from said special assessment fund, "Warrant 22,344," the sum of \$4,353.77, which the city claimed for the cost of engineering and superintendence and the cost of making and collecting said assessment, to another fund known as "Fund W." The actual cost of inspection of said improvement, \$2,453.50, was also transferred to "Fund W," making an aggregate of \$6,807.27 so transferred. Said sum of \$6,807.27 together with 6 per cent. of the estimated cost of all other improvements made by special assessments during the year 1896, and several years prior and subsequent to said year, were merged into "Fund W" and together constituted a single fund, from which were paid the pay rolls of the special assessment department of the city of Chicago, including the pay roll of all inspectors and engineers, as well as the accountants, administrative officers, and all other employees of said department, including the expenses of making and collecting the assessments. No account was kept of the expense of making or collecting any particular special assessment, nor of the actual cost of the engineering and superintendence of any particular special assessment. It cannot now be ascertained what was the expense of the city of Chicago of the engineering and superintendence, making and collecting the special assessment above referred to, nor of any other particular special assessment. The amounts thus transferred in the aggregate to "Fund W" were more than the total cost of administration of the special assessment department, and the balance of the said "Fund W" was again transferred to the general fund of the city of Chicago and used for general corporate purposes.

It is also stipulated that on December 31, 1896, the city, by its then officers, also transferred from said special assessment fund the

sum of \$3,072.82 and credited the same to the account for the sewer department, and used said sum of money, together with other similar sums transferred from other special assessment funds, in the payment of the expenses of said sewer department, without keeping any account of the particular amounts expended by the said sewer department on the separate and particular special assessment improvements. The work done by the sewer department consisted in constructing catch-basins and connecting the same with the openings in the gutters of the streets so improved and with the sewers in said streets underneath said pavements, so as to provide for taking care of the surface waters on said streets, but the special assessment ordinance in the case in question contained no provision for the construction or adjustment of sewers and catch-basins and did not describe and refer to the same as a portion of said improvement.

The stipulation further shows that during the year 1897 appellant voluntarily made abatements to property owners assessed for the improvement under the following circumstances: "After the special assessment had been confirmed by the order and judgment of the county court of Cook county, and the amount of the benefits and of the proportionate cost of the improvement to each particular lot fronting upon the said improvement had been ascertained and confirmed by the court, the city of Chicago, by its then officers, undertook to ascertain the actual expense of constructing the pavement in front of each particular lot, and where it appeared that, by reason of the physical condition of the property, a less amount of filling and grading was necessary for one lot than for another, or for any reason the cost of improvement in front of a particular lot was less than the amount assessed against it, the city of Chicago issued an abatement certificate to such property owner for the amount so ascertained and delivered the same to the county treasurer, to which officer the said assessment had then been certified for collection according to law, and directed him not to collect said amount from said property owner, but to credit the account of said property owner with the amount of said certificate mentioned as 'paid by the city of Chicago,' and directed him, after thus crediting said abatement certificates and collecting the balance, to turn in said certificates to the city on final accounting of the collection as so much money collected. This was done after the contract for said improvement had been awarded and signed and while the improvement aforesaid was in process of construction, and without any order of court or any judicial proceeding to determine whether the amount previously adjudicated by the court as the amount of benefits and the proportionate cost of the improvement for each particular lot was excessive, and without any proceeding to charge to the other lot owners

an equivalent amount. This action of the city was taken in good faith and without any fraud on the part of its officers, and in compliance with a theory of the law then entertained by them that an assessment should be spread and collected on the front foot basis, that is to say, according to the actual cost of constructing the improvement in front of each particular lot. The aggregate of the said abatements so made is \$5,251.18." Appellee claims that appellant had no legal right to make these abatements, and that it is consequently liable to him for the amount of such abatements, together with interest thereon.

It further appears that certain property assessed in the original proceeding, amounting to \$902.39, was struck off to the city at the tax sale by the collector, there being no other bidders, and that the tax deeds which were subsequently issued to the city for these lots have been tendered to appellee as payment on the account for the face value of the tax certificates but have been refused by appellee. It was further stipulated between the parties that this case merely involves appellee's claim against appellant on account of the three sums above mentioned and the interest thereon, and is not intended to affect any other rights or causes of action which appellee may have or become entitled to.

The contract under which appellee constructed the improvement provided, among other things, as follows: "The said city of Chicago hereby covenants and agrees, in consideration of the covenants and agreements in this contract specified to be kept and performed by the said party of the first part, to pay to said party of the first part, when this contract shall be wholly carried out and completed on the part of said contractor and when said work shall have been accepted by said commissioner of public works, and when also the special assessment or assessments levied or to be levied for the same shall be collected, in installments, in accordance with the act of the General Assembly of the state of Illinois entitled 'An act to amend article 9 of an act entitled "An act to provide for the incorporation of cities and villages," approved April 10, 1872, in force July 1, 1872.' \* \* \* In case the city of Chicago should become the purchaser of any special assessment certificate at any sale for the delinquent special assessments, in default of other bidders, such purchase shall not be deemed a collection of such special assessment, and no act of the city done or suffered shall be construed as a collection of any special assessment, or part thereof, until the money due thereon shall be actually paid into the city treasury. \* \* \* The said party of the first part agreeing hereby to make no claim against said city, in any event, except from the collections of the special assessment made or to be made for said improvement, and to take all risks of the in-

validity of special assessments, or any of them, or of the proceedings therein, or for failure to collect the same."

George A. Mason and Lyman, Lyman & O'Conner (Edward J. Brundage, Corp. Counsel, of counsel), for appellant. Tolman, Redfield & Sexton, for appellee.

VICKERS, J. (after stating the facts as above). First. By exceptions preserved to the refusal of the court to hold certain propositions of law, appellant has preserved the question of the liability of the city for three items which constitute a part of appellee's claim. The improvement having been projected by the city as an improvement to be paid for by special assessment, the city is not liable generally for any unpaid balance due the contractor. The liability of the city, both under the law and under the contract with appellee, is limited to the amount of the special assessments actually collected for this improvement and which have not been paid over to appellee. *City of Alton v. Foster*, 207 Ill. 150, 69 N. E. 783. If the city neglects or refuses to discharge any of the duties required of it in connection with the levying and collection of special assessments provided for by the ordinance under which the improvement is constructed, the remedy of persons entitled to have such assessment levied and collected is by a mandamus to compel the performance of such duties. *People v. City of Pontiac*, 185 Ill. 437, 56 N. E. 1114. Where the special assessment has been levied and collected by the city and nothing remains to be done except to pay it to the party entitled to it, assumpsit is a proper remedy to compel the city to pay it over.

The stipulation shows that appellant collected \$4,353.77 of this assessment which was transferred to "Fund W" and \$3,072.82 which was placed to the credit of the sewer department. This the city had no legal right to do. The funds, collected from this special assessment constituted a trust fund to pay for the improvement, and the city had no right to transfer them to other funds and draw on them indiscriminately for pay rolls of inspectors, engineers, accountants, and other officers and employees of the special assessment department, without regard to the improvement with respect to which such services were rendered or expenses incurred. Even if appellant might properly pay out of these funds the necessary expenses for inspection and engineering incurred in connection with this improvement, it could not appropriate for this purpose more of such assessment than was necessary for such purpose. Under the system of creating one fund for inspection and engineering and another for sewer department, and arbitrarily taking from each local improvement an amount estimated to be its proper contribution to such funds, it is apparent that no one could

tell even approximately whether any particular improvement was bearing more or less of its just share of such expenses. Appellant, having thus wrongfully diverted these amounts, is liable therefor in this action.

The questions whether appellant is liable for interest upon these amounts, and if so, at what rate, and the time from which such interest shall be computed, are questions properly submitted for our determination. Appellee insists that he is entitled to interest at the rate of 6 per cent. from December 31, 1896, which is the day on which appellant transferred these funds from the special assessment fund to other funds held by appellant for other purposes than the payment of the obligation incurred by this improvement. The bonds issued to appellee in payment for this improvement, and which remain unpaid, bear 6 per cent. interest, and it is upon this fact that appellee bases his claim to recover that rate of interest in this suit. Appellant contends that it is not liable for any interest, and, if liable at all, that it is only liable at the rate of 5 per cent., to be computed from the time when there was a default, at maturity, of the bonds to pay them. The circuit court sustained appellee's contention on this point, and allowed interest at 6 per cent. from the date when the transfer of the funds occurred—a period of 10 years. The Appellate Court disagreed with the trial court, and allowed interest at 5 per cent. from the time when appellee became entitled under his bonds to demand the payment of these funds to him. Upon this question we think that the view of the Appellate Court is correct. While appellee's ownership of past-due bonds issued in anticipation of this special assessment is a necessary element in his right to recover in this case, still this is not a suit upon the bonds in the sense that the recovery must be according to the tenor and effect of the instruments, but it is essentially a suit against the city for money had and received to the use of appellee which in good conscience ought to be paid to him. The rate of interest therefore which appellant is liable for is that fixed by the statute, and not the contract rate specified in the bonds. Appellee is undoubtedly entitled to the rate mentioned in the bonds as against the special assessments levied or to be levied to pay such bonds, but the general liability of appellant to pay interest does not arise out of the contract, but out of the unlawful withholding of these funds after they were collected by the city. The general rule as to the liability of municipalities is that they are not liable on their contracts for interest in the absence of an express agreement to pay it, yet where money is wrongfully obtained, or where it is lawfully obtained and unlawfully and wrongfully withheld, the municipality is liable for interest to the same extent as a private person. *Vider v. City of Chicago*, 164 Ill. 354, 45 N. E. 720; *City of Danville v. Danville Water Co.*,

180 Ill. 235, 54 N. E. 224; *City of Chicago v. Northwestern Mutual Life Ins. Co.*, 218 Ill. 40, 75 N. E. 803, 1 L. R. A. (N. S.) 770. Appellant transferred these funds on its books December 31, 1896, but on that date appellee was not entitled to receive the same, for the reason that at that time he held no bonds that were due. The transfer of the funds by the appellant was at that time a mere matter of harmless bookkeeping, so far as appellee was concerned. If appellant had restored these funds to the special assessment fund on the day that appellee's obligations matured, so that the funds would have been on hand ready to meet his obligation, it can hardly be said that the mere fact that appellant had previously, through a misapprehension of the law, allowed the fund to rest in another account, ought to make appellant liable to appellee for interest. We think that appellee's right to demand interest of appellant accrued when he became entitled to demand and receive the funds under his bonds, which was a period some months later than the date upon which appellant transferred the funds upon its books. Upon this basis the amount that appellee is entitled to recover on account of the two items now under consideration is \$10,071.71.

Second. The next item in appellee's claim is \$5,251.18, which was rebated to the property owners under the circumstances set out in the statement preceding this opinion. Both the circuit and Appellate Courts held that the appellant was liable for these rebates, with interest thereon. It must be borne in mind that the amount of these rebates never, in fact, came into the hands of the city. Through a misapprehension as to the legal basis upon which the special assessment should have been levied, these rebates were left with the taxpayers. If appellant is required to pay appellee these rebates, the effect of it will be to establish a general liability against the city for the mere neglect, default, or mistake of its officers in regard to the levying and collecting of a special assessment. It is true that appellant had no legal right to make such rebates, and all orders and proceedings purporting to authorize such rebates were null and void. Being mere nullities, they could not have been interposed as a defense to an application for a mandamus to compel the collection of the full amount of the special assessment. Appellee's remedy, in so far as the amount of these rebates is concerned, is by mandamus to compel the performance of whatever legal duties appellant is under in connection with the collection of these rebates from the taxpayers. It is suggested that difficulties arising out of the lapse of time will prevent the collection of the original assessment or the levying of a supplemental assessment covering these rebates. However this may be, we are not inclined to extend the general liability of a municipality for special assess-

ments beyond that which results from a failure to pay over money actually collected by it. These rebates never having come into the hands of the city in cash, it is not liable in an action of assumpsit for them, on the theory that by the exercise of due diligence in the discharge of its legal duties it ought to have collected them.

Third. The city discharged its full duty, under the contract and under the law, when it perfected the tax titles to such lots as were delinquent and tendered the deeds obtained on tax sales to appellee. It is not liable to appellee for the amount of these delinquent special assessments. The Appellate Court properly disposed of the appellant's contention that the judgment below exceeded the ad damnum of the declaration. Under the stipulation, no objection for want of a proper pleading by either party can now be raised.

All the facts in this case are before the court, and no reason exists for remanding the cause. The judgment of the Appellate Court will therefore be reversed and a judgment entered in this court for the amount due, which is \$11,051.68, to which should be added 5 per cent. interest from February 4, 1907, the date on which the judgment was entered in the circuit court, to the date on which this judgment is entered.

Judgment reversed and judgment in this court.

(237 ILL. 242.)

#### CITY OF EARLVILLE v. RADLEY.

(Supreme Court of Illinois. Dec. 15, 1908.)

##### 1. MUNICIPAL CORPORATIONS (§ 57\*)—GOVERNMENTAL POWERS.

A municipal corporation has only such powers as have been granted to it by the Legislature, and it can legislate only because it is authorized so to do by the state.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 148; Dec. Dig. § 57.\*]

##### 2. MUNICIPAL CORPORATIONS (§ 170\*)—ALDERMEN—NEGLECT OF DUTY—EFFECT.

While the burden of the office of alderman provided for by statute is imposed by law on each person elected, and he must, as stated in the oath required of him, faithfully discharge the duties of the office to the best of his ability, the Legislature has not by any general enactment provided a penalty for neglect of duty except by Hurd's Rev. St. 1905, c. 38, § 208, which imposes a fine on and authorizes the removal from office of every person guilty of any palpable omission of duty.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 170.\*]

##### 3. MUNICIPAL CORPORATIONS (§ 92\*)—GOVERNMENTAL POWERS—ORDINANCES—VALIDITY.

City and Village Act (Hurd's Rev. St. 1905, c. 24, §§ 35, 36) art. 3, §§ 7, 8, providing that the city council shall determine its own rules of proceeding, punish its members for disorderly conduct, and that a majority of the aldermen elected shall constitute a quorum, but a smaller number may adjourn and may compel the at-

tendance of absentees "under such penalties as may be prescribed by ordinance," do not authorize a city council to adopt an ordinance imposing a penalty on a member absenting himself from any of the meetings unless for good reason he shall be excused by the council, since the ordinance has no tendency to aid the minority in compelling the attendance of absentees.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 92.\*]

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, La Salle County; Edgar Eldredge, Judge.

Action by the City of Earlville against James S. Radley. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant, on the Appellate Court granting a certificate of importance, appeals. Reversed.

The circuit court of La Salle county on a hearing without a jury of an appeal from a police magistrate of the city of Earlville rendered a judgment against the appellant for a penalty of \$4 for absenting himself from four meetings of the city council, of which he was a member. The Appellate Court affirmed the judgment, and, a certificate of importance having been granted, an appeal was taken to this court. The penalty was imposed under the provisions of section 5 of an ordinance regulating sessions of the city council, which reads as follows: "Any member absenting himself from any of the meetings of the same may be fined the sum of one dollar, unless for some good reason he shall be excused by the city council, which fine, with the costs of the proceedings, may be collected by suit, to be commenced before the police magistrate in the name of the city of Earlville." A regular meeting of the council, which consisted of six aldermen and the mayor, was held on July 8, 1905, with all the members present, and was adjourned until July 7th. At that time three aldermen, including appellant, were absent, and the meeting was adjourned until July 14th, when the same three aldermen were absent. At the next regular meeting, August 7th, the same three aldermen were absent, and the meeting was adjourned until August 9th, when they were again absent. At this last meeting a resolution was unanimously adopted by the three aldermen present that the absent members be fined \$1 each for each of the four meetings from which they had been absent, the fines to be paid within three days. On August 14th this suit was begun before the police magistrate.

James J. Conway, for appellant. George S. Wiley (Browne & Wiley, of counsel), for appellee.

DUNN, J. (after stating the facts as above). The city of Earlville is organized under the general law, and the appellant's claim is that the city council had no authority to pass section 5 of the ordinance. Cities have

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

only such powers as have been granted to them by the Legislature. "Municipal corporations exercise only delegated and limited powers, and, in the absence of express statutory provisions to that effect, courts are authorized to indulge in no presumptions in favor of the validity of their ordinances. If in conformity with the express or necessarily implied grant in the charter, they are valid, otherwise not." *Schott v. People*, 89 Ill. 185. "A city council can legislate only because it is authorized so to do by the state." *City of Chicago v. McCoy*, 136 Ill. 344, 26 N. E. 363, 11 L. R. A. 413. The election of aldermen is provided for by the statute. The burden of office is imposed by law upon each person elected, and it is his duty, as stated in the oath required of him, faithfully to discharge the duties of the office to the best of his ability. But the Legislature has not seen fit by any general enactment to provide a penalty for the neglect of this duty, unless it is by the statute which imposes a fine upon and authorizes the removal from office of every person guilty of any palpable omission of duty. *Hurd's Rev. St.* 1905, c. 88, § 208. Nor has it conferred the power generally on the city council to impose penalties upon its elective officers for failures or omissions of official duty. A limited power of punishment of aldermen is given by section 7 of article 3 of the city and village act (*Hurd's Rev. St.* 1906, c. 24, § 35) which provides that the city council "shall determine its own rules of proceeding, punish its members for disorderly conduct, and with the concurrence of two-thirds of the aldermen elect, may expel a member." The only other authority given the council for imposing a penalty upon an alderman is found in section 8 of the same article, which provides that "a majority of the aldermen elect shall constitute a quorum to do business, but a smaller number may adjourn from time to time, and may compel the attendance of absentees, under such penalties as may be prescribed by ordinance."

Appellee contends that this section gives the council authority to pass the ordinance in question. The section authorizes a minority of the aldermen to adjourn and compel the attendance of absentees under such penalties as may be prescribed by ordinance. There is necessarily implied, therefore, a power to prescribe penalties by ordinance. The penalties to be prescribed are such that under them the minority may compel the attendance of absentees. The majority usually has no need to compel the attendance of absentees because it can transact the business of legislation and of the city without them. The minority needs the power to compel the attendance of absentees, because without it the business of the city may suffer through mere neglect of aldermen to attend. The only object of the penalty is to enable the

minority present at a meeting to compel the attendance of absentees at the meeting then being held, or, at the continuation thereof, at the time to which the minority may adjourn. If the minority may compel attendance under such penalties as may be prescribed, then the penalties must be adapted to enable the minority to compel attendance. Moreover, the penalty must be adapted to compel the attendance of absentees—of those who have absented themselves. This ordinance puts no power in the hands of the minority. The penalty has no tendency to enable the minority to compel the absentees to attend. It cannot compel the attendance of absentees on peril of incurring the penalty. That is incurred, if at all, without the action of the minority or in spite of its action. The minority has nothing to do with imposing the penalty. The penalty has already been incurred by the absentees for the present meeting, and it will apply equally at the next meeting to all the aldermen, whether of the minority or the absentees. All who are then absent will be subject to the penalty, whether they were absent or present at the former meeting. Under the statute the minority may compel the attendance of the absentees, but this ordinance has no tendency to aid to that end. It merely imposes a fine for his neglect of official duty upon any alderman who fails to attend any meeting. The city council has no power to do this. The Legislature has not granted the power nor is it necessary to carry into effect the powers which are granted.

We express no views in regard to the power of a majority of the council to compel the attendance of all the aldermen. We hold that a city council has neither an express nor an implied power to impose a penalty on an alderman for a mere failure to attend a council meeting.

The judgments of the Appellate Court and of the circuit court will be reversed.

Judgment reversed.

(237 Ill. 36)

# HARMAN v. ILLINOIS & EASTERN COAL CO.

(Supreme Court of Illinois. Dec. 15, 1908.)

WITNESSES (§ 272\*)—CROSS-EXAMINATION—ADMISSIBILITY ON CROSS-EXAMINATION OF WRITINGS USED ON DIRECT EXAMINATION.

Where a witness based his testimony on certain records showing the facts to which he testified, and was unable to testify without using such records to refresh his memory, opposing counsel was entitled to have such records for use in cross-examining such witness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 961; Dec. Dig. § 272.\*]

Error to Appellate Court, First District, on Writ of Error to Municipal Court of Chicago; John W. Houston, Judge.

Action by William S. Harman against the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
86 N.E.—40

Illinois & Eastern Coal Company. Judgment for plaintiff and against defendant on its set-off, and defendant brings error. Reversed and remanded.

Harman, defendant in error, sued the coal company, plaintiff in error, in the municipal court of Chicago, in assumpsit, to recover \$700.82 claimed to be due him under the provisions of a contract in words and figures following:

**"Contract No. 528.**

"William S. Harman agrees to sell and Illinois and Eastern Coal Company (a corporation) of Chicago, Illinois, agrees to buy:

"Quantity—Buyer's requirements for buyer's retail trade at Canal and Ewing street yard, Chicago, from May 1, 1905, to April 1, 1906, estimated at two hundred cars of lump and one hundred and fifty cars of egg, more or less.

"Material—Re-screened four-inch lump and re-screened egg from Indiana Hocking mine, at Farmersburg, Sullivan county, Indiana, same as furnished last year.

"Price—Lump, one dollar and forty cents (\$1.40) per net ton, f. o. b. cars mine; egg, one dollar and twenty cents (\$1.20) per net ton f. o. b. cars mine.

"Delivery—As ordered by buyer. Not less than fifteen cars lump and ten cars egg during May, June and July, 1905. Not less than twenty cars of lump and ten cars of egg any month thereafter.

"Route—C. & E. I. R. R. to Chicago and C., B. & Q. R. R. to yard.

"Terms—Buyer to remit on or before the 15th of each month for all shipments of the preceding month.

"Weights—Mine or railroad weights, as ascertained at original point of shipment.

"This contract is made subject to strikes, accidents, car supply, delays in transportation or other causes beyond control.

"The buyer and seller, in entering into this contract, realize the uncertainty of deliveries growing out of strikes, casualties or other causes beyond the control of either party, and it is hereby mutually acknowledged that the intent of this agreement is not to bind either party as to failure to perform by reason of matters beyond the control of the party in default, but that the material shall be shipped by the seller and accepted by the buyer as per delivery specified, so far as the labor, the physical conditions at the respective plants and the ability of carriers will permit.

"It is agreed and understood that during such time or times as our production of coal shall be reduced, but not wholly prevented, by strikes, lockouts, delays, failure of transportation, accident or other causes beyond our control, we shall ship to you such proportion of the coal actually produced from our mines as the maximum daily amount of coal hereby contracted for bears to the maximum daily amount of coal covered by all the con-

tracts under which we may at such time or times be required to supply from said mines.

"William S. Harman. [Seal.]

"Illinois & Eastern Coal Co. [Seal.]

"R. L. Pottinger, V. P."

It was admitted that there was a balance due to Harman for coal received by the company of the amount claimed by Harman, but the company interposed a plea of set-off or recoupment, claiming that there was \$1,328.92 due it from Harman on account of his failure to deliver the amount of coal which he was obligated to deliver by his contract. Upon a trial without a jury the court found there was nothing due on account of the claimed recoupment or set-off, and entered judgment in favor of Harman for \$700.82. That judgment has been affirmed by the Appellate Court for the First district, and the company brings the cause to this court by writ of error.

Stedman & Soelke, for plaintiff in error.  
Leslie H. Whipp, for defendant in error.

SCOTT, J. (after stating the facts as above). The briefs of the parties in this case are devoted principally to a discussion of the facts, which the law does not permit us to consider. The only question presented which is open for determination in this court arises upon the action of the court in sustaining an objection made during the cross-examination of the witness Conkel, who testified on the part of Harman. The proof showed, and it was not denied, that the coal company was unable to obtain from Harman the full amount of coal specified in the paragraph beginning with the word "quantity," which is a part of the contract set out in the foregoing statement of facts, and it offered testimony tending to show that, in lieu of coal so specified which was not delivered, it had been obliged to purchase other coal at a price higher than that fixed by the contract with Harman, and it was this difference in price that it sought to recover from Harman. For the purpose of meeting this alleged state of facts, Harman offered evidence tending to show that during a certain part of the time covered by the contract the output of the mine was reduced by causes mentioned in the last paragraph of the contract, and that the coal company received its full proportion of the coal actually produced during that time, as that proportion was fixed by that paragraph. In order to prove what the output of the mine was during the time in question, and to show on what days the mine was idle on account of causes specified in the last paragraph of the contract, Harman took the testimony of Conkel, who was assistant mine superintendent of the Indiana Hocking mine, and who superintended the operation of the mine during the time in question. The mine, when in active operation, produced from 800 to 1,000 tons of coal per day. The witness testified

as to the number of tons of various kinds of coal produced by the mine during the months of October, November, and December, 1905, and January, February, and March, 1906, and as to the days the mine was idle during that time for causes specified in the contract. Practically the whole of the alleged shortage occurred during these months. The witness was unable to so testify from his unaided memory, but testified by constantly refreshing his memory, as he proceeded, by referring to sheets of paper which he had in his possession while on the witness stand. The information on those sheets he had assisted in copying from the coal reports which were kept at the mine, and which were at the mine during the time of the trial. These reports so kept at the mine, according to the testimony of this witness, showed the amount of coal mined each day, and were in that respect made up from weights taken by this witness as the cars loaded with freshly mined coal from time to time passed over the scales at the mine, and such reports showed also the dates upon which the mine was idle. Upon cross-examination of this witness the fact was developed that he could not testify in regard to the amount of the output and as to the dates on which the mine was idle, except by reference to these sheets, which at that moment were in the courtroom and in the possession of counsel for Harman. Counsel for the company asked that he (counsel) be permitted to take them. Harman's attorney objected, because, as he stated, the witness "used the sheets to refresh his memory, and for no other reason than that. Under the decisions witness can use a memorandum and testify to it, and it is not necessary for counsel to introduce it in evidence." The court sustained this objection, and counsel for the company was not permitted to examine the papers. The purpose for which the sheets were desired by the cross-examiner, as stated by him at the time the objection was made and before it was passed upon, was for use in cross-examination. For that purpose he was entitled to have possession of these sheets and to examine them, in order that he might conduct the cross-examination of the witness with intelligence. 1 Taylor on Evidence, §§ 749-753; 1 Wharton on Evidence, § 525; 8 Ency. of Pl. & Pr. 142, 143; 1 Greenleaf on Evidence, § 437; Watson v. Miller, 82 Tex. 279, 17 S. W. 1053. No other witness testified who pretended to have personal knowledge of the amount of the output of the mine or of the number of days during which the mine was closed for any of the causes mentioned in the last paragraph of the contract.

For the error in sustaining the objection above discussed, the judgment of the Appellate Court and the judgment of the municipal court will be reversed, and the cause will be remanded to the municipal court for further

proceedings consistent with the views herein expressed.

Reversed and remanded.

(237 Ill. 192)

### MELCH v. POTTINGER.

(Supreme Court of Illinois. Dec. 15, 1908.)

APPEAL AND ERROR (§ 1094\*)—REVIEW—DECISION OF INTERMEDIATE COURT—QUESTIONS OF FACT.

Where the facts are controverted, the judgment of the Appellate Court is conclusive on the Supreme Court on all questions of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322-4352; Dec. Dig. § 1094.\*]

Appeal from Appellate Court, First District, on Appeal from Municipal Court of Chicago; John W. Houston, Judge.

Action by Max Melch against Robert L. Pottinger. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant appeals. Affirmed.

Stedman & Soelke, for appellant. Leslie H. Whipp, for appellee.

FARMER, J. This is an appeal from a judgment of the Appellate Court affirming a judgment of the municipal court of the city of Chicago in an action of assumpsit on a promissory note for the sum of \$2,340.

It appears that in September, 1901, appellee told appellant he would like to make a loan of \$600; that appellant said he could make it, and thereafter received the \$600 and turned over to appellee three notes executed by Myron A. Singleton, for \$200 each, secured by trust deed on real estate in Louisville, Ky. Afterwards appellee notified appellant he desired to loan an additional \$1,400, and it was arranged between the parties that appellee should turn over to the appellant the three Singleton notes and \$1,400 cash, which he did, and thereupon appellant turned over to him a note for \$2,000 executed by James V. Bishop and secured by mortgage on real estate in Morgan Park. Appellee claims he had no knowledge of Bishop nor of the property mortgaged to secure the note, and relied entirely upon appellant's representations as to the value of the security. Bishop never paid any interest on the note. Appellant paid one installment, and, default being made in the subsequent installments, appellee investigated the character of the security and found that it was inadequate. He so reported to appellant, who appears to have conceded that this was true. Thereupon appellant delivered to appellee a \$1,200 note executed by Bishop and secured by a mortgage on vacant Morgan Park property, and the three \$200 Singleton notes and his own note for \$270, for the \$2,000 Bishop note. The day following this transaction he executed and delivered to appellee the note sued on. Appellant afterwards paid his \$270 note. No

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

further payments having been made on the Bishop or Singleton notes, the appellee brought this suit to recover on the \$1,800 note of appellant. The note reads as follows:

"Chicago, Ill., Sept. 5, 1901.

"Five years after date I promise to pay to the order of Max Melch \$1800 and 00-100, payable at Chicago, Illinois, value received, with interest at six per cent per annum, but subject to terms on back hereof, however.

"Due Sept. 5, 1906. Robert L. Pottinger."

And on the back of it is indorsed the following: "This note is given as collateral and as additional for a certain \$1,200 note signed by one James V. Bishop and dated September 5, 1901, with interest at six per cent, payable semiannually; also as additional security for three certain \$200 notes, aggregating \$600, and signed by one Myron A. Singleton, and dated November 5, 1900, with interest at six per cent, payable semiannually. Said Max Melch in accepting this note agrees to apply all payments of principal and interest that may be made from time to time by said Bishop and Singleton upon this note only, and render said Bishop and Singleton note to Robert L. Pottinger when they are fully paid, together with this one."

Appellant contends that he never became indebted to appellee by reason of any of the loans; that in the first place he sold the \$600 Singleton notes to appellee, and that he afterwards sold him the \$2,000 Bishop note for the \$600 of Singleton notes and \$1,400 in cash; that the \$1,200 Bishop note, the \$600 in Singleton notes, and his own note for \$270, were given in lieu of the \$2,000 Bishop note, and that the note sued on was given as "an additional collateral" security. Something like four years after these notes were given, appellant caused to be executed, recorded, and sent to appellee quitclaim deeds from Singleton and Bishop for the Morgan Park and Louisville properties.

Appellee's position is that appellant was always primarily liable to him for the loans, and that the notes of Bishop and Singleton given him were as security; and, further, that he had no knowledge of the execution of the Bishop and Singleton quitclaim deeds until he received them, after having been recorded, through the mails, and that he refused to accept them as payment of the money due him. The appellant's principal contentions are that Melch did receive the quitclaim deeds in payment of the Singleton and Bishop notes, thereby discharging the liability of appellant; that the \$1,800 note, upon which this suit was brought, was given by appellant as collateral "and additional security" for the payment of the Bishop and Singleton notes, and that it did not represent any indebtedness of appellant to appellee. These were controverted questions of fact, and the questions of law discussed by counsel depend upon the facts being found as contended for by appellant. If the facts are con-

trary to appellant's contention and in harmony with appellee's position, then the judgment was supported by the evidence. Where the facts are controverted, the judgment of the Appellate Court is conclusive upon this court on all questions of fact. *Thomas Pressed Brick Co. v. Herter*, 162 Ill. 46, 44 N. E. 380; *Sconce v. Henderson*, 102 Ill. 376; *Hight v. Walker*, 179 Ill. 209, 53 N. E. 631; *Henry v. Stewart*, 185 Ill. 448, 57 N. E. 190; *Lusk v. Throop*, 189 Ill. 127, 59 N. E. 529.

Outside of the alleged error of the Appellate Court in finding the facts contrary to the evidence, to which appellant's brief and argument are almost entirely devoted, some complaint is made of certain portions of the instructions given by the municipal court. It is alleged that the municipal court erred in that respect, but it is not pointed out in what the error consists. We have, however, examined the instructions complained of, and find no error was committed in giving instructions.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(237 Ill. 265)

PEOPLE ex rel. TANDY, County Treasurer, v. GRACE.

(Supreme Court of Illinois. Dec. 15, 1908.)

1. DRAINS (§ 72\*)—ASSESSMENT OF BENEFITS—CLASSIFICATION OF LANDS—EFFECT OF APPEAL.

Farm Drainage Act (Hurd's Rev. St. 1908, c. 42) § 21 et seq., provides for the classification of land for assessment and for an appeal from the action of the classification commissioners to the county court, and from the county court to the circuit court. Section 25 provides that on the hearing of the appeal the jury may view the land, and if they find the classification too high or too low they shall "correct the errors," but if they find that no injustice has been done they shall confirm the classification. Section 28 provides that an appeal shall not operate to delay the collection of any tax for which no appeal has been taken. *Held*, that the county or circuit court on appeal takes jurisdiction merely to correct errors, and not to determine the matter de novo; and hence such appeal does not suspend proceedings for the assessment and collection of the benefits, and in proceedings for judgment, commenced while an appeal was pending, judgment may be rendered for the amount due, less any reduction made by the jury on such appeal.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 72.\*]

2. APPEAL AND ERROR (§ 878\*)—REVIEW—OBJECTIONS BY APPELLEE—NECESSITY OF CROSS-APPEAL.

A ruling of the trial court adverse to the appellee, to which ruling appellee saves an exception but does not take a cross-appeal, cannot be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3573; Dec. Dig. § 878.\*]

Appeal from Macon County Court; O. W. Smith, Judge.

Action by the People, on the relation of Charles E. Tandy, county treasurer and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

county collector, against James S. Grace. From a judgment for respondent, relator appeals. Reversed and remanded.

W. H. Stead, Atty. Gen. (Hugh W. Housum, Hugh Crea, and Louis A. Mills, of counsel), for appellant. James M. Taylor and Leslie J. Taylor (Whiteley & Fitzgerald, of counsel), for appellee.

VICKERS, J. This is an appeal from a judgment of the Macon county court sustaining objections and refusing judgment for a delinquent drainage tax levied upon the lands of James Grace by the drainage commissioners of Union Drainage District No. 1 in the towns of Milan and Dora, in the counties of Macon and Moultrie. The drainage commissioners of said district, as appears by their record, classified the lands of the district on a graduated scale June 13, 1905. On August 30th, being the day fixed for the hearing of objections of landowners to the classification of their lands, appellee, Grace, appeared before the commissioners and entered his objections to the classification of his lands, which objections were by the commissioners overruled and the classification scale confirmed as to his lands as originally filed. Grace appealed from the decision of the commissioners to the county court of Macon county. While such appeal was pending and undisposed of in the county court, the drainage commissioners levied the tax in question in this proceeding upon appellee's lands. Subsequently, upon a hearing of the appeal from the classification before the county court of Macon county and a jury, the classification of appellee's lands was substantially reduced. From this judgment the drainage commissioners appealed to the circuit court, where a trial was had at the January term, 1908, and a final judgment entered upon the verdict of the jury, confirming the scale as found by the jury in the circuit court, which was also materially lower than the original scale fixed by the commissioners. Upon application being made to the county court for judgment against appellee's lands for the amount of taxes due according to the scale as the same was finally fixed by the judgment of the circuit court, appellee appeared and filed objections to the rendition of such judgment, which were sustained by the county court and judgment refused. From this judgment the present appeal is prosecuted by the people.

The only objections made to the rendition of judgment which were sustained by the court below are the first and fourth. The first objection is that the county court had no power to render judgment for said tax, for the reason that at the time when the assessment purports to have been made there was no classification or graduated scale of the lands in question from which the assessment could be spread. Appellee's contention is that the appeal from the classification had the effect of vacating such classification, so

that no valid assessment could be made until the appeal had been finally disposed of, and this contention appears to have been sustained by the county court.

Section 21 of the farm drainage act (Hurd's Rev. St. 1908, c. 42) provides that the commissioners shall proceed to make an assessment for benefits by classifying the lands in the district in tracts of 40 acres, more or less, according to the legal subdivisions, on a graduated scale, to be numbered according to the benefits to be received by the contemplated drainage. The tracts of land which will receive the most and about equal benefits are to be marked 100, and such as are adjudged to receive less benefits shall be marked with a less number denoting the per cent. of benefit; and it is provided in said section that the classification thus made, when established as provided by the statute, shall remain as a basis for such levy of taxes as may be needed for the lawful and proper purposes of the drainage district. In other sections following, provision is made for notifying the landholders to appear, if they desire, and make objections to the classification thus made by the commissioners. Provision is made for an appeal from the classification of the commissioners to the county court, and from the county court to the circuit court, if the county judge, in his discretion, shall so order. When an appeal is taken from the classification of the commissioners, either to the county or circuit court, the court in which the appeal is pending takes jurisdiction of the proceeding for the purpose merely of correcting the errors, if any, that may have been committed by the commissioners. Such court does not proceed to hear the matter de novo and make a classification independently of the one previously made by the commissioners. This court held in the case of Carr v. People, 224 Ill. 160, 79 N. E. 648, that upon an appeal from the classification by a landowner the only persons within the jurisdiction of the court were those who had filed objections before the commissioners and had appealed from the commissioners' decision. It was there pointed out by this court that other landowners who are in the district were not notified, and that there was no provision in the statute for notice to be given to such other landowners, and that they were not within the jurisdiction of the court. It follows from this situation that the court to which the appeal is taken has no power to interfere with the classification made by the commissioners, except in so far as it relates to the lands of the persons who are within the jurisdiction, so that the county or circuit court is not authorized by the statute to treat the entire classification of the district as vacated by the appeal of one landowner and proceed to make another classification for the whole district. Section 25 of the farm drainage act (Hurd's Rev. St. 1908, c. 42) provides that upon the hearing of the appeal it is the duty

of the court to lay before the jury the classification adopted by the drainage commissioners, and the jury are required to examine the classification and hear the allegations in support and in opposition to it, and may, if requested by either party, visit the district and examine the lands; and it is provided further, that, if the jury shall find the tracts of land in question marked too high or too low in the classification, they shall "correct the errors," but, if they find that no injustice has been done, the jury shall confirm the classification as made by the commissioners. In the Carr Case, above cited, this court held that the authority of the jury in such cases is limited to the correction of errors alleged to have been committed in overruling the objections made before the commissioners.

We think that the appeal from the classification by a landowner, under the statute, cannot be held to vacate the classification, and that the classification as made by the commissioners remains in full force for all purposes until it is modified upon an appeal, as provided for by the statute. When the classification is thus modified and no further right of appeal exists, such classification becomes the final and established classification, and must so remain as a basis for the levy of all assessments needed for the lawful and proper purposes of the drainage district. If the classification by the commissioners is regarded as partaking, in some degree, of the nature of a judgment at law, from which an appeal is taken, appellee's position can receive no support by the supposed analogy. The effect of an appeal upon the judgment appealed from depends upon the character of the jurisdiction of the court to which the appeal is taken. If the latter court has authority to try the cause *de novo* and settle the controversy by a judgment of its own, and to enforce such judgment by its own process, then the judgment of the inferior court is vacated and set aside, and during the pendency of such appeal the judgment appealed from has no vitality, as an estoppel or otherwise. *Freeman on Judgments*, § 328. This rule applies to appeals from justices of the peace to the circuit or county courts, the effect of which is to vacate the judgment appealed from. *Shaffer v. Currier*, 13 Ill. 667; *Joliet and Chicago Railroad Co. v. Barrows*, 24 Ill. 562. But if the appeal is in the nature of a writ of error conferring power on the Appellate Court to determine such errors as may have occurred at the trial or in the decision of the cause, and the court, after the correction of errors, remits the case back to the tribunal whence it came, then the judgment appealed from does not become vacated or cease to operate until it is reversed or set aside by the appellate tribunal. The effect of such appeal only suspends the execution of the judgment, but does not vacate the same or destroy the lien thereof. *Curtis*

*v. Root*, 28 Ill. 367; *Oakes v. Williams*, 107 Ill. 154; *Moore v. Williams*, 132 Ill. 589, 24 N. E. 619, 22 Am. St. Rep. 563; *Brown v. Schintz*, 203 Ill. 136, 67 N. E. 767. This court held in *Barnes v. Chicago Typographical Union*, 232 Ill. 402, 83 N. E. 932, 14 L. R. A. (N. S.) 1150, that an appeal from a decree in chancery awarding an injunction did not, during the pendency of such appeal, prevent the court wherein the injunction was granted from attaching and punishing for contempt a violation of the injunctive order. It thus appears that, if the rules in respect to judgments be applied to the classification of lands by drainage commissioners, the proceeding on appeal is somewhat analogous to an appeal for the correction of errors, in which case, as we have seen, the effect of the appeal does not vacate the judgment below.

Our conclusion is that the appeal from the classification of the drainage commissioners did not vacate such classification, and that the levy made by the commissioners pending such appeal was not void. If a contrary rule were established, the effect of taking an appeal by one landowner would be to vacate the entire assessment and suspend all the functions of the district until such appeal was disposed of. Such was not in contemplation by the Legislature in passing the drainage law, since by section 28 it is provided that the taking of an appeal by any person or persons, as herein provided, shall not operate to delay the collection of any tax from which no appeal has been taken, nor delay the progress of the work. The fact that the assessment upon appellee's lands was made upon a classification higher than that established by the final decision in the circuit court is no reason why the court should refuse judgment for the amount of taxes actually due under the scale as the same was finally established. This amounts to no more than an excessive levy, and under the law the county court had the power to determine the amount of tax which the appellee's lands were liable for, and render judgment therefor. In this case no judgment was asked for the excess. It is not contended that the appellee should pay any sum in excess of the legal rate as established by the final classification. For this amount the court should have rendered judgment. *People v. Meyers*, 124 Ill. 95, 16 N. E. 89.

The fourth objection sustained by the county court is the same as the first, which has already been considered, extended to include the point that there was no assessment of the tax such as is levied against the lands of the appellee. This objection relates to the discrepancy between the amount of taxes levied upon the original classification and the amount for which judgment was asked. What has already been said sufficiently disposes of this objection. Appellee

asked leave to file an additional objection raising the point that the tax in question is barred by limitation. The court denied such leave, to which the appellee excepted, but there is no cross-error assigned by appellee on this ruling, hence the question which is argued in the brief of both parties in regard to this point is not properly saved for review.

The judgment of the county court of Macou county is reversed, and the cause remanded to that court with direction to overrule the objections of appellee and render judgment for the amount of the taxes due as computed upon the classification of his lands as the same is established by the final judgment of the circuit court.

Reversed and remanded, with directions.

(237 Ill. 40)

PEOPLE ex rel. McCALL, County Treasurer,  
v. SCHWANK et al.

(Supreme Court of Illinois. Dec. 15, 1908.)

1. DRAINS (§ 72\*)—ASSESSMENT—RECLASSIFICATION.

Farm Drainage Act (Hurd's Rev. St. 1908, c. 42) § 21, provides that in any district where a classification of lands has once been made, and the commissioners believe that the classification has not been fairly adjusted, they shall make a new classification in accordance with justice and right. *Held* that, where commissioners of a drainage district find that a prior classification is unfair, nothing is left to their discretion, but it is their duty to make a new one.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 72.\*]

2. DRAINS (§ 72\*)—CLASSIFICATION OF LANDS—ABORTIVE ATTEMPTS.

Where drainage commissioners found a prior classification of lands improper, the fact that a new classification made by them, as required by Farm Drainage Act (Hurd's Rev. St. 1908, c. 42) § 21, was quashed on certiorari, did not affect their duty to make a new classification nor authorize them to abandon their attempt and proceed under the original classification.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 72.\*]

3. DRAINS (§ 76\*)—COMMISSIONERS—MEETINGS—PLACE—ACTS OUTSIDE DISTRICT.

The jurisdiction of drainage commissioners being confined to the territorial limits of the district, an assessment made by the commissioners' attorneys at a meeting held outside the district, in the absence of the clerk and without notice to him, was void.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 76.\*]

4. DRAINS (§ 76\*)—ASSESSMENTS—INVALID ACT—RATIFICATION.

Where a drainage assessment was levied by persons not authorized to exercise such power at all, at a meeting held outside the drainage district, a resolution adopted long after the attempted assessment had become due and payable, purporting to ratify the levy, was ineffective.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 76.\*]

5. DRAINS (§ 76\*)—ASSESSMENTS—CLASSIFICATION—INTEREST OF COMMISSIONERS.

Where a classification of land for the imposition of a drainage assessment made in 1883

had been acquiesced in for over 20 years by the landowners, it was no objection to an assessment levied on such classification that the commissioners, who were not the same as those who made the classification, were disqualified because they were landowners within the district.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 76.\*]

Appeal from Whiteside County Court; Henry C. Ward, Judge.

Action by the People, on relation of Charles W. McCall, county treasurer, etc., against C. Schwank and others. Judgment for defendants, and relator appeals. Affirmed.

H. H. Waite and C. L. & C. E. Sheldon, for appellant. Jarvis Dinsmoor, for appellees.

CARTWRIGHT, C. J. The county collector of Whiteside county applied to the county court of said county, at the May term, 1908, for judgment against lands of the appellees and an order of sale for an unpaid assessment levied by the commissioners of Union Drainage District No. 5 of the towns of Montmorency and Coloma, in said county, a district organized under the farm drainage act. The appellees appeared and filed objections, some of which were sustained, and judgment was refused. The record was brought to this court by appeal.

Union Drainage District No. 5 of the towns of Montmorency and Coloma was organized in 1883. There was at that time a drainage district known as "Drainage District No. 3 of Montmorency," which had been organized in 1881 to drain lands in that town. There was no outlet for the main ditch of that district, and when the Union Drainage District No. 5 of the two towns was organized, the lands in the existing Drainage District No. 3 of Montmorency were included with other lands in that town and the town of Coloma. The main ditch of the union district connected with the main ditch previously constructed by district No. 3, and furnished an outlet for the waters of that district. The commissioners of highways of the two towns, who were ex officio drainage commissioners, on December 12, 1885, made a classification of all the lands in the union drainage district, including the lands in district No. 3, and upon this classification assessments were spread and the contemplated improvements for the purpose of drainage were made. District No. 3 of Montmorency kept up its organization as a district, and in September, 1903, the drainage commissioners of the union drainage district held a meeting, at which it was determined to repair and improve the drainage works of the district and to levy an additional assessment therefor. They then determined, and entered of record their finding, that it appeared from experience and results that the former assessments were not fairly adjusted

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on the several tracts of land in said district according to benefits contemplated at the time the first classification was made, and that they disregarded the proportions of the former assessment and determined to classify the lands in said district on a graduated scale, according to the benefits received and to be received by the drainage work in the district. In pursuance of that finding and determination, they made a new classification of all the lands in the district, and spread an assessment on that classification on October 13, 1903. The landowners and drainage commissioners of district No. 3 filed in the circuit court a petition for a writ of certiorari to quash the record of the orders classifying and assessing the lands of the district, alleging that the classification was void because the commissioners of the union district had no authority to classify lands included in said district No. 3, and that the commissioners failed to give legal notice of the assessment. At the January term, 1904, the circuit court quashed the classification and the assessment roll based on it. On October 12, 1907, the commissioners of the union drainage district met at the office of their attorneys in Sterling, outside of the district. The clerk had no notice of the meeting and was not present, but wrote a record of the meeting from minutes mailed to him from the office of the attorneys and at the direction of one of the commissioners. The record shows a resolution reciting that the classification made on October 13, 1903, had been quashed by the circuit court, leaving the former classification of the lands in the district in force, and that under these facts a new classification was not necessary, and proceedings for a new classification should be discontinued. On November 2, 1907, the commissioners again assembled at the same place, in the absence of the clerk, and resolved to levy an assessment of \$900 upon the lands of the district, to be due and payable December 1, 1907, and employed the attorneys to make the assessment. On November 11, 1907, the commissioners again met at the office of the attorneys and adopted an assessment roll of that date prepared by the attorneys, amounting to \$900, based on the original classification, with some minor changes previously made. The clerk was not only absent from all these meetings, but he had no notice of any of them and no knowledge of what was done, and wrote the record from minutes sent to him by the attorneys. On February 26, 1908, the commissioners met in the district, and the clerk was present. They then passed a resolution confirming the assessment previously adopted on November 11, 1907, and made payable on December 1, 1907, and approved and ratified the action taken at the meetings held outside of the district. The assessment roll included only that part of the lands in the union drainage district not within the limits of district No. 3 of Montmorency, and left

out the lands in said district No. 3 which were included in the organization of the district and classified and assessed as lands of the district.

Section 21 of the farm drainage act (Hurd's Rev. St. 1908, c. 42) provides that in any district where a classification has once been made, and the commissioners believe, from experience and results, that such former classification was or is not fairly adjusted on the several tracts of land according to benefits which may be derived from new or additional assessments, then the commissioners shall disregard such former classification, and make a new classification in accordance with justice and right. The commissioners of the union drainage district believed, from experience and results, that the classification first made was not fairly adjusted, and entered their finding to that effect in their record. It was then their duty to disregard the former classification and make a new one in accordance with justice and right, and the landowners had a right to have that duty performed. After a finding that a classification was not fairly adjusted, nothing is left to the discretion of the commissioners, and the provisions of the statute designed for the protection and benefit of the landowners cannot be disregarded. *People v. Warren*, 231 Ill. 518, 83 N. E. 271. The commissioners attempted to make a new classification in the discharge of their duty, but it was quashed by the court upon an inspection of the record returned in obedience to the writ of certiorari. The fact that the new classification proved abortive for lack of notice, or any other reason, did not alter the finding that the first classification was not properly adjusted as between the landowners, and did not authorize the commissioners to abandon their duty to make a classification in accordance with justice and right. The order quashing the classification merely set it aside and the assessment based upon it, and did not destroy the original organization of the district more than 20 years before, which had been acquiesced in for that length of time by all owners of lands in the district which had been classified and assessed. The assessment was spread upon a portion, only, of the lands included in the district as they had been classified for assessment with the other lands, and the commissioners had decided that such classification was not properly adjusted between the landowners. The duty of making a new classification had not been performed, and the assessment was not based on a valid classification of the lands in the district.

The meetings at which the assessment was determined upon and the attorneys employed to make it, and at which it was adopted, were held outside of the district, in the absence of the clerk and without notice to him. The minutes were furnished to the clerk by the attorneys, and from them he wrote the record. These proceedings were void and

without jurisdiction, for the reason that the jurisdiction of drainage commissioners is confined to the territorial limits of the district. *People v. Carr*, 231 Ill. 502, 83 N. E. 269. The resolution passed at the meeting of February 26, 1908, purporting to confirm the assessment and ratify the void acts, was not effective for that purpose. Mere defects or irregularities in the exercise of the taxing power might, perhaps, be subsequently cured, but in this case the assessment was levied by three individuals who were not authorized to exercise the taxing power at all, and the resolution was adopted long after the attempted levy and after it was to become due and payable. Under those circumstances the resolution could not validate the assessment.

It is contended by counsel for appellees that the commissioners had no power to levy an assessment because they were landowners in the district. It is the classification of the lands which determines the rights and liabilities of the landowners, and the spreading of an assessment is nothing but a mathematical computation, which determines no right and affects no interest. The classification made in 1883 was acquiesced in for over 20 years by the landowners, and, if it were still a valid classification, any objection to the manner in which it was made would be regarded as waived. No classification was made by the present commissioners, and the question of their power in that respect is not involved in this appeal.

The judgment of the county court is affirmed.

Judgment affirmed.

(237 Ill. 323)

#### CITY OF CHICAGO v. GAGE

(Supreme Court of Illinois. Dec. 15, 1908.)

#### 1. MUNICIPAL CORPORATIONS (§ 304\*)—PUBLIC IMPROVEMENTS—CONFORMITY OF ORDINANCE TO RESOLUTION.

An ordinance, providing for a public improvement, must be consistent with the resolution authorizing it, and cannot change the nature, character, locality, or description of the improvement, but since it forms the basis of the contract for the improvement, it is necessarily more particular than the resolution is required to be, and must specify, with particularity and exactness, the precise details of the work to be done and materials to be used.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 811; Dec. Dig. § 304.\*]

#### 2. EVIDENCE (§ 7\*)—JUDICIAL NOTICE—MATTERS OF COMMON KNOWLEDGE.

The court will not, for the purpose of setting aside an assessment for expenses of asphalt pavement, take judicial notice that a combination of asphaltic cement, sand, and carbonate of lime, specified in the ordinance providing for the improvement, was not the asphalt mentioned in the resolution authorizing it, but the inconsistency, if any, must be shown by the party seeking to avoid the assessment, as the chemical and mechanical composition of asphalt is not a matter of common knowledge.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 6; Dec. Dig. § 7.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 304\*)—PUBLIC IMPROVEMENTS—ORDINANCES—CERTAINTY.

A provision in an ordinance that the ingredient of concrete to be used in paving a street shall be "torpedo sand or limestone screenings or other material equal thereto for concrete purposes" does not render the ordinance uncertain, or give an improper discretion to the city authorities in the selection of the material to be used; for, while the work must be done under their supervision, the question whether the improvement has been constructed substantially in conformity with the ordinance is finally to be determined by the court in which the assessment is confirmed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 808; Dec. Dig. § 304.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 296\*)—PUBLIC IMPROVEMENTS—ESTIMATES—COMPLIANCE WITH ORDINANCE.

An estimate for a public improvement contained an item "constructing one new catch-basin, at \$50," and a statement that it included labor and materials, and also contained an item for "adjusting sewers, catch-basins and manholes, \$485." *Held*, that the estimate was a sufficient compliance with the ordinance providing for the improvement, which required that the catch-basin should be built of brick on a two-inch pine plank, connected with the sewer by a nine-inch tile pipe and a "Y" branch trapped with a half trap, and provided with a cast-iron cover; it not being necessary for the estimate to set out in minute detail all the separate items of material and labor which were to go into the improvement, but only the substantial component elements of the improvement.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 793; Dec. Dig. § 296.\*]

Appeal from Cook County Court; Lewis Rinaker, Judge.

Proceedings by the City of Chicago against Henry H. Gage for confirmation of a certain special assessment. From a judgment of confirmation, defendant appeals. Affirmed.

F. W. Becker, for appellant. George A. Mason and William T. Hopeman (Edward J. Brundage, Corp. Counsel, of counsel), for appellee.

**DUNN, J.** This appeal is from a judgment of confirmation of a special assessment against certain lots of the appellant for the improvement of South Paulina street, in the city of Chicago. Appellant's objections insisted upon here are a variance between the resolution of the board of local improvements and the ordinance, that the ordinance failed to prescribe the nature, character, locality, and description of the proposed improvement, and that the estimate of the cost was void.

The resolution provided for paving with asphalt on six inches of Portland cement concrete, swept with natural hydraulic cement. The ordinance provided for a foundation of 6 inches of Portland cement concrete, made of 1 part cement, 3 parts torpedo sand, limestone screenings or other material equal thereto for concrete purposes, and 6 parts of limestone or other stone equal in quality for concrete purposes, a binder course of lime-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

stone and asphaltic cement, and a wearing surface composed of 17 parts asphaltic cement, 73 parts sand, and 10 parts of pulverized carbonate of lime, swept with natural hydraulic cement. The resolution and ordinance must agree as to the nature, character, locality, and description of the improvement. A substantial variance in any of these particulars is fatal to the assessment, and numerous cases may be found where assessments have been defeated on this ground. The resolution is not, however, expected to go into such minute detail of description as the ordinance, or to give a particular specification of the proposed improvement. The object of the resolution is to furnish such a general description of the proposed improvement and its estimated cost as will give the property owners a general understanding of what is proposed to be done and the cost of doing it. The ordinance must be consistent with the resolution, and cannot change the nature, character, locality, or description of the improvement. But since it forms the basis of the contract for the improvement, it is necessarily more particular than the resolution is required to be, and must specify, with particularity and exactness, the precise details of work to be done and materials to be used. *Gage v. City of Chicago*, 225 Ill. 218, 80 N. E. 127; *Ogden, Sheldon & Co. v. City of Chicago*, 224 Ill. 294, 79 N. E. 699; *McLennan v. City of Chicago*, 218 Ill. 62, 75 N. E. 762.

The variance claimed here is in the materials to be used. The resolution calls for a Portland cement concrete base and an asphalt surface. The ordinance specifies particularly the materials and proportions of which the concrete and the asphalt shall consist. We are asked to take judicial notice that the combination of asphaltic cement, sand, and carbonate of lime mentioned in the ordinance is not the asphalt mentioned in the resolution. It is said that the terms are apparently variant, and if they were reconcilable by extraneous evidence, it was the duty of the city to introduce the evidence to reconcile them. On the contrary, the city is entitled to judgment unless the inconsistency complained of is made to appear. We have no judicial knowledge of the chemical or mechanical composition of asphalt. Whether the combination mentioned in the ordinance is the asphalt mentioned in the resolution is a question of fact, as to which the objector has the burden of proving his contention. It is not a fact of common knowledge of which a court can take judicial notice. The provision of the ordinance that one of the ingredients of the concrete shall be "torpedo sand or limestone screenings or other material equal thereto for concrete purposes" does not render the ordinance uncertain, or give an improper discretion in the selection of material to be used. In *Village of Oak Park v. Galt*, 231 Ill. 365, 83 N. E. 209, a paving ordi-

nance provided that the wearing surface should be "a layer of re-pressed brick, either Metropolitan Block of Canton, Ohio, or brick equally good to be approved by the board of local improvements," and the same objection made here was overruled. So in *Jones v. City of Chicago*, 213 Ill. 92, 72 N. E. 798, an objection that the language of the ordinance "that seven parts best quality of broken limestone, or other stone which shall be equal in quality for concrete purposes," was indefinite and uncertain was held to be of no substantial merit. It is proper to permit a reasonable selection from materials, all of which are adapted to the use intended, and to refer to a standard of quality and fitness to which the material shall conform. This provision vests no improper discretion in the city authorities, for, while the work must be done under their supervision, the question whether the improvement has been constructed substantially in conformity with the ordinance is finally to be determined by the court in which the assessment was confirmed.

The estimate contains the item "constructing one new catch-basin, at \$50." The ordinance provides that the catch-basin shall be built of brick on a two-inch pine plank floor, connected with the sewer by a nine-inch tile pipe and a "Y" branch trapped with a half trap, and provided with a cast-iron cover. It is objected that the estimate is defective because it mentions none of these items. The estimate states that it includes labor and materials, and contains an item for "adjusting of sewers, catch-basins and manholes, \$485." It is not necessary for the estimate to set out in minute detail all the separate items of material and labor which go into the improvement. Only the substantial component elements of the improvement are required to be placed in separate items. *Village of Oak Park v. Galt*, 231 Ill. 482, 83 N. E. 212; *Chicago & Western Indiana Railroad Co. v. City of Chicago*, 230 Ill. 9, 82 N. E. 399. The materials composing the catch-basin and its connection with the sewer are included in the estimate.

The judgment is affirmed.  
Judgment affirmed.

(237 Ill. 98)

**VILLAGE OF EAST PEORIA v. LAKE  
ERIE & W. R. CO.**

(Supreme Court of Illinois. Dec. 15, 1908.)

**APPEAL AND ERROR (§ 753\*)—ASSIGNMENT OF  
ERROR—FAILURE TO ASSIGN ERROR—DISMISSAL.**

An assignment of errors on the record stands as the pleadings in the Supreme Court and is necessary, and, where a case has been submitted for final decision without an assignment of errors on the record, the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3088; Dec. Dig. § 753.\*]

Appeal from Circuit Court, Tazewell County; L. D. Puterbaugh, Judge.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by the Village of East Peoria against the Lake Erie & Western Railroad Company. From a judgment for defendant, plaintiff appeals. Dismissed.

George J. Jochem, for appellant. Stevens & Horton and George C. Rider (John B. Cockrum, of counsel), for appellee.

PER CURIAM. This is an action of debt commenced by the village of East Peoria against the Lake Erie & Western Railroad Company to recover a penalty for a failure to comply with an ordinance alleged to be in force in said village requiring said railroad company to maintain a flagman at certain public street crossings in the village of East Peoria. A judgment was rendered against the village, and it has prosecuted an appeal to this court.

The abstract fails to show any assignment of errors, and upon an examination of the record we are unable to find any errors assigned thereon. An assignment of errors upon the record stands as the pleadings in this court and is necessary, and, if a case has been submitted for a final decision without an assignment of errors upon the record, the appeal will be dismissed. *Aetna Life Ins. Co. v. Sanford*, 197 Ill. 310, 64 N. E. 377; *Burrall v. American Telephone & Telegraph Co.*, 217 Ill. 189, 75 N. E. 461.

The appeal will therefore be dismissed.  
Appeal dismissed.

(237 Ill. 416)

LEWIS et al. v. LEWIS et al.

(Supreme Court of Illinois. Dec. 15, 1908.)

1. COURTS (§ 219\*)—APPELLATE JURISDICTION—HOW DETERMINED.

The questions involved in the Supreme Court, as affecting its jurisdiction, are determined by the assignments of error on the record.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 219.\*]

2. COURTS (§ 219\*)—APPELLATE JURISDICTION—PARTITION.

The Supreme Court has no jurisdiction of an appeal in partition, where the assignments of error do not question the action of the court in determining the estates of the parties, but relate only to the existence or adjustment of liens.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 562; Dec. Dig. § 219.\*]

3. COURTS (§ 219\*)—APPELLATE JURISDICTION.

On appeal by complainants in partition from part of the decree subjecting their interest to a lien, they cannot rely upon an issue made by minor defendants involving a freehold, so as to show appellate jurisdiction in the Supreme Court, where no cross-errors have been assigned in behalf of the minors, and no reason appears why any should be assigned; the decree being final in the minors' favor as well as against them.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 562; Dec. Dig. § 219.\*]

Appeal from Circuit Court, Warren County; John A. Gray, Judge.

Bill by N. Mills Lewis and others against

Jed Lewis and others. From the decree, complainants appeal. Appeal transferred.

The appellants filed their bill for the partition of the real estate devised by the will of H. M. Lewis, their grandfather, making all the other devisees under the will parties defendant. Appellants are the children of Norvel Lewis, a son of the testator, who died before the making of the will. The third clause of the will directed that, after the payment of the testator's debts and funeral expenses and a legacy of \$1,000 to a daughter, all the balance of his property should be divided into seven equal parts, and that one part should be given to each of his six living children and the seventh to the heirs of his deceased son, Norvel, after deducting therefrom two promissory notes, one for \$3,300, dated January 1, 1891, the other for \$1,200, dated May 1, 1894, each bearing 6 per cent. interest. It is averred that the note for \$3,300 was paid in full by Norvel Lewis in his lifetime to H. M. Lewis, and it is prayed that the amount thereof be not charged against the share of the complainants. After a hearing upon the pleadings and evidence a decree was rendered in accordance with the prayer of the bill, except that the complainants' interest was subjected to the lien of the note for \$3,300. The complainants have appealed to this court, and their assignments of error question the action of the circuit court only in so far as it subjects their interest to the lien of the \$3,300 note.

Brown & Soule, for appellants. Hanley & Cox (H. B. Safford, guardian ad litem), for appellees.

DUNN, J. (after stating the facts as above). The appeal should have been taken to the Appellate Court. No freehold is involved, and no other ground appears for an appeal to this court. A freehold was involved in the decree of partition, but no complaint is made of the disposition of the freehold by the circuit court. All parties are satisfied with that part of the decree, and, in fact, it is in that respect precisely the decree that the appellants prayed for. It is only the action of the court in regard to the \$3,300 note that is complained of, and the relief sought by this appeal is not to affect the decree in regard to the estate of any of the parties, but merely to relieve the complainants' estate from a lien for the payment of money.

The questions involved in this court are determined by the assignment of error on the record, and this court has not jurisdiction of an appeal in a partition suit, where the assignments of error do not question the action of the court in determining the estates of the parties in the land, but relate only to the existence or adjustment of liens.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Hutchinson v. Spoehr, 221 Ill. 312, 77 N. E. 580; Miller v. Kensil, 223 Ill. 201, 79 N. E. 24; Fread v. Fread, 185 Ill. 228, 46 N. E. 268; Fields v. Coker, 161 Ill. 186, 43 N. E. 616; Malaer v. Hudgens, 130 Ill. 225, 22 N. E. 855.

Two of the defendants to the bill were minors, defending by a guardian ad litem, and filed a formal answer calling for strict proof of the bill, and it is said that a freehold is involved in the issue thus made. A freehold was involved in this issue, but no cross-errors have been assigned in behalf of the minors, and no reason appears why any cross-errors should be assigned. The decree is final in favor of the minors as well as against them, and appellants have no right to insist upon the assignment of errors on the part of the minors upon a decree which apparently is favorable to them.

The appeal will be transferred to the Appellate Court for the Second district.

Appeal transferred.

(237 Ill. 148)

**DRAINAGE COM'RS OF DIST. NO. 8 IN TOWN OF OAKWOOD v. KNOX.**

(Supreme Court of Illinois. Dec. 15, 1908.)

**1. EMINENT DOMAIN (§ 63\*)—COMPENSATION—TAKING PROPERTY AS GROUND FOR COMPENSATION—"TAKING OF PROPERTY FOR PUBLIC USE."**

The right to enter upon land to lay and maintain a tile drain is a "taking of property for public use," within the constitutional provision requiring compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 161; Dec. Dig. § 63.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 6852-6863, 7813.]

**2. EMINENT DOMAIN (§ 126\*)—COMPENSATION—EXTENT OF RIGHT TAKEN.**

Where the drainage commissioners condemned a strip 31 feet in width, the fact that the drain occupied but two feet of the strip, and that the owner cultivated the rest, did not render the taking any the less a taking of the entire strip as far as the assessment of damages was concerned.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 126.\*]

**3. PROPERTY (§ 1\*)—"PROPERTY IN LAND"—NATURE OF RIGHT.**

"Property in land" is the right of user, disposition, and dominion over it to the exclusion of all others.

[Ed. Note.—For other cases, see Property, Cent. Dig. § 1; Dec. Dig. § 1.\*]

**4. EMINENT DOMAIN (§ 81\*)—COMPENSATION—TAKING PROPERTY—"PROPERTY."**

The term "property," as used in the constitutional provision requiring compensation for a taking thereof, means the right to use, dispose of, and have dominion over, property to the exclusion of all others.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 81.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5693-5723; vol. 8, pp. 7763-7770.]

**5. EMINENT DOMAIN (§ 118\*)—COMPENSATION—"TAKING OF PROPERTY"—APPROPRIATION OF ADDITIONAL USE—OCCUPATION BY TELEPHONE POLE.**

The imposition of an additional burden on property already taken for public use, as the erection of a telephone pole, is a "taking of property" within the constitutional meaning of that term.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 303; Dec. Dig. § 118.\*]

**6. EMINENT DOMAIN (§ 126\*)—COMPENSATION—MEASURE—NECESSITY OF FULL COMPENSATION.**

The nature and extent of the interest taken by condemnation must be considered in estimating the amount of compensation; and, where the owner retained the right to use a part of a strip taken for laying a drain, his measure of damages would not be the full market value.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 126.\*]

**7. NEW TRIAL (§ 144\*)—GROUNDS—MISCONDUCT OF DEFENDANT.**

In proceedings to assess compensation for land taken for drainage purposes, where petitioners filed two affidavits that defendant talked to a juror during the trial about the case, affidavits made by defendant and the juror that they did not talk about the case, and that the juror had no personal acquaintance with the defendant, were sufficient to negative any improper conduct by defendant requiring a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 298; Dec. Dig. § 144.\*]

**8. NEW TRIAL (§ 49\*)—GROUNDS—CONDUCT AFFECTING JURORS—PARTY AND ATTORNEY.**

While the jurors in drainage proceedings were going to view the land, in company with petitioners' attorney and defendant, a juror suggested that somebody furnish cigars, and defendant, who was in the habit of smoking, offered some cigars he had in his pocket, which some of the jurors took, and petitioners' attorney gave some of them peanuts which he had in his pocket. The conduct of neither party was sufficient to require a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 97-99; Dec. Dig. § 49.\*]

**9. PLEADING (§ 433\*)—AID OF DEFECTS BY VERDICT—DEFECTS IN CROSS-PETITION.**

In proceedings to ascertain the compensation to be paid for laying a drain across defendant's land, though defendant's cross-petition for damages to the land not taken only described the land as a farm of 115 acres, across which the drain was laid, and claimed damages for a probable interference with his existing drain system, any formal defect for want of certainty was cured by the verdict for defendant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1467, 1468; Dec. Dig. § 433.\*]

Appeal from Circuit Court, Vermillion County; J. W. Craig, Judge.

Proceedings by the Drainage Commissioners of District No. 8 in Town of Oakwood against Charles Knox. From a judgment for defendant, the commissioners appealed. Affirmed.

Rearick & Meeks, for appellants. Walter V. Dysert, for appellee.

CARTWRIGHT, C. J. The drainage commissioners of drainage district No. 8 in the town of Oakwood, in Vermillion county, ap-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pellants, filed their petition in the county court of said county to ascertain the compensation to be paid to Charles Knox, appellee, for the laying and maintenance of an 18-inch drain tile across his farm upon a strip of land of the width of 80 feet, being 30 feet on each side of the center line of the ditch in which the tile was to be laid, with the right to pass over said strip of land for the construction, repair and maintenance of the tile drain. The defendant filed a cross-petition, alleging that the proposed tile drain and right of way would cross a farm owned by him containing 115 acres; that the center line of the proposed right of way followed the center of an open ditch 10 feet wide and 10 feet deep made by him across the farm; that his farm was drained by about 15 car loads of lateral tile, laid 8 rods apart, emptying into the ditch 2 feet above the bottom, and that his system of drainage would be injuriously affected and his farm damaged by the taking and use of the strip for the tile drain. A change of venue was taken to the circuit court, where the cause was tried, and the jury returned a verdict fixing the compensation to be paid for the property taken at \$12.50 and the damage to the rest of the farm at \$487.50. The defendant remitted \$200 from the amount allowed for damages, and the court, after overruling motions for a new trial and in arrest of judgment, entered judgment for \$12.50 for land taken, and \$287.50 for damages to land not taken. From that judgment the commissioners appealed.

It is first contended that the court erred in refusing to grant a new trial on the ground that the damages allowed were excessive and contrary to the weight of the evidence. At the opening of the trial it was stipulated that the width of the right of way should be cut down to 31 feet, of which 1 foot was to be south of the center line of the tile ditch, and 30 feet on the north side, and the petition contained a statement that the defendant was to have the full use of the land for the purpose of raising crops, doing no injury to the drain, and the petitioners would claim no further rights than should be necessary for the construction, repair, and maintenance of the tile drain. The cause was not tried upon the correct theory as to what constituted a taking of defendant's property, and it is evident that the amount allowed by the jury as damages consisted mainly of compensation for property taken, but the verdict as reduced by the remittitur was not excessive or contrary to the evidence. The witnesses for the petitioners were examined on the theory that the land taken consisted of only a strip of ground 2 feet wide in the bottom of the existing ditch in which the tile was to be laid, and they fixed the fair cash value of that strip at a fraction of an acre, estimating the farm at about \$160 per acre. They were examined with reference to the remainder of

the 31 feet as though it were a question of damage to land not taken, and said that the market value of the strip would not be depreciated at all. The court, in the instructions given for the petitioners, directed the jury to fix the fair cash market value of a 2-foot strip, and as to the remainder of the 31 feet, gave the jury to understand that they were to allow, or not allow, damages accordingly as they should believe, from the evidence, that it would be, or would not be, depreciated in market value. As a question of law the whole 31 feet was proposed to be taken. The right to enter upon land permanently for the purpose of laying, maintaining, and repairing a line of tile is a taking of property within the meaning of the constitutional provision requiring compensation for property taken for public use. Property need not be taken in the literal sense in order to entitle the owner to compensation for property taken, and, in fact, the right acquired is ordinarily a mere easement. The owner has the same amount of land as before, but the easement acquired for the public use is a material and permanent interruption in the use of the land, which is the taking of property. Property in land is the right of user and disposition and dominion to the exclusion of all others, and that is the sense in which it is used in the Constitution. *Rigney v. City of Chicago*, 102 Ill. 64; *Illinois Central Railroad Co. v. Commissioners of Highways*, 161 Ill. 247, 43 N. E. 1100. The property taken may itself be no more than an easement, as when a street or highway is extended across the right of way of a railroad, or there is a physical interference with a private easement. *Metropolitan West Side Elevated Railroad Co. v. Springer*, 171 Ill. 170, 49 N. E. 416. Property may be already devoted to a public use, but an additional burden, such as the erection of a telegraph line, is the taking of the property. *Postal Telegraph-Cable Co. v. Eaton*, 170 Ill. 513, 49 N. E. 365, 39 L. R. A. 722, 62 Am. St. Rep. 390. Of course, the nature and extent of the interest acquired by the condemnation is to be considered in estimating the compensation to be paid to the owner, but that does not affect the question whether the property is taken or not. In some cases, such as railroad right of way, the right acquired by the petitioner is practically exclusive, and the naked title which is left in the owner is for all practical purposes of no value. In such cases the damages must be assessed at the full market value of the land. In any case the owner is entitled to be paid for such rights of use and enjoyment of his land as are taken from him; and, inasmuch as the defendant retains substantial rights in the strip of land, the measure of damages would not be the full market value. But it was not a case of damage, but of taking. The testimony of witnesses for the petitioners that the defendant was deprived of no right

of any value in a strip of land 1,402 feet long across his farm was clearly wrong. The defendant's witnesses fixed the damage at from \$500 to \$1,000, but they also counted the entry upon the strip of land and the use of it as damages. There was also evidence tending to prove that the present drainage system of the farm might be interfered with, and there might be other damage to the farm. The petitioners cannot complain of the manner in which the case was tried and the consequent confusion as between compensation and damage, but it is quite clear that the amount of the judgment, considered as a whole, for both compensation and damage, was not excessive.

It is next insisted that the court ought to have awarded a new trial on account of the conduct of the defendant. Two affidavits were filed by the petitioners stating that during the trial the defendant was seen talking to one of the jurors, and one affidavit stated that they were talking about the case. The defendant and the juror made affidavits that they did not talk about the case, that the defendant did not talk about it, or attempt to do so, and that the juror had no personal acquaintance with the defendant. These affidavits were entirely sufficient to absolve the defendant from any charge of improper conduct with that juror. Affidavits were also filed alleging that the defendant had treated the jury to cigars. It appeared from the affidavits presented by the parties that, when the jury were sent by the court to view the premises in charge of a bailiff, they made the trip on an interurban car, and were accompanied by the attorney for the petitioners and by the defendant; that while on the way one of the jurors suggested that somebody ought to furnish cigars for the crowd; that defendant, who was in the habit of smoking, said that he had some in his pocket and they were welcome to them if they wanted to smoke; that some of the jurors took cigars, and others did not; and that the attorney for the petitioners gave to members of the jury peanuts which he had in his pocket. When the motion for a new trial was being argued, the attorney stated that if the court deemed it material, he would file an affidavit denying any improper conduct on his part, but the court regarded it as unnecessary, and ignored all the charges in reference to improper conduct on the part of either side. The court did not err in so doing. The cigars and peanuts must be placed in the same class, and whether one or the other would prove more alluring, or have a greater effect in enticing a juror to the side of the tempter, we are unable to say. We do not think that the conduct of either party would cause a juror to deviate from the path of rectitude or influence his verdict.

The court overruled the motion of the pe-

tioners in arrest of judgment which was based on the alleged insufficiency of the cross-petition in failing to describe defendant's farm with certainty or to expressly aver the supposed damages to the remainder of the farm not taken. The farm was not described by government description, but merely as a farm of 115 acres owned by the defendant, across which the tile was to be laid. It set forth elements of damage to the farm by a probable interference with the existing system of drainage, and also upon the theory that the open ditch would be less effective in carrying water from low lands to the east. Any formal defect as to description or lack of certainty was cured by verdict. *Chicago & Alton Railroad Co. v. Clausen*, 173 Ill. 100, 50 N. E. 680.

The judgment is affirmed.

Judgment affirmed.

(237 Ill. 112.)

#### LANDBERG v. CITY OF CHICAGO et al

(Supreme Court of Illinois. Dec. 15, 1908.)

#### 1. CONSTITUTIONAL LAW (§ 88\*)—RIGHT TO CHOOSE OCCUPATION.

A citizen has a right to pursue any lawful avocation which he may choose, subject only to the restrictions necessary for public health, morals, safety, and welfare of the people.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 164, 165; Dec. Dig. § 88.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 607\*)—POLICE POWERS—REMOVAL AND DISPOSITION OF REFUSE.

The collection, shipping, and sale of manure is a business which is legitimate, but which might be conducted in such a manner as to be offensive and injurious to the public health; and it is therefore a proper subject for municipal regulation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1325; Dec. Dig. § 607.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 59\*)—GOVERNMENTAL POWERS—POWERS AND FUNCTIONS IN GENERAL.

Municipal corporations may exercise such powers as are expressly conferred upon them, and such as are necessary to carry into effect those expressly delegated.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 149; Dec. Dig. § 59.\*]

#### 4. CONSTITUTIONAL LAW (§ 70\*)—DISTRIBUTION OF GOVERNMENTAL POWERS—JUDICIAL POWERS—ENCROACHMENT ON LEGISLATURE.

If the Legislature authorizes the passage by a municipality of an ordinance requiring or prohibiting the doing of a specified thing, the judicial department cannot set it aside as unreasonable, but the courts will assume that the legislative intent is that power given shall be exercised in a reasonable manner, and the courts can only declare such ordinance void if it is in conflict with the Constitution, but, where the authority is not expressly given, it is the duty of the courts to determine whether the general authority is reasonably exercised.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129, 131; Dec. Dig. § 70.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

# 5. MUNICIPAL CORPORATIONS (§ 625\*)—POLICE POWER—REMOVAL AND DISPOSITION OF REFUSE.

Under a charter provision conferring upon the city council the power to do all acts and make all regulations necessary or expedient for the promotion of health or the suppression of disease, the council is not authorized to pass an ordinance giving the exclusive right to a person selected by a commissioner of health to ship manure from the city from stations designated by him, as such ordinance is an unreasonable exercise of a power given by the charter.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 625.\*]

Appeal from Circuit Court, Cook County; C. M. Walker, Judge.

Action by Christ Landberg to enjoin the City of Chicago and others from enforcing an ordinance. From a judgment overruling a demurrer to the bill, defendants appeal. Affirmed.

Edward J. Brundage, Corp. Counsel, Clarence N. Board, George M. Bagby, and Emil C. Welten, for appellants. James Turnock and Robert Redfield (Tolman, Redfield & Sexton, of counsel), for appellee.

CARTWRIGHT, C. J. The circuit court of Cook county overruled the demurrer of the city of Chicago and its mayor and commissioner of health, the appellants, to the bill in equity of Christ Landberg, the appellee, for an injunction against the enforcement of an ordinance establishing stations for shipping manure from said city, and giving the exclusive privilege of engaging in that business to any bidder whom the mayor and commissioner of health might choose to contract with. The defendants stood by their demurrer, and the court entered a decree in accordance with the prayer of the bill. The defendants prayed an appeal, and the court certified that the validity of a municipal ordinance was involved and the public interest required that the case be taken directly to this court. The appeal was allowed, and the record certified to this court.

The material facts alleged in the bill and admitted by the demurrer are as follows: The complaint was engaged in the business of shipping manure from the city of Chicago from certain fixed places or stations on 6 different railroads, and had been so engaged for about 7 years, loading and shipping an average of 40 cars per week. He had contracts with numerous persons and corporations, by which he was bound to remove, and did remove, from their premises daily all the manure that had accumulated. He had complied with all ordinances of the city, regulations of the department of health, and orders of the commissioner of health pertaining to the conduct of his business and maintained the same in a sanitary condition, and never failed to have manure removed within the time required by the ordinances, rules, and orders of the city and health de-

partment. On April 18, 1908, the city council passed the ordinance in question, providing that the commissioner of health should designate a requisite number of stations in the city, adjoining some railway or waterway, for the purpose of receiving and shipping manure which might be deposited at such stations. The ordinance divided the city into three divisions for the purposes of the ordinance, and authorized the commissioner to advertise for and receive bids for the exclusive privilege of establishing and maintaining such stations and shipping or removing manure therefrom. The bids were to be made separately for each division and accompanied by a certified check for \$200 to secure the making of a contract, and the commissioner was authorized, with the approval of the mayor, to enter into a contract with some reliable and responsible bidder, giving him the exclusive right to remove manure from such stations, saving to the owners of domestic animals the right to haul manure accumulating on their premises to a point beyond the limits of the city, or to gardens, farms, or lawns within the city, for fertilizing purposes, subject to rules and regulations to be made by the commissioner. The ordinance made it unlawful for any person, firm, or corporation, other than the party to whom the commissioner should choose to award the contract, to use any of the stations, and it would effectually prevent any other person from engaging in the business of shipping manure, destroy complainant's business, and compel him to violate his contracts.

A citizen has a right to pursue any lawful avocation which he may choose, subject only to such restrictions as are necessary for the protection of the public health, morals, safety, and welfare. *City of Chicago v. Netcher*, 183 Ill. 104, 55 N. E. 707, 48 L. R. A. 261, 75 Am. St. Rep. 98. To the farmer manure is a valuable commodity, and the collection, shipping, and sale of it is a perfectly legitimate business, in which the complainant was engaged, shipping about 40 car loads weekly from the city to the country. It is a business, however, which might be conducted in such a manner as to be offensive and injurious to the public health, and it is therefore a proper subject for municipal regulation. Municipal corporations may exercise such powers as are expressly conferred upon them and such as are necessary to carry into effect those expressly delegated; and the particular provision of the city charter under which it is thought the ordinance ought to be sustained is that which gives the city council power to do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease. The charter specifies a number of things which the city may do with the same general object in view, such

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

as declaring what shall be a nuisance and abating it, directing the location of buildings or business which are or may be offensive, and compelling the cleansing of unwholesome or nauseous places, but there is no provision for doing the specific thing attempted by this ordinance. If the legislative branch of the state government authorizes the passage by a municipality of an ordinance of a particular kind, requiring or prohibiting the doing of a specific thing, the judicial department cannot declare it unreasonable and on that ground set it aside, since such action would be a substitution of judicial judgment as to reasonableness for the legislative judgment on the same subject, and would be an encroachment upon the legislative power; but, if a general power is given to a municipal corporation to act on a particular subject, the courts assume that the legislative intent is that the power shall be exercised in a reasonable manner. If the Legislature expressly authorizes the doing of a certain thing or the passage of an ordinance of a certain character, the courts can only declare it void if it is in conflict with the will of the people as expressed in the Constitution, but, where the authority is not expressly given, it is the duty of the courts to determine whether the general authority is reasonably exercised. The powers of municipal corporations are conferred for the benefit of the entire body of the inhabitants, and ordinances passed under a general power must be reasonable, and not vexatious, unequal, or oppressive. *City of Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196. The removing of manure from the city and the sanitary handling and proper care of the same while at shipping stations within the city have a substantial relation to the promotion of health and suppression of disease. Accumulations of manure may be fairly regarded as inimical to the public health, and no doubt the city may require the removal of the same, regulate the conduct of the business, prescribe penalties for the infraction of reasonable rules and regulations, require a license of persons proposing to engage in the business, and compel them to give adequate security for the observance of the ordinances and regulations of the city. It would subvert the health of the community to compel the removal of all manure within a specified time, to establish shipping stations at suitable places convenient to railway or water transportation, to require security for obeying all proper regulations, and to require the removal of the manure from the shipping stations within a limited time; but the provision for an exclusive privilege to one person upon his paying the amount bid therefor has no relation what-

ever to the authority conferred upon the city. The grant of a monopoly having no legitimate relation to the purpose to be accomplished by an ordinance is offensive, and renders an ordinance unequal and unreasonable as between citizens.

There have been a number of cases where the grant of a monopoly for the removal of garbage, dead animals, or other substances constituting a menace to public health have been sustained; but ordinances were expressly authorized by the charter of the city or the monopoly was essential to accomplish the intended purpose. In *Walker v. Jameson*, 140 Ind. 591, 37 N. E. 402, 39 N. E. 869, 28 L. R. A. 679, 49 Am. St. Rep. 222, a contract of the city of Indianapolis clothed the contractor with the exclusive right and obligation to remove the garbage from the premises of all persons in said city, and to transport the same through the streets thereof to the crematory. The contract fixed the price for removal of garbage, and permitted the contractor to collect the same from the householder, and the question whether the contract was valid arose between a property owner and the contractor. It was expressly authorized by the charter. In *Smiley v. McDonald*, 42 Neb. 5, 60 N. W. 355, 27 L. R. A. 540, 47 Am. St. Rep. 684, the suit was by a citizen and taxpayer of the city of Omaha to restrain the defendant from proceeding under a contract with the city providing for the removal of garbage, offal, night soil, dead animals, etc., from the city, and the contract was within the strict letter of the city charter. The same is true of the *Slaughterhouse Case*, 16 Wall. 36, 21 L. Ed. 394, as was pointed out in *Huesing v. City of Rock Island*, 128 Ill. 465, 21 N. E. 558, 15 Am. St. Rep. 129. Cases of that character do not involve the question with which we are concerned in this case. The question here is whether an ordinance granting an exclusive privilege to some contractor who will pay for it, with the effect of destroying the complainant's legitimate business, is reasonable. To hold it unreasonable does not impair the power of the city of Chicago in any respect to perform all its legitimate functions for the preservation of the public health, all of which may be performed without unreasonably interfering with individual rights.

Without considering other questions argued by counsel, we must hold the ordinance void, as being an attempted unreasonable exercise of the general power given to the city to do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.

The decree of the circuit court is affirmed.  
Decree affirmed.

(171 Ind. 449)

## DUNCAN v. STATE. (No. 21,265.)

(Supreme Court of Indiana. Dec. 17, 1908.)

## 1. CRIMINAL LAW (§ 1137\*)—APPEAL—ERROR IN INSTRUCTIONS—ESTOPPEL TO ALLEGE ERROR.

Defendant in a prosecution for homicide cannot complain on appeal that the trial court imposed on him the burden of establishing his defense beyond a reasonable doubt where other instructions given at defendant's request are subject to the same objection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3009; Dec. Dig. § 1137.\*]

## 2. HOMICIDE (§ 109\*)—SELF-DEFENSE—GOOD FAITH IN EXERCISING RIGHT.

The law of self-defense is available only to those who act honestly and in good faith, and cannot be employed as a shield for the protection of one clearly guilty of murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 138; Dec. Dig. § 109.\*]

## 3. HOMICIDE (§ 300\*)—TRIAL—INSTRUCTIONS—SELF-DEFENSE.

In a prosecution for homicide, an instruction on the law of self-defense that, if upon the facts and circumstances shown by the evidence it appears beyond a reasonable doubt that, in taking the life of deceased, defendant was not honestly and in good faith exercising the right of self-defense, he cannot be acquitted on that ground, is not subject to the objection that it tends to confuse the jury, and to cast suspicion on the doctrine of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 616-619; Dec. Dig. § 300.\*]

## 4. HOMICIDE (§ 300\*)—INSTRUCTIONS—SELF-DEFENSE—PROVOKING DIFFICULTY.

In a prosecution for homicide, an instruction requested by defendant that if defendant was in a public alley in the rear of the premises occupied by deceased, though he was there for the purpose of seeking sexual intercourse with deceased's wife, such fact would afford no legal excuse or justification for an attack on him by deceased, was properly refused, as it left out of view the question whether defendant's conduct provoked the difficulty; the fact that defendant was in a public alley not improving his situation under the circumstances.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 628; Dec. Dig. § 300.\*]

## 5. HOMICIDE (§ 300\*)—TRIAL—INSTRUCTIONS—SELF-DEFENSE—PROVOKING DIFFICULTY.

In a prosecution for homicide committed by defendant while he was lurking about the premises occupied by deceased for the purpose of seeking sexual intercourse with deceased's wife, an instruction that decedent had the right to protect, by reasonable means, the honor and sanctity of his home from the defendant, and all other persons who might seek to bring it into disrepute by debauching his wife, was not misleading and erroneous.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 619, 628; Dec. Dig. § 300.\*]

## 6. HOMICIDE (§ 297\*)—TRIAL—INSTRUCTIONS—FACTS AND CIRCUMSTANCES SHOWING JUSTIFICATION.

The rule that, where the court undertakes to enumerate the facts and circumstances connected with an offense, the enumeration must be complete, is not applicable to an instruction given in a homicide case on defendant's claim of justification.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 297.\*]

## 7. HOMICIDE (§ 297\*)—TRIAL—INSTRUCTIONS—FACTS AND CIRCUMSTANCES SHOWING JUSTIFICATION.

In a prosecution for homicide, an instruction on the issue of justification, which, after enumerating certain facts and circumstances shown by the evidence, states that the jury must consider such facts and circumstances in connection with "all the evidence and the facts and circumstances as shown by the evidence surrounding and leading up to the killing," is not open to the objection that it fails to enumerate all the facts and circumstances which the jury might consider on such issue.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 297.\*]

## 8. CRIMINAL LAW (§ 761\*)—TRIAL—INSTRUCTIONS—ASSUMPTION AS TO FACTS.

An instruction in a prosecution for homicide that defendant had introduced evidence tending to prove a good reputation for peace and quietude "prior to the time of the commission of the crime herein charged" was not open to the objection that it assumed that a crime had been committed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1756; Dec. Dig. § 761.\*]

## 9. CRIMINAL LAW (§ 902\*)—TRIAL—INSTRUCTIONS—REFUSAL OF REQUEST—SUBSEQUENT ALLOWANCE.

Defendant in a prosecution for homicide cannot complain that the court refused a correct instruction requested by him where such instruction was afterwards given by the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1993; Dec. Dig. § 902.\*]

## 10. CRIMINAL LAW (§ 829\*)—TRIAL—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

Defendant in a criminal prosecution cannot complain of the refusal of an instruction, where the subject-matter of such instruction is included in the charge as given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

## 11. CRIMINAL LAW (§ 1170½\*)—APPEAL—REVIEW—HARMLESS ERROR—IMPROPER QUESTIONS TO WITNESSES.

Defendant in a criminal prosecution is not prejudiced by the act of the prosecuting attorney in propounding an objectionable question to a witness where the witness does not answer the question.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8131; Dec. Dig. § 1170½.\*]

## 12. CRIMINAL LAW (§ 1044\*)—APPEAL—OBJECTIONS BELOW—NECESSITY.

Though a witness for the state, to the question "Did you feel any weapon in his (defendant's) coat at that time?" answered, "Yes; I felt something in his pocket. I was satisfied it was a revolver"—afforded no ground for reversal of a conviction for homicide, where the defendant did not ask the court to strike out the objectionable part of the answer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2674; Dec. Dig. § 1044.\*]

## 13. CRIMINAL LAW (§ 448\*)—EVIDENCE—CONCLUSION OF WITNESS.

In a prosecution for homicide, it was proper for the court to refuse to strike out the statement "I heard quarreling," made by a witness in answer to a proper question, on the ground that it was a conclusion of the witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1035; Dec. Dig. § 448.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**14. CRIMINAL LAW (§ 1036\*)—APPEAL—PRESENTATION OF QUESTIONS IN LOWER COURT—EXCLUSION OF PROFFERED EVIDENCE—SUFFICIENCY OF OBJECTION.**

Defendant in a prosecution for homicide cannot complain on appeal that objections to questions propounded by him to witnesses were sustained, where no statement was made in the trial court as to the answer expected to be elicited.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1036.\*]

**15. CRIMINAL LAW (§ 1054\*)—APPEAL—EXCEPTIONS IN LOWER COURT—NECESSITY—EXCLUSION OF EVIDENCE.**

Alleged error in sustaining objections to questions propounded to a witness on behalf of defendant in a criminal prosecution cannot be considered on appeal where the rulings of the court were not excepted to.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2862; Dec. Dig. § 1054.\*]

**16. HOMICIDE (§ 190\*)—EVIDENCE—SELF-DEFENSE—THREATS BY DECEASED.**

In a prosecution for homicide, testimony of accused that a certain person had heard deceased make a threat respecting defendant was properly excluded where it was not shown how defendant learned of the incident he proposed to relate or that his conduct at the time of the homicide was influenced by such threat.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 405-412; Dec. Dig. § 190.\*]

**17. CRIMINAL LAW (§ 1170½\*)—APPEAL—REVIEW—HARMLESS ERROR—EXAMINATION OF WITNESSES.**

Error of the court in permitting the state to propound a hypothetical question to defendant's character witnesses was not ground for reversal where the court subsequently struck out the questions and the answers thereto, and admonished the jury not to consider the same.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3141; Dec. Dig. § 1170½.\*]

**18. CRIMINAL LAW (§ 1037\*)—APPEAL—OBJECTIONS IN LOWER COURT—IMPROPER ARGUMENT.**

Alleged misconduct of the prosecuting attorney in his argument to the jury will not be considered on appeal where the record fails to show that defendant called the attention of the trial court to such misconduct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645; Dec. Dig. § 1037.\*]

Appeal from Circuit Court, Hancock County; R. L. Mason, Judge.

Francis M. Duncan was convicted of murder in the second degree, and appeals. Affirmed.

Sanford & Glascock and Felt & Binford, for appellant. Charles L. Tindall, Pros. Atty., James Bingham, A. G. Cavins, H. M. Dowling, and E. M. White, for the State.

MONTGOMERY, J. Appellant was convicted of murder in the second degree, and assigns error upon the overruling of his motion for a new trial. The motion for a new trial was predicated upon the giving of improper instructions, the refusal to give instructions at the request of appellant, and the erroneous admission and exclusion of evidence.

Instructions numbered 4, 28, 29, and 30,

given by the court, are attacked upon the ground that in each of them the burden of establishing his defense beyond a reasonable doubt was erroneously imposed upon appellant. Agreeing upon the legal principle involved, and conceding the truth of this contention, the state insists that the erroneous expression, if any, embodied in these instructions, will not constitute available error, since appellant requested and caused the court to give other instructions containing the same error and in which he expressly assumed the burden of establishing his alleged defense to the exclusion of a reasonable doubt. Instruction numbered 32, given at appellant's request, and others tendered, required him to prove every element of self-defense beyond a reasonable doubt to justify the killing and authorize his acquittal. This instruction is as clearly open to the criticisms urged as any given by the court of his own motion or at the instance of the state. When it appears that an appellant has incorporated an erroneous principle or declaration of law in an instruction and requested the same to be given, it is well settled that he will be held to have invited such error, and estopped from complaining that other instructions of the same import were given by the trial court. Elliott's App. Procedure, §§ 626, 627, 630; 12 Cyc. p. 885; Lawson v. State (Ind.) 84 N. E. 974; Eacock v. State, 169 Ind. 488, 82 N. E. 1039; Indianapolis, etc., Co. v. Kidd, 167 Ind. 402, 79 N. E. 347, 7 L. R. A. (N. S.) 143; Indiana, etc., Co. v. Jacobs, 167 Ind. 85, 93, 78 N. E. 325; Consolidated Stone Co. v. Morgan, 160 Ind. 241, 247, 66 N. E. 696; Baltimore, etc., Ry. Co. v. Conoyer, 149 Ind. 524, 48 N. E. 852, 49 N. E. 452; Louisville, etc., Ry. Co. v. Miller, 141 Ind. 533, 37 N. E. 343.

It is next contended that certain instructions given tended to confuse the jury, and to cast suspicion upon the doctrine of self-defense. The instructions set out are not open to the first criticism advanced, nor fairly subject to the charge of disparaging the right of self-defense. The law of self-defense is available only to those who act honestly and in good faith, and cannot be employed as a shield for the protection of one clearly guilty of murder. It is not improper for a trial court in a case involving a disputed claim of self-defense, after fully instructing upon that subject, to admonish the jury that, if upon the facts and circumstances shown by the evidence in the case on trial it appears beyond a reasonable doubt that in taking the life of the deceased the defendant was not honestly and in good faith exercising such right of self-defense, he cannot be acquitted upon that ground. The instructions under consideration were within the principle above declared, and fully warranted by the evidence.

Complaint is made of the refusal to give appellant's instructions numbered 21, 28, and 31, as requested. These instructions reitera-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ted appellant's right to be in the public alley in the rear of the premises upon which the deceased was living at the time of the encounter, and asserted the further proposition that although it be conceded that appellant had theretofore sustained illicit sexual relations with the wife of the deceased, and at the time in question was in the alley seeking an opportunity for having such intercourse, such fact would afford no legal excuse or justification for an attack upon him by the deceased. The jury were fully advised by numerous instructions that while in the lawful use and enjoyment of the public alley appellant was in a place where he had a right to be; but the idea sought to be impressed by the second proposition embraced in the requested instruction is radically and grossly wrong. The deceased was not on trial for an assault upon appellant, and it was but incidentally material whether or not he was legally justifiable in making such assault, if any was in fact made. Appellant claiming that he was assaulted, and in defending himself killed his adversary, the important question was whether he was free from fault tending to provoke the fatal encounter. In this connection one of the instructions refused declared that, being in a public alley, appellant should be held without fault unless shown to be at the time committing some act in violation of the law of the land. The highways are provided for the use of the public as a general means of travel, and may not be rightfully employed for lascivious and immoral purposes. If appellant armed with a deadly weapon was lurking about the alley for the sole purpose of debauching the wife of the deceased, and thus menacing the personal safety, and the sanctity of the home of deceased, when attacked, he was not in a place where he had a right to be and without fault. It would be a reproach upon the law and our civilization to acquit a villain of fault in provoking an attack upon himself by his intended victim while lurking about his premises in the darkness for the avowed purpose of kidnapping, or committing larceny, burglary, or arson. It would be alike absurd to hold a libertine confessedly guilty of defiling the wife of another without fault when assaulted by the outraged husband while upon or about his premises under cover of darkness seeking an opportunity to repeat the offense. The doctrine advanced in the refused instructions are antagonistic to moral precepts, and fundamental principles of law, both human and divine. 21 Cyc. 800.

Appellant's next insistence is that instructions should embody some proposition of law within the issues, and be definite and clear. Certain instructions given are alleged to be so general as to be misleading and erroneous. The sixth, charged with this vice, reads as follows: "The deceased had the right under the law to protect, by reasonable means, the honor and sanctity of his home from the defendant and all other persons who might seek to bring it into disgrace by having illicit

sexual intercourse with the wife of the deceased." This instruction was peculiarly applicable to the evidence, and was made proper and necessary by appellant's claim that he was without fault in the encounter. It embraces a correct and wholesome principle of law, worthy of wide publicity. The jury could not have been misled in this connection, and appellant's criticisms of these instructions are without substantial merit.

The sixteenth instruction is condemned by counsel because it does not include and specifically enumerate every fact and circumstance which the jury might consider in determining appellant's claim that the killing was justifiable. This instruction enumerated particular matters given in evidence proper to be considered by the jury upon the subject of the good faith of appellant's alleged self-defense in connection with "all the evidence and the facts and circumstances as shown by the evidence surrounding and leading up to the killing." Counsel rely upon the cases holding an instruction to be defective and erroneous which undertakes to state all the elements of an offense necessary to a conviction, but omits an essential element. This instruction does not come within the rule invoked, and, in any event, its terms are not open to the criticisms made. No error was committed in giving this instruction. Indianapolis, etc., R. Co. v. Bennett, 39 Ind. App. 141, 79 N. E. 389.

In the introductory part of an instruction upon the subject of good character the court said that appellant had introduced evidence tending to prove a good reputation for peace and quietude "prior to the time of the commission of the crime herein charged." It is argued that by this expression the court erroneously assumed that a crime had been committed. This claim is manifestly unwarranted, since the reference is merely to the crime "charged" in the indictment. The state tendered an instruction defining the right of the deceased to exclude appellant from his premises, and denying appellant's right to resist such expulsion, which was at first refused, but subsequently upon reinstructing the jury was given with the others previously read. The propositions of law were correctly stated, and there was evidence making the instruction pertinent. It follows that appellant has no ground of complaint because the court did tardily what ought to have been done in the first instance.

The court refused to give two of appellant's instructions relating to evidence which had been stricken out. The subject-matter of the tendered instructions was fully and sufficiently covered by others given, and no error was committed in this respect.

A witness for the state was asked whether he had ever seen appellant going in the direction of the home of deceased, and to this question appellant's objection was overruled and an exception saved. No answer was made, but another question somewhat similar was propounded and answered without

objection. There is no prejudicial error where an objectionable question is asked but no answer is given. *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 28, 181; *Warson v. McElroy*, 33 Mo. App. 553.

A witness for the state was permitted to answer, over appellant's objection, the following question: "Did you feel any weapon in his [appellant's] coat at that time?" The answer was: "Yes, I felt something in his pocket. I was satisfied it was a revolver." The question was not open to objection, and, if any part of the answer was improper, it should have been rejected upon motion. No motion to strike out was made, and no error is shown.

Complaint is made of the court's refusal to strike out a responsive answer in which the witness said: "I heard quarreling." We think this ruling was right, and that the witness might know as a fact without being able to distinguish the words used that persons were quarreling, as he might say that he heard crying or singing.

Appellant propounded certain questions to his own witnesses to which the state's objections were sustained, and in connection with which no statement was made as to the answer to be elicited or expected in response to such question. No error was saved in these cases by excepting to the rulings. *Elliott's App. Procedure*, § 743. When appellant was on the stand as a witness, an offer was made to prove by him that a Mr. Butler saw the deceased exhibit a knife and heard him say at the same time that he was waiting for appellant, and intended to kill him if he had an opportunity. This offer was excluded. It was not shown when or how appellant learned of the incident he proposed to relate, nor was any claim made that his conduct on the night of the killing was in any manner influenced by this alleged threat. Mr. Butler was not called as a witness in the case. Assuming that the threat inquired about was unknown to appellant at the time of the homicide, it would still be competent evidence in his favor after having shown an attack by the deceased as tending to show the motive and character of such attack, but the proof should be made by the witness having knowledge of the fact, and not by hearsay testimony as attempted in this instance. *Guy v. State*, 37 Ind. App. 691, 77 N. E. 855; *Leverich v. State*, 105 Ind. 277, 280, 4 N. E. 852; 21 Am. & Eng. Ency. of Law, 222.

Appellant complains of the putting of a hypothetical question in cross-examination of his character witnesses. The trial court must of necessity exercise a liberal discretion in controlling cross-examination, and we think no abuse of discretion is shown in this instance, but since the court subsequently struck out this question in every case and the answers thereto, and admonished the jury not to consider them in determining the

merits of the case, no ground of complaint remains. *Pigg v. State*, 145 Ind. 560, 43 N. E. 309; *Anderson et al. v. State*, 147 Ind. 445, 46 N. E. 901; *Blume v. State*, 154 Ind. 343, 56 N. E. 771; *Smith v. State*, 165 Ind. 180, 74 N. E. 983.

Alleged misconduct of the prosecuting attorney in argument is assigned as a ground for a new trial, but the record fails to show any objection to such argument, or ruling of the court with respect thereto made or refused to which an exception was saved, and hence no question is presented for our consideration. *Hill v. State*, 169 Ind. 561, 83 N. E. 243, and cases cited.

The Attorney General has challenged the sufficiency of appellant's brief to present some of the questions sought to be raised, but, appreciating the importance of the interests involved, we have resolved all practice questions in favor of appellant, and carefully considered all propositions advanced as errors. We have found the alleged errors to be purely technical, and without substantial merit, as above shown. Appellant's counsel do not claim that the evidence was insufficient to sustain the conviction, and in our opinion no such contention could have been plausibly urged. The conviction was right upon the evidence before us, and the motion for a new trial was properly overruled.

The judgment is affirmed.

(79 Oh. St. 23)

ANDERSON v. UNITED REALTY CO. et al.  
(Supreme Court of Ohio. Nov. 10, 1908.)

1. REMOVAL OF CAUSES (§ 97\*)—WITHDRAWAL OF PETITION—JURISDICTION OF STATE COURT.

Upon the filing in a state court of the requisite petition and bond for the removal of the suit to a federal court, the state court is divested of jurisdiction; but a party who procures the withdrawal of the petition and bond by the party who filed it, before any action in the federal court, and then dismisses his action in the state court as to the party who filed the petition for removal, and by agreement with the remaining parties prosecutes the suit in the state court, cannot be heard, after judgment against him, to assert that the jurisdiction of the state court had not been restored.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 206; Dec. Dig. § 97.\*]

2. WILLS (§ 602\*)—NATURE OF ESTATE.

Where in a will there is a devise to a son, and, if he dies without lineal descendants living at the time of his decease, then over, these words are not, by themselves, without assistance from other parts of the will, sufficient to create an estate by implication in the lineal descendants, but the son takes a fee defeasible upon his death without lineal descendants living at the time of his decease; and, in the event of lineal descendants living at the time of the son's decease, his fee becomes absolute, and such descendants have no interest under the will as against his grantee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1351; Dec. Dig. § 602.\*]

Davis, J., dissenting.

(Syllabus by the Court.)

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Error to Circuit Court, Lucas County.

Action by Peter Anderson against the United Realty Company and others. Judgment for defendants was affirmed in the circuit court, and plaintiff brings error. Affirmed.

Rhea P. Cary, C. A. Thatcher, and C. H. Trimble, for plaintiff in error. King, Tracy, Chapman & Welles, George A. Bassett, Oliver B. Snider, Rathbun Fuller, Elmed E. Davis, Rhoades & Rhoades, and Clayton W. Everett, for defendants in error.

SUMMERS, J. In the court of common pleas of Lucas county this was an action by Peter Anderson against several defendants to recover the possession of several city lots, or parcels of real estate, in the city of Toledo. The title of Peter Anderson to the lands in question depends upon the construction to be given to his grandfather's (Henry Anderson's) will. Henry Anderson, the grandfather, made his will on February 28, 1846, and died on the 3d day of April following. He left two children only, William, born February 12, 1828, and James H., born June 25, 1831. William died in 1850 intestate, unmarried, and without issue. James H., the other son, died in 1902, intestate, and left surviving him as his only child, and only heir at law, the plaintiff, Peter Anderson, who was born August 27, 1859, and he is the grandson, and the only grandchild, and only living descendant, of the said Henry Anderson.

The testator gave all of his property, both real and personal, to certain persons in trust, and the will then reads as follows:

"Item. It is my will that when my son William arrives at the age of twenty-one years the trustees of the first and general trust shall deliver to him a settlement of the affairs of the trust, and if my debts are then paid, and as soon as that takes place, they shall put him in possession of one-half of my property, reserving thereout two-fifths parts of said moiety by valuation, which my said trustees shall hold in trust and properly invest and pay over to him at the age of twenty-five years. If my interest in the American Land Company be not brought in to the general trust at the time William becomes twenty-one, but is brought in at any time before he arrives at twenty-five, so soon as brought in, two-fifths shall be deducted therefrom and invested and paid over to him at twenty-five, the other three-fifths he shall have as soon as paid in. I find the above does not express my will in this: When I say two-fifths shall be deducted from the interest I may have in the land company for investment, and three-fifths to be paid to him. I mean two-fifths of a moiety shall be deducted and three-fifths of a moiety paid over.

"And it is my will that my said trustees hold and invest and pay over the remaining moiety of my estate to my son James at the respective periods of twenty-one and twenty-

five years of age, being governed as to the amounts to be paid at each of the respective periods by the same rules and directions as are above laid down in the bequest to William, and to be governed in all other respects by the regulations laid down concerning the same.

"If either of my sons die without lineal descendants, the one surviving shall take his estate above bequeathed, and, if the survivor dies without lineal descendants, then one-half both of the decedent's original portion, as well as one-half of the portion taken by survivorship, shall go to my brother Peter, the other half to such of my brothers and sisters as may be living at the time of the death of such surviving son. If my brother Peter be not living at the time of the death of my surviving son, so dying without lineal descendants, then the share he would have taken, if living, shall go to his children living at the time of the decease of my said son, and if there be no children surviving, then the share shall go to my other brother and sisters surviving at the time of such decease of my son. I make the following explanation: The limitation over on the death of my surviving son without lineal descendants is intended to take effect if there be no lineal descendants living at the time of the decease of such son. Nothing in the foregoing will shall be construed as to deprive either of my sons disposing of their portions by will on their attaining the age of twenty-one years, respectively. The above limitations over shall give way to the provisions of such wills."

This will was duly probated in Mississippi, and an authenticated copy of the will and of the probate thereof were thereafter duly filed in the probate court of Lucas county, Ohio, where the will was duly admitted to probate and record as a will from another state. On April 7, 1860, James H. Anderson, the father of the plaintiff, and the then surviving son of the testator, executed and delivered to one Charles Butler a quitclaim deed of all the real estate involved in this action, which deed was duly signed, sealed, acknowledged, and executed by him in the presence of two witnesses, who signed the deed as such, and which deed was duly recorded in the recorder's office of Lucas county, Ohio, on May 3, 1860. The defendants derive their title from Charles Butler. In 1838 the land in controversy was owned in fee simple by one Edward Bissell, who then mortgaged it to Charles Butler to secure the payment of his bond for a large sum due in one year. In 1841 Butler assigned the bond and mortgage to Henry Anderson as collateral security for the payment of his note to Anderson, and, in default of payment, Anderson in 1843 filed his bill in chancery in the court of common pleas of Lucas county, Ohio, to foreclose the Bissell mortgage. The land was bid in by Anderson at the master's sale in 1844, and he received the deed therefor. He then entered

into an agreement with Butler, which, in effect, so it is contended, made the land the property of Butler, and vested the title in Anderson merely as security for the payment of Butler's note to Anderson. Butler thereafter obtained quitclaim deeds from Bissell and from Anderson's trustees and from William and James H. Anderson, and it is also contended that the proof shows that the payments made by Butler to Henry Anderson and to his trustees discharged the note, but it is not necessary to narrate the facts in detail; for, if the title was in James H. Anderson, his quitclaim deed conveyed it to Butler, and it did not descend from James H. Anderson to his son, the plaintiff, and these facts become material only in the event the plaintiff took an estate in the land under his grandfather's will. The facts are set out in detail in the opinion of the circuit court. 9 Ohio Cir. Ct. R. (N. S.) 473.

The petition in this case was filed August 17, 1905. The defendants were not tenants in common, but each held a lot in severalty. Some of the defendants by answer objected to the petition, on the ground that separate causes of action against several defendants were improperly joined, and on August 25, 1905, one of the defendants, a corporation, filed its petition and bond for removal into the next Circuit Court of the United States to be held in the Northern District of Ohio, Western Division. The petition for removal averred that the corporation was the owner, and in exclusive possession, of one of the lots; that it had no interest in any of the other lots, and that none of the other defendants had any interest in its lot; that the corporation was a citizen of Michigan; that plaintiff was a citizen of Tennessee, and that the controversy in said suit between the corporation and the plaintiff was a separable controversy, wholly between it and the plaintiff, relating to the ownership and right to possession of the real estate described as lot 332 in Port Lawrence Division, Toledo, Ohio, and the rents and profits to the same; and that the value of the real estate in controversy, exclusive of interest and costs, exceeded the sum of \$2,000. The transcript does not show any action by the court upon the petition for removal or upon the bond, but it does appear that on the 6th of November, 1905, the plaintiff dismissed his action, without prejudice, as to that defendant, and that in consideration thereof such defendant withdrew its petition for removal, and on the same date there is this docket entry, "Petition for removal withdrawn." The action was dismissed also as to some other defendants. Thereafter, on January 2, 1906, the plaintiff and the remaining defendants entered into a stipulation that the defendants waived the misjoinder of causes of action in the plaintiff's petition, and that all the parties consented and agreed to try together all of the causes of action set forth in the petition. Thereafter the action was

tried in the court of common pleas, and a verdict was directed for the defendants, and each of them, and the petition was dismissed. On July 14, 1906, the plaintiff filed a petition in error in the circuit court, and assigned, as his first ground of error, that the common pleas court lost jurisdiction of the action with the filing of the petition and bond for removal. Other errors are assigned. The circuit court affirmed the judgment of the court of common pleas, and the case is brought here on error to reverse the judgment of the lower courts.

Upon the filing of such petition and bond the federal statute makes it the duty of the state court to accept them, and to proceed no further in the suit. Thereupon the state court is divested of jurisdiction of the suit, and its subsequent orders are *coram non jure*, unless its jurisdiction be restored. *Railroad Company v. Koontz*, 104 U. S. 5, 26 L. Ed. 643; *Steamship Company v. Tugman*, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. Ed. 87; *Madisonville Traction Company v. St. Bernard Mining Company*, 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462. In this case we think the jurisdiction was restored as to the remaining defendants by the withdrawal of the petition for removal by the defendant that filed it, and the dismissal by the plaintiff of his action against that defendant, before any action upon the petition and bond had been taken in either court. The state court had jurisdiction of the subject-matter and of the parties, but under the federal Constitution and laws it was the privilege of one of the defendants to have the suit transferred to a federal court, and when he filed the requisite petition and bond, the jurisdiction of the state court was suspended. The federal court could, with the consent of the parties, restore the jurisdiction by remanding the suit, and we see no good reason why the jurisdiction of the state court may not be restored by the withdrawal of the petition for removal before any action upon it has been taken, or at least that there was merely an irregularity in the mode of restoring the jurisdiction, of which the plaintiff will not be heard to complain. In *Garrozi v. Dastas*, 204 U. S. 64-72, 27 Sup. Ct. 224, 227, 51 L. Ed. 369, Mr. Justice White says: "The assertion of the want of jurisdiction in the court below rests, however, not upon a denial of power in that court to have entertained the controversy if the suit had been originally brought there, but upon the contention that, as a defendant other than the husband was a resident and citizen of Porto Rico, the cause was improperly removed from the local court. And the proposition goes to the extent of insisting that such want of jurisdiction may be asserted by the person who procured the removal, who resisted the effort to remand, and when the want of jurisdiction is only suggested after the trial and final decree." And the conclusion was that, even though the removal was irregular, the

party who caused the removal could not be heard, after judgment against him, to assert that the United States court was wanting in jurisdiction solely on the ground that the case was erroneously removed. And if the conclusion in *Baltimore & Ohio Rd. Co. v. Fulton*, Adm'r, 59 Ohio St. 575, 53 N. E. 265, 44 L. R. A. 520, that where a suit is removed to the federal court, and then dismissed without trial, no subsequent suit upon the same cause of action can properly be brought in the state court is not correct, as seems to be the opinion in *Gassman v. Jarvis* (C. C.) 100 Fed. 148, then, in effect, the withdrawal of the petition and bond for removal, and the trial of the suit in the state court by agreement of all the parties, was the prosecution of a new suit upon the same cause of action.

The remaining question, what estate did the plaintiff take under the will? would not, perhaps, have consumed much time, for the leading text-books and the cases are in accord that he took none, had not the Circuit Court of Appeals reached a different conclusion in *Anderson v. Messinger*, 146 Fed. 929, 77 C. C. A. 179, 7 L. R. A. (N. S.) 1094, where the same will was construed. It is there held that James H. Anderson, the surviving son, took a life estate, with the remainder to his son, Peter Anderson, the plaintiff. In *Underhill on the Law on Wills*, § 468, it is said: "Where real or personal property is given to a person absolutely, but if he should die without leaving children, then over, the primary devisee takes a common-law fee conditional, which is defeasible on his death without leaving children, though the children, if he leave any, take no estate as purchasers under the will by implication. If the first taker shall die leaving children him surviving, by which event the remainder is defeated, they will take by descent from their parent, and not as purchasers under the will. He has an estate in fee, with full power of disposal, and the only effect of mentioning the children in the will is to indicate the contingency upon which his estate in fee is to be defeated." "At common law it was settled," says Mr. Jarman (*Jarman on Wills*, \*521 [6th Ed.]), "that a devise to a person indefinitely, with a limitation over in case he died without issue, or words of similar import, conferred an estate tail on such person, and on the ulterior devisee a remainder in fee expectant on the estate tail in such prior devisee, on the ground that by postponing the ulterior devise until the failure of the issue of the prior devisee, the testator afforded an irresistible inference that he intended that the estate to be taken by the prior devisee under the indefinite devise should be of such a measure and duration as to fill up the chasm in the disposition, and prevent the failure of the ulterior devise, which, as an executory devise to take effect on the general failure of issue, would be void for remoteness." And in like case, where

there was an express estate for life in the first taker, he was held to take an estate tail. In *Stanley v. Lennard*, 1 Eden's Chancery Reports, 87-95, the Lord Keeper said: "Where a man, by his will, makes one tenant for life, with remainder to one, two, three, four, five, etc., of the issue of the tenant for life, and then for want of issue of tenant for life, limits the estate over, this will be an estate tail in the first taker for life by necessary implication, and this, because of the word 'then' before the limitation over, which, though sometimes an adverb of time, yet is sometimes a word of relation, and signifies as much as 'in such case,' and must have this effect: That upon the first, second, third, fourth, fifth, etc., limitations failing, the remainderman could not take it because of the words 'for want of issue'; and therefore, unless the tenant for life was construed to have an estate tail, it would descend, in the meantime, to the heir at law, because the contingency on which the remainderman was to take had not happened. But as the testator certainly intended to dispose of his whole estate, it has been construed a necessary implication that the tenant for life should take an estate tail to carry the testator's intent into execution. But where there is an express estate for life, the court never enlarges this estate for the sake of the tenant for life himself, but merely for the sake of other persons who are intended to take by the will. To this it is objected that you will introduce an estate tail, which will give the party an opportunity of defeating the limitations over; but this proves too much, for so it happened in all the cases that have been cited at the bar; for you cannot supply the defect and omission in the will without giving the tenant for life power to destroy the remainders over." This result follows from interpreting the words "die without issue," or words of similar import, to mean an indefinite failure of issue. But in 1837 an act was passed (St. 1 Vict. c. 26, §§ 28, 29), by which it was provided that a devise of real estate without any words of limitation shall be construed to pass the fee simple, or other the whole estate and interest which the testator had power to dispose of by the will, and "that in any devise or bequest of real or personal estate the words 'die without issue,' or 'die without living issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will." And so Mr. Jarman says (\*625): "Under this clause, coupled with the preceding section, which makes a devise confer an estate in fee without words of inheritance, it will generally happen, in cases in which, ac-

cording to the old law, the prior devisee would have been tenant in tail, by the effect of words devising over the property on the failure of his issue, that he will, under the new rule of construction, take an estate in fee simple, subject to an executory devise in the event of his dying without leaving issue at his death." And then, speaking of the advantages attending the present mode of construction, he says (\*523): "Secondly, that by excluding an implication of an estate tail in the person whose issue is so referred to, where he takes an estate under the will, or where he or the express devisee happens to be the heir at law of the testator, the new construction has the effect of exempting the interest of the ulterior devisee from its liability to be defeated or destroyed by the act of the prior devisee; the result being that, instead of the ulterior devisee having (as formerly) a remainder in fee expectant on an estate tail in such prior devisee (which, of course, the latter might have barred by a disentailing assurance), he takes by executory devise engrafted on a preceding fee simple, to arise on the event of the first devisee dying without leaving issue at his death, the estate of such prior devisee being absolute in the alternative event." Now, the pertinency of this statement that, in such a case under the new rule of construction, the prior devisee takes an estate in fee simple, subject to an executory devise in the event of his dying without leaving issue at his death, is apparent when it is stated that in this state the common-law rule never was adopted, but was rejected and the modern rule was adopted. *Parish's Heirs v. Ferris et al.*, 6 Ohio St. 563; *Niles et al. v. Gray et al.*, 12 Ohio St. 320.

Where there is a devise to A. for life and in case he should die without issue to B., it has been urged, in case A. dies leaving issue, the issue take by implication, on the ground that it would be absurd in the testator to make the estate of the ulterior devisee depend on the contingency of there not being issue, and yet, in the alternative event to give the property neither to A. himself nor to such issue, but to leave it to devolve to the heir at law or residuary devisee. Mr. Jarman says (\*522): "There is, however, no authority for implying an estate in the issue living at the death, and the contrary conclusion is supported by *Monypenny v. Dering*, 7 Hare, 588, where it is argued that a devise over in default of issue, A., a tenant for life, to some only of whose issue an estate was expressly given, showed that the intention must have been that, not some only, but all the issue, should take; but Sir J. Wigram, V. C., said, that, admitting such to be the intention, it furnished no sufficient ground for supplying estates by purchase to the omitted issue. He had asked for, but did not get any authority for such a proposition." It may be added that there is no such absurdity, for in cases

of bequests for life, with gift over in default of children, it is held that the children do not take by implication. In *Jarman on Wills* (\*524) it is said: "As no implied estate to the issue arises (as we have seen) from a limitation over in case of the prior devisee or legatee dying without leaving issue at his decease, it should seem that there is the same absence of authorized ground for implying a gift to children from a similar limitation over in default of these objects. Accordingly, in several cases it has been considered that a bequest to a person, and, if he shall die without having children, or without leaving children (which means without having had a child born, or without leaving a child living at his decease), then over, does not raise an implied gift in the children; but the parent takes an absolute interest, defeasible on his dying without having had, or without leaving, a child, as the case may be. The rejection of the implication in such a case is not (as already pointed out) productive of any absurdity; for it supposes the testator, by making the interest of the legatee indefeasible on his having or leaving a child, to intend that, if there are children, he shall have the means of providing for them. And even where the language of the will necessarily confines the interest of the parent to his life, the children will not generally be held to take by implication. It is extremely probable that the testator intended a benefit to them, but *si voluit non dixit*."

Before the making of this will an act was passed (March 3, 1834 [32 Ohio Laws, p. 41] 1 Curwen, p. 145, now section 5970, Rev. St.), which declared that, in any will thereafter made, a devise of lands shall be construed to be a fee simple, "and the devisee shall take, all the estate which the deviser had in the property or thing divested, unless it appears by express words the manifest intent that a lesser estate was intended." And before the passage of this act it had been decided by this court that words of inheritance are not necessary in a will to pass an estate in fee simple. So that Henry Anderson, by the direction in his will to his trustees to put his son William, when he arrived at the age of 21 years, in possession of one-half of his property, excepting two-fifths part of said moiety, which they shall pay over to him at the age of 25 years, and by a similar direction as to his son James, vested in them a fee-simple title of all the estate he had in real property, unless it appears by express words or manifest intent that a lesser estate was intended. There are no express words, unless the son died without lineal descendants living at the time of his decease, which was not the event at the decease of the surviving son James. But it is contended that by making the limitation over contingent upon the death of the son without lineal descendants living at the time of his decease, the testator manifested an intention that the

son, in the event he died with lineal descendants living at the time of his decease, should take only an estate for life, and that the lineal descendants should take a remainder. The answer to this is that it is settled, as already shown, that the limitation over in the event of nonexistence of lineal descendants does not of itself imply a devise to the lineal descendants. The alternative of the devise over is an indefeasible estate in the son. To say that the testator must have intended the grandchildren to take is merely conjecture. The testator may have supposed that the son's children would inherit the son's property, or that the son would give it to them. This is the most that can be implied from his mention of them; and, if he acted upon that belief, and, after the devise of his property to the sons, attempted to provide only for the contingency of their death without surviving lineal descendants, then not only can it not be said that he intended to devise it to grandchildren, but a reason for his not doing so is apparent. In this will not only is there nothing from which to imply an estate in grandchildren, but such an implication is precluded by the explanations of the testator. He says: "Nothing in the foregoing will shall be construed as to deprive either of my sons disposing of their portions by will on their attaining the age of twenty-one years, respectively. The above limitations over shall give way to the provisions of such wills." This is not the gift to the sons of a power to dispose of the estate by will. In the contemplation of the testator that power they already had upon attaining the age of 21 years, for he says they are not to be deprived of it. If it be said that this explanation merely qualifies the limitation over, then it does not help the plaintiff, and if taken literally, then the sons, upon attaining the age of 21 years, could dispose of their estates by will, even though they had children, which is inconsistent with an intention of the testator to make the grandchildren objects of his bounty. The evident intention of the testator was to give his sons absolute estates, to be divested only in case they died without issue living at the time of their decease, and without having disposed of the estate by will.

In *Dowling v. Dowling*, L. R., 1 Ch. App. 615, the testator directed that the interest from his residuary estate should be divided half-yearly between his four sons, "and at the decease of either without lawful issue such share to revert to the remainder then living, or their child or children." Stuart, V. C., held that the sons took only a life estate, and that the children took a remainder by implication, but on appeal (*Dowling v. Dowling*, 1 Ch. App. Ca., 612) his decree was overruled, and it was held: "That each of the four sons took an absolute interest in his share, subject to be divested in case of his dying without leaving issue, and that there was no gift by implication to the chil-

dren of any who might die leaving issue." In the opinion, Turner, L. J., says (page 615 of 1 Ch. App. Ca.): "There is therefore in my opinion an absolute gift to the sons; but this absolute gift is subject to this condition: that upon the death of either of them without issue, the share is to revert to the remainder then living, or their child or children. It appears to me, upon the construction of the whole will, that the children were not to take any interest as against their parents. If the parents are out of the way, then the children are to take in their place; but, so long as there are parents, the children are to take nothing. The testator thought that in that case he had done enough for them, for the parents might provide for their own children."

In *Re Rawlins' Trusts*, L. R., 45 Ch. Div. 299, it is held: "Where in a will there is a gift to A. for life, with a gift over on the death of A. without leaving children, those words are not, by themselves, without assistance from other parts of the will, sufficient to create a gift by implication to the children." This case went on appeal to the House of Lords, where it was affirmed, under the name of *Scale v. Rawlins* (1892) A. C. 342. There it was contended that the construction below led to an absurdity, and that either the niece took an absolute interest in fee simple in the houses, subject to defeasance if she left no children, or there was an implied gift to the children. Lord Halsbury, L. C., says: "It is manifest that, taking either alternative proposition put forward by the appellants, this House, if it is called upon to give that effect to the instrument, must put words into the will in order to do it. The thing has not been done; and I am not aware of any authority which would lead your Lordships to come to the conclusion that, because the testator had at some time or other the intention in his mind to give this property to the person in question, you are justified in saying that he has done so by the instrument which he has executed." Again he says: "Then it is said that he intended to make a gift to the children. Again I say that he does not do so. I cannot say that he had not the intention, but all I can say is that he has not expressed it, and your Lordships cannot put in words, simply because you may have some suspicion that in making his testamentary disposition that was the intention in his mind."

In *Doe ex dem. Barnfield et al. v. Wetton*, 2 Bosanquet & Puller, 324, there was a devise to S. S., her heirs and assigns forever; but, if she shall happen to die leaving no child or children, lawful issue of her body living at the time of her death, then to F. B. and his heirs, and it was held that the devise in fee to S. S., who was not restrained by the subsequent words to an estate tail, and that the devise over to F. B., was a good executory devise. In the opinion Lord Eldon, Ch. J., says: "It has been argued in this

case that it was manifestly the testator's intention that the children and grandchildren of S. Saunders should be benefited. But however that may be, the question is whether the testator intended that the children and grandchildren should be benefited by this will, or by some disposition to be made by S. Saunders. If she had any children living at the time of her death, the estate being given to her in fee, she would have abundant power to provide both for children and grandchildren. Nothing, however, is given to them by this will. They are merely named in the description of the contingency on which the estate is to go over."

In *Den v. Snitcher*, 14 N. J. Law, 53, where there was a devise to a son, and, if he should die without issue, then at his decease over, *Hornblower, C. J.*, says (page 59 of 14 N. J. Law): "It appears to me hardly possible that any intelligent mind, unembarrassed by technical rules and legal refinement can entertain a doubt upon the plain reading of this will that the testator intended his son Samuel should have the whole of the plantation in fee simple in case he had issue, and that at all events he should be the absolute and unconditional owner of one-half of it. He did not intend to give the estate to Samuel's issue, but he intended to give it to Samuel if he had issue." Again he says (page 60 of 14 N. J. Law), referring to the statute of that state providing that a devise without the word "heirs" shall convey an estate in fee simple: "Let us then inquire: First. Did Joseph Copner devise to his son Samuel any lands, etc., without using the words 'heirs and assigns'? He certainly did; and, if he had stopped there, the whole plantation, under the influence of the act of Assembly, would have passed in fee simple to Samuel, the devisee. Secondly. Has the testator used any expressions to show that he intended to give Samuel 'only an estate for life,' in all the lands devised to him? Or, to change the form of the interrogatory, Has the testator used any expressions to show that he did not intend that Samuel should have a fee simple in any part of the lands devised to him? I consider these questions of exactly the same import; for, since the act has declared that a devise to A., without words of perpetuity or inheritance, is a devise in fee simple, we must presume the testator used the words understandingly, and so intended to give the land in fee simple, unless he has used some expressions inconsistent with such intention, or qualifying the general gift, and showing that he did not mean to give the devisee either the whole, or any part, of the land in fee simple."

In *Kinsella v. Caffrey*, 11 Irish Ch. Rep. 154, the master of the rolls, after reviewing a number of cases, says: "I apprehend, therefore, that the authorities may be classed under three heads: First. Where there is an indefinite bequest to the parent, and, if he die without having or leaving children, to B.

In that case it is clear that the children do not take any interest by implication. Secondly. If there is a bequest to the parent for life, and, if he die without having or leaving children, to B., if the parent dies leaving children, they are not entitled by implication. Thirdly. If, however, in a case such as I have last mentioned, there are matters on the face of the will to raise an inference in favour of the children, the court is at liberty to consider these circumstances in connection with the bequest over, in the event of the parent dying without having or leaving children, although such bequest over, by itself, is not sufficient to justify the court inferring a gift in favour of the children." These rules of construction are expressly approved in *Re Rawlins' Trusts*, *supra*.

The case of *Shaw and Campbell v. Hoard et al.*, 18 Ohio St. 227, supports the contention of plaintiff, but it is contrary to the current of authorities, and appears to have been disposed of without reference to any decisions, and upon the conjecture that the testator supposed the property would descend to the children of the wife and daughter, and that this was sufficient to give it to them by implication. The case was decided in 1868, long after the making of the Anderson will, and so cannot be insisted upon as controlling the decision in this case. It is in conflict with other well-considered decisions of this court. In *Niles et al. v. Gray et al.*, 12 Ohio St. 320, where the testator gave real estate to his daughter, and provided that, if she died without any legitimate heir, her part of the real estate should go to his eldest son, and the daughter had children, and conveyed away the land, it was held, in a suit to quiet title by the grantees against the children, and in which the children claimed that the mother took only a life estate, and they took a fee simple, that the mother took an estate in fee simple, subject to be determined by the contingency of her dying without issue living at the time of her death, on the happening of which the estate would pass over to the eldest son by way of executory devise. This case is followed and approved in cases decided subsequently to *Shaw and Campbell v. Hoard*.

The judgment is affirmed.

Judgment affirmed.

PRICE, C. J., and SHAUCK and SPEAR, JJ., concur.

DAVIS, J. (dissenting). It seems to have been conceded at every stage of this case that *Shaw v. Hoard*, 18 Ohio St. 227, if adhered to, would control the judgment in the present controversy; but the circuit court passed over it with the remark that it had been ignored, if not substantially overruled, in cases following *Niles v. Gray*, 12 Ohio St. 320. It is also stated, in the conclusion of the majority opinion above, that *Shaw v. Hoard* is in conflict with *Niles v. Gray* and subsequent

cases which follow the latter. I have no difficulty in distinguishing, to my own satisfaction, *Shaw v. Hoard* from *Niles v. Gray* and cognate cases. Indeed, it has always seemed to me that the distinction was very plainly indicated by the court itself, by Scott, J., in *Carter v. Reddish*, 32 Ohio St. 1, as follows: "The English rule that a devise to A. and his heirs, followed by a devise over in case A. die without issue, will be cut down to a fee tail in A., and the word 'heirs' be construed as meaning issue, is owing to the fact that in that country the words 'dying without issue' are construed as meaning an indefinite failure of issue. 2 Jar. on Wills, 301. In this state, however, it is well settled that the words 'dying without issue' import a dying without issue living at the death of the prior devisee. *Parish's Heirs v. Ferris*, 6 Ohio St. 563; *Niles v. Gregory* (misprint for *Niles v. Gray*) 12 Ohio St. 320. Still, we should have no hesitation in finding, from the language of the will before us, that the testator intended a life estate only for the first devisees, if the sole condition of the limitation over to the nephews and nieces had been the dying of his children without issue, and without reference to the time when they should so die. But such is not the language of the will," etc. An examination of the cases referred to by Judge Scott, as well as the other decisions of this court relied on by the majority, will disclose the fact that he has stated the doctrine of this court with admirable precision and conciseness; and he cannot be presumed to have misunderstood the decisions to which he refers, for he participated in and concurred in both of them. And we will not underrate the authority of the distinction outlined in *Carter v. Reddish*, when we remember that the personnel of the court which made it was not one whit inferior to the highest standards of this court as to breadth of learning, depth of insight, sound discrimination, and analytic power. And still, in *Carter v. Reddish*, notwithstanding those decisions, the court would have had "no hesitation in finding that the testator intended a life estate only for the first devisees," under conditions such as are found in *Shaw v. Hoard* and the case now at bar, but said that such conditions did not exist in *Carter v. Reddish*.

But I waive further elucidation of this proposition, because from my point of view the question as to the nature of the estate devised by this will is merely academic. It is a matter of indifference whether it be a life estate or a determinable fee, because in either case the only power of disposition apparently intended by the testator is by will, as provided in this clause: "Nothing in the foregoing will shall be construed as to deprive either of my sons disposing of their portions by will on their attaining the age of twenty-one years respectively. The above limitations over shall give way to the provi-

sions of such wills." That is to say, the testator gives to his sons the power of appointment by will, and, except in that way only, the property devised cannot be diverted from the family line prescribed by the testator. Whether each of the sons took an estate for life with a contingent remainder over or a fee simple, determinable on the happening of the contingency, he could not defeat the devolution of the property within the family, as prescribed by the testator, except by appointment in a will. I will not discuss this proposition further than to say that this clause of the will stands out as prominent as the Washington Monument, and it cannot be ignored in any fair construction of the will.

The sons of the testator never executed the power of appointment by will. Charles Butler, from whom the defendants in error claim title, by a course of procedure which is, to say the least, very suspicious, obtained from one of them, who had succeeded to the rights of the other, a quitclaim deed for a consideration of "one dollar and other considerations." This deed, as I think I have shown, he had no power to make, even if the transaction was free from fraud. Butler also, at or about the same time, procured from the executors of Henry Anderson a quitclaim upon a like expressed consideration in which it is recited that: "It being understood that the above-described premises were conveyed to Henry Anderson in fee but held by him in his lifetime as a mortgage to secure the payment of a certain sum of money due from Charles Butler and Henry Anderson, which fact, after his death, was duly acknowledged under seal by William Anderson and James H. Anderson, his only heirs at law," etc. As I construe the will, neither the sons of the testator nor his executors and trustees had power to divert the estate by these deeds; and I am constrained to believe that they executed the deeds under mistake and misinformation as to both the law and the facts.

I will not unnecessarily consume space by making any argument of my own to show that not a remnant of title, legal or equitable, remained in Butler after Anderson bought the property at the master commissioner's sale, even after the agreement between Anderson and Butler on October 4, 1844. For brevity's sake I refer to the opinion in *Anderson v. Messinger*, by Severens, J., 146 Fed. 929, 77 O. C. A. 179, 7 L. R. A. (N. S.) 1094. I might add something to that, but it would be fruitless.

(79 Oh. St. 153)

TURNER v. POPE MOTOR CAR CO. et al.  
(Supreme Court of Ohio. Dec. 1, 1908.)

1. TRIAL (§ 162\*)—DISMISSAL—WHEN ALLOWED—FINAL SUBMISSION.

Under favor of subdivision 1 of section 5314, Revised Statutes of 1906, the plaintiff cannot as a matter of right dismiss his action

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

after the final submission of the case to the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 370; Dec. Dig. § 162.\*]

**2. TRIAL (§ 162\*)—MOTION FOR DIRECTED VERDICT—DISMISSAL WITHOUT PREJUDICE.**

Where the plaintiff has introduced his evidence and rested, and each of the defendants has moved the court for a directed verdict on the ground that the plaintiff has failed to make a case for the jury, upon which motions the cause has been submitted to the court and its conclusions thereon announced, the plaintiff has not the right to dismiss the action without prejudice to a future action.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 162.\*]

(Syllabus by the Court.)

**Error to Circuit Court, Cuyahoga County.**

Action by one Turner against the Pope Motor Car Company and the Baker Motor Vehicle Company. Judgment directed for defendants was affirmed in the circuit court, and plaintiff brings error. **Affirmed.**

The plaintiff in error was plaintiff in the court of common pleas, and in his amended petition sets out the grounds of complaint against the two defendants, who are now defendants in error. The scene of his injuries was the Cleveland Driving Park, and he alleges that the Cleveland Automobile Club had leased the park for the purpose of holding a contest of speed of different automobiles, which contest was to be, and in fact was, held on the 5th day of September, 1903. The public was invited to attend and witness the races. Upon this park is a race track separated from the rest of the grounds of said park by an inside and outside fence, in order to keep patrons off the track and in a place of safety. Among the contestants at the entertainment, the plaintiff says the Pope Motor Car Company entered and contested one of their automobiles, called a "Waverly," and that the Baker Motor Vehicle Company entered and contested one of its automobiles called the "Baker." On the day announced these companies started said automobiles in contest around the race track, and that while in said contest they so carelessly and negligently operated their respective automobiles, and drove them at so high a rate of speed, that they lost control of the cars and they collided, and that by reason of the collision the automobile owned and entered by the Baker Motor Vehicle Company was hurled with frightful force and velocity across the track, which the car left, and crashed through the outside fence surrounding said track and into the crowd of spectators witnessing said entertainment. The plaintiff says he was then standing at a safe place outside of said track and fence among the spectators when the Baker motor car left the track, which was about 400 feet from the judges' stand, and it struck the plaintiff, knocked him unconscious, threw him high

in the air, broke his collar bone, dislocated his shoulder, cut a big gash in his leg, etc. He alleges that as a result of said injuries he suffered great bodily pain, and has been permanently injured for life, all because of the carelessness and negligence of said companies, which plaintiff specifies as negligent in so guiding their automobiles around the track, in the speed contest that they collided while moving at a high rate of speed. He then avers that, for want of knowledge of the construction and operation of automobiles, he is unable to more definitely state what part of the automobile defendants used in steering or operating it. He prays for damages in the sum of \$15,000.

The defendants answered separately. Each admits its corporate capacity under the statutes of Ohio. The Baker Motor Vehicle Company admits the holding of the speed contest on the day and at the place named in the petition, admits that its co-defendant, the Pope Motor Car Company, entered one of its autos, called the "Waverly," to contest with one owned by the Baker Motor Vehicle Company called the "Baker." It then denies all and singular the allegations of negligence made against it, and charges that, if plaintiff received injuries at the time mentioned, his own negligence contributed thereto directly. The Pope Motor Car Company made special answer that its place of business is in Toledo, Ohio, and that it has no place of business in Cuyahoga county; that its president, chairman of its board of directors, or trustees, or other chief officers, or its cashier, treasurer, secretary, clerk, or managing agent are not within Cuyahoga county, and never have at any time been therein; that it has no office or place of business in Cuyahoga county, and has no person in charge of an office or place of business therein; that it has no property or debts owing to it in said county, nor has it at any time been found in said county; that the summons in this case was not served in Cuyahoga county upon any of the several officers named in the statute, but that service was made on it in Lucas county. As a second defense the answer denies that it jointly or otherwise carelessly operated any automobile so as to injure plaintiff. The case came on for trial at the April term of the court of common pleas for the year 1903, and the plaintiff introduced his evidence and rested. Thereupon a motion was made on behalf of the Baker Motor Vehicle Company to direct a verdict for that defendant. Mr. Holding, on behalf of the Pope Motor Car Company, moved "to arrest the testimony from the jury and to direct a verdict, first, on the ground that there had been no proof that the Pope Motor Car Company had any machine in this race; and upon the further ground that there has been no negligence shown as against it in any particular."

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Whereupon the court announced: "This motion is sustained as to the Pope Motor Car Company for default of proof of its having entered a car. That must be sustained. There is nothing to show that this car was operated by anybody in the employ of the Pope Motor Car Company and that it owned the car. I find there is no negligence shown against either of these companies, and the motion as to both will be sustained." Thereupon counsel for plaintiff asked for a moment of consultation before anything further was said or done in the case, which was granted by the court. Whereupon counsel for plaintiff returned to the courtroom, and said to the court: "Mr. Ong: I am perfectly satisfied from this deposition and from the claim made here that the Pope Motor Car Company did not enter this car and did not control it. I think there is no doubt about that, but it now develops that a local company, unknown to us until we appeared in this trial, did enter and control it. I have no objection to the granting of this motion as to the Pope Motor Car Company, because they did not enter and control it, but I do not want that motion granted as to the Baker Company, because this plaintiff has a right to bring his action against the party that did enter and control jointly with the Baker. And I am asking that as to the Baker, this action may be dismissed without prejudice." The question of dismissal was then discussed by the court, who announced that he would consider and pass upon the matter at the opening of court the following morning. When court convened, counsel for plaintiff said that: "Before any other order is made or found, plaintiff dismisses this case as to both defendants without prejudice." The statute was cited and question argued to the court. The jury was then called, and Mr. Ong, for the plaintiff, said: "If the court please, before any direction to the jury is given in this case, the plaintiff dismisses the same as to both the defendants without prejudice." The court refused to enter said action dismissed, and directed the jury to return a verdict for the defendants, which was done. The plaintiff saved exceptions to the rulings of the court. A motion for new trial was overruled and judgment rendered on the verdict, which judgment was affirmed by the circuit court.

Error is prosecuted here to reverse both judgments.

D. D. Hurlbut and Walter C. Ong, for plaintiff in error. Goulder, Holding & Masten and Marshall & Fraser, for defendant in error the Pope Motor Car Co. H. H. McKeenan and Hoyt, Dustin & Kelley, for defendant in error the Baker Motor Vehicle Co.

PRICE, C. J. (after stating the facts as above). The plaintiff in error asserts and

discusses two points of error for either of which he claims the judgment of the circuit court should be reversed: (1) That the court of common pleas erred in sustaining the motions of the defendants for a verdict in their favor at the close of the plaintiff's evidence, especially did it err in directing a verdict for the Baker Motor Vehicle Company; there being sufficient evidence to warrant a recovery against it. (2) That the trial court erred in so directing a verdict for defendants after the plaintiff had dismissed his action as to both defendants.

One of the answers made to the first point is that the bill of exceptions considered by the circuit court does not purport to contain all the evidence adduced at the trial, and for that reason that court could not review the case on the weight of the evidence. There is much force in this position, for the record is silent on the subject. It contains the connected testimony of the several witnesses called for the plaintiff, and then the record is: "Thereupon plaintiff rested his case with the understanding that they could call Dr. Copeland when he came in to testify as to the nature and extent of plaintiff's injuries." There is no other reference as to what the bill contains, and it does not affirmatively appear that it contains all the evidence introduced. But, if we look at the judgment entry of the circuit court, it may well be inferred that it considered the bill of exceptions, for it says: "This cause came on to be heard upon the pleadings and the transcript of the record in the court of common pleas and was argued by counsel, and, on consideration of all the assigned errors, the judgment of the said court of common pleas is affirmed. \* \* \*" One of the errors assigned and to which the judgment responds is: "Said court [common pleas] erred in directing the jury to return a verdict for the defendants in error." Therefore there is nothing in the record to show that the lower court refused to review the case on the weight of the evidence, but the language of the judgment indicates the contrary. If that court had refused to consider the case on the weight of the evidence, it could find its justification in the absence of the important certificate or record declaration that the bill contains all the evidence introduced at the trial. If it rightfully considered the bill as to the sufficiency of the evidence, the question is made: Did the trial court err in directing a verdict for defendants? To meet the entire claim of plaintiff in error, and on account of the conflicting claims made by counsel, we have examined the evidence involved in the motions for verdicts, and we are not persuaded that error was committed in sustaining them. In argument counsel for plaintiff below conceded that the evidence failed to make a case against the Pope Motor Car Company, and consent was offered that the court direct a verdict in its favor. As to the Baker Motor Vehicle Company, the

same counsel opposed a directed verdict, "because," as the record shows, "this plaintiff has a right to bring his action against the party that did enter and control [the other car] jointly with the Baker. And I am asking that as to the Baker this action may be dismissed without prejudice." It does not appear that counsel relied on the sufficiency of the evidence as to the Baker Motor Company. The plaintiff's evidence tended to prove that an automobile race was being conducted at the driving park, a ten-mile race on a one-mile track; that the Baker Motor Vehicle Company entered and controlled the car which injured the plaintiff, who was a spectator or patron of the contest. The other car, then supposed to be controlled by the other defendant, the Pope Motor Car Company, on the fourth or fifth round of the race, ran into or collided with the Baker Motor Vehicle Company's car, the result of which was that the latter turned directly across the track and through the fence between it and the spectators on the ground, thus striking Turner and doing him great bodily injury. There was nothing to show why the car was forced in that direction, or what did it. If it was disabled by the collision and put beyond control of its driver, it would seem to be the fault of the driver of the other machine. There is nothing definite or satisfactory in the evidence as to how or why the car ran upon the plaintiff, and it did not tend to establish the material allegations of negligence made in the amended petition. Hence, if the circuit court did weigh the evidence, we are not convinced that it erred in its conclusions. Indeed, counsel for plaintiff appeared cognizant of the weakness of his case, for he insisted on his right to dismiss the action without prejudice as to the Baker Motor Vehicle Company, while he was willing that the court might direct a verdict in favor of the Pope Motor Car Company.

(2) The second point involves an important question of practice, inasmuch as the plaintiff in error, under the provisions of section 5314, Rev. St. 1906, sought to dismiss without prejudice to a future action. The section reads, in part: "An action may be dismissed without prejudice to a future action (1) by the plaintiff before the final submission of the case to the jury, or to the court, when the trial is by the court. \* \* \*" In considering this statute, it is well to recall the status of the case when the right to dismiss was asserted. The plaintiff had rested his case. Immediately each defendant moved the court to direct a verdict in its favor. The record is silent concerning arguments on the motions. Next in order is the decision of the court: "The motion is sustained as to the Pope Motor Car Company for default of proof of its having entered a car. That must be sustained. There is nothing to show that this car was operated by anybody in the employ of the Pope Motor Car Company, and that it owned

the car. I find there is no negligence shown against either of these companies, and the motion as to both will be sustained." As to the Pope Motor Car Company, it is clear that the motion was promptly sustained, and that was directly followed by the finding that no negligence had been shown against either of the companies, and that as to both the motion "will be sustained." The court had reached and announced its conclusion, and, while the words are, "will be sustained," we think they mean that the decision was then made. No further consideration of the motions was intimated. The way to decision was clear. Neither argument nor time to further deliberate was hinted at, or deemed necessary. After the court had thus taken and announced its position, counsel asked a moment for consultation, which was allowed, and at its expiration, as seen in our statement of this case, he expressed his willingness that the motion for verdict in favor of the Pope Motor Car Company be sustained, but as to the other defendant the decision should be different. Then counsel said: "I am asking that as to the 'Baker' this action may be dismissed without prejudice." The subject of the proposed dismissal was then discussed by counsel, upon the conclusion of which the court recessed until the next morning. On convening of court, counsel again took up the subject, and said: "The plaintiff \* \* \* dismisses this case as to both defendants without prejudice"; and cited the statute on the subject, and the right to so dismiss was again argued. The court refused to enter the dismissal, but directed the jury to return a verdict for the defendants. There was no request to withdraw a juror and continue the case; no leave to amend the pleadings or make new parties defendant; and no request that the case be opened up for further testimony or proceedings. The case had already been submitted to the court on the motions for verdicts, and on them the trial was to the court who had heard and determined them, and the time had gone by for the plaintiff to exercise the right of dismissal. The cause had been submitted to the court and its judgment invoked. If the court had the power to exercise discretion on the subject, we cannot find that the discretion was abused in refusing to enter the dismissal at so late a stage in the proceedings.

Other states have similar code provisions as to the right of dismissal of an action, and decisions of the highest courts of some of such states are cited in the brief of plaintiff in error. Holding the light of the foregoing facts before us, we will examine those cases.

First in order is *Harris v. Beam et al.*, 46 Iowa, 118. The headnote reads: "A case is not finally submitted to the jury, within the meaning of section 2844 of the Code, until they have been directed to proceed to the consideration of their verdict, and it may be dismissed without prejudice after the comple-

tion of the charge of the court." The suit was upon a bond of which the plaintiff claimed to be the owner. After the evidence was introduced and the arguments of counsel were concluded, the court in substance instructed the jury that plaintiff had introduced no proof that he was the owner of the claim sued on, and the verdict must be for the defendant. Thereupon the plaintiff offered to dismiss his action. Defendant objected, the objection was overruled, and the action was dismissed. In deciding the case on appeal, the Supreme Court of that state said: "In every case finally submitted there must be some moment of time in which the condition of being finally submitted is assumed. Ordinarily there is no difficulty in determining whether or not a case has been submitted. But the difficulty increases with the approach to the time which marks the line of demarcation between a case finally submitted and one not finally submitted and becomes greatest when that precise time is reached. If the last word of the court's charge to the jury had not been read, it would probably be conceded that no final submission had occurred. But, as the charge had been fully read, it is claimed nothing further remained for court or counsel to do, and that the cause was finally in the hands of the jury. This case presents the question, perhaps, in the most difficult light of which it is susceptible." The court then discusses *Hays v. Turner*, 23 Iowa, 214, and continues: "But that is not a parallel case. In that case the trial was by the court. The court had found the facts and had announced the conclusions of law and was about to pronounce judgment. The cause had been finally submitted to the court, and the court had acted upon it to the extent of finding and settling both the facts and the law. The case was in the same position as a cause tried by jury after the return of the verdict. It is quite clear that in that case it was too late for the plaintiff to dismiss. \* \* \*" We think *Hays v. Turner*, supra, an authority here, for there had been a submission of the cause to the court and on the all-important motions for verdicts. The court had found the facts and announced its conclusions of law in this case, and the formal return of a verdict to comply with the judgment of the court was not essential to a final submission. The evidence had been demurred to and the demurrer sustained, and it remained for the jury to obey that judgment and concur with the court. *Mullen v. Peck*, 57 Iowa, 430, 10 N. W. 829, is another case cited. That was a trial by jury and it presents a situation very different from the case at bar, but follows the doctrine of *Harris v. Beam et al.*, supra.

In chronological order, while it is not cited by plaintiff in error, we find *McArthur v. Schultz*, 78 Iowa, 864, 43 N. W. 223, which is part of the pronounced law of that state. On page 366 of 78 Iowa, page 224 of 43 N. W., the court says of the third proposition in-

volved: "It only remains to say whether upon the record, as shown in appellant's abstract, the court erred in permitting the plaintiff to dismiss at the time he did. The case was fully tried and submitted on November 20th, and on November 21st the plaintiff was granted leave to withdraw all his claim except \$10 interest on the incumbrance without prejudice. Code, § 2844, provides that actions may be dismissed 'by the plaintiff before the final submission of the case to the jury, or to the court, when the trial is by the court.' This is construed to be equivalent to a denial of a right to dismiss after such submission. [Certain cases cited.] If we were to consider the judge's certificate, it only shows that upon the final submission of the cause plaintiff's attorney reserved the right to dismiss without prejudice, in the event the court decided against him. Such a practice cannot be sustained. \* \* \*"

The case of *Morrissey v. Railway Co.*, 80 Iowa, 314, 45 N. W. 545, seems to be the strongest case in support of the contention of plaintiff in error. It is there held that: "Under section 2844 of the Code, providing that a plaintiff may dismiss his action 'before the final submission of the case to the jury, or to the court, when the trial is by the court,' plaintiff had a right to dismiss after the defendant had moved for an order for a verdict on plaintiff's evidence, and the court had intimated that it would sustain the motion, but had made no entry to that effect, and had not yet directed the jury to return a verdict; for as yet there was not a final submission of the case." And *Harris v. Beam*, supra, is cited as authority. We cannot concur in the reasoning of the court, where it is said on page 315 of 80 Iowa, on page 545 of 45 N. W.: "Surely the submission of the motion was not a submission of the case to the court, for whether the motion was overruled or sustained it remained to submit the case to the jury for verdict. \* \* \*" The fallacy of such conclusion is in attaching ultimate importance to the verdict of the jury in such a case. We again say that the finding and judgment of the court on the motion is the determining authority and the directed verdict is compliance with the forms of practice.

In *Oppenheimer Bros. v. Elmore*, 109 Iowa, 196, 80 N. W. 307, the subject was again considered and former rulings followed. The court says on page 198 of 109 Iowa, on page 307 of 80 N. W.: "Defendant's counsel have cited a number of cases from the Supreme Court of Kansas holding that the action of the trial court under such a statute is discretionary, and will not be interfered with on appeal. We have adopted a different rule, and, as it is a rule of practice our own decisions must govern."

*Chicago, M. & St. P. Ry. Co. v. Metalstaff et al.*, 101 Fed. 769, 41 C. C. A. 669, decided by United States Court of Appeals of the Eighth Circuit, and cited by plaintiff in er-

ror, simply holds that the federal courts will usually conform to the rules of practice established by the courts of the state in which the federal court is sitting, and that it followed the practice of the courts in Missouri as to the time a plaintiff might dismiss his action. The Court of Appeals declared no rule of its own, but followed the long settled practice in that state. To the same effect are *Colorado Fuel & Iron Co. v. Menapace*, 16 Colo. App. 200, 64 Pac. 584; *Gassman v. Jarvis* (C. C.) 94 Fed. 608; *Howe et al. v. Harroun*, 17 Ill. 494, cited in brief of plaintiff in error. On the same line is *Vertrees' Adm'r v. Newport News Co.*, 25 S. W. 1, 95 Ky. 314.

But there is an array of cases where adverse holdings are made. Kansas is a Code state, and its statute touching the point here at issue is similar to our own. In *St. Joseph & Denver City R. R. Co. v. Dryden*, 17 Kan. 278, *Brewer, J.*, stated the question to be whether the district court abused its discretion in refusing to open up a case and permit the plaintiff to offer further testimony after it had sustained a demurrer to the evidence. The court refused permission, and then the plaintiff moved for leave to dismiss the action without prejudice, but the court overruled the motion and rendered judgment in favor of defendant for costs. Among other things the court say, on page 280: "Where a demurrer to the evidence is sustained, the case is ready for judgment. It has been finally submitted to the court, and the plaintiff has no more right to dismiss than he has after a verdict is rendered. The case is decided, and the plaintiff has no right to avoid that decision by a dismissal." In *State v. Scott*, 22 Neb. 628, 36 N. W. 121, it is held (1) that under the practice of that state (code provision) "the plaintiff cannot as a matter of right dismiss an action after the final submission of the case to the court." (2) "Where a cause was submitted to the court on a demurrer to the petition and a decision rendered sustaining the demurrer, but no opinion filed, and afterwards, and before the preparation of the opinion, the plaintiff attempted to dismiss the action, to which the defendant objected, held, that the attempt to dismiss was unavailing, and that, the cause having been finally submitted, final judgment in the case would be rendered." The provision of the Nebraska Code is the same as in this state. In fact, the court say in the opinion (page 639 of 22 Neb., page 120 of 36 N. W.) that it was "copied verbatim from section 372 (old number) of the Ohio Code," and refers to its construction as found in *Beaumont et al. v. Herrick*, 24 Ohio St. 446, of which we will speak again. In *Bee Building Co. v. Dalton*, 68 Neb. 38, 93 N. W. 930, the Supreme Court of Nebraska again passed on the question. *Dalton* sued the *Bee Building Company* to recover damages for a personal injury. A jury was impaneled to try the issues, and, the plaintiff hav-

ing submitted his case, defendant moved the court to direct a verdict in its favor on the ground that there was neither averment nor proof of an actionable wrong. The motion was sustained, but, before the peremptory instruction could be given, the plaintiff asked that the case be dismissed without prejudice, and his request was granted by the trial court. The Supreme Court held this to be error. In the opinion by *Sullivan, C. J.*, is found a forceful statement of the law of that case. On page 40 of 68 Neb., on page 930 of 93 N. W., it is said: "The contention of counsel for plaintiff is that the trial was to the jury and that there could be no submission of the case until the jury had complete authority to deal with it. This argument is plausible, but we cannot believe that it is sound. It is true a jury was impaneled, but it is equally true that the case was tried by the court, and not by the jury. The case was submitted on an issue of law, and the determination of that issue eliminated the jury and ended the controversy. After it had been adjudged that the plaintiff had no case, and that there was no issue of fact to be decided, the direction, reception, and recording of a verdict would have been mere ceremonial acts. These acts would, we know, be in accordance with conventional procedure. They would satisfy the requirements of judicial formalism, but they would be as useless and idle, and almost as absurd, as the archaic practice of withdrawing a juror in order to secure a continuance. To direct a jury to return a verdict in favor of the defendant would have been to command the triers of fact to ratify a decision already made by the court upon a question of law. When the Legislature, in section 430, spoke of 'the final submission of the case to the jury,' it must have had in mind the submission of a disputed question which might be resolved by the jury in favor of either party. In this case there was no issue of fact. The court so decided. \* \* \* In every such case the judgment rests not on a decision of a question of fact, but wholly and exclusively upon the decision of a question of law. When it was determined that the plaintiff had failed to make a case, the court might, without taking from the jury a meaningless verdict, have proceeded at once to render judgment in favor of defendant. To be sure, the procedure would not be according to established usage, but it would be legal and logical and in harmony with modern methods of transacting business. \* \* \* Indeed, the very essence of a decision sustaining a demurrer to evidence is a denial of the litigant's claim that he is entitled to a jury trial. \* \* \*" As to what constitutes a final submission of a case to the jury under certain circumstances, see *Drummond v. L. & N. R. Co.* (C. C.) 109 Fed. 531, also *Huntt v. McNamee*, 141 Fed. 293, 72 C. C. A. 441; *Cahill v. Railway Co.*, 74 Fed. 285, 20 C. C. A. 184. Many cases might be added to the

list, but in our judgment they are not necessary.

But coming home to our own state, we find at least one case which supports the judgment under review: *Beaumont et al. v. Herrick*, 24 Ohio St. 445. It was there held: "(3) Where a case is submitted to the court on a demurrer to the answer, the ground of the demurrer being that the answer does not contain a defense, and the demurrer is overruled, the plaintiff cannot, without the leave of the court, dismiss his action without prejudice. The submission of the case on the demurrer is a final submission of the case within the meaning of section 372 of the Code, unless leave is obtained to reply or amend. (4) Whether, in such case, after the overruling of the demurrer, the plaintiff should have leave to reply, or to amend his petition, is a matter resting in the sound discretion of the court. If the exercise of such discretion is reviewable on error in any case, it can only be where the record shows, in view of all the circumstances under which the court acted, an abuse of discretion, resulting in a denial to the party of a fair trial." Omitting the long statement of that case, it is sufficient to say here that the original petition was filed in the court of common pleas, and afterwards a demurrer was sustained to an amended petition on the ground that it did not show a cause of action, and the petition was dismissed. The case was taken on appeal to the district court, and there another amended petition was filed. The defendant answered and plaintiff demurred to the answer. The demurrer was overruled and the petition dismissed. On overruling of the demurrer, application was made to amend the petition by setting up additional matter. The court refused the leave asked. Plaintiff's counsel then represented to the court that the demurrer to the answer was filed in good faith, and asked leave to reply to the answer. This was refused. Thereupon plaintiff asked leave to dismiss the action without prejudice which was also refused. Error was prosecuted in this court to reverse the judgment dismissing the petition. On that branch of the case *White, J.*, on page 457, says: "We see no error in this refusal of the court. The submission of the case on the demurrer was a final submission of the case within the meaning of section 372 (old number) of the Code, unless leave was obtained to reply or amend. Without additional pleading, the legal consequence of the overruling of the demurrer was a judgment of dismissal." The court then discusses the action of the court in refusing leave to amend or reply, and found no error.

To recognize in our practice the claim that is made by plaintiff in error would give a plaintiff the right, when he fails to make a case, and it is so decided, to thwart the con-

test on his own evidence, dismiss without prejudice, and again bring the defendant in to some court to answer a similar demand, with all the attendant costs; and, if it can be done once, it may be done a second or third time, thus prolonging the expensive and annoying litigation. This system of practice should not be encouraged, and we therefore think it our duty to affirm the judgment of the circuit court.

Judgment affirmed.

SHAUCK, SUMMERS, SPEAR, and DAVIS, JJ., concur.

(79 Oh. St. 121)

YEAGER et al. v. TUNING et al.

(Supreme Court of Ohio. Dec. 1, 1908.)

1. EASEMENTS (§ 2\*)—WHAT CONSTITUTES.

The right of an owner of an estate to erect and maintain, or to cause to be erected and maintained, a line of telephone poles over the estate of another for the benefit of the former, is an easement.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 8; Dec. Dig. § 2.\*]

2. EASEMENTS (§ 1\*)—CREATION.

An easement can be created only by deed or by prescription.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 1; Dec. Dig. § 1.\*]

3. LICENSES (§ 44\*) — DISTINGUISHED FROM EASEMENT.

A parol agreement by several adjoining landowners to erect and maintain telephone poles on their respective lands, and to contribute equally to the expense of stringing wires thereon, and of operating a telephone line, does not create an easement, but is merely a parol license, and is revocable by any one of such owners, although in reliance thereon the poles have been erected and the line constructed.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 44.\*]

(Syllabus by the Court.)

4. EASEMENTS (§ 1\*)—DEFENSES.

An easement is a right without profit created by grant or prescription, which the owner of one estate may exercise in or over the estate of another for the benefit of the former.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2305-2311; vol. 8, pp. 7646-7647.]

5. LICENSES (§ 43\*).

A license is a personal, revocable, and non-assignable privilege conferred either by writing or parol to do one or more acts on land without possessing any interest therein.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 96; Dec. Dig. § 43.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4133-4141; vol. 8, p. 7706.]

Davis, J., dissenting.

Error to Circuit Court, Gallia county.

Action by Garret Yeager and others against John P. Tuning and others. A demurrer to the petition was sustained in the circuit court, and plaintiffs bring error. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is averred in the petition that the plaintiffs and the defendants mutually agreed orally to construct a telephone line over and across their respective lands and to their respective residences thereon to enable them to have telephonic communication with each other and with persons on other lines with which such line might be connected; that each agreed at his own expense to erect and maintain a certain number of poles, and that the plaintiffs and defendants agreed to contribute equally money to purchase and string the wires and to contribute equally sufficient money to repair and maintain the line; that the line was constructed as agreed; that it was of a permanent nature and of the value of \$250; that each of the parties expended about \$15 additional for telephone boxes and other appliances, and that the line was in use for about three years, and until shortly before the filing of the petition when certain of the defendants cut the wires and cut down certain of the poles and rendered the line in places useless, and they pray for a mandatory order requiring the replacing of the poles and the restoring of the line, and for an injunction against the destruction or interference with the line in the future. The case went to the circuit court on appeal, where a demurrer was sustained and the petition dismissed.

R. M. Switzer, for plaintiffs in error. H. C. Johnston and E. D. Davis, for defendants in error.

SUMMERS, J. (after stating the facts as above). If the plaintiffs are entitled to a specific performance of the agreement, then they have an easement created by parol in the lands of the defendants. An easement is a right without profit, created by grant or prescription, which the owner of one estate may exercise in or over the estate of another for the benefit of the former. A license is a personal, revocable, and nonassignable privilege, conferred either by writing or parol, to do one or more acts upon land without possessing any interest therein. *Greenwood Lake & P. J. Railroad Co. v. N. Y. & G. L. Railroad Co.*, 134 N. Y. 435, 31 N. E. 874. Section 4198, Rev. St., provides that: "No lease, estate or interest, either of freehold or term of years, or any uncertain interest of, in, or out of lands, tenements, or hereditaments, shall be assigned, or granted, except by deed, or note in writing, signed by the party so assigning or granting the same, or his agent thereunto lawfully authorized, by writing, or by act and operation of law." This statute would seem to settle the question of the right to a decree for specific performance against the plaintiffs, but it is contended that it is the well-settled law of this state that such an agreement is a parol license, and that such license, when executed is irrevocable. Mr. Freeman in a note to *Lawrence v. Springer*,

49 N. J. Eq. 289, 24 Atl. 933, 31 Am. St. Rep. 702-715, says: "At common law a parol license to be exercised upon the land of another creates an interest in the land, is within the statute of frauds, and may be revoked by the licensor at any time, no matter whether or not the licensee has exercised acts under the license, or expended money in reliance thereon. In many of the states this rule prevails, while in others the licensor is deemed to be equitably estopped from revoking the license, after allowing the licensee to perform acts thereunder, or to make expenditures in reliance thereon. These two lines of cases cannot be reconciled; for one of them holds that an interest in land cannot be created by force of a mere parol license, whether executed or not, while the other declares that where the licensee has gone to expense, relying upon the license, the licensor may be estopped from revoking it, and thus an easement may be created. The former line of cases, it seems to us, is founded upon the better reason. They decide that a parol license to do an act on the land of the licensor, while it justifies anything done by the licensee before revocation, is revocable, at the option of the licensor, and this although the intention was to confer a continuing right, and money has been expended by the licensee upon the faith of the license. Such license cannot be changed into an equitable right on the ground of equitable estoppel." To the same effect is *Browne on the Statute of Frauds*, § 31; *Jones on Easements*, § 84; *Bigelow on Estoppel* (5th Ed.) 666.

In *Lawrence v. Springer*, 49 N. J. Eq. 289, 24 Atl. 933, 31 Am. St. Rep. 702, *Beasley, C. J.*, says: "It has not been, and it cannot be, denied that such a grant as the one in question cannot be enforced in a court of law. Such easements, being incorporeal, lie in grant, and their creation requires an instrument under seal. Nor is it questioned, nor questionable, that a parol imposition of a servitude of this kind upon land is in flat contradiction of the statute of frauds. It is true, indeed, that in one class of cases, as is well known, courts of conscience have felt dispensed from putting in force the provisions of that act. This has been the course pursued where a parol agreement for the purchase of lands, or of some interest in them, has been performed to the extent of possession having been taken in part execution of such contract. But, while this is the undeniable rule in equity, it should be ever borne in mind that its introduction has been regretted by the wisest judges. 'The statute,' says Lord Redesdale, 'was made for the purpose of preventing perjuries and frauds, and nothing can be more manifest to any person who has been in the habit of practicing in courts of equity than that the relaxation of that statute has been a ground of much perjury and much fraud. If the statute had been vigorously observed, the result would

probably have been that few instances of parol agreements would have occurred. Agreements from the necessity of the case would have been reduced to writing. Whereas it is manifest that the decisions on the subject have opened a new door to fraud.' And these strictures are pointed with the emphatic declaration that 'it is therefore absolutely necessary for courts of equity to make a stand, and not carry the decisions further.' *Lindsay v. Lynch*, 2 Schoales & L. 4. And in the same vein, Judge Story (2 Story's Eq. Jur. § 766) says that 'considerations of this sort have led eminent judges to declare that they would not carry the exceptions of cases from the statute of frauds further than they were compelled to do by former decisions.' To the same purpose are the criticisms of Chancellor Kent in *Phillips v. Thompson*, 1 Johns. Ch. 149, and of Chancellor Zabriskie in *Cooper v. Carlisle*, 17 N. J. Eq. 529." Pomeroy, in his work on Specific Performance of Contracts, referring to the doctrine of the irrevocability of a parol license when executed, says that it is opposed to the common-law doctrine concerning licenses as it prevails in England and in most of the American states. In *Rodefer v. Railroad*, 72 Ohio St. 272, 74 N. E. 183, 70 L. R. A. 844, the opinion of Andrews, J., in *Crosdale v. Lanigan*, 129 N. Y. 604, 29 N. E. 824, 26 Am. St. Rep. 551, was quoted from at length with approval, and it is unnecessary to repeat here what was said there. In that opinion he says that it is plainly the rule of the statute, as well as the rule required by public policy, that such a license, though executed, is revocable. See, also, *Hicks v. Swift Creek Mill Company*, 133 Ala. 411, 31 South. 947, 57 L. R. A. 720, 91 Am. St. Rep. 38; *Pitzman v. Boyce*, 11 Mo. 387, 19 S. W. 1104, 33 Am. St. Rep. 536; *Thoenke v. Fiedler and Another*, 91 Wis. 386, 64 N. W. 1030; *Stewart v. Stevens*, 10 Colo. 440, 15 Pac. 786; *St. Louis National Stock Yards v. Wiggins Ferry Company*, 112 Ill. 384, 54 Am. Rep. 243. The cases are too numerous to cite, but may be readily found by reference to the reports and textbooks already cited.

The early cases were grounded on some early English cases which were overruled in the leading case of *Wood v. Leadbitter*, 13 Meeson & W. 838. The cases of *Wilson et al. v. Chalfant*, 15 Ohio, 248, 45 Am. Dec. 574, and *Hornback v. Cincinnati & Zanesville Railroad Company*, 20 Ohio St. 81, are cited as supporting the doctrine of the irrevocability of such a license. The former seems to have been based upon precedents that were in accord with the early English decisions, which, as we have seen, have been overruled. The later case is not authority for the doctrine, but is a case of a parol agreement for the purchase of an interest in lands which has been performed to the extent of possession having been taken in part execution of

the contract. The later case decided by the Supreme Court Commission (*Wilkins v. Irvine*, 33 Ohio St. 138) is not in accord with the earlier doctrine, but is in accord with the modern doctrine, and it is there held that: "A written license, without seal and unacknowledged to enter upon and imbed water pipes in the land of another, with privilege to enter and repair them, creates no interest in, nor incumbrance upon, the land such as will disable the owner thereof from making a good and sufficient deed conveying a good title thereto." It may be added that in that case the written license had been executed, and in the opinion it is said (page 144): "It gave the Cleveland Rolling Mill Company no dominion over the land, nor did it create, in its favor, an easement in the land. If its terms had been violated by Brooks or his grantees, the jurisdiction of a court of equity could not have been successfully invoked to enforce a specific performance. The remedy, if any it had, would have been an action for damages."

Judgment affirmed.

PRICE, C. J., and SHAUCK, CREW, and SPEAR, JJ., concur.

DAVIS, J. (dissenting). The contrary rule has been a rule of property in this state for more than 60 years. *Wilson v. Chalfant*, 15 Ohio, 248, 45 Am. Dec. 574. It is in the strictest sense *stare decisis*, and is no longer an open question for the courts. If there is any demand for a change of the law, the Legislature alone is competent to decide whether a change so vital to property rights which have been acquired under the existing rule should be made.

(200 Mass. 340)

#### LYNCH v. LYNN BOX CO.

(Supreme Judicial Court of Massachusetts. Essex. Jan. 4, 1909.)

##### 1. MASTER AND SERVANT (§ 288\*)—INJURY TO SERVANT—ASSUMPTION OF RISK—QUESTION FOR JURY.

Whether an employé, injured while working on a heading machine in a box factory by having his hand drawn against the saw in consequence of a defect in the machine, assumed the risk, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.\*]

##### 2. MASTER AND SERVANT (§ 288\*)—INJURY TO SERVANT—ASSUMPTION OF RISK—QUESTION FOR JURY.

The fact that an employé, working on a heading machine in a box factory, knew that the machine was defective, and that boards at times hit the spreader and caused his hand to jump, does not, as a matter of law, show that he appreciated and assumed the risk of injury by having his hand thrown onto the saw by the tendency which the machine had to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cause his hand to jump when a board hit the spreader.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.\*]

Report from Superior Court, Essex County; John C. Crosby, Judge.

Action by Arthur L. Lynch against the Lynn Box Company. There was a verdict for plaintiff, and the cause was reported to the Supreme Judicial Court for determination on the question whether on the evidence there was an issue proper for submission to the jury. Judgment on the verdict.

James H. Sisk, William E. Sisk, and Richard L. Sisk, for plaintiff. Matthews, Thompson & Spring and Woodbury Rand, for defendant.

MORTON, J. This case was before this court in 194 Mass. 306, 307, 80 N. E. 580, on the plaintiff's exceptions to a ruling directing a verdict for the defendant, and it was there held that the case should have been submitted to the jury. The case has been tried a second time and it comes before us now upon a report by the presiding justice made pursuant to a stipulation entered into by the parties at the close of the plaintiff's evidence that the jury should "return a verdict for the plaintiff in the sum of \$2,000 and the case \* \* \* be reported to the Supreme Judicial Court for its determination on the question whether upon the evidence presented there was an issue proper for submission to the jury." If there was, judgment is to be entered on the verdict. If there was not, judgment is to be entered for the defendant.

The defendant does not seriously contend that there was not evidence warranting a finding that the machine was defective, and that its condition was due to negligence on the part of the defendant. Neither does it seriously contend that the evidence did not warrant a finding that the accident was due to the defective condition of the machine. Its main contentions are that the risk was an obvious one and that the plaintiff assumed it, and was not in the exercise of due care.

The evidence, especially in regard to the plaintiff's knowledge of the condition and operation of the machine, is fuller than it was at the former trial, but it is not such, we think, as to warrant us in saying that there was no issue for the jury. The testimony in regard to the plaintiff's occupations before he entered the defendant's employment and as to what he did after he entered its employment down to the time of the accident was substantially the same as at the former trial. There was no testimony at this trial as there was at that from the defendant's superintendent that he instructed the plaintiff in regard to the operation of the machine, and the plaintiff's testimony that he received no instruction was left uncon-

tradicted. The evidence at this trial tended rather to show that the plaintiff had worked less upon the machine than appeared to have been the case at the previous trial, and that his work upon it had been more intermittent and desultory. But the defendant contends that in view of the plaintiff's familiarity with the condition and operation of the machine as shown by his testimony at this trial, and in view of the fact that during the time that he worked upon the machine boards hit the spreader and caused his hand to jump "real often," to quote his words, he must be deemed to have understood that such an accident as occurred might happen and therefore to have assumed the risk. And it further contends that these facts render the case as now presented distinguishable from the case presented at the other trial. But it does not follow as matter of law that, because the plaintiff knew that the machine was defective and that boards at times hit the spreader and caused his hand to jump, he appreciated and assumed the risk of such an accident as happened. He might well have continued to work upon the machine without understanding or appreciating the fact that his hand was liable to be thrown onto the saw by the tendency which the machine had to make his hand "jump" when a board hit the spreader. His knowledge in regard to the machine and its operation would not necessarily preclude him from recovery. It would be for the jury to say, taking all the circumstances into account, whether he appreciated and assumed the risk. *Wagner v. Boston Elev. Ry.*, 188 Mass. 437, 74 N. E. 919; *Finnegan v. Winslow Skating Mfg. Co.*, 189 Mass. 580, 76 N. E. 192; *Urquhart v. Smith & Anthony Co.*, 192 Mass. 257, 78 N. E. 410; *Cahill v. New England Tel. & Tel. Co.*, 193 Mass. 415, 79 N. E. 821. He testified that he was operating the machine in the usual way when injured, and it could not be ruled, therefore, as matter of law that he was not in the exercise of due care.

Judgment on the verdict.

(199 Mass. 483)

#### OLD DOMINION COPPER MINING & SMELTING CO. v. BIGELOW.

(Supreme Judicial Court of Massachusetts. Suffolk. Sept. 4, 1908.)

APPEAL AND ERROR (§ 1106\*)—PROCEEDINGS ON APPEAL—MOTION FOR LEAVE TO FILE SUPPLEMENTAL ANSWER—DISPOSITION.

The court, on appeal from a decree of a single justice in a suit in equity, will, on defendant moving for leave to file a supplemental answer in bar, set aside the decree and remit the cause for hearing before a single justice on the question whether defendant shall be allowed to file the supplemental answer, and for a hearing on the merits, on the motion being granted, and reserving to the parties the right of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4391; Dec. Dig. § 1106.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Supreme Judicial Court, Suffolk County.

Bill in equity by the Old Dominion Copper Mining & Smelting Company against Albert S. Bigelow. From a decree granting insufficient relief, plaintiff appealed. Defendant moved for leave to file a supplemental answer in bar to plaintiff's claim. Decree vacated, and cause remitted for hearing before a single justice.

Bill in equity, filed in the Supreme Judicial Court on October 7, 1902, a description of which will be found in 188 Mass. 316-320, 74 N. E. 653, 108 Am. St. Rep. 479.

The case was reserved upon demurrer for determination by the full court. On June 19, 1905, the demurrer was overruled by a decision reported in 188 Mass. 315, 74 N. E. 653, 108 Am. St. Rep. 479.

On December 10, 1907, after a hearing on the merits, Sheldon, J., made a decree that the plaintiff should recover from the defendant a sum of money found by the justice to be due to it from him, with interest from a date named, and that execution should issue against the defendant for the total sum with costs. On December 24, 1907, the plaintiff appealed. On January 6, 1908, the defendant appealed.

While the appeals were on the docket of the full court, the defendant made a motion to be allowed to file a supplemental answer, setting up as a bar to the plaintiff's claim a judgment of the Circuit Court of the United States for the Southern District of New York, entered on July 23, 1908, in a suit in equity entitled "Old Dominion Copper Mining & Smelting Co. v. Frederick Lewisohn & Others, Executors."

Arguments were heard upon the motion at a special sitting of the full court at Boston on September 3, 1908.

Argued before KNOWLTON, C. J., and MORTON, LORING, SHELDON, and RUGG, JJ.

L. D. Brandles and E. F. McClennen, for plaintiff. C. G. Littlefield and A. Hemenway (J. W. Farley, on the brief), for defendant.

PER CURIAM. Ordered, that the clerk make the following entry, viz.:

"The defendant having made an application for leave to file a supplemental answer, the decree is vacated and the case is remitted for hearing before a single justice upon the question whether the defendant shall be allowed to file the supplemental answer, and, if his motion for leave to file the supplemental answer is allowed, for a further hearing upon the matters set up in this answer, and for reversal or such modification of the original decree, if any, as ought to be made by reason of these matters. After the hearing or hearings the original decree, un-

less reversed, is to be entered with or without such modification, and the parties shall have the same right of appeal as they had when the decree was first made, or the justice may reserve for the full court the questions that arise upon the supplemental answer."

(237 Ill. 9)

# HUDSON et al. v. HUDSON.

(Supreme Court of Illinois. Dec. 15, 1908.)

## 1. WITNESSES (§ 185\*) — INCOMPETENCY — TRANSACTIONS WITH DECEDENT.

The statute rendering complainants incompetent witnesses for themselves, in a suit against one defending as administrator and heir of a decedent, does not apply to a suit by heirs of a deceased grantor against a coheir to set aside a deed to defendant on the ground of the grantor's incapacity to make it and fraud and undue influence of the grantees in procuring it, since the defendant defends, as grantee and not as heir.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 572; Dec. Dig. § 185.\*]

## 2. DEEDS (§ 196\*)—EVIDENCE—PRESUMPTIONS—VALIDITY.

There is no presumption of law that a conveyance from a parent to a child is procured by fraud or undue influence, but there must be proof of fraud or undue influence in fact.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 587; Dec. Dig. § 196.\*]

## 3. DEEDS (§ 211\*) — EVIDENCE — WEIGHT AND SUFFICIENCY—VALIDITY.

Evidence, in an action to set aside a deed by a parent to a child, examined, and held insufficient to show fraud and undue influence of the grantee in procuring a deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 641, 645; Dec. Dig. § 211.\*]

Appeal from Circuit Court, Montgomery County; S. L. Dwight, Judge.

Suit by George Hudson and others against William H. Hudson. From a decree for defendant, complainants appeal. Affirmed.

Lane & Cooper and L. V. Hill, for appellants. Jett & Kinder, for appellee.

CARTWRIGHT, C. J. The appellants, George Hudson, Marion Hudson, James Hudson, Nellie Durston, and Ida Dixon, sons and daughters of Rhoda Hudson, deceased, by their amended bill asked the circuit court of Montgomery county to set aside a deed of 42 acres of land executed by said Rhoda Hudson on February 12, 1907, to her son, the appellee, William H. Hudson, and to set aside an assignment by said Rhoda Hudson to William H. Hudson of a certificate of deposit for \$800, issued to her by the Nokomis National Bank, and to require said defendant to account to the complainants for the same. The grounds alleged for the relief prayed for were incapacity of Rhoda Hudson to make the deed and assignment, and fraud and undue influence of William H. Hudson in procuring her to make the same.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The incapacity and all charges of fraud and undue influence were denied, and the witnesses for the respective parties were heard by the chancellor in open court, resulting in a finding in favor of the defendant. The bill was therefore dismissed at the cost of complainants for want of equity, and from the decree this appeal was taken.

The testimony was to the following effect: Rhoda Hudson was 72 years old at the time of the transaction, and had consumption, with which she had been afflicted for a year or more, and there was no hope of her recovery. She owned 42 acres of land, and had lived on it with her two sons, William H. Hudson and George Hudson, for 16 or 17 years, since the death of her husband, and the three constituted the family. The day before the deed was made, William H. Hudson, James Hudson, and a daughter of James Hudson were present in the bedroom of Rhoda Hudson, and she then proposed to make a deed of the land to James Hudson, but he said he did not want it. She then asked William whether he would divide the land equally with James, if she made a deed to him, and give George Hudson \$400 of the money from the certificate of deposit. William said that he would, and if she made the deed to him he would make part of the land over to James and give George \$400. James said that it would be all right for her to make the deed to William, and he would be satisfied to get 20 acres. The next morning William and James went to the office of Baxter Williams, a notary public, and told him that they wanted the deed made, and he told them to bring in the old deed and he would prepare the deed at his leisure. Later in the day William took the old deed, containing the description of the property, to the notary, and the notary filled out a deed and went to the farm residence in the evening to have it executed. That was February 12, 1907, and Charles Tobias, who lived on an adjoining farm, also came to witness the deed. The notary gave the deed to Tobias and told him to explain it to Mrs. Hudson. Tobias told Mrs. Hudson that they had come to fix the deed, and asked her if she understood it, and she said, "Yes." He told her that this was a warranty deed from her to William, and she asked if it was for all of her land, and he told her, "Yes." She replied that she wanted it all to go to William, as he had stayed with her and been good to her, and she asked the witness what he thought about it. He told her that was not for him to say; that he was not there to dispose of her property, but only to do what she wanted. She then signed the deed by her mark, and acknowledged it. The notary was going to take the deed back to put on his seal, and asked her what he should do with it, and she said to give it to William—that it would be his. William was not in the room when the deed was executed, and a

daughter of James was present. James Hudson got the deed from the notary and had it recorded and paid the recorder's fee, thinking at that time that he would get one-half of the land.

Mrs. Hudson had \$800 deposited in the Nokomis National Bank, and held a certificate for the deposit dated March 21, 1906. In June, 1906, Henry S. Baker, was at her home, and she told him she wanted William and George to receive the \$800 equally, and wanted it transferred to the boys in case she died. Baker wrote an indorsement on the certificate making it payable to William and George, and also wrote this on it: "In case she gets well, to become null and void." She signed the indorsement with her mark, and Baker witnessed it. On February 25, 1907, Mrs. Hudson handed the certificate to Dr. M. L. Moyer and asked him to erase George's name, saying that she wanted William to have it to pay her expenses and build a tombstone and have the balance. The doctor erased George's name with a pen, she holding the end of the pen as he drew it through the name, and the doctor signed his name as a witness. Mrs. Hudson gave to the doctor her reasons for making the change, and he handed her back the certificate. William Hudson took the certificate to the bank, and the cashier told him that the language on the certificate made a qualified indorsement, and William took the certificate away and afterward returned it with the words, "In case she gets well, to become null and void," erased, and the cashier paid the money to William on February 28, 1907. She died March 10, 1907. George testified that his mother's directions were to pay her funeral expenses and put up a monument out of the \$800, and after William got the money he asked him to take out the monument expenses, amounting to \$225, which William had paid, and to give him his half, and when the indorsement was first made George took the certificate down to the bank and let the banker look at the indorsement and see if it was all right.

There was much testimony as to the condition of Mrs. Hudson at the time of the transactions, and all the witnesses agreed that she was very weak physically and very much emaciated. She had suffered from consumption for more than a year, and her case was hopeless. James and George in their testimony did not express any opinion as to whether she was competent to transact business at the time the deed was made, but a number of witnesses expressed the opinion that she was not competent. An examination of their testimony leads to the conclusion that their opinion was based on her weak physical condition, and it was the opinion of a number of other witnesses that she was entirely capable of transacting business. She knew her friends and talked with them when they came to see her, and on the oc-

casion when the deed was executed there were a few minutes of conversation about her health before the notary took the deed out of his pocket. So far as appears from any testimony, she talked rationally at all times and showed no signs of any mental disturbance. George and James were both perfectly satisfied with the transaction provided they got their half, and the real trouble seems to be that William did not carry out the agreement which they alleged. That fact, if it is a fact, would not confer any right upon the complainants in their relation to their mother as heirs at law. The chancellor heard the witnesses and had superior opportunities to determine what weight should be given to the opinions of witnesses as to the competency of Mrs. Hudson to make the transfers, and we cannot say that his finding was wrong.

In coming to that conclusion, the testimony of the complainants in their own behalf is regarded as competent and has been considered. It is contended here that they were not competent, and the decision in *Guild v. Warne*, 149 Ill. 105, 36 N. E. 635, is relied upon as so holding. In that case the defendants were the administrator and heirs of John W. Guild, and were defending in that capacity, so that the statute rendered their adversaries incompetent; but in this case William H. Hudson was not defending as the heir at law of his mother, but as grantee, and the complainants were competent to testify. *Gage v. Eddy*, 179 Ill. 492, 53 N. E. 1008.

There is no presumption of law that a conveyance from a parent to a child is the product of fraud or undue influence (*Sears v. Vaughan*, 230 Ill. 572, 82 N. E. 881), but there must be proof of fraud or undue influence in fact. In this case it appears that the deed was made by Mrs. Hudson of her own free will; that she proposed to make it to James, and, when he declined, it was made to William, who was absent when the deed was executed. There is an entire absence of any evidence tending to prove fraud or undue influence at the time the deed was executed. The certificate of deposit was originally indorsed to the two sons William and George, but afterward the name of George was erased at the request of Mrs. Hudson by Dr. Moyer, and there is nothing tending to show that her action was by the persuasion or with the connivance of William. There is no evidence that there was any fraud in the subsequent erasure making the indorsement absolute instead of qualified, and as matter of fact she did not recover, so that William would have been entitled to the money in any event. Whether he made an agreement to divide the land with his brother James, and the money, over and above the funeral expenses and cost of the monument, with

George, and then failed to keep his agreement, is not involved in this case.

We find no reason for disturbing the decree, and it is affirmed.

Decree affirmed.

(237 Ill. 300)

# SINGS et al. v. CITY OF JOLIET.

(Supreme Court of Illinois. Dec. 15, 1908.)

## 1. HEALTH (§ 14\*)—POLICE POWER—ABATEMENT OF NUISANCES—INFECTED BUILDINGS.

A city in the exercise of its police power may declare a building infected with disease germs a public nuisance and have it destroyed, if that was the only method of preventing the disease from spreading.

[Ed. Note.—For other cases, see *Health*, Cent. Dig. § 12; Dec. Dig. § 14.\*]

## 2. HEALTH (§ 14\*)—INFECTED BUILDINGS—PUBLIC NUISANCE—ABATEMENT—SUMMARY REMEDIES.

In the exercise of the police power of a city, the maxim that the people's safety is the supreme law, as well as that requiring the use of one's property so as not to injure others, should be given effect, and property may be summarily declared a public nuisance and destroyed without hearing or previous notice to the owner, when necessary to insure the public safety.

[Ed. Note.—For other cases, see *Health*, Cent. Dig. § 12; Dec. Dig. § 14.\*]

## 3. MUNICIPAL CORPORATIONS (§ 623\*)—POLICE POWER—ABATEMENT OF NUISANCE.

Under Hurd's Rev. St. 1908, c. 24, § 62, par. 75, giving the city council power to declare what shall be a nuisance and to abate it, the decision of the city council that a building was a public nuisance was not final, but the question may be adjudicated in an action for damages for its destruction.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1371-1374; Dec. Dig. § 623.\*]

## 4. MUNICIPAL CORPORATIONS (§ 623\*)—POLICE POWER—ABATEMENT OF NUISANCE—WRONGFUL ABATEMENT—ACTION FOR DAMAGES.

The power to declare and abate a public nuisance being given to a city, if it declares property to be a nuisance and destroys it when it is not a nuisance, the city will be liable for the damages sustained by the owner, and the defense of ultra vires is not available to it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1371-1374; Dec. Dig. § 623.\*]

Error to Circuit Court, Will County; Frank L. Hooper, Judge.

Action by Mary Sings and others against the City of Joliet. Judgment for defendant on demurrer to the complaint, and plaintiffs bring error. Reversed, and remanded, with directions.

On July 11, 1906, Mary Sings, Edith G. Evans, America Miller, Alcyone Lewis, Arvilla A. Withrow, and William Bissell, plaintiffs in error, brought an action in the circuit court of Will county against the city of Joliet, defendant in error, for damages for the destruction by defendant in error of an

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

apartment house and its contents owned by plaintiffs in error in said city.

The declaration contains four counts.

The first two will not be set out for a reason which appears from the opinion which follows.

The third count alleges: That on July 11, 1901, the plaintiffs in error were the owners and in possession of a certain lot located in the city of Joliet and a two-story frame building, with appurtenances thereto, located thereon. That at the time aforesaid, and for a long time prior thereto, they had occupied the said frame building as a home and for tenement purposes. That defendant in error at said time, acting by means of the common council, contriving unlawfully to injure the plaintiffs in error in their possession, use, occupation, and enjoyment of said premises, on July 8, 1901, passed and enacted a certain ordinance, which, with the title thereof, is in words and figures following:

"An ordinance to condemn as a nuisance the wooden building known as the Bissell House, situate on lot 1, in block 6, in that part of the city known as East Joliet, and to authorize and direct the destruction of the same and its contents.

"Be it ordained by the city council:

"Section 1. That whereas a certain building known as the Bissell House, situate on lot 1, in block 6, of that part of the city of Joliet known as East Joliet, in the city of Joliet, county of Will and state of Illinois, for some time past has been, and still is, occupied by a large number of persons, all of whom are more or less exposed to, infected by and suffering with the dread contagious and infectious disease known as smallpox; and whereas, the said Bissell House is now thoroughly impregnated with the germs of said disease; and whereas, the said Bissell House is, by reason of its old age, present state of deterioration and otherwise in such condition that it cannot be successfully disinfected so as to wholly destroy the said germs, in consequence of which it is extremely dangerous and detrimental to the health of the citizens and residents of the said city of Joliet, and that necessity exists for prompt action to prevent the spread of such contagious disease; therefore, and by reason of all of which, the said Bissell House is hereby declared to be a public nuisance and condemned to destruction as such, as hereinafter provided.

"Sec. 2. It shall be the duty of the health commissioner of said city to remove all occupants of said Bissell House to the pest house, or some other place temporarily to be used as a place of isolation, within three days after the adoption and going into effect of this ordinance.

"Sec. 3. That after the removal of the said occupants, as aforesaid, the superintendent of streets, health commissioner and fire marshal of said city shall tear down, or

cause to be torn down, the said Bissell House. They shall, moreover, wholly destroy, by fire, all of the debris and contents of said Bissell House impregnated or exposed to impregnation with the germs of said disease and not capable of a thorough and successful disinfection."

That defendant in error, by virtue of said ordinance, declared said premises, the building, and houses thereon by reason of infectious diseases therein, to wit, smallpox, to be a public nuisance, without any authoritative investigation beforehand or the finding of any jury that the same was so infected as to be inimical or a menace to the welfare of the public, and when the same was not then and there incapable of disinfection and was not a nuisance or menace to the public. That defendant in error, without notice to plaintiffs in error, or compensation paid to them, or any finding or award of damages to plaintiffs in error, or any offer by said city to reimburse them, proceeded to and did condemn said buildings to be destroyed, etc. That defendant in error, acting by its servants and officers and by virtue of the authority of said ordinance, entered upon said premises without leave or license and against the will of plaintiffs in error, and without compensation to them, and destroyed the said building and its appurtenances with fire, to the damage of plaintiffs.

The fourth count, in addition to the allegations of the third count, alleges the value of the annual rental on the building to be \$800; that it was lawfully erected and maintained for dwelling and tenement house purposes, and was not a nuisance nor dangerous to the public health; that it was unnecessarily and arbitrarily condemned and destroyed by the city under said ordinance, without notice to plaintiffs and without legal proceedings first being had or compensation being paid to them, as required by law and the Constitution; that the said city, by eminent domain or some other proceeding, should have had the protection of some court or its order before taking and destroying such property; and that it was the duty of said city not to utterly destroy said property, but to undertake to, and to, fumigate and disinfect the same, and save and keep from destruction so much thereof as might be of value or use in the construction of another building. The ad damnum was placed at \$5,000.

To the declaration defendant in error filed a demurrer, which was sustained by the court on January 10, 1908. Plaintiffs in error elected to stand by their declaration, and judgment was entered against them for costs and the suit dismissed. To review the judgment of the circuit court the plaintiffs in error have sued out a writ of error from this court, and it is contended by them that the court erred in sustaining the demurrer and in entering judgment against them.

Arthur B. Cowing (E. C. Hall, of counsel), for plaintiffs in error. Robert W. Martin (T. F. Donovan, of counsel), for defendant in error.

SCOTT, J. (after stating the facts as above). We regard the first and second counts as fatally defective. It is unnecessary to discuss them in view of our conclusions as to the sufficiency of the remaining counts. In what is hereinafter said regarding the narr. reference is had only to the third and fourth counts.

Section 2 of article 2 of the Constitution of the state provides that no person shall be deprived of property without due process of law. Plaintiffs in error insist that, when that clause is given proper meaning, it appears therefrom that the city was without lawful authority to pass the ordinance made a part of the declaration and to do the acts charged by that pleading. Paragraph 75, § 62, c. 24, Hurd's Rev. St. 1908, provides that the city council shall have power "to declare what shall be a nuisance and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist." By the seventy-eighth paragraph of the same section the council is authorized to do all acts and make all regulations necessary or expedient for the promotion of health or the suppression of disease. The position of the city is that it had authority to do everything charged against it by the declaration under and by virtue of these two sections and under and by virtue of its general police power.

Plaintiffs in error first object that the city was without power to pass an ordinance which had application only to the property involved in this suit; that the power given to declare a nuisance must be exercised by an ordinance general in its character, operating uniformly upon all persons and upon all property of the same character within the city. While the precise steps necessary to be taken by the city in declaring a thing to be a nuisance have never been pointed out by this court, we are of opinion that the city, in the exercise of its police power, if the emergency existed, as it appears to have existed from the recitals of the ordinance, had the power to declare the existence of the nuisance by the ordinance which it passed, provided the location and condition of the building were such that the method ordained was the only one which could in reason be used that would be effective in preventing the spread of the disease. Many cases can readily be imagined in which the city must proceed in a manner exceedingly summary both to declare and to abate a nuisance, and in such case the passage of an ordinance such as that here involved would seem to be a declaration sufficiently formal.

It is then said that the power of the city to declare what shall be a nuisance is not an arbitrary one. To that proposition there

can be no dissent. In the case of *Laugel v. City of Bushnell*, 197 Ill. 20, 28, 63 N. E. 1086, 1088, 58 L. R. A. 286, it is said: "Nuisances may thus be classified: First, those which in their nature are nuisances per se or are so denounced by the common law or by statute; second, those which in their nature are not nuisances, but may become so by reason of their locality, surroundings, or the manner in which they may be conducted, managed, etc.; third, those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds." It is apparent that, if the building in this case was a nuisance, it fell within the second classification, and the city had the power to declare it to be a nuisance if it was in fact so. If the conditions recited in the ordinance existed, and if the building was so located as that persons in the city could not by the city authorities, in the exercise of reasonable precaution, be excluded from the building or prevented from approaching so near thereunto as to be in danger of contagion therefrom, it would appear that the building was, in fact, a nuisance and that it might lawfully be abated.

It is next insisted that, before the property was actually destroyed, the owners thereof were entitled to have a day in court, where the question whether the property was, in fact, a nuisance might be adjudicated before the building was destroyed. In the exercise of the police power the command "so use your own property as not to injure others," and the maxim "the safety of the people is the supreme law," are to be observed and given effect. *City of Chicago v. Gunning System*, 214 Ill. 628, 73 N. E. 1085, 70 L. R. A. 230. If in every emergency the owner of the property the destruction of which is deemed necessary must be given a hearing, the exercise of the police power would in many instances be so delayed that serious injury to public health and other public interests would result. In *King v. Davenport*, 98 Ill. 365, 313, in considering a like question, the following language was quoted with approval: "In the exercise of this [police] power the Legislature may not only provide that certain kinds of property (either absolutely or when held in such a manner or under such circumstances as to be injurious, dangerous or noxious) may be seized and confiscated upon legal process after notice and hearing, but may also, when necessary to insure the public safety, authorize them to be summarily destroyed by the municipal authorities without previous notice to the owner, as in the familiar cases of pulling down buildings to prevent the spreading of a conflagration or the impending fall of the buildings themselves, throwing overboard decaying or infected food, or abating other nuisances dangerous to health."

Plaintiffs in error next argue that even if the city had the power to pass the ordinance,

and to proceed in the summary manner in which it did, they are entitled to maintain this suit and test the question whether or not the property was, in fact, a nuisance. To this the city first replies that the declaration of the council that the building was a nuisance finally determines that question. The law in this state gives no binding or final effect to the decision of the city council upon this question of fact. On the contrary, this question remains an open one, which may be adjudicated in this suit. *Village of Des Plaines v. Poyer*, 123 Ill. 348, 14 N. E. 677, 5 Am. St. Rep. 524; *Pearson v. Zehr*, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113.

Defendant in error then contends that if the building was not, in fact, a nuisance, the acts of the city council in passing the ordinance and destroying the building were, according to the declaration, *ultra vires*, and for such *ultra vires* acts the municipality cannot be held liable. It may be that if the thing which the city council did or expressly directed to be done was wholly beyond the scope of the city's power, as if, for instance, the city council, in the name of the city, should engage in the business of mining coal, and as a result of negligence in conducting the mine some individual should be injured, the doctrine of *ultra vires* would afford a defense to the municipality; but to declare and abate a nuisance is within the scope of the power conferred upon the city, and if the council, in the exercise of that power, destroys or expressly authorizes the destruction of property which, in fact, is not a nuisance, the municipality must be held liable for damages sustained by the owner. *Wood on Nuisances*, § 740; *Dillon on Mun. Corp.* (4th Ed.) § 972. The city was not justified in destroying this property unless the statement of alleged facts contained in the ordinance was true, and then only if the property was so located and in such condition that the danger to public health therefrom could not be obviated by the use of some reasonable measures less drastic than the absolute destruction of the property.

The judgment of the circuit court will be reversed and the cause will be remanded, with directions to sustain the demurrer as to the first and second counts and to overrule it as to the third and fourth counts of the declaration.

Reversed and remanded, with directions.

(237 Ill. 123)

PEOPLE ex rel. THOMPSON, County Treasurer, v. HULIN et al.

(Supreme Court of Illinois. Dec. 15, 1908.)

1. TAXATION (§ 319\*)—ASSESSMENT—PRESUMPTIONS.

The burden of proof is on the party objecting to a tax or special assessment to establish its invalidity, as the presumption is that the tax-

ing or assessing officers have performed their duty, and that the tax or special assessment is valid.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 319; \* Evidence, Cent. Dig. § 106.]

2. DRAINS (§ 90\*)—ASSESSMENTS AND SPECIAL TAXES—ENFORCEMENT—EVIDENCE—BURDEN OF PROOF.

Farm Drainage Act (Hurd's Rev. St. 1908, c. 42, § 100) § 26, provides for the levying of drainage assessments under the act, and section 29 (section 103) that the commissioners may order the assessment divided into installments. Act May 22, 1885 (Hurd's Rev. St. 1908, c. 42, §§ 154-160), provides that an assessment for drainage purposes may be divided into installments subsequent to the levy thereof, upon petition of the landowners of the district. *Held*, in a proceeding to enforce the payment of certain installments of a drainage assessment, it being presumed that an order dividing the tax into installments had been made, the contestant's burden of proof to the contrary was not sustained by showing that the drainage record, down to and including the date upon which the assessment on which the drainage tax was made, showed no order dividing the tax into installments.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 90.\*]

3. DRAINS (§ 76\*)—ASSESSMENTS—NOTICE.

Under Farm Drainage Act (Hurd's Rev. St. 1908, c. 42, §§ 75-153), providing for the classification of lands in a drainage district, and that such classification, when established, shall remain as a basis for the levy of drainage taxes, the owners of land subject to drainage taxes are entitled to no notice of the levy of special assessments where they have been notified of the classification of their lands.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 79; Dec. Dig. § 76.\*]

4. DRAINS (§ 74\*)—ASSESSMENTS—CLASSIFICATION OF PROPERTY—OBJECTIONS—TIME FOR MAKING—WAIVER.

Where the owners of land in a drainage district, classified for purposes of drainage assessments under Farm Drainage Act (Hurd's Rev. St. 1908, c. 42, §§ 75-153), are notified of the classification of their land, they should then appear and object to their classification, if they have any objections; and, where they fail to do so, they cannot subsequently raise the question of classification on application for judgment against the land for a drainage tax.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 82; Dec. Dig. § 74.\*]

5. DRAINS (§ 72\*)—ASSESSMENTS—CLASSIFICATION OF PROPERTY—QUALIFICATIONS OF COMMISSIONERS.

That commissioners who classified lands for purposes of assessment under Farm Drainage Act (Hurd's Rev. St. 1908, c. 42, §§ 75-153) were landowners within the drainage district did not invalidate the classification.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 72.\*]

6. DRAINS (§ 76\*)—ASSESSMENTS—PROCEEDINGS FOR ASSESSMENT—FILING DELINQUENT LIST—STATUTES—CONSTRUCTION.

Hurd's Rev. St. 1908, c. 42, § 106, provides that the delinquent list of assessments under Farm Drainage Act (Hurd's Rev. St. 1908, c. 42, §§ 75-153) shall be filed on a stated date. Section 191, Revenue Act (Hurd's Rev. St. 1908, c. 120, § 191), provides that no assessments on property shall be considered illegal on account of the assessment rolls or tax lists not having been made, completed, or returned within the time required by law. *Held*, that

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the requirement as to the date of filing the delinquent list was not mandatory.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 76.\*]

**7. DRAINS (§ 73\*)—ASSESSMENTS—GROUNDS OF OBJECTION.**

Mere irregularities in the levy of a drainage tax, which do not go to the substantial justice of the tax, are not grounds for refusing to enforce its collection.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 73.\*]

Appeal from Cook County Court; David T. Smiley, Judge.

Application by the People, on the relation of John R. Thompson, County Treasurer and ex officio County Collector, for judgment and order of sale of lands of William Hulin and others to enforce a drainage tax. From a judgment granting the application, respondents appeal. Affirmed.

James E. Daughters, for appellants. Fred-eric R. De Young, for appellee.

**HAND, J.** This was an application upon the relation of John R. Thompson, county treasurer and ex officio county collector of Cook county, in the name of the people, in the county court of Cook county, for judgment and order of sale of certain lands of the appellants to enforce the payment of the second and third installments of the first assessment of a drainage tax levied by the commissioners of Calumet Union drainage district No. 1 of the towns of Thornton and Bremen, in Cook county. The appellants appeared, and filed objections as to the rendition of judgment against their lands, which objections were overruled, and judgment and order of sale were entered against their lands for the amount of said drainage tax, and they have prosecuted an appeal.

The first contention of appellants is that it does not appear that assessment No. 1 of the drainage tax levied by said district upon their lands was divided into installments, and that for that reason the county court was without jurisdiction to render a judgment and order of sale against their lands for the installments of said drainage tax included in said judgment and order of sale. The appellee introduced in evidence the formal proofs necessary to make a prima facie case, and then rested, whereupon the appellants introduced the drainage record down to and including September 30, 1905, the date upon which the assessment of the drainage tax in question was made, which record showed no order dividing the drainage tax into installments. The law casts the burden of proof upon the party objecting to the enforcement of a tax or special assessment to establish its invalidity, as the presumption is the taxing or assessing officers have performed their duty, and that the tax or special assessment is valid. In *People ex rel. v. Keener*, 194 Ill. 16, 61 N. E. 1069, which was

an application for a judgment and order of sale to enforce the payment of a drainage tax, it was, on page 18 of 194 Ill., on page 1070 of 61 N. E., said: "That proof made a complete prima facie case. 'The collector's return of the delinquent list, with statutory notice and proof of publication, prima facie entitles the collector to judgment for the tax returned as delinquent. The presumption is that the assessor and other officers charged with the levy and collection of taxes have done their duty, and have not made an illegal assessment or returned an illegal tax delinquent. We have repeatedly held that the burden of proof showing such matters as would avoid the tax or establish its illegality is upon the person objecting thereto.' Consolidated Coal Co. v. Baker, 185 Ill. 545, 26 N. E. 651, 12 L. R. A. 247; *People ex rel. v. Chicago & Alton Railroad Co.*, 140 Ill. 210, 29 N. E. 730; *Chicago & Northwestern Railroad Co. v. People*, 171 Ill. 249, 49 N. E. 542. 'It is the settled doctrine of this court, that any one objecting to the enforcement of a tax assumes the burden of showing its invalidity. The presumption is that the tax is just—that all officers who have had any official connection with it have properly discharged their duties.' *Peoria, Decatur & Evansville Railway Co. v. People ex rel.*, 116 Ill. 401, 6 N. E. 497." Section 28, Farm Drainage Act (*Hurd's Rev. St. 1908*, c. 42, § 100), provides for the levying of drainage assessments under said act, and section 29 of the act that the commissioners may order the assessment divided into installments, and Act May 22, 1885 (*Hurd's Rev. St. 1908*, p. 869, c. 42), provides that an assessment for drainage purposes may be divided, subsequent to the levy thereof, upon the petition of the landowners of the district into installments. If, therefore, it was necessary, in order to obtain judgment and order of sale for the installments in question, that the drainage record show that the drainage tax had been divided into installments—which is not decided—we think it clear that the presumption obtains in this proceeding that an order had been made by the commissioners, which was a matter of record, dividing said drainage tax into installments, and that, as the division of said drainage tax could legally have been made subsequent to the 30th day of September, 1905, the introduction of the drainage record up to and including September 30, 1905, did not rebut the presumption that the drainage tax had been legally divided into installments and made a matter of record by the drainage commissioners. *Toledo, St. Louis & Western Railroad Co. v. People*, 225 Ill. 425, 80 N. E. 283.

It is next contended that the appellants were not notified of the levy of said assessment No. 1 by the commissioners of said drainage district. Appellants were notified of the classification of their lands, and, as

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

we understand the statute, that was all the notice that they were entitled to receive of the levying of said drainage tax. The classification of the lands in a farm drainage district is the vital thing to the landowner, as the classification, when established, forms and remains the basis upon which all drainage taxes, future and present, are to be levied in the district. In *People v. Chapman*, 127 Ill. 387, 392, 19 N. E. 872, 874, the court said: "The objection that appellee was not notified of the resolution and order of the commissioners making these special assessments, and of the making and filing of the assessment roll, and did not, in fact, learn of the same until the time allowed by the statute for an appeal therefrom had expired, is most strenuously insisted upon. It would seem to be a sufficient answer to this contention to say that the statute does not require such notice to be given. The better answer, perhaps, is that no reason is perceived why such a notice should be given. From the time the drainage commissioners assume to exercise the powers conferred on them, and which is to result in the levying of a special drainage assessment, the proceedings may not inaptly be likened to a suit in court. The commissioners, as a first step, make a classification of the lands. The property owners are then brought before them by notice, residents by personal service, and nonresidents by publication; and the succeeding steps to be taken, both by the property owner and by the commissioners, follow in regular progression and without unnecessary delay. And for the same reason that a party over whose person the court has acquired jurisdiction is required to take notice of the different steps taken in his cause, the property owner in a drainage district, who has been notified of the classification of the lands, must also be required to take notice of each succeeding step taken by the commissioners to effect the object for which the district has been organized."

It is further contended that the lands of W. K. Gove, one of the objectors, were classified and assessed as town lots instead of farm property. The objector was notified of the classification; and, if he desired to object to the classification of his lands, he should then have appeared and made his objection. He cannot, on application for a judgment against the land for a drainage tax, raise the question of classification. In *People v. Chapman*, 127 Ill. 391, 19 N. E. 873, it was said: "Assuming, as we must, that the appellee was served with the notice, as required by this section, and the commissioners being by the next section of the act authorized and required, at the time and place mentioned in such notice, to 'hear whatever objections may be urged by any person interested,' and to correct any injustice shown to exist in such classification, appellee must be presumed to have appeared before the commissioners at the time they were sitting in review of their classification of the lands within this district,

and to have then objected to any injustice to him by reason of such classification; and, if appellee failed to so appear and object, he must be held to have waived all objection to the action of the commissioners relating to such classification."

It is further urged that the commissioners who made the classification were landowners of the district, and it is said they were interested in the classification, and that their classification was void. The cases cited by the appellants arose under the levee act, and are not applicable to proceedings under the farm drainage act. *Scott v. People*, 120 Ill. 129, 11 N. E. 408; *People v. Cooper*, 139 Ill. 461, 29 N. E. 872; *Vandalla Levee & Drainage District v. Hutchins*, 234 Ill. 81, 84 N. E. 715. The commissioners, although landowners in the district, had the power to make the classification which formed the basis of the assessment.

It is also urged that the delinquent list showing the nonpayment of the assessments in question was not filed in time with the county collector; the list being filed on March 31, 1908, when the statute provides it should have been filed on March 10, 1908. *Hurd's Rev. St. 1908*, § 106, p. 851, c. 42. The section of the statute requiring the delinquent list to be filed on March 10th provides the county collector shall place the delinquent tax, when certified to him by the treasurer of the drainage district, upon the tax books, and that like proceedings shall be had, and with like force and effect, in the collection of said delinquent drainage tax or an installment thereof, and the sale of said lands for the nonpayment thereof, as in the collection of ordinary state and county taxes; and section 191 of the revenue act (*Hurd's Rev. St. 1908*, p. 1782, c. 120) provides that no assessment of property shall be considered illegal on account of any irregularity in the tax lists or assessment rolls, or on account of the assessment rolls or tax lists not having been made, completed, or returned within the time required by law. The requirement that the delinquent list be filed on March 10th was therefore directory, and not mandatory.

A number of other claimed irregularities in the levy of said drainage tax are pointed out in the briefs of appellants. None of said irregularities, however, go to the substantial justice of said tax, and afford no legal grounds for refusing to enforce the collection of the tax. In *People v. Chicago & Eastern Illinois Railroad Co.*, 214 Ill. 190, 193, 73 N. E. 315, 318, it was said: "We are obliged to keep before us the necessity of taxation, and the fact that all the machinery of taxation, except the mere extension of the taxes, is confided to the local authorities, and that all the citizens of the local municipalities are eligible to the offices which compose the taxing body. The Legislature was not unmindful of this when it enacted the broad-saving provisions of section 191 of the revenue act. To expect the ordinary citizen to observe

every possible formality and the strict letter of the statute concerning nonessentials—matters that cannot affect the substantial justice of the tax—and to defeat the tax if that be not done, upon technical objection that some mere form has not been complied with, is, in a sense, to defeat the means of government itself. Such was not the intention of the law; and is not the duty of the courts."

Finding no reversible error in this record, the judgment of the county court will be affirmed.

Judgment affirmed.

(237 Ill. 262)

PEOPLE ex rel. THOMPSON, County Treasurer, v. GUNZENHAUSER et al.

(Supreme Court of Illinois. Dec. 15, 1908.)

**1. DRAINS (§ 83\*)—ASSESSMENTS—ADDITIONAL ASSESSMENTS.**

A second assessment for an improvement in the drainage system may be made to complete the improvement where the first assessment proves inadequate.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 83.\*]

**2. DRAINS (§ 74\*)—ASSESSMENTS—WAIVER OF OBJECTIONS.**

In a proceeding to enforce a drainage assessment, a contention by the contestant that the assessment was levied to pay an indebtedness already incurred, which the drainage district had no right to incur, is waived by a stipulation between the parties that the assessment was levied before any liability or indebtedness was incurred thereunder.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 82; Dec. Dig. § 74.\*]

**3. DRAINS (§ 68\*)—CONSTRUCTION OF BRIDGES—LIABILITY FOR EXPENSES.**

Under Farm Drainage Act (Hurd's Rev. St. 1908, c. 42, § 115) § 40½, providing that the commissioners of a drainage district shall make all necessary bridges and culverts along or across any public highway or railroad which shall be deemed necessary for the use or protection of the work, the expense of constructing bridges or culverts along or across a railroad right of way must be borne by the drainage district, where no natural water course exists at the place of construction.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 68.\*]

**4. DRAINS (§ 90\*)—ASSESSMENTS—ENFORCEMENT—PRESUMPTIONS AND BURDEN OF PROOF.**

In a proceeding to enforce a drainage tax, the presumption is that the tax was levied for a lawful purpose, and was a legal tax, and the burden is upon objectors to overcome such presumption.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 90;\* Evidence, Cent. Dig. § 105.]

Appeal from Cook County Court; David T. Smiley, Judge.

Application by the People, on the relation of John R. Thompson as county treasurer, for judgment and order of sale against John Gunzenhauser and others for nonpayment of drainage assessments. From a judgment overruling respondents' objections, they appeal. Affirmed.

James E. Daughters, for appellants.  
Frederic R. De Young, for appellee.

HAND, J. This was an application for judgment and order of sale against the lands of appellants for the nonpayment of the first and second installments of a second assessment levied by the commissioners of Calumet union drainage district No. 1 of the towns of Thornton and Bremen, in Cook county. Objections were filed by appellants and overruled, and judgment and order of sale were entered, and they have prosecuted this appeal.

The questions raised in this case have all been disposed of adversely to the contentions of appellants in the case of *People ex rel. v. Hulin* (Ill.) 86 N. E. 666, with the exception of the one that the commissioners were powerless to levy a second assessment upon the lands of the appellants for the completion of the proposed improvement. The resolution levying the assessment reads as follows: "Resolved by the commissioners of the Calumet union drainage district No. 1 of the towns of Thornton and Bremen, in Cook county, Illinois, that it be and is hereby ordered that the amount of forty-two thousand dollars (\$42,000) be raised by special assessment upon the lands of the district aforesaid, as the same may be necessary, and that such amount be and is apportioned among the several tracts in the name of the owners thereof, when known, according to the acreage of each and its figure of classification on the graduated scale, so that each tract may bear its equal burden in proportion to benefits, the said assessment herein ordered to be known as special assessment No. 2 of said district before mentioned, said assessment to be payable in ten equal annual installments." Section 63, Farm Drainage Act (Hurd's Rev. St. 1908, p. 863, c. 42, § 138) in part reads as follows: "If at any time the commissioners shall find that the amount of such assessment or tax levied will be inadequate to complete the proposed work, they shall make such additional levy or levies as may be necessary to complete the proposed work, which additional levy or levies shall be made on the original classification, as herein provided, for the first assessment or tax levy, and computed and extended by the clerk in the same manner." This court has held that a second assessment may be made to complete the improvement where the first assessment proves inadequate. *Moore v. People*, 106 Ill. 378; *Commissioners of Drainage District v. Kelsey*, 120 Ill. 482, 11 N. E. 256. It is, however, urged that the second assessment made by said drainage commissioners was levied to pay indebtedness already incurred, and to pay for liabilities, about to be incurred, which the drainage district had no right to incur. It was stipulated between the parties that the second assessment, being the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

one involved in this proceeding, was levied before any liability or indebtedness was incurred thereunder. The first contention of appellants is therefore without force, and the resolution by which the assessment was levied does not, as is contended by appellants, provide that a portion of said assessment is levied for the purpose of paying the cost of the construction of a railroad bridge. If, however, it be conceded that other portions of the record of said drainage district show it was the intention of the commissioners to use a portion of the tax, when collected, for the purpose of building a bridge "on the Grand Trunk right of way," we do not think that fact would make the tax levy void, as it does not appear that the proposed bridge was to be constructed across a natural water course, as was the case in *Chicago, Burlington & Quincy Railway Co. v. People*, 212 Ill. 103, 72 N. E. 219.

In *Morgan v. Schusselle*, 228 Ill. 106, 81 N. E. 814, it was held that section 40½ of the farm drainage act required the drainage commissioners of drainage districts to make all necessary bridges and culverts along and over any public highway which may be deemed necessary for the use or protection of the work, at the expense of the drainage district, where such necessity arises from the construction of a purely artificial ditch at a place along a line where no natural water course exists. We think that the same construction of that section of the statute should be applied to a bridge or culvert constructed along or across a railroad right of way where there is no natural water course. If the appellants contended that the portion of the tax, when collected, was to be used to construct a bridge along or across a railroad right of way over a natural water course, they should have introduced evidence to establish that fact. The presumption is that the tax was levied for a lawful purpose, and was a legal tax, and the burden was upon the objectors to overcome by competent proof, such presumption. *Durham v. People*, 87 Ill. 414; *Mix v. People*, 86 Ill. 312; *Chicago & Northwestern Railway Co. v. People*, 174 Ill. 80, 50 N. E. 1057; *Hurd v. People*, 221 Ill. 398, 77 N. E. 443.

Finding no error in this record, the judgment of the county court will be affirmed.  
Judgment affirmed.

(237 Ill. 159)

#### MAEGERLEIN v. CITY OF CHICAGO.

(Supreme Court of Illinois. Dec. 15, 1908.)

#### 1. PLEADING (§ 252\*)—AMENDMENT—EFFECT.

Where an amended declaration completely redrafted the third count of the original declaration, the original third count passed out of the case.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 737½; Dec. Dig. § 252.\*]

#### 2. LIMITATION OF ACTIONS (§ 182\*)—PLEADING—AMENDED DECLARATION.

Where, after defendant had pleaded the general issue to a cause of action alleged in the original third count of plaintiff's declaration, plaintiff filed an amended third count, which, though stating the same cause of action, entirely superseded the original, defendant was then entitled to plead limitations thereto, notwithstanding its original plea.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 680; Dec. Dig. § 182.\*]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; R. W. Clifford, Judge.

Action by William Maegerlein against the City of Chicago. Judgment for plaintiff reversed by the Appellate Court, and plaintiff appeals. Affirmed.

On July 12, 1907, William Maegerlein recovered a judgment for the sum of \$3,990 in the circuit court of Cook county against the city of Chicago, the appellee, for damages to certain personal property owned by Maegerlein, alleged to have been caused through the acts of the appellee, which resulted in a diversion of the surface water from Mary street, in that city, to and upon the premises of Maegerlein, and under a building there owned by him and used for manufacturing and storage purposes. The judgment of the circuit court has been reversed, with a finding of facts by the Appellate Court for the First district, but the cause was not remanded, and to review that judgment Maegerlein has prosecuted this appeal.

The suit was begun October 27, 1903. The original declaration, consisting of two counts, was filed on February 4, 1904, and alleged only damages to the real estate owned by appellant on account of the obstruction of Mary street in front of his premises by a railway embankment. To this the city pleaded not guilty. On March 12, 1907, appellant filed an amended declaration, consisting of three counts. The first and second were, in substance, the same as the counts in the original declaration, and the third alleged that the plaintiff was the owner of certain lots; that prior to the committing of the grievances thereafter set forth said Mary street in front of said premises was provided with, and had theretofore been provided by defendant with, sewer pipes, catch-basins, manholes, and divers other means and appliances for carrying off the natural flow of water upon said street in front of the premises of plaintiff, and that by means of such connections and appliances the flow of water caused by rainfall or the melting of snow and other causes had always prior to that time been carried off and adequately disposed of, so that no surface water stood in the street or overflowed therefrom, or from any source, onto and over the premises of plaintiff; that defendant, well knowing the premises, but regardless of the rights

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of plaintiff, during the year 1900 wrongfully closed and obstructed all sewer connections in front of the plaintiff's premises, whereby the natural flow of water which had theretofore been drained off from said street and from adjoining premises was interfered with and prevented; that, on account of the acts charged, rain water in large quantities, which ordinarily flowed into said sewers, was diverted from its natural course and ran and flowed in a different direction and over and upon the land and premises of the plaintiff, and there remained, and injured large quantities of an article of commerce owned by plaintiff and known as "fill hose," which was in the building there owned by the plaintiff.

On the day that the amended declaration was filed, an order was entered that the plea of the general issue filed by defendant to the original declaration stand as pleaded to the amended declaration. On April 24, 1907, on the third day of the trial, the appellant amended the third count of the amended declaration, and thereby that count was made to charge that the wrong was done by the city in 1901, and consisted in the removal of catch-basins, manholes, and sewer connections. A plea of the five-year statute of limitations was interposed by the defendant to this count as so amended, to which plea appellant filed a general demurrer, which was sustained, and the trial proceeded.

On July 3, 1901, the employees of the sewer department of the city removed two catch-basins and the sewer connections in Mary street in front of appellant's building, and nothing to take their places as drains was provided. Following this, within a day or two, several railroad companies using rights of way in that street began the construction of an embankment in front of appellant's premises for the purpose of elevating their tracks. After this work was begun, the surface water from the street, which prior to that time had drained off through the catch-basins, formed pools in the street immediately in front of appellant's building, and also formed pools on the premises of the appellant adjoining his building. Appellant was engaged in this building in the business of making "fill hose" from the esophagi of cattle. The esophagi were treated by a process which fitted them to be used in the brewing business for conducting beer from vats to kegs. In the preparation of these articles for use they were hung up to cure for a year or more in the building, and when they were properly prepared for use they were wrapped and packed in air-tight glass jars and stored away in the basement of the building until such time as they were shipped out to buyers. Some time after the removal of the catch-basins complaints were received by appellant from customers in regard to the condition of the goods shipped to them, and many boxes of the goods were returned to him. Upon investigation he discovered that under the floor of the basement of the build-

ing there was a pool of stagnant water, and that practically his whole stock stored in the basement had become unfit for use and worthless because of dampness. Thereupon he instituted this action.

The finding of facts made by the Appellate Court was to the effect that the wrongs complained of by the third count, both as originally filed and as amended, were all done during the year 1901. That court held that the circuit court erred in sustaining the demurrer interposed to appellee's plea of the statute of limitations, and it is insisted by appellant that this holding of the Appellate Court is wrong.

Felsenthal, Foreman & Beckwith, for appellant. Edward J. Brundage, Corp. Counsel, Robert N. Holt, and Emil C. Wetten, for appellee.

SCOTT, J. (after stating the facts as above). No proof was offered which would sustain a recovery under the first or second count of the declaration, either as originally filed or as amended. In fact, those counts were abandoned by the plaintiff upon the trial. The third count first appears in the case as a count in the amended declaration filed on March 12, 1907, and it is now conceded that it states a cause of action other and different from the causes of action stated by the first and second counts, either as those counts were originally filed or as they were amended. To the amended declaration so filed on March 12th it was ordered that the plea of the general issue which had been filed to the original declaration should stand as pleaded to the declaration as amended. The plaintiff, on April 22, 1907, pursuant to leave of court, amended his third count by filing a count introduced as follows: "And now comes the plaintiff, by his counsel, and amends the third count of the declaration heretofore filed by him so as to read as follows"; and then follows a count which is in itself complete. It does not, by reference or otherwise, make the original third count, or any part thereof, a part of the amended count. The original third count, while still a part of the record in the case, was withdrawn and superseded by the amended third count, so that it was no longer a part of the plaintiff's averments against the defendant. 1 Ency. of Pl. & Pr. 625; Baker v. L. & N. T. Co., 106 Tenn. 490, 61 S. W. 1029, 53 L. R. A. 474.

It appears both by the original and by the amended third counts that the alleged wrong or wrongs upon which those counts were founded occurred more than five years before the filing of the original third count. The appellant, in effect, concedes that had the statute of limitations been filed to the original third count it would have presented a defense thereto, but insists that the amended third count states the same cause of action as the original third count; that it is

but an amplification of that count; and that the defendant having elected to file the general issue, and not to file a plea of the statute of limitations to the original third count, thereby waived and lost its right to file the plea of the statute of limitations as to the cause of action set up by the original third count. The cases upon which he relies are cases in which no plea of the statute of limitations was ever filed. At the time of the filing of the plea of the statute of limitations to the third count as amended, the court might, in its discretion, have given leave to defendant, upon application, to file the plea of the statute of limitations to the original third count had no amendment thereto been made. When the plea of the statute was interposed to the third count as amended, no motion to strike it from the files was made, and no objection was taken to it on the ground that it had been filed without leave. On the contrary, plaintiff demurred to it for the reason "that said third count, as amended, of the plaintiff's declaration, is the same cause of action as originally filed by the said plaintiff, and not a different cause of action," and that demurrer the court sustained. We think that upon the record made herein it should not now be said that this plea was filed without leave of court—this on appellant's theory that the cause of action stated in the third amended count is the same cause of action as that stated in the third original count. If the cause of action stated in the third amended count was not the same as that stated in either of the counts theretofore filed, defendant unquestionably had the right, without leave, to interpose the plea of the statute. That plea presented to the third amended count a perfect defense.

It is not urged that the Appellate Court should have remanded the case if it was correct in holding that the demurrer to the plea of the statute of limitations should have been overruled.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(237 Ill. 421.)

#### PEOPLE v. WILCOX.

(Supreme Court of Illinois. Dec. 15, 1908.)

#### 1. STATUTES (§ 67\*)—LOCAL AND SPECIAL LAWS—CONSTITUTIONAL PROVISION MANDATORY.

Const. 1870, art. 4, § 22, prohibiting local or special laws on specified subjects and on other subjects where a general law can be made applicable, is mandatory as to the specified subjects on which local and special laws are interdicted, whatever the character of the law in other respects, but a special law upon a subject not specified may be constitutional, since the Legislature's determination that a general law cannot be made applicable is not reviewable.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 69; Dec. Dig. § 67.\*]

#### 2. WORDS AND PHRASES—"LOCAL."

The words "local and special" are frequently used interchangeably, though they do not have the same meaning; "local" signifying a belonging or confinement to a particular place and being a counter term to "general."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 4202.]

#### 3. STATUTES (§ 77\*)—"LOCAL" AND "SPECIAL" LAWS.

The word "local," as applied to legislation, signifies legislation relating to part of the territory of a state only, while the word "special" is more appropriately applied to laws granting some special right, privilege, or immunity, or imposing some particular burden upon some portion of the people of the state less than all.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 79; Dec. Dig. § 77.\*]

For other definitions, see Words and Phrases, vol. 7, p. 6563.]

#### 4. STATUTES (§ 77\*)—SPECIAL LAWS—CONSTITUTIONALITY.

Under Const. 1870, art. 4, § 22, prohibiting local or special laws on specified subjects and on other subjects where a general law can be made applicable, special laws on such other subjects may be constitutional where they apply to all members of a designated class, where the classification rests upon some disability, attribute, or classification marking them as proper objects for special legislation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 79-82; Dec. Dig. § 77.\*]

#### 5. STATUTES (§ 77\*)—SPECIAL AND-LOCAL LAWS—FISH—CONSTITUTIONAL LAW.

Act June 5, 1907, § 21 (Laws 1907, p. 843), providing for the protection of fish, imposing penalty for its violation, and excluding Lake Michigan from its operation, is void under Const. 1870, art. 4, § 22, prohibiting the passage of local or special laws for the protection of game or fish.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 77.\*]

Cartwright, C. J., and Hand and Carter, JJ., dissenting.

Appeal from Circuit Court, Schuyler County; Harry Higbee, Judge.

Amos Wilcox was charged with violating Act June 5, 1907 (Laws 1907, p. 835), relating to fishes, and the Board of Fish Commissioners appeal from a judgment of the circuit court quashing the complaint and discharging accused on his appeal from a conviction in justice court. Affirmed.

Chipperfield & Chipperfield, for appellant. L. A. Jarman, for appellee.

VICKERS, J. Amos Wilcox was charged before a justice of the peace of Schuyler county with the violation of section 21 of the act of June 5, 1907 (Laws 1907, p. 843), entitled "An act to encourage the propagation and cultivation and to secure the protection of fishes in all the waters under the jurisdiction of the state of Illinois, defining the duties of the fish commissioners, fixing their compensation and providing penalties for the violation of the provisions thereof." Appellee was convicted before the justice of the peace before whom the prosecution was commenced, and he took an appeal to the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

circuit court of Schuyler county. In the circuit court appellee made a motion to quash the complaint on the ground that said section 21 is invalid, null, and void, in that it violates section 22 of article 4 of the Constitution, which provides that the General Assembly shall not pass local or special laws for the protection of game or fish. This motion was by the circuit court sustained, the complaint quashed, and appellee discharged. Exceptions were duly preserved to this action of the court by the people, and the fish commissioners of the state, by virtue of section 13 of said act, have prosecuted an appeal to this court.

The only question raised on this appeal is the constitutionality of section 21 of the act above referred to. Section 21 provides that any person desiring to fish in any of the waters, as provided for in section 1 of said act, within the jurisdiction of this state, with hoop net or with seine or trammel net, shall first obtain a license from a city or county clerk, who are authorized by said act to issue such license. The license fee is fixed at 50 cents for each hoop net and \$5 per 100 yards of seine or trammel net. The act provides that the fish commissioners shall prescribe a uniform style and pattern of metal tags which shall be attached to hoop nets and each 100 yards of seine or less, or trammel nets, in such manner as to be at all times exposed to public view, and that any person using any hoop net, seine, or trammel net which has no tag attached, as provided by said act, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than \$25 nor more than \$100, and such untagged net or seine shall be forfeited to the state. A proviso added to said section excludes Lake Michigan from its operation, and it is this proviso that is supposed to render said section unconstitutional under that clause of section 22 of article 4 of the Constitution of 1870 which prohibits the passage of local or special laws for the protection of game or fish. All of the objections urged may be considered together.

When reduced to their final analysis, the several contentions made against the validity of this statute amount simply to this: That the Legislature has no constitutional power to pass a law for the protection of fish, impose penalties for its violation, and restrict the operation of such law to a particular portion of the waters of the state. Section 22 of article 4 of the Constitution of 1870 provides that the General Assembly shall not pass local or special laws on certain specified subjects enumerated in said section, and it is provided, further, that no local or special law shall be passed on any other subject where a general law can be made applicable. Concerning the subject as to which local or special laws are interdicted the Constitution is mandatory, and any

act falling within the description of local or special legislation must be held unconstitutional, whatever may be the character of the law in other respects. A special act of the Legislature upon a subject other than those specified in this section may be constitutional, since the determination of the Legislature that a general law cannot be made applicable to such subject is not open to review. *City of Mt. Vernon v. Evens Brick Co.*, 204 Ill. 32, 68 N. E. 203.

The words "local" and "special" are frequently used interchangeably, although it is clear that they do not have the same meaning. The word "local" signifies belonging to or confined to a particular place. When applied to legislation, it signifies such legislation as relates to only a portion of the territory of a state. *Bouvier's Law Dict.*; *Burrill's Law Dict.*; *People v. O'Brien*, 33 N. Y. 193; *People v. Newburgh, etc., Railroad Co.*, 86 N. Y. 1; *Ellis v. Frazier*, 38 Or. 462, 63 Pac. 642, 53 L. R. A. 454. The word "local" is used as a counter term to "general." The word "special" appears to be more appropriately applied to laws that grant some special right, privilege, or immunity or impose some particular burden upon some portion of the people of the state less than all. *State v. Oorson*, 67 N. J. Law, 178, 50 Atl. 780. Special as well as local laws are forbidden under our Constitution respecting the several enumerated subjects in section 22. Upon other subjects special laws may be constitutional where they apply to all members of a designated class, where the classification rests upon some disability, attribute, or classification marking them as proper objects for the operation of special legislation. *Gillespie v. People*, 183 Ill. 176, 58 N. E. 1007, 52 L. R. A. 233, 80 Am. St. Rep. 176; *Ruhstrat v. People*, 185 Ill. 133, 57 N. E. 41, 49 L. R. A. 181, 76 Am. St. Rep. 30; *Starne v. People*, 222 Ill. 189, 78 N. E. 61, 113 Am. St. Rep. 389; *Off & Co. v. Morehead*, 235 Ill. 40, 85 N. E. 264. Since our Constitution prohibits both local and special legislation in the specified cases, an act that falls under either classification must be held void. The words "local" and "special" as used by the framers of our Constitution, were designed to remedy different evils. Judge John Scholfeld, who afterwards as a member of this court did much towards settling the construction of our Constitution, introduced the resolution which finally became section 22 of article 4. In discussing this section before the constitutional convention Judge Scholfeld said: "It was said by the gentleman from Grundy (Mr. Peirce), however, that our present Constitution provides for the passage of general laws and prohibits special legislation. It does so, but in such a manner as that the prohibition is practically ineffectual. It leaves the judgment of the Legislature to be final and conclusive on the question of whether the ob-

ject sought can be accomplished by a general law or whether it must be accomplished by a special law, and therefore, whenever a Legislature assumed to pass a special law, it follows that the Legislature had exercised its judgment upon a question, and that is conclusive. It was not, however, the people that demanded the special laws. The thousands of private charters that have been passed by former Legislatures of the state were not demanded by the people as a body politic at all. They were satisfied with general laws upon the subject. It was in most instances individuals who demanded these special laws—individuals who were not satisfied to do business upon a broad and honest basis upon which all might be equal, but who wanted special favoritism, chances to plunder the public treasury or their fellow men, covered up by a private charter to avoid detection or punishment. Those were the men who demanded these special laws, and at their bidding and by their behests they were passed. It was they who filled our lobby with the instruments and appliances of corruption. It was the applicants for these special favors that made legislation profitable, and enabled legislators, on a salary of \$2 per day, to at the end of a session display their wealth like successful gamblers.”  
1 Debates of the Const. Convention, p. 512.

Hon. Jonathan Merriam, a member of the constitutional convention from the Twenty-Seventh district, in discussing the clause of the Constitution now under consideration, on page 576 of the same work, said: “Mr. Chairman, the report of the legislative committee simply trims off a few of the branches of this Upas tree of special legislation. I, sir, am in favor of laying the ax at the root of the tree. We want no half-way measures about this matter. If there be any one thing that the people are agreed upon, it is that the whole foul system of special legislation shall be wiped out. It has been, and while it remains it must ever be, the ground work of corrupt, ring legislation. It gives to corporations and individuals extraordinary powers, benefiting the few at the expense of the many. It fills the lobbies of our state capitol with corruptionists. It creates a vast number of statutes that are conflicting and contemptible. It has disgraced our Legislatures, demoralized the people, befogged the lawyers, and bewildered the courts. It is utterly at variance with every principle of statesmanship and sound public policy.”

It will thus be seen what the constitutional convention was seeking to accomplish by prohibiting special legislation. But special legislation was not the only evil that was to be remedied. There had grown up in this state a great body of purely local laws on various subjects, the most conspicuous of which are those enumerated in section 22 of article 4. Among the subjects with which the Legislature had been dealing were a

large number of acts relating to the protection of fish and game. There was an act passed February 22, 1861, entitled “An act for the protection of fish within the county of Rock Island.” This act made it a misdemeanor to take or capture fish within Rock Island county with seines, gill nets, dip nets, or other nets, and provided for the prosecution of persons who should violate said act and their punishment by fine of \$5 for each fish so unlawfully taken. Laws 1861, p. 122. Other acts were passed of a similar character applicable to Knox county; one prohibiting the netting of fish in the Grand Rapids of the Wabash river, in Wabash county; another act prohibiting fishing with seine or net in the Illinois river between Starved Rock and the dam at Marseilles; an act preserving game in Macoupin county; an act exempting Piatt county from the operation of the game law; another act extending the game law of 1865 to Bond, Fayette, Effingham, Marion, Clay, Richland, Hamilton, Wayne, Warren, Henderson, and Jersey counties; an act in 1869 prohibiting fishing, except under certain conditions, in any part of Adams county; another act preserving fish in Rock river; another act preventing the netting of fish in Kankakee, Iroquois, and McHenry counties; another act preventing the netting of fish in Will county; another restricting killing of game in Henry county; another preserving game in Montgomery and Moultrie counties. These and many other acts of like character had been passed from time to time by the Legislatures, so that the subject of fish and game was covered by such a great number of local and antagonistic laws that the legal profession and the courts, as well as the people, were harassed by the great mass of conflicting local laws. It was this condition of things that led the constitutional convention to adopt the clause of the Constitution now under consideration for the purpose of restricting the power of the Legislature upon these subjects to such laws as should have a uniform application throughout all the territory subject to the jurisdiction of this state.

It is strongly urged upon our consideration by appellant that the proper protection of fish in our state requires laws of local application, owing to the differences existing in the kinds and habits of the fish found in the different waters of the state. Strong arguments along this line are made, the effect of which is merely to show what might reasonably have been the intention of the framers of our Constitution. But such arguments can have no weight where the intention is clearly expressed by the words used. This same argument seems to have been made in the constitutional convention. The clause under consideration, as originally drawn, simply prohibited the passage of local or special laws for the protection of game. Upon the final consideration of the

clause the words "or fish" were added. On the consideration of the amendment, it was suggested that a general law upon this subject might operate unequally in different parts of the state—that what was suitable to the north might not be acceptable in the south. The amendment was, however, agreed to and became a part of the Constitution. 1 Const. Debates, p. 608. It thus appears that the clause of our Constitution now under consideration was proposed by the constitutional convention for the express purpose of preventing legislation for the protection of game and fish by laws that should not operate in all the territory subject to the jurisdiction of the state. It is not for the courts to pass upon what the Constitution or laws ought to be, but to declare what they are.

In our opinion it is impossible to sustain section 21 of the act in question under our Constitution. The section is invalid, and the court below did not err in quashing the complaint.

The judgment of the circuit court of Schuyler county is affirmed.

Judgment affirmed.

CARTWRIGHT, C. J., HAND and CARTER, JJ. (dissenting). The Constitution forbids the passage of local or special laws for the protection of game or fish, and the only question in this case is whether the provision requiring license for fishing with hoop net, seine, or trammel net, which does not apply to Lake Michigan, renders the act local or special. It has not been claimed by any one that local or special laws for the protection of fish are not prohibited or that the prohibition is not to have its full and legitimate effect, and, on the question whether this law is local or special, the facts that local and special laws existed before the adoption of the present Constitution, and that the framers of the Constitution thought such laws ought to be prohibited, seem to be without relevancy or point. It would be a natural conclusion from the prohibition that such laws were regarded as having evil tendencies.

Touching the only question submitted to the court for decision, the condition of the law is this: Two acts of the Legislature took effect on the same day. One required a license for fishing with hoop net, seine, or trammel net, and provided that the requirements should not apply to Lake Michigan; the other required a license for fishing by means of a steam, gasoline, or sail boat upon the waters of Lake Michigan under the jurisdiction of this state, and the two acts constitute the whole law and embody the will of the Legislature on the subject. In considering the constitutional question, it is to be borne in mind that the legislation is presumed to be in harmony with the Constitution, and is not to be held void if it can be sustained upon any reasonable ground.

The constitutionality of an act does not depend on the mere form or language of the enactment, but the question to be determined is whether it produces a result prohibited by the Constitution. *People v. Cooper*, 83 Ill. 585. A statute which applies uniformly to all persons in the state similarly situated cannot be said to be a special law (*Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610); and the law is not local merely because it is operative in a single place or places where the conditions necessary to its operation exist (*Trausch v. County of Cook*, 147 Ill. 534, 35 N. E. 477). There are essential differences between the kinds of fish inhabiting the waters of Lake Michigan and those found in the small lakes and streams of the state and in the methods of fishing, and this is matter of common knowledge. When these material differences are pointed out as a basis for different provisions in the law, a reply that the arguments can have no weight as against the intention clearly expressed in the Constitution seems to be ineffectual, since the question is whether the law comes within the prohibited class and is contrary to such intention. Different provisions may be essential to accomplish the purpose of the legislation. Local and special laws for the protection of game are prohibited, but it has not been thought that the Legislature was thereby prevented from making different provisions with respect to different kinds of game, both as to open and closed seasons, or an absolute prohibition for a term of years, or the requirement of a license for hunting one kind of game and not for another. A game law is not regarded as within the prohibition of the Constitution although a license is required for hunting certain kinds of birds and rabbits or squirrels but no license is necessary for hunting coons, ground hogs, or possums. Hunters of some kinds of game may be rewarded by bounties while hunters of other varieties may be compelled to bear the burden of procuring a license.

In this case there is no evidence that fishing is carried on in Lake Michigan by means of hoop nets, seines, or trammel nets, and, until that appears, it certainly cannot be said that the law is either local or special. The presumption in favor of the validity of the act would justify the conclusion that fishing in Lake Michigan is carried on by means of boats and launches, and that fish are caught in the small lakes and streams by means of hoop nets, seines, and trammel nets. There are provisions of the act under consideration, such as the prohibition against fishing within a certain distance from a dam, which necessarily can only apply to streams, and not to the small lakes or to Lake Michigan, and no one would say that the law is thereby rendered local. The license is required by the law for the only kind of fishing which so far as appears is carried on in the waters of Lake Michigan; and we do

not regard the act as either local or special by reason of the fact that one license is required for fishing in small lakes and streams by one method, and a different license is required for fishing in Lake Michigan in another way.

(237 III. 237.)

**PEOPLE v. JOHNSON.**

(Supreme Court of Illinois. Dec. 15, 1908.)

**1. MUNICIPAL CORPORATIONS (§ 700\*) — STREETS—OBSTRUCTION OF—CRIMINAL PROSECUTION—EVIDENCE.**

In a prosecution for obstructing a public street by the building of a fence across it, evidence that the defendant came to the committee on streets and alleys of a village, and asked leave to put a lane across it, so as to give his stock access to water, calling it a street, and that the committee refused his application, was inadmissible to prove the existence of the street by prescription, as the village refused the privilege asked for, and as its declarations at the time of making the application could not operate as an estoppel, and the natural effect of the testimony would be to lead the jury to believe that defendant was guilty, because he had recognized the existence of the street.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 700.\*]

**2. CRIMINAL LAW (§ 814\*)—TRIAL—ABSTRACT INSTRUCTIONS.**

Instructions not based upon any evidence in the case should not be given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979; Dec. Dig. § 814.\*]

**3. MUNICIPAL CORPORATIONS (§ 654\*) — STREETS — ESTABLISHMENT — PRESCRIPTION — EVIDENCE—SUFFICIENCY.**

In a prosecution for obstructing a street by erecting a fence across it, evidence held insufficient to show a user of the tract so as to establish the existence of a street by prescription.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 654.\*]

**4. DEDICATION (§ 31\*)—REQUISITES—ACCEPTANCE.**

A dedication of land as a public street is only complete upon acceptance.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 64, 65; Dec. Dig. § 31.\*]

**5. DEDICATION (§ 44\*) — ACCEPTANCE — EVIDENCE.**

The express acceptance by a municipality of a dedication of land as a public street may be shown by some order, resolution, or action of the public authorities, made and entered of record, or it may be implied by acts of the public authorities recognizing the existence of the street, and treating it as a public way, but the proof of acceptance must be unequivocal, clear, and satisfactory.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 85-87; Dec. Dig. § 44.\*]

**6. DEDICATION (§ 34\*)—ACCEPTANCE—TIME.**

Though the acceptance by a municipality of a dedication of land for street purposes may be made immediately after the making of the offer of dedication, still it is not necessary that the offer be accepted immediately, but it may be accepted within such reasonable time as the public necessity may require, the offer not having been withdrawn in the meantime.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 67; Dec. Dig. § 34.\*]

**7. DEDICATION (§ 29\*)—REQUISITES—OFFER—IMPLIED REVOCATION—DEATH OF PARTY.**

An offer to dedicate land for street purposes is revoked, by implication, by the death of person making the offer before acceptance by the municipality.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 79; Dec. Dig. § 29.\*]

Error to Circuit Court, Christian County; A. M. Rose, Judge.

Louis Johnson was convicted of obstructing a public street by a fence, and brings error. Cause transferred to Supreme Court from Appellate Court, on the ground that a freehold was involved. Reversed and remanded.

Provine & Provine and F. P. Drennan, for plaintiff in error. R. C. Neff, State's Atty. (J. C. & W. B. McBride and Hogan & Wallace, of counsel), for the People.

**CARTWRIGHT, C. J.** An indictment was returned by the grand jury to the circuit court of Christian county, charging Louis Johnson, plaintiff in error, with obstructing a public street of the village of Morrisonville, in said county, by building a fence across the same. He entered a plea of not guilty, and there was a trial resulting in a verdict finding that he was guilty of the offense charged. The court overruled his motion for a new trial, and sentenced him to pay a fine of \$10 and the costs of prosecution. The record was certified to the Appellate Court for the Third District in return to a writ of error, and that court decided that a freehold was involved, and the court was without jurisdiction, and therefore transferred the cause to this court.

The controverted question of fact was whether there was a public street 60 feet wide along the north side of block 2 of the defendant's addition to Morrisonville. In 1887 the defendant laid out and platted his addition to Morrisonville, consisting of two blocks, numbered 1 and 2. Block 2 was east of block 1, with a street running north and south between them, and adjoining the addition on the north was a farm owned by J. L. D. Morrison. No street was ever laid out or platted north of defendant's addition, but at the trial the strip of ground was claimed to be a street, either by dedication or prescription. When the addition was laid out the defendant built a fence on the north line of block 2, and Morrison owned and farmed the land up to that fence. It was conceded that there was a street north of block 1, but the dispute was whether there was a street north of block 2, where the fence was built. The Morrison farm north of the addition was open, and there was some travel over the ground now in dispute by Morrison's tenants and others, and there was a wagon track among the cockleburs and weeds. On May 4, 1888, the year after the addition was laid out, Morrison conveyed to Louis Banschbach a tract of land containing 78.51 acres, lying

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

north and east of defendant's addition, but leaving a strip 60 feet wide between the tract sold and the addition. Banschbach was a witness, and gave his recollection of what Morrison said at that time, stating it differently in some respects, but the substance of it was that he told Morrison he would give him his price for the land if he would allow him a street there. That Morrison said, "I won't donate no street to you. If I will donate that street, I will donate it to the village of Morrisonville." That Morrison told the surveyor, "You go ahead and survey it, and leave 60 feet for the street." That Morrison said he would not let Banschbach have the 60-foot strip, and if he donated it, he would donate it to the village of Morrisonville, and that he told the surveyor to allow 60 feet for a street, and if he donated it to anybody he would donate it to the village of Morrisonville. There was another witness, who testified that, about the same time, Morrison said he would leave 60 feet there for a street. No doubt Morrison then entertained an intention to dedicate the strip not conveyed to Banschbach for a street, but he died about August 14, 1888, and the land was then in crops. The strip was not fenced out, and no act had been done toward carrying out his intention. In 1889 Banschbach took possession of the land which he had bought, and fenced it so that a lane 60 feet wide was left open, and the title of the land was then in Morrison's heirs. Banschbach was uncertain whether he built the fence in 1889 or 1890, but he thought it was not as late as 1893. There was evidence for the defendant that Banschbach farmed the land up to the defendant's line until 1893, when he built a house and set some trees along his line and built the fence. When Morrison died there had been no acceptance by the village of the proposed dedication. A witness testified that at some time, which he was unable to fix, he did some work on the strip under a street commissioner, and that three or four furrows were plowed on each side of the strip, and it was graded up. He named two persons as street commissioners, under whose direction he said the work was done, but they both testified they never gave him any instructions to work north of defendant's addition and that they never did or ordered any grading on that part of the street. One of these persons said that he was street commissioner about 1888; that no work was done at that place, and he did not know there was any street there. The other one said that he was street commissioner from 1893 to 1898, and never did any grading on the disputed ground or saw any grading done there, and never gave the witness who testified that grading was done any orders to do grading at that place. There was no evidence whatever from which the jury could find that there was any acceptance by public authorities in the lifetime of Morrison, the owner of the land, of an offer to dedicate the strip for a street. In 1896 the defendant bought from

Banschbach a track of 8 acres north of block 2, and built two fences at the northwest corner of that block across the strip in question connecting his land in the addition with the 8-acre tract. The fences remained across the strip about 11 years, until the village authorities removed them, in May, 1897, and defendant rebuilt them. Banschbach fenced up the east end of the strip about 1900 or 1901, and used it for a hog pen for about six years, and only removed his fence in the spring of 1907. From the time Banschbach built his fence on the south line of his land, whenever it was, until the defendant bought the tract of 8 acres from Banschbach and built the lane across the strip, there was some travel by the public over the disputed ground, but since 1896 there has been no public use of the strip of ground, on account of the defendant's fences being there all the time, and Banschbach's hog pen the greater part of the time.

The court overruled the objection of the defendant to testimony that he came to the committee on streets and alleys of the village in 1898, and asked leave to put a lane across the strip of ground so that his stock could go and come and get water without carrying water across, calling it a street, and that the committee told him they could not give him permission to blockade a street, and denied his application. The evidence was not competent to prove the existence of the highway by dedication, prescription, or in any other manner. The village did not grant, but refused, the privilege asked for, and what the defendant said could not operate as an estoppel. The natural effect of the testimony was to lead the jury to believe that the defendant was guilty because he had recognized the strip of land as a street.

Instruction No. 11, given at the request of the prosecution, was erroneous in telling the jury that it was sufficient to constitute a dedication if Morrison intended to give, and did offer to give, the land for a street, and the village by its acts and uses accepted it and appropriated it as a street. The instruction set no limit of time to the acceptance, but authorized the jury to find that the strip was a street if accepted at any time, whether in the lifetime of Morrison or afterwards.

Instructions 13 and 14 were abstract in form and related to streets by user or prescription. They had no application to the case for want of any evidence on which to base them, and the fourteenth was entirely unintelligible.

There was no user which could establish a street by prescription, and a dedication is only complete upon an acceptance, which may be manifested in various ways. An express acceptance may be shown by some order, resolution, or action of the public authorities made and entered of record, or it may be implied by acts of the public authorities recognizing the existence of the street and treating it as a public way, but the proof of acceptance must be unequivocal, clear, and satisfactory. *City of Chicago v. Drexel*, 141

Ill. 89, 30 N. E. 774; *City of Carlinville v. Castle*, 177 Ill. 105, 52 N. E. 383, 69 Am. St. Rep. 212. The acceptance may follow the offer to dedicate at once, but it is not necessary that the public authorities should accept the offer immediately. The acceptance may be within such reasonable time as the public necessity may allow and require. *Town of Lake View v. Le Bahn*, 120 Ill. 92, 9 N. E. 269. The acceptance, however, must be within a reasonable time, and before a withdrawal of the offer. *Elliott on Roads and Streets*, § 155. The dedication is not complete until an acceptance, and as there must be two parties to a dedication, the offer to dedicate was revoked, by implication, by the death of Morrison. 13 Cyc. 490.

The court erred in refusing defendant's motion for a new trial on the ground that the verdict was against the evidence.

The judgment is reversed and the cause remanded.

Reversed and remanded.

(237 Ill. 88)

#### JOHNSON v. COEY.

(Supreme Court of Illinois. Dec. 15, 1908.)

##### 1. CARRIERS (§ 280\*)—INJURY TO PASSENGER IN AUTOMOBILE—DUTIES OF DRIVER.

The driver of an automobile carrying passengers is bound to use at least reasonable and ordinary care for the protection of his passengers in driving the machine through the streets of a city, and is required to anticipate that he may meet persons or vehicles and to keep a proper lookout for them, and use care to have his machine under such control as to enable him to avoid collisions.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 280.\*]

##### 2. APPEAL AND ERROR (§ 1094\*)—REVIEW—DECISION OF INTERMEDIATE COURT—QUESTIONS OF FACT.

Whether the driver of an automobile carrying passengers through the streets of a city was guilty of negligence as to the rate of speed in approaching a crossing at which a street car was standing, and whether a collision with the car resulting in injury to one of his passengers was the result of the improper speed or the breaking of a brake-rod on the automobile, being questions of fact for the jury, the Supreme Court cannot review the determination of the Appellate Court on such questions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4322-4352; Dec. Dig. § 1094.\*]

##### 3. CARRIERS (§ 305\*)—INJURY TO PASSENGER IN AUTOMOBILE—PROXIMATE CAUSE OF INJURY.

Though a collision between an automobile carrying passengers and a street car resulting in injury to a passenger in the automobile occurred by reason of the breaking of a brake-rod on the automobile owing to a latent defect in such rod, the driver of the automobile was liable, where the accident would not have happened if he had had his machine under control as he was approaching the car.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 305.\*]

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; Ben M. Smith, Judge.

Action by Anna E. Johnson against Charles A. Coey. From a judgment of the Appellate Court affirming a judgment of the circuit court in favor of plaintiff, defendant appeals. Affirmed.

Benjamin Levering, for appellant. Frank A. Rockhold and Francis X. Busch, for appellee.

DUNN, J. This appeal is from a judgment of the Appellate Court for the First District affirming a judgment recovered by the appellee for damages sustained by her in a collision between a street car and an automobile.

The appellee, with several other persons, was riding in the automobile which they had hired of appellant, who also furnished a driver. The collision occurred at the intersection of Thirty-Fifth street and Indiana avenue, in the city of Chicago. There were two street car tracks on each street. The automobile was going west on the north side of Thirty-Fifth street and the street car north on Indiana avenue. The automobile struck the rear end of the street car, and appellee was thrown out on the pavement and severely injured. The declaration charges that the driver of the automobile so negligently operated the machine as to run it against the car and cause the injury. The appellant claims the collision occurred because of the breaking of the brake-rod, and that the brake-rod broke because of a flaw therein which was a latent defect, not discoverable by inspection or by any usual and practicable test.

There was evidence tending to prove that the machine was running at the rate of 12 or 15 miles an hour; that the street car had slowed up or stopped on the south side of Thirty-Fifth street, and, having nearly crossed the street, was slowing down for a stop for passengers on the north side; that no signal was given of the approach of the machine; that the driver did not slacken speed or make any effort to stop the machine or check its speed; and that the force of the collision was such as to throw appellee out on the street and to wholly disable the automobile so that it could not be used. On the contrary, there was evidence tending to prove that the machine was going at the rate of seven miles an hour; that the driver, in approaching Indiana avenue, slowed down to four miles an hour; that he applied his foot to the brake and the brake-rod broke; that if it had not broken the machine would have stopped more than six feet from the car; that there was no other way to stop the machine; that the machine was thoroughly inspected before leaving the garage; that an examination after the accident disclosed a flaw in the broken brake-rod; and that such flaw could not have been discovered by inspection before the accident. The driver of the automobile was bound to use at least reasonable and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ordinary care. He was bound to anticipate that he might meet persons or vehicles and to keep a proper lookout for them and use care to have his machine under such control as to enable him to avoid collisions. It was for the jury to say what the rate of speed was; whether it was negligence to approach the street intersection at such rate; whether the driver slackened speed; whether there was a lack of ordinary care in approaching the car without slackening speed; and whether the brake-rod broke and caused the collision or the force of the collision broke the brake-rod. These are all questions of fact, which we are not authorized to determine. The judgment of the Appellate Court has concluded that question. The issue was properly left to the jury.

The court refused to give to the jury the following instruction asked by the appellant: "The court instructs the jury that the plaintiff has charged in her declaration in this case that she received her injuries by reason of the negligent running of the automobile by the driver of the defendant and does not allege any other ground of recovery; and the court further instructs the jury that if they believe, from the evidence in this case, that the plaintiff received injuries and that they were caused by an accident resulting from defective machinery, the plaintiff cannot recover, because the plaintiff has not alleged said cause as a ground of recovery." The instruction was properly refused, because, though the accident may have resulted from defective machinery, yet, if the driver's negligence in operating the machine was the cause of the accident, the appellee was entitled to recover. Appellant's seventh instruction stated to the jury, in effect, that if the accident was caused by the breaking of the brake-rod, and if such breaking of the brake-rod was not caused by the driver's negligence, the plaintiff could not recover. This was as favorable an instruction as the appellant was entitled to; for, if the driver of the automobile negligently ran near to the street car at a high rate of speed without having his machine under control, and if without such negligence the accident would not have happened, the appellant would still be liable, even though the breaking of the brake-rod was occasioned by a latent defect for which he was not responsible.

We find no error in the record. The judgment is affirmed.

Judgment affirmed.

(237 Ill. 173)

#### PEOPLE v. ARGO.

(Supreme Court of Illinois. Dec. 15, 1908.)

#### 1. WITNESSES (§ 293\*)—EXAMINATION—PRIVILEGE—SELF-INCRIMINATION—CONSTITUTIONAL PROVISIONS—"CRIMINAL CASE."

Inquisition before the grand jury is a "criminal case" within the meaning of Const.

U. S. Amend. 5, and Bill o. Rights Ill. § 10, providing that no person can be compelled in any criminal case to give evidence against himself.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1011; Dec. Dig. § 293.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1743-1745.]

#### 2. WITNESSES (§ 297\*)—EXAMINATION—PRIVILEGE—SELF-INCRIMINATION.

Where evidence, sought from a witness in a criminal case, has a tendency to incriminate him or to establish a link in a chain of evidence which may lead to his conviction, or if the proposed evidence will disclose the names of persons upon whose testimony the witness might be convicted of a criminal offense, or will expose him to penalties or forfeitures, he cannot be compelled to answer.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1026; Dec. Dig. § 297.\*]

#### 3. WITNESSES (§ 21\*)—EXAMINATION—PRIVILEGE—SELF-INCRIMINATION—IMMUNITY ORDER—REFUSAL TO OBEY—CONTEMPT.

Starr & C. Ann. St. 1896, c. 38, par. 69, div. 1, provides that whenever, in any investigation before a grand jury or the trial of any person charged with bribery, it shall appear to the court that another person than the one charged is a material and necessary witness, and that his testimony would tend to criminate himself, the court may make an order that such witness be released from all liability to be prosecuted or punished for any matter to which he shall be required to testify, and, if he shall testify, such order shall forever after be a bar to any indictment, information, or prosecution against him for such matter. *Held*, that the statute did not contemplate that the making of an immunity order thereunder in a prosecution for bribery should wholly deprive a witness of his constitutional privilege and compel him to make a complete disclosure concerning offenses other than that of bribery, and hence an order of immunity under the statute could not exempt a witness from prosecution for disclosures made as to other offenses, and would not protect him from prosecution for such offenses so as to render him guilty of contempt of court in refusing, after the making of an immunity order under the statute, to answer questions tending to show him guilty of such other crimes.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 21.\*]

#### 4. WITNESSES (§ 304\*)—EXAMINATION—PRIVILEGE—STATUTES—CONSTRUCTION.

Statutes requiring a witness to answer questions tending to incriminate him, providing an order of immunity has been made protecting him from prosecution for matters testified to by him, should be enforced only where the immunity is as ample as the constitutional privilege surrendered by the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1051, 1052; Dec. Dig. § 304.\*]

Error to Branch Appellate Court, First District, on Appeal from Criminal Court, Cook County; A. H. Chetlain, Judge.

Horace Argo was convicted of contempt of court. From a judgment of the Branch Appellate Court of the First district, affirming the conviction, defendant brings error. Reversed.

Edward H. Morris, for plaintiff in error. W. H. Stead, Atty. Gen., and John J. Healy, State's Atty. (Hobart P. Young, of counsel), for the People.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

VICKERS, J. This is a writ of error, sued out of this court by Horace Argo to the Branch Appellate Court for the First district, to bring up for review the record of a judgment affirming the conviction of plaintiff in error on a charge of contempt of court in refusing to answer certain questions propounded to him by the grand jury of Cook county.

The plaintiff in error was regularly brought before the grand jury as a witness, and upon being interrogated he refused to answer, on the ground that his answers might tend to incriminate him by furnishing evidence connecting him with gambling and keeping common gaming houses, and subjecting him to divers pains and penalties, both by direct prosecution by the people, and by prosecution for penalties and forfeitures by individuals. Upon refusal of plaintiff in error to answer the questions propounded by the grand jury, the state's attorney presented a petition to the criminal court praying that the court should make an order, under paragraph 69, div. 1, c. 38, Starr & C. Ann. St. Ill. 1896, releasing plaintiff in error from all liability to be prosecuted or punished on account of any matter to which he should be required to testify before the grand jury. Upon a hearing of the petition, and over the objection and exception of plaintiff in error, the court entered an order of record, the substance of which is that it was "ordered, adjudged, and decreed by the said court that the said Horace Argo be and is hereby released from all liability to be prosecuted or punished on account of any matter to which he may be required to testify before the grand jury aforesaid in said investigation and inquiry of said charge of bribery." The court then entered a rule requiring the plaintiff in error to testify before the said grand jury and to answer all questions that might be put to him by the grand jury in the course of the inquiry and investigation on the charge of bribery. The plaintiff in error was again interrogated by the grand jury, and refused, for the reasons above stated, to answer certain questions then propounded to him. Thereupon the state's attorney filed an information charging the plaintiff in error with contempt of court in refusing to answer a large number of questions before the grand jury. A list of the questions which plaintiff in error refused to answer was filed with the information and made a part thereof. Upon a rule to show cause why he should not be attached for contempt, the plaintiff in error answered the information, in which he again claimed his privilege, and charged that the order of the court granting him immunity was not sufficient to protect him from prosecutions and suits that might be instituted for the recovery of penalties under the statute in regard to gaming and keeping gaming houses. Thereupon the court imposed a fine of \$500 upon the plaintiff in error, and sentenced him to six months' imprisonment

in the county jail, and it is the alleged errors in this judgment that are brought in to review in this court.

The list of questions propounded to plaintiff in error is too long to reproduce. We have therefore selected a few, which will serve to show the general character of all of them.

The grand jury were investigating a charge against Mont Tennes and others of bribery. Some of the questions put to plaintiff in error are the following: "Q. Are you employed by Mont Tennes? Q. Do you know anything about the existence of gambling or bookmaking in Chicago? Q. Did you ever talk with anybody in the city of Chicago about the opening up or operating of poolrooms? Q. Did you have anything to do with the operating of the City of Traverse? Q. Did you at various times have discussions with different individuals with reference to payment of money for police protection? Q. Did you have anything to do with the money that was received from the operation of the City of Traverse? Q. Did you have anything to do with the distribution or paying out of money that was received by that boat? Q. Did you ever hear that any money received from the operation of that boat had been paid for police protection? Q. Did you ever discuss with anybody the question of police noninterference with the operation of the boat City of Traverse? Q. How about the operation of any other poolroom or gambling game? Q. Are you working for Mont Tennes? Q. Are you interested in business with Mont Tennes? Q. Have you ever talked with anybody over the telephone from the premises where it is currently reported that a bomb was exploded last night—the railroad depot of the Wisconsin Central Railroad at Forest Park? Q. Don't you know, as a matter of fact, that the gambling syndicate had telephone headquarters in that depot? Q. And that all racing information is sent out from that depot to all parts of the city of Chicago? Q. Are you familiar with the premises at 91 Washington street? Q. Have you ever been in the premises at 949 Lincoln avenue? Q. Are you familiar with the premises on Center street, at No. 135? Q. Do you know that Mont Tennes operates a poolroom on those premises? Q. Do you know that the poolrooms on these premises were protected?" These and many other similar questions were propounded to plaintiff in error, all of which he declined to answer on the ground already stated.

By the fifth amendment to the Constitution of the United States, and a like provision found in section 10 of the Bill of Rights of our own Constitution, it is provided that no person can be compelled in any criminal case to give evidence against himself. Under the decisions of the Supreme Court of the United States and of this state, an inquisition before the grand jury is "a criminal case," within the meaning of these constitutional

provisions. *Minters v. People*, 139 Ill. 363, 29 N. E. 45; *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110. The extent of the privilege guaranteed to a citizen under these constitutional provisions has received the consideration of this court, and the rule is firmly established that if the proposed evidence has a tendency to incriminate the witness or to establish a link in a chain of evidence which may lead to his conviction, or if the proposed evidence will disclose the names of persons upon whose testimony the witness might be convicted of a criminal offense or expose him to penalties or forfeitures, he cannot be compelled to answer. *Minters v. People*, supra; *Lamson v. Boyden*, 160 Ill. 618, 43 N. E. 781; *Samuel v. People*, 164 Ill. 379, 45 N. E. 728.

It is conceded in the case at bar that the questions propounded to plaintiff in error might have a direct tendency to convict him of gambling and of keeping a gambling house, and also expose him to penal actions provided for by paragraph 255 of the Criminal Code (Starr & C. Ann. St. 1896, c. 38), in relation to the recovery of treble the value of the money, goods, or chattels which may have been won by plaintiff in error or by other persons while gaming in a common gaming house belonging to plaintiff in error; but it is contended in support of the judgment below that the immunity order entered by the criminal court of Cook county affords complete protection to plaintiff in error against any action that might be brought against him, either criminal or penal. Whether this is true or not depends upon the construction of the statute under which the court assumed to enter the immunity order. The section of the statute under which the immunity order was entered reads as follows: "Whenever, in any investigation before a grand jury, or the trial of any person charged with any offense mentioned in either of the four preceding sections, it shall appear to the court that another person than the one charged is a material and necessary witness in the case, and that his testimony would tend to criminate himself, the court may cause an order to be entered of record that such witness be released from all liability to be prosecuted or punished on account of any matter to which he shall be required to testify; and upon each order being entered, such witness shall be compelled to testify; and if he shall testify, such order shall forever after be a bar to any indictment, information or prosecution against him for such matter. And when any such witness is admitted to testify on the trial, and does so testify, the defendant shall also at his own request be deemed a competent witness, but his neglect or refusal to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect or refusal."

The "four preceding sections" referred to

in this statute all relate to the offense of bribery. Such offense cannot be committed without the participation of at least two persons. The giving and taking of bribes is made criminal by these sections of the statute. In view of the great difficulty of securing evidence in bribery cases, the Legislature has passed the section of the statute above quoted, authorizing the court to enter an order granting complete amnesty to either party connected with such offense, and then to compel him to answer questions which otherwise he could not be required to answer. It was never contemplated that the entry of an immunity order under this statute would wholly deprive a witness of his constitutional privilege and compel him to make a complete exposure concerning offenses other than those mentioned in the four preceding sections. To so construe the statute would deprive a witness for whose benefit such immunity order had been entered of all his constitutional privilege, not only with respect to his connection with the offense of bribery, but all other offenses as well. Such construction does not appear to us to be consistent with the language employed nor within the reasons which manifestly led to the enactment of this statute. The order of the court granting immunity to plaintiff in error was no broader in its scope than the statute under which it was made.

If it be conceded that the order was valid to the extent that it would protect plaintiff in error from any indictment or prosecution for any of the offenses mentioned in the four preceding sections, it certainly cannot be held to grant immunity to plaintiff in error from indictment and prosecution for offenses not defined in the bribery statute. It will be seen by reference to the questions propounded to the plaintiff in error that they related, directly or indirectly, to the offenses of gambling and keeping gambling houses. Against prosecution for these offenses the immunity order afforded no protection. The grand jury were apparently investigating a charge of bribery against Mont Tennes, alleged to have been committed by paying money to the police officers of Chicago to protect him in running certain gambling houses with which plaintiff in error seems to have been so connected as to make him criminally liable with Mont Tennes. By thus connecting the charge of bribery with the offense of gambling, the grand jury was as liable to obtain evidence proving one offense as the other by the line of questions propounded to plaintiff in error. The fact that the charge of bribery was thus related to the offense of gambling or keeping gambling houses affords no justification for compelling plaintiff in error to answer questions which would have a tendency to convict him of the latter offenses. If a procedure of this kind can be upheld in respect to bribery and gambling, we see no reason why it might not

be employed with equal propriety in regard to any other offense. Thus construed, this statute could be used so as to virtually destroy the constitutional right of accused persons. It is the capability of abuse, and not the probability of it, which is to guide in the interpretation of the statute. When it is attempted to take away the constitutional rights of a citizen and give him in exchange a statutory immunity, that which is given ought to be as broad as the right which is taken away. Statutes of the class to which this one belongs have often been before the courts of sister states, and, while they have usually been held to be constitutional, in enforcing them courts are careful to see that the immunity is as ample as the privilege under the Constitution which is surrendered by the witness. *People v. Kelly*, 24 N. Y. 74; *Republica v. Gibbs*, 3 Yeates, 429; *State v. Quarles*, 13 Ark. 307; *Higdon v. Hurd*, 14 Ga. 255; *Ex parte Rowe*, 7 Cal. 184; *Wilkins v. Malone*, 14 Ind. 153; *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851; *Bedgood v. State*, 115 Ind. 275, 17 N. E. 621; *Counselman v. Hitchcock*, supra; *Emery's Case*, 107 Mass. 172, 9 Am. Rep. 22.

*Emery's Case*, decided by the Supreme Court of Massachusetts, is in many respects like the case at bar. Emery was summoned to give testimony before a special committee of the Senate and House of Representatives charged with an investigation affecting the public interests and with authority to require the testimony, and, having refused to testify, was arrested, brought to the bar of the Senate, and asked, first, whether, since the appointing of the state constabulary force, he had ever been prosecuted for the sale or keeping for sale of intoxicating liquors; and, second, whether he had ever paid any money to any state constable, or whether he knew of any corrupt practice or improper conduct of the state police. Emery, under the advice of counsel, declined to answer, on the ground that his answer would accuse him of an indictable offense and furnish evidence by which he might be convicted of such offense. He was adjudged guilty of contempt, and imprisoned by the sergeant at arms of the Senate for such contempt. Emery sued out a writ of habeas corpus. He was remanded to jail by the lower court, and he removed the case to the Supreme Court of the state. The Constitution of Massachusetts contained a provision that "no subject shall be held to answer for any crimes or offenses until the same is fully and plainly, substantially and formally, described to him, or be compelled to accuse or furnish evidence against himself." A statute passed March 8, 1871 (*Laws 1871*, p. 490, c. 91), provided as follows: "No person who is called as a witness before the joint special committee on the state police shall be excused from answering any question or from the production of any paper relating to any corrupt

practice or improper conduct of the state police, forming the subject of inquiry by such committee, on the ground that the answer to such question might tend to criminate himself or to disgrace him or otherwise render him infamous, or on the ground of privilege; but the testimony of any witness examined before said committee upon the subject aforesaid, or any statement made or paper produced by him upon such an examination, shall not be used as evidence against such witness in any civil or criminal proceeding in any court of justice." In regard to the character of the questions put to Emery the Supreme Court says: "It is apparent that an affirmative answer to the question put to him might tend to show that he had been guilty of an offense either against the laws relating to the keeping and sale of intoxicating liquors, or under the statute for punishing one who shall corruptly attempt to influence an executive officer by the gift or offer of a bribe." The Supreme Court of Massachusetts held that the statute failed to furnish to persons to be examined an exemption equivalent to that contained in the Constitution, or to remove the whole liability against which its provisions were intended to protect, and for that reason such act fails to deprive them of the right to appeal to the privilege secured to them by the Constitution. That court used the following language: "The principle applies equally to any compulsory disclosure of his guilt by the offender himself, whether sought directly as the object of the inquiry, or indirectly and incidentally for the purpose of establishing facts involved in an issue between other parties. If the disclosure thus made would be capable of being used against him as a confession of crime or an admission of facts tending to prove the commission of an offense by himself in any prosecution then pending or that might be brought against him therefor, such disclosure would be an accusation by himself within the meaning of the constitutional provision." This case lends support to the construction which we think our statute should receive.

We hold that the immunity order did not, and legally could not, protect the plaintiff in error from indictment and prosecution for any offense not expressed in the four sections of the statute preceding the one under which the order was entered, and that he had a right to claim his constitutional privilege as to all questions which directly or indirectly tended to connect him with any offense other than those defined in the sections of the statute above referred to. By far the greater number of questions put to plaintiff in error had a plain and undisguised tendency to show his criminal connection with gambling and the keeping of gambling boats or rooms. Other questions connected the offense of bribery and gambling in such a way that the answer would tend to prove both offenses.

If the answer called for by the questions tended to incriminate plaintiff in error of some offense against which the immunity order gave no protection, he was entitled to his privilege, no difference what else the answer tended to prove. In refusing to answer these questions plaintiff in error was within the protection of the Constitution, from which it follows that the court erred in adjudging him guilty of contempt.

The judgments of the Branch Appellate Court for the First District and the criminal court of Cook county are reversed.

Judgment reversed.

(237 Ill. 46)

**STURGES v. CITY OF CHICAGO.**

(Supreme Court of Illinois. Dec. 15, 1908.)

**1. MUNICIPAL CORPORATIONS (§ 740\*)—LIABILITY FOR MOBS—STATUTES.**

Laws 1887, p. 237, § 1, declaring that, when any property is injured in consequence of a mob or riot, the city, or, if not in a city, the county, in which the property was injured, shall be liable to the owner for part of the damages, does not impose a liability on a city for property injured by a mob or riot assembling or occurring outside the limits and beyond the control of the city in which the property was injured.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1558; Dec. Dig. § 740.\*]

**2. MUNICIPAL CORPORATIONS (§ 740\*)—LIABILITY FOR MOBS—POLICE POWER.**

Laws 1887, p. 237, § 1, making a city liable for injury to property by a mob or riot therein, is not based on the negligence of the city, but is based on, and is within, the police power of the state.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1558; Dec. Dig. § 740.\*]

Appeal from Circuit Court, Cook County; S. C. Stough, Judge.

Action by Frank Sturges against the City of Chicago. Judgment for plaintiff. Defendant appeals. Affirmed.

Edward J. Brundage, Corp. Counsel, Robert N. Holt, and Clyde L. Day, for appellant. Bulkley, Gray & More, for appellee.

**HAND, J.** This was an action on the case commenced by Frank Sturges, the appellee, against the city of Chicago, the appellant, in the circuit court of Cook county, to recover damages for an injury to the property of the appellee caused by a mob or riot in the city of Chicago on the 16th day of July, 1903. A jury was waived, and the cause, by agreement of the parties, was tried by the court, and resulted in a finding and judgment in favor of the plaintiff for the sum of \$702, and the city has prosecuted this appeal.

The declaration contained one count, and alleged that the plaintiff was the owner of a six-story brick building located at the corner of Green and Congress streets, in the

city of Chicago; that on the 16th day of July, 1903, during a strike, a large mob or riot of more than 12 persons assembled in the vicinity of said building, and with stones, brickbats, and other missiles broke and destroyed a large quantity of plate glass in the said building, of the value of \$1,048; that the destruction and injury to said plate glass and said building were not occasioned by the negligence or wrongful act of the plaintiff or his tenant; that the plaintiff used all diligence to protect his property from being destroyed or injured, and averred that notice of the injury to his property was given to the city on the 3d day of August, 1903. The general issue was filed, and on the trial defendant submitted certain propositions, in writing, which challenged the constitutionality of the said statute on the ground that it was in conflict with the state and federal Constitutions, and particularly in conflict with section 22 of article 4, and sections 2 and 11 of article 2, of the state Constitution, and in conflict with the provisions of the fifth amendment, and the first section of the fourteenth amendment, to the Constitution of the United States, which propositions were all marked "refused" by the court.

The suit is based upon an act of the Legislature of this state entitled "An act to indemnify the owners of property for damages occasioned by mobs and riots," approved June 15, 1887, in force July 1, 1887 (Laws 1887, p. 237), and it is conceded by the appellant, if said act is constitutional, appellee was entitled to recover in the court below, and the judgment of that court should be affirmed.

Section 1 of the act of 1887 reads as follows: "Be it enacted by the people of the state of Illinois, represented in the General Assembly: That whenever any building or other real or personal property, except property in transit, shall be destroyed or injured in consequence of any mob or riot composed of twelve or more persons, the city, or if not in a city then the county in which such property was destroyed, shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured, for three-fourths of the damages sustained by reason thereof."

The constitutionality of this act was before this court in *City of Chicago v. Manhattan Cement Co.*, 178 Ill. 372, 53 N. E. 68, 45 L. R. A. 848, 69 Am. St. Rep. 321, and in *Dawson Soap Co. v. City of Chicago*, 234 Ill. 314, 84 N. E. 920, and it was there sustained. It is, however, contended by appellant that the act should be held unconstitutional in this case upon grounds other than those upon which it is said the former decisions of this court were based, and for reasons which were not then presented to the court either in the briefs filed by counsel or upon oral

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

argument. Counsel for the appellant now contend that said act is unconstitutional for the following reasons: First, because the act makes the location of the property destroyed or injured, and not the place where the mob assembled or the riot occurred, the criterion as to who should be punished; and, second, because the act makes the liability of the city or county conclusive from the fact, alone, that the property was destroyed or injured within the limits of the city or county, and wholly regardless of the fact whether the city or county, or its officers, were guilty of negligence or had the power to disperse the mob or suppress the riot.

To emphasize the first position of the appellant, it is said, in the brief filed by counsel on its behalf, a mob may assemble or a riot occur in one city or county, or even in a foreign state, and by the use of dynamite or cannon destroy or injure property in another city or county or in this state, and that the city or county "in which such property was destroyed or injured" may be held liable under the statute although the city or county where the destruction or injury to the property occurred was powerless to disperse the mob or suppress the riot, as the mob or rioters were beyond the limits of the city or county. Whether a city or county in which a mob assembled or a riot occurred would be liable for property destroyed or injured in an adjoining city or county, under the circumstances suggested by counsel for appellant, need not now be discussed or decided, as that sort of a case is not now before the court, and the law is well settled that courts do not entertain objections to the constitutionality of a statute unless the objection is made by one whose rights have been in some way affected. *Neifling v. Town of Pontiac*, 56 Ill. 172; *People v. McBride*, 234 Ill. 146, 84 N. E. 865. The case here made by the declaration and by the proofs by the appellee brings the case clearly within the provisions of the statute; that is, the property in question was destroyed or injured by a mob or riot in the city where the mob assembled or the riot occurred.

It is fundamental that the courts will not construe a statute so as to make it unconstitutional if any other reasonable construction can be placed upon it which will make it effectual. *Newland v. Marsh*, 19 Ill. 376; *People v. Peacock*, 98 Ill. 172. To hold that the statute in question should be so construed as to make a city or county liable for the destruction or injury of property caused by a mob or a riot outside of the limits of the city or county, would be to attribute to the Legislature the doing of an unreasonable and absurd thing, and something which the Legislature clearly could not have contemplated. This the courts will never do, unless the language of the statute is so clear and certain in its terms that no other reasonable conclusion from the reading thereof can be reached. And even when

the literal enforcement of a statute will result in inconvenience and great hardship and lead to consequences which are absurd, the courts will presume no such consequences were intended, and adopt a construction which is in its consequences in accordance with reason and which will promote the ends of justice and avoid the absurdity. In *People v. Harrison*, 191 Ill. 257, 61 N. E. 99, the court, on page 267 of 191 Ill., and page 102 of 61 N. E., said: "When the literal enforcement of a statute would result in great inconvenience and cause great injustice, and lead to consequences which are absurd and which the Legislature could not have contemplated, the courts are bound to presume that such consequences were not intended, and adopt a construction which will promote the ends of justice and avoid the absurdity." To the same effect were *People v. City of Chicago*, 152 Ill. 546, 38 N. E. 744, and *Crane v. Chicago & Western Indiana Railroad Co.*, 233 Ill. 259, 84 N. E. 222. We think it clear, therefore, from a consideration of the statute upon which the cause of action in this case is based, said statute should be so construed as not to impose a liability upon a city or county for property destroyed or injured by a mob or riot assembling or occurring outside of the limits and beyond the control of the city or county in which the property was destroyed or injured. If the statute is given such construction then the objection urged by the appellant against its constitutionality is removed. The Supreme Court of the state of New York, and the Supreme Courts of the state of Pennsylvania and other states in the Union, have each held a statute substantially in the language of our statute constitutional. *Darlington v. State of New York*, 81 N. Y. 164, 88 Am. Dec. 248; *County of Allegheny v. Gibson*, 90 Pa. 397, 35 Am. Rep. 670. Our conclusion, therefore, is that the first contention of the appellant cannot be sustained.

The second contention of the appellant is based upon the supposition that the statute was enacted to guard against injury to the property of the citizen caused by the negligence of the city or the county, in which its destruction or injury takes place, in failing to disperse a mob or suppress a riot. The liability imposed by statutes of this kind is not based by the Legislature or sustained by the courts upon the theory that the city or the county in which the property is destroyed or injured has been guilty of negligence, as the element of negligence is not the basis upon which the liability rests, but such statutes are enacted by virtue of the police power of the state and are sustained upon the ground of public policy, and have been universally enforced by the courts without regard to the hardship which might arise by reason of their enforcement in particular cases. The question raised in appellant's second contention was raised and passed upon by this court adversely to the contention

of appellant in the case of *City of Chicago v. Manhattan Cement Co.*, supra, and was there set at rest. On page 379 of 178 Ill., and page 70 of 53 N. E. (45 L. R. A. 848, 69 Am. St. Rep. 321), of the opinion in that case, the court said: "Except that of the state of Maryland, all of the statutes of this character, so far as we can ascertain, like our own, fix the liability of the municipality without reference to its ability or exercise of diligence to prevent the destruction, and that feature has not been considered by any of the courts passing upon the question as an objection to their validity." And the court in that case quoted with approval the following excerpt from the *Gibson Case* (page 378 of 178 Ill., and page 69 of 53 N. E. (45 L. R. A. 848, 69 Am. St. Rep. 321): "Under our political system the state grants a portion of its sovereignty to certain municipalities. It clothes them with certain of its powers, and exacts from them in return the performance of certain duties. Among the powers granted is that of maintaining a police force. Among the duties exacted is that of preserving the public peace. There is an implied contract between the state and every municipality upon which it bestows a portion of its sovereignty that such municipality shall preserve the public peace and maintain good order within its borders. The state lends its aid when the local authorities are overborne and a call for assistance is made in the manner pointed out by law. But it is entirely within the power of the sovereign to make such communities responsible for the preservation of order. The privileges conferred must be taken with such burdens as the lawmaking power chooses to annex thereto." And again, on page 379 of 178 Ill., and page 70 of 53 N. E. (45 L. R. A. 848, 69 Am. St. Rep. 321): "It may seem a harsh rule to hold a community responsible for the effects of mob violence, which, apparently at least, they had no power to prevent, yet not more so than to hold every inhabitant of the English hundred liable for a robbery of which he knew nothing and had no means of arresting. In both cases it is a police regulation. It is based upon the theory that with proper vigilance the act might and ought to have been prevented." And from the *Darlington Case*, on page 378 of 178 Ill., and page 70 of 53 N. E. (45 L. R. A. 848, 69 Am. St. Rep. 321): "It cannot be doubted but that the general purposes of the law are within the scope of legislative authority. The Legislature has plenary power in respect to all subjects of civil government which they are not prohibited from exercising by the Constitution of the United States or by some provision or arrangement of the Constitution of this state. This act proposes to subject the people of the several local divisions of the state, consisting of counties and cities, to the payment of damages to prop-

erty in consequence of any riot or mob within the county or city. The policy upon which the act is framed may be supposed to be to make good at the public expense the losses of those who may be so unfortunate as, without their own fault, to be injured in their property by acts of lawless violence of a particular kind which it is the general duty of the government to prevent, and further, and principally, we may suppose, to make it the interest of every person liable to contribute to the public expense to discourage lawlessness and violence and maintain the empire of the laws established to preserve public quiet and social order. These ends are plainly within the purposes of civil government, and, indeed, it is to maintain them that governments are instituted, and the means provided by this act seem to be reasonably adapted to the purpose in view."

We have gone over the questions involved in this case with much care, and have reached the same conclusion which was reached in *City of Chicago v. Manhattan Cement Co.*, supra, where, on page 377 of 178 Ill., and page 69 of 53 N. E. (45 L. R. A. 848, 69 Am. St. Rep. 321), this court said: "Statutes similar to ours have been in force in England, as well as in several of the states in this country, for many years, and have uniformly been upheld by the courts. The constitutional right of Legislatures to enact such laws under our form of government has been frequently challenged in courts of last resort, and our attention is called to no case denying that authority."

Finding no reversible error in this record, the judgment of the circuit court will be affirmed.

Judgment affirmed.

(237 Ill. 55)

ALLOTT et al. v. AMERICAN STRAWBOARD CO. et al.

(Supreme Court of Illinois. Dec. 15, 1908.)

1. APPEAL AND ERROR (§ 840\*)—JURISDICTIONAL QUESTIONS.

The Supreme Court of its own motion may raise the question of want of jurisdiction over the subject-matter at any stage of the proceedings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3301; Dec. Dig. § 840.\*]

2. QUIETING TITLE (§ 7\*)—"CLOUD ON TITLE."

A "cloud on title" is a semblance of a title, legal or equitable, or a claim of an interest, in lands appearing in some legal form, but which is in fact unfounded. It is a title or incumbence apparently valid, but actually invalid, and exists where the claim of an adverse party to land is valid on the face of the instrument or the proceeding sought to be set aside, and extrinsic facts are required to be established to show its invalidity.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 15-17; Dec. Dig. § 7.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1233-1235.]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

### 3. QUIETING TITLE (§ 7\*)—CLOUD ON TITLE—EQUITABLE JURISDICTION.

A bill will not lie to remove a mere verbal claim or oral assertion of ownership in property as a cloud on title, but applies only to instruments or other proceedings in writing which appear on the record and cast doubt on the validity of the record title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 15-17; Dec. Dig. § 7.\*]

### 4. EQUITY (§ 359\*)—BILL—DISMISSAL.

Complainants in equity, where no cross-bill is filed, can control their own bill and dismiss the same at any time up to the entry of decree.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 749-756; Dec. Dig. § 359.\*]

### 5. INJUNCTION (§ 37\*)—CONDITION—LEGAL TITLE—ESTABLISHMENT AT LAW.

Equity will not interfere by injunction in a suit to protect alleged water rights until the legal title thereto has been established at law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 85; Dec. Dig. § 87.\*]

### 6. INJUNCTION (§ 13\*)—RIGHT TO RELIEF—INJURY.

Equity will not issue an injunction unless complainant shows he will be substantially injured if relief is not granted.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 13; Dec. Dig. § 13.\*]

### 7. INJUNCTION (§ 9\*)—RIGHT TO RELIEF.

To authorize an injunction, there must not only be a clear and palpable violation of complainants' rights, but such rights must be certain and clearly ascertained.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 8; Dec. Dig. § 9.\*]

### 8. INJUNCTION (§ 11\*)—RIGHT TO RELIEF—APPREHENSION OF INJURY.

An injunction will not be granted to allay complainant's fears or apprehensions of injury, unless there is a reasonable probability that the threatened acts complained of will be committed.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 10; Dec. Dig. § 11.\*]

### 9. INJUNCTION (§ 11\*)—RIGHT TO RELIEF.

Where it did not appear that there was any reasonable ground for believing that defendants would undertake to make any change in an existing dam, or in the use of water flowing through the east channel of a stream to which they were entitled under a water rights conveyance, and the court in a suit to restrain defendants from making such change, etc., could do nothing more than determine an abstract question as to the rights of the parties, the bill was unsustainable, under the rule that equity will not entertain a bill merely to vindicate an abstract principle.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 10; Dec. Dig. § 11.\*]

Error to Circuit Court, Will County; Frank L. Hooper, Judge.

Suit by William D. Allott and others against the American Strawboard Company and others. Decree for complainants, and defendants bring error. Reversed and remanded, with directions.

The original bill in this case was filed September 9, 1904, against the American Strawboard Company and two of the other plaintiffs in error, asking that they be restrained from taking or continuing in possession of an abutment of a dam on block 16, Alden's Island

addition to Wilmington, or the abutment to said dam on the opposite shore of the Kankakee river, or of the lands between said abutments, and from proceeding to erect a dam across the Kankakee river at said place or so near as to interfere with complainants in maintaining a dam there, except as such plaintiffs in error might proceed in accordance with certain provisions and restrictions of certain deeds of July 28, 1838, executed by Thomas Cox and others to A. B. Bowen and others, and that the rights of all parties as to the maintenance and control of the five-foot dam at said place and the rights of the parties to the water power derived from such dam might be defined and declared. No injunction was ever issued in the case. Subsequently, on May 16, 1905, an amendment was filed adding as parties other persons owning or claiming to own certain lots and the right to have power from the dam. Answers were filed, and, on issues being joined, testimony was taken, which shows that in the Kankakee river in this locality is situated Alden's Island. The river, flowing in a northerly direction, is divided thereby into two streams, the largest one originally flowing on the west side of the island. The river has been used for water power at that point since about 1838. At that time the land and water rights were owned jointly by Thomas and Joseph Cox and A. B. Bowen, who afterward divided the property between them by deeds. The land on the east bank of the east branch was platted into water lots and sold to various parties by the Coxes and Bowen, and by means conveyances the title to the respective lots is now in the various defendants in error. Several mills, including a paper mill operated by the American Strawboard Company, are situated on these water lots, and are run a part of the time by power obtained from a raceway running out of the east channel. One of these early deeds includes, among other rights granted, "the privilege of letting and drawing off from the mill race at said lot 11, also 72 inches of water from the mill race at any place on the premises hereby conveyed, and of reserving 884 inches of water to be drawn from said mill or point at said lot 1, and water sufficient to run a sawmill, and 72 inches of water to be drawn from the mill race at lot 10 of water lots, the one-half of all the remaining water in the mill race, together with all and singular the hereditaments and appurtenances," etc. Some of the other deeds contain provisions of the same nature. There are also provisions as to the building and repairing of the milldam and other portions of the work connected with the water power, in proportion to the respective rights.

About 1838 a raceway was constructed, leading out from the east channel of the river, across the water lots, and into the river again. At about the same time a dam was erected across the west channel of the river

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

at the upper or southern end of the island. This dam has been replaced from time to time, first being built of brush, then of boulders, and then a wooden dam five feet high was erected in 1871, all at substantially the same point in the river. Before the dam was built in 1871 there was a dispute as to whether it should not be constructed six feet in height, but after conferences the parties interested decided upon a five-foot dam, and it appears to have been built by the Kankakee Company largely for the purpose of facilitating navigation of the river by that company. Water gates were put in at the upper end of the east channel to regulate the flow of water therein. The Kankakee Company navigated tugs and barges on the river for a number of years, but in 1881 or 1882 ceased its operations, and refused to pay for repairs on the water gates or dam. Evidently the main part of the cost of keeping the dam and water gates in repair for many years thereafter was met by the owners of the water lots on the race and by the city of Wilmington. A part of Alden's Island is used by the city as a wooded park, and the city's interest in the water gates seems to be largely to use them as flood gates to control the water when it is high.

Up to 1871 there appears to have been no controversy relative to the water power. Since that date the five-foot dam continued to exist, with some repairs, until January, 1904, when a portion of it was swept away, and there then arose some controversy as to when and by whom it should be rebuilt. Defendants in error erected a small wire inclosure around the east abutment, which is on land owned by them, had a tent placed there, and hired a man to live in the tent and watch the property. They also had a small amount of filling and other work done at various places. There is some evidence tending to show that they claimed that they were intending to build a new dam on a much larger scale than had been built before, and one of the defendants in error testified that he had a conversation with a representative of the American Strawboard Company to the effect that he wanted the parties in interest to get together, and that he did not object to building a new dam at that point at the joint expense of the defendants and the plaintiffs in error, provided it was so constructed as to serve for the foundation of a higher structure when that should be commenced, but nothing definite came of this talk. The owners of the water power rights shortly thereafter started to rebuild the dam, and the original bill in this case seems to have been filed at about that time, but no injunction was issued, and it appears from the pleadings and from the evidence taken that during the pendency of the suit, and before the amended bill was filed adding the new defendants, the dam was rebuilt as a five-foot dam, at the same height as it had existed from 1871.

The circuit court of Will county at the January term, 1908, entered a decree finding that whatever rights plaintiffs in error had arose under their deeds, and not by prescription, and further finding "that the right to control the flow of water in said east channel in excess of what is required to supply the defendant owners of water power with the flow to which they are entitled under their respective grants is a valuable property owned and possessed by the complainants, and that the assertion of said claims of the defendants, and the assertion of the right to have other water power than that defined by their respective grants, under which they derive title, as aforesaid, made in connection with the use of water power, and the exercise of the authority which they rightfully have to make repairs on said dam and for such purpose to exercise a limited right of possession, in connection with the fact that the complainants have made no use of the surplus power afforded by said dam for a period of years, constitute a cloud upon the title of the complainants aforesaid which tends to greatly impair the value of the complainants' aforesaid property; and the complainants, under the conditions aforesaid, being without adequate remedy at law, the court doth find and decree that the rights of the said defendants to water power and to the control of the said dam at the south end of Alden's Island are such only as they have acquired aforesaid by deed or grant and as are defined and limited by their respective grants, and that they are without title or authority to have possession of or to exercise control over the said dam except as authorized by said deeds," etc. The court further found that, by reason of waiver of counsel on one side and objections on the other, it would not attempt to adjudicate or determine the rights of the several defendants, under their respective deeds as to the particular amount of water or power limited under such deeds, as the determination of such respective rights was not material or essential to the determination of the other questions. From that decree, this writ of error has been sued out.

J. L. O'Donnell and T. F. Donovan (James Todd, of counsel), for plaintiffs in error. Rufus Cope, for defendants in error.

CARTER, J. (after stating the facts as above). Manifestly from this record the only thing attempted to be settled by the decree was the question whether the rights of the various plaintiffs in error arose solely from the deeds in question, or if they possessed an easement, acquired by prescription, in the use of water, over and above that called for by the deeds, to the amount such excess had habitually flowed through the east channel since the erection of the five-foot dam in 1871.

The only question we deem it necessary to discuss is the jurisdiction of a court of equity

to grant the relief specified in said decree. The jurisdictional question is not raised by the pleadings, and only incidentally in the briefs of plaintiffs in error, but this court may of its own motion interpose the objection of want of jurisdiction over the subject-matter of the suit at any stage of the proceedings. *Gage v. Schmidt*, 104 Ill. 106. The jurisdiction of equity was invoked in the original bill to restrain plaintiffs in error from rebuilding the dam, but that part of the remedy is not now urged and does not seem to have been since the time the dam was rebuilt. The only remedy now urged giving equity jurisdiction is the settling of the rights of the parties, and the court by its decree entertained jurisdiction for that purpose on the ground that plaintiffs in error's claim to a part of the water rights by prescription amounted to a cloud upon the title of defendants in error. A cloud on a title is a semblance of a title, either legal or equitable, or a claim of an interest in lands appearing in some legal form, but which is in fact unfounded. *Rigdon v. Shirk*, 127 Ill. 411, 19 N. E. 698. It is a title or incumbrance apparently valid but actually invalid. *Goodkind v. Bartlett*, 136 Ill. 18, 26 N. E. 387. It exists where the claim of an adverse party to land is valid upon the face of the instrument or the proceeding sought to be set aside, and extrinsic facts are required to be established to show the supposed conveyance to be inoperative and void. *Reed v. Tyler*, 56 Ill. 288. This court has held that a bill will not lie to remove a mere verbal claim or oral assertion of ownership in property as a cloud upon the title. Such clouds upon title as may be removed by courts of equity are instruments or other proceedings in writing which appear upon the records and thereby cast doubt upon the validity of the record title. *Parker v. Shannon*, 121 Ill. 452, 13 N. E. 155. See *Roby v. South Park Com'rs*, 215 Ill. 200, 74 N. E. 125, as to whether the existence of an ordinance looking towards the condemnation of property, without any attempt to enforce it, would constitute a cloud upon the title. Up to the time the answers were filed in this proceeding there was nothing of record that would justify a court of equity in interfering to remove a cloud on the title of defendants in error. While it has been held that the semblance of a title, such as would justify the filing of a bill in equity to remove a cloud, may exist on account of the filing of a bill in equity claiming title to real estate, even though it had been dismissed on the merits (*Shults v. Shults*, 159 Ill. 654, 43 N. E. 800, 50 Am. St. Rep. 188), yet defendants in error could control their own bill, no cross-bill having been filed (*Langlois v. Matthiesen*, 155 Ill. 230, 40 N. E. 496), and therefore, up to the time of entering the decree, they could dismiss it any time they saw fit. It is true that in other jurisdictions, under somewhat similar circumstances, courts of equity have taken jurisdiction to remove a cloud upon the title. *Oman v. Bedford-Bowl-*

*ing Green Stone Co.*, 124 Fed. 64, 67 C. C. A. 190; *Riverside Land & Irrigation Co. v. Jansen*, 66 Cal. 300, 5 Pac. 486; *Reservoir Co. v. Water Supply Co.*, 27 Colo. 532, 62 Pac. 420. See, also, *Lyon v. Ross*, 4 Ky. 466; *Gould on Waters* (3d Ed.) § 519. But it will be noted that in all those cases there appears to have been an immediate danger of rights being interfered with unless a court of equity assumed jurisdiction. It has been held that chancery will not intervene to sustain the right to a water course, or to enjoin the use thereof, until after the legal title is first settled; the question in dispute being the construction of certain grants. *Prentiss v. Larnard*, 11 Vt. 135. Where defendant asserted title to an easement in a water course across complainant's premises, and had gone on the premises, without the complainant's consent, to repair the stream for more than twenty years, and had destroyed a gate erected by complainant to lessen the flow of water, equity would not take jurisdiction to quiet title in the easement until the legal right had been decided. *De Hamme v. Bryant*, 61 N. J. Eq. 141, 48 Atl. 220; *Farnham on Waters and Water Rights*, §§ 474, 829. It has been frequently held that in an attempt to obtain an injunction under circumstances similar to those set up on this record equity will not interfere until the legal title has been established by law. *Malloon v. White*, 57 N. H. 152; *Outcalt v. Helme Co.*, 42 N. J. Eq. 665, 4 Atl. 669, 9 Atl. 683; *Peters v. Hansen*, 55 Mich. 276, 21 N. W. 342; *State v. Sunapee Dam Co.*, 70 N. H. 458, 50 Atl. 108, 59 L. R. A. 55. Where three persons were severally in possession of certain lands bordering on a river, the lands of one being on the east bank and those of another on the west bank and those of the third on an island in the center, a court of equity properly refused to take jurisdiction to settle their respective rights as to the use of the water until such rights had been established at law. *Stolp v. Hoyt*, 44 Ill. 219; *Howell Co. v. Glucose Co.*, 171 Ill. 350, 49 N. E. 497; *Bradfield v. Dewell*, 48 Mich. 9, 11 N. W. 760. We are of the opinion that under the authorities in this state there was no such cloud on the title as to justify equity in taking jurisdiction here, either at the time of filing the original bill or when the decree was entered.

It may well be doubted, for another reason whether equity should assume jurisdiction in this case. It has been repeatedly held that equity will not assume jurisdiction and issue an injunction unless the party complaining shows that he will be injured if relief is not granted. *Shonk Tin Printing Co. v. Shonk*, 138 Ill. 34, 27 N. E. 529. And it is also a rule that the allegations must be clear and distinct and supported by satisfactory evidence that substantial injury will be sustained. *Springer v. Walters*, 139 Ill. 419, 28 N. E. 761. It has also been held that to authorize an injunction there should not only be a clear and palpable violation of the rights of the complainant, but the rights themselves should be certain and such as can be clearly

ascertained and measured. *Olmsted v. Loomis*, 6 Barb. (N. Y.) 152; *Tipping v. Eckersley*, 2 K. & J. Ch. 284. The courts will not grant an injunction to allay the fears or apprehensions of individuals unless there is a reasonable probability of the threatened acts complained of being committed. 16 Am. & Eng. Ency. of Law (2d Ed.) p. 361. This same doctrine has been applied in actions to settle title where the apprehensions appear to be unfounded. 6 Am. & Eng. Ency. of Law (2d Ed.) p. 153, and cases there cited. There is nothing shown in this record which indicates that there is any reasonable ground for believing that plaintiffs in error will undertake to make any change in the dam, or in the use of the water flowing through the east channel, to the detriment of the defendants in error. Furthermore, there is a controversy as to whether on this record it could be positively and certainly ascertained how high a dam the deeds in question authorized to be constructed at the point in question or to how much water plaintiffs in error were entitled under said deeds. Surely it cannot be claimed that a reading of the deeds, in connection with the pleadings in this case, makes those points clear and plain, and, as we have said, the decree does not attempt to settle this. We cannot see that the decree will be of any particular benefit to any one, except, perhaps, in so far as the fact that it finds in a general way that plaintiffs in error have no prescriptive rights in the water might be deemed of benefit to defendants in error's title. While the decree found that the only rights of plaintiffs in error arise under the deeds and not from prescription, it does not attempt to settle the practical questions involved, such as whether, under those deeds, plaintiffs in error are entitled to have a five-foot dam at the point in question, or whether the dam, if desired by plaintiffs in error, could be erected higher, or whether it could be lowered, and how much water the deeds actually call for. The decree does not attempt to change the present condition of the dam. Defendants in error do not seek to deprive plaintiffs in error of the right to make repairs pursuant to the provisions of the deeds, and the decree does not attempt to regulate or change in any way the use of the water now being sent through the east channel by means of the dam and the gates at the upper or south end of said Alden's Island. A court of equity is not called upon to do a vain thing, and it will not entertain a bill simply to vindicate an abstract principle of justice. *Patterson v. Northern Trust Co.*, 230 Ill. 334, 82 N. E. 837; *Joliet & Chicago Railroad Co. v. Healy*, 94 Ill. 416; *Werden v. Graham*, 107 Ill. 169; *Seeger v. Mueller*, 138 Ill. 86, 24 N. E. 513; *Beattie v. Whipple*, 154 Ill. 273, 40 N. E. 340.

For the reasons stated, equity does not have jurisdiction of the subject-matter here in dispute. The decree of the circuit court is therefore reversed and the cause remanded,

with directions to dismiss the bill without prejudice to further proceedings.

Reversed and remanded with directions.

(237 Ill. 278)

# DEVINE v. CHICAGO CITY RY. CO.

(Supreme Court of Illinois. Dec. 15, 1908.)

## 1. PLEADING (§ 212\*)—DEMURRER—WAIVER.

Where defendant, after filing a demurrer to the declaration, files no further pleadings, and goes to trial without calling up the demurrer for disposition, he waives the demurrer, and cannot raise the objection for the first time after verdict.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 521-524; Dec. Dig. § 212.\*]

## 2. APPEAL AND ERROR (§ 1048\*)—REVIEW—HARMLESS ERROR—EXAMINATION OF WITNESS.

Where a witness, having, in answer to a question as to whether he did not testify differently at the coroner's inquest, stated "I may have. I don't remember," error of the court in sustaining an objection to a further question as to whether the matter was not fresher in the witness' mind at the time of the inquest than at the time of trial was not ground for reversal, where the witness was otherwise cross-examined at great length on the subject of his testimony given before the coroner, and the testimony itself was introduced for the purpose of impeaching him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145; Dec. Dig. § 1048.\*]

## 3. CARRIERS (§ 384\*)—EJECTION OF PASSENGER—USE OF FORCE—RESISTANCE—SELF-DEFENSE.

In an action by a passenger for wrongful ejection, an instruction asked by defendant presenting the theory that the conductor acted in self-defense, which was so drawn as to lead the jury to believe that the conductor could use any amount of force, even to the extent of causing death, if there were reasonable grounds for believing that there was danger of his receiving bodily injury, however slight, from the resistance of the passenger, was properly refused, where the only evidence to support such instruction was that, when the passenger attempted to get back on the car, he appeared to have his hand behind him.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 384.\*]

## 4. TRIAL (§ 260\*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

A party cannot complain of the refusal of the court to give a requested instruction, where the subject-matter of such instruction is included in the charge as given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; Robert W. Wright, Judge.

Action by John F. Devine, administrator of Thomas Keating, deceased, against the Chicago City Railway Company. From a judgment of the Appellate Court affirming a judgment of the circuit court for plaintiff, defendant appeals. Affirmed.

It appears from the evidence that deceased was found by a night watchman about 2 o'clock on the morning of April 29, 1905, ly-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
86 N.E.—44

ing unconscious on the sidewalk on Sixty-Third street, and having a wound on the right side of his head some five inches long. He was taken to a hospital in the patrol wagon, and died about 2 o'clock the next afternoon. The evidence shows that the deceased, in company with one Casey, had been drinking to a considerable extent the afternoon of April 28th, remaining in the last saloon until nearly midnight. Casey testified that at a point near State and Thirty-Seventh streets they boarded a street car and stood on the rear platform of the front car; that the conductor asked for their fares, and that the witness, who was an employé of the company, showed a badge; that the deceased told the conductor that he had a badge also, but showed none. He was told he must pay fare or get off the car. This he refused to do, and after some talk the conductor pushed him off the car. Deceased immediately got back onto the running board of the car, and this witness states that the conductor then struck the deceased on the head with something about a foot long; that the deceased sank to his knees, still holding to the car, and the conductor hit him a second time; and that then deceased fell to the street in a heap. Casey testified that the conductor then kicked and pushed him off the car, and, after following it a short distance, he went back to the deceased and found him just getting up and bleeding from the right side of the head. After washing Keating's head at a nearby saloon, they boarded another car at Thirty-Ninth street to go to Sixty-Third street, where the witness went to the car barn to make an inquiry, leaving Keating sitting on the sidewalk, and, when he returned to that point from the barn, Keating was gone. The next time witness saw him was at the undertaker's, after his death. There was testimony by other witnesses that Casey and Keating were drunk, and that the conductor hit the latter. The motorman of the car on which the deceased was when struck stated that the conductor used a "billy" about six or eight inches long, made of leather and filled with sand. The conductor was not called as a witness.

John E. Kehoe and Watson J. Ferry (John R. Harrington, of counsel), for appellant. O'Donnell, Dillon & Toolen, for appellee.

CARTER, J. (after stating the facts as above). The defendant filed a general and special demurrer to the declaration. No issue was joined on this demurrer, and the declaration and demurrer were all the pleadings in the case. The case was called, both parties being represented by counsel, and a jury was impaneled without either party saying anything about the condition of the pleadings. The attention of the trial court does not seem to have been specifically called to this question at any time. The instructions asked do not mention it. The mo-

tion for new trial, although it sets out particularly 26 different reasons why a new trial should be granted, does not call attention to it; and, while a formal motion for arrest of judgment appears to have been made, the record does not disclose that the court's attention was then called to this point. Apparently it was first raised in the Appellate Court. Appellant argues that this is an error that appears on the face of the record, and hence can be raised in a court of review for the first time. Conceding, for the sake of the argument, that this is true, is the error of such nature as to require the reversal of this case? It must be admitted, as was stated by Mr. Justice Breese in *Hopkins v. Woodward*, 75 Ill. 62, that the cases in this state on this question are not in entire harmony. This court held that where, while a demurrer is pending, general and special pleas are filed to the count demurred to, the demurrer is thereby waived, and no judgment need be pronounced on it. *Walden v. Gridley*, 36 Ill. 523. Substantially to the same effect are *Davis v. Ransom*, 26 Ill. 100, *Edbrooke v. Cooper*, 79 Ill. 582, *Hull v. Johnston*, 90 Ill. 604, *Shreffler v. Nadelhoffer*, 133 Ill. 536, 25 N. E. 630, 23 Am. St. Rep. 626, and *Chicago & Alton Railroad Co. v. Clausen*, 173 Ill. 100, 50 N. E. 680. We have also held that, if the parties appear and go to trial without a plea being put in, it is such an irregularity as will be held waived and cured by the verdict under the statute of amendments. *Brazzle v. Usher*, Breese, 35. To the same effect are *Loomis v. Riley*, 24 Ill. 307, *Strohm v. Hayes*, 70 Ill. 41, *Barnett v. Graft*, 52 Ill. 170, and *First Nat. Bank v. Miller*, 235 Ill. 135, 85 N. E. 312. It has been held it is error to render judgment by default on demurrer to one of the counts in the declaration when one of the special pleas remained undisposed of. *Bradshaw v. McKinney*, 4 Scam. 54; *Steelman v. Watson*, 5 Gilman, 249. It has also been held that, where a demurrer remains undecided as to a part of the counts of a declaration, it is erroneous to try the case and render final judgment against the defendant on the other counts. *Bradshaw v. Hoblett*, 4 Scam. 53; *Weatherford v. Wilson*, 2 Scam. 253. This court in *Nye v. Wright*, 2 Scam. 222, held that, where the record showed that a demurrer had been filed in the court below by the defendant and the plaintiff had joined in the demurrer, it was error to proceed with the cause and submit it to a jury upon its merits without first disposing of the demurrer. The doctrine of that case has been upheld in *Moore v. Little*, 11 Ill. 549, and *Chapman v. Wright*, 20 Ill. 120, and substantially to the same effect are *Richeson v. Ryan*, 15 Ill. 13, and *Sammis v. Clark*, 17 Ill. 398. In *Lincoln v. Cook*, 2 Scam. 61, it was held that where the record stated that the court sustained the demurrer to the first plea of the defendant, and that after replication filed to certain other pleas issues were joined

by agreement of parties and the cause submitted to a jury, the parties must be considered as waiving all objections to the form of the pleadings on either side. In *Parker v. Palmer*, 22 Ill. 489, the conflict in the decisions here under discussion was noticed, and it was there said that the court did not intend to go one particle beyond the point to which the decided cases lead, and that, where there is an unanswered demurrer on record and the party filing it goes to trial by consent, it will not be cause for reversal of the judgment. Again, in *Williams v. Baker*, 67 Ill. 238, it was held that, where a defendant who has demurred to a declaration consents to a trial of the case and it is tried on the merits, it amounts to a waiver of any benefit he might otherwise have had from the demurrer. Again, in *Hopkins v. Woodward*, supra, where the trial court proceeded to trial upon issues of fact formed without deciding a demurrer to a plea, there being no joinder in demurrer, this court, after stating that the decisions were conflicting, held that the irregularity was not such as to authorize a reversal; the defendant not having placed himself in a position to demand a decision as to the demurrer. In *Belleville Nail Mill Co. v. Chiles*, 78 Ill. 14, the exact situation as it appears here on the record was apparently presented, and this court held that where the parties go to trial by consent, with a demurrer to a count of the declaration undecided, it is no cause for reversal of the judgment.

Counsel for the appellant argue that some of these last cases are different from this case, because a jury was there waived. This is not true of the last case, as there the trial was by jury. Counsel in this case, as in that case, consented to go to trial.

Counsel for appellant, however, insist that the latest utterance of this court in *Jocelyn v. White*, 201 Ill. 16, 66 N. E. 327, upholds their contention, as *Nye v. Wright* was quoted with approval on this point. While it is true there are some expressions in that case unnecessary for its decision, which tend to uphold appellant's contention, it is also true that on page 22 of 201 Ill., on page 329 of 66 N. E., this court said: "If, then, one does not waive his undisposed of demurrer by proceeding to trial without plea and without calling it up, it would seem that the court would be going very far to hold that he had waived his rights thereunder where such a demurrer was, in fact, overruled, merely because he failed to expressly give notice to the court, and to have the same entered of record, that he had elected to abide by such demurrer." It is therefore very clear that the court in that case was of the opinion that this question could be waived by proceeding to trial without plea and without calling the demurrer up for disposition. While it may have been a technical error to proceed to trial before a jury on issues of

fact without disposing of this demurrer, we think it is the better practice and in accord with the later decisions of this court to hold that such error was waived by appellant by proceeding to trial the same as if the case was at issue on the facts, and cannot be raised for the first time after verdict.

Counsel for appellant further insist that the court committed reversible error in sustaining objections to questions asked by the appellant of witness Casey. That witness was asked if he did not testify differently before the coroner than on this trial, and answered: "I may have. I don't remember." The question was then asked if the matter was not fresher in his mind then than it now is. An objection to the question was sustained. A like question was also asked in another part of his examination, and the objection was sustained. The other points raised as to the questions on cross-examination of the witness were of a similar character. His testimony before the coroner on this point was afterwards introduced for the purpose of impeaching him. This witness was cross-examined at great length on all phases of his testimony. We should be inclined to hold, from an examination of the record, that the trial court allowed too much, and not too little, latitude in such cross-examination. Certainly no reversible error was committed in refusing to allow him to answer the question suggested above, or as to any others to which our attention has been called.

The appellant also insists that the court erred in refusing its nineteenth offered instruction. This instruction attempted to set up the law of self-defense as it applied to the conductor in ejecting the deceased from the car. Some of the witnesses testified that, when deceased attempted to get back on the car, he appeared to have his hand behind him. The argument of the appellant is that the conductor might well have believed that Keating was attempting to draw a revolver although there is no proof that he had a revolver on his person. The instruction in question was so drawn that, if it had been given, the jury might have been led to believe that the conductor could use any amount of force, even to the extent of causing death, if there were reasonable grounds for believing that there was danger of his receiving any bodily injury, however slight. This is not the law. Admitting, however, for the sake of the argument, that the instruction stated the law correctly, it was not error to refuse it, as two other instructions were given for appellant which fairly covered the rule of law as to self-defense for the conductor which might be invoked by the appellant.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(237 Ill. 200)

**PETERSON v. PUSEY.**

(Supreme Court of Illinois. Dec. 15, 1908.)

**1. PLEADING (§ 172\*)—REPLICATION—JOINDER—FILING OUT OF TIME—LEAVE OF COURT.**

Though plaintiff failed to file a joinder to defendant's general issue or a replication to defendant's plea of set-off within the proper time, the court should allow the same to be filed out of time on application at any time before the trial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 334-338; Dec. Dig. § 172.\*]

**2. APPEAL AND ERROR (§ 1094\*)—REVIEW—DECISION OF INTERMEDIATE COURT—CONFLICTING EVIDENCE.**

Where a judgment entered on a verdict, based on conflicting evidence, is affirmed by the Appellate Court, the Supreme Court cannot review such judgment on questions of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322-4352; Dec. Dig. § 1094.\*]

**3. CONTRACTS (§ 324\*)—ACTIONS—NATURE AND FORM OF REMEDY—COMMON COUNTS.**

Where a contract has been performed and nothing remains but the payment of the price for labor and material furnished, recovery may be had under the common counts, though there were slight variations from the agreement as originally entered into.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1549-1557; Dec. Dig. § 324.\*]

**4. TRIAL (§ 236\*)—INSTRUCTIONS—CREDIBILITY OF WITNESSES—"KNOWINGLY"—"WILLFULLY."**

An instruction that, if the jury believe that any witness has "knowingly" testified falsely, they may disregard his entire testimony, was not subject to the objection that it failed to use the word "willfully," since such words are of equivalent meaning.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 531-533; Dec. Dig. § 236.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 3937-3939; vol. 8, pp. 7468-7481, 7835, 7836.]

**5. TRIAL (§ 295\*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.**

In an action to recover compensation under a contract, an instruction that substantial performance was all that the law required was not subject to the objection that it failed to inform the jury what constituted substantial performance, where that information was given in other instructions, and the objectionable instruction did not direct a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.\*]

**6. CONTRACTS (§ 294\*)—SUBSTANTIAL PERFORMANCE.**

A substantial performance of a contract is all that the law requires, where there has been no willful departure from the terms of the contract, no omission in essential points, and it has been honestly and faithfully performed in its material parts.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1357-1361; Dec. Dig. § 294.\*]

**7. APPEAL AND ERROR (§ 207\*)—OBJECTIONS IN LOWER COURT—MISCONDUCT OF COUNSEL.**

Improper remarks by counsel in his argument to the jury will not be considered on appeal where the party complaining did not object to the remarks in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1500; Dec. Dig. § 207.\*]

**8. APPEAL AND ERROR (§ 261\*)—EXCEPTIONS IN LOWER COURT—MISCONDUCT OF COUNSEL.**

An objection that counsel made improper remarks in his argument to the jury cannot be considered on appeal, where the party complaining failed to take an exception to the ruling of the trial court on his objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1500; Dec. Dig. § 261.\*]

Appeal from Appellate Court, First District, on Appeal from the Municipal Court of Chicago; W. N. Gemmill, Judge.

Action by Teander G. Peterson against Charles M. Pusey. From a judgment of the Appellate Court, affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

Charles A. Phelps, for appellant. Gallagher & Messner and Leonard Fiske, for appellee.

CARTER, J. Appellee recovered a judgment in the municipal court of Chicago for labor and material furnished appellant under a verbal contract for digging trenches, furnishing material, doing the mason work, and laying cut stone for the erection of a building in Chicago. Appellee claimed that the contract price finally agreed on was \$4,775, of which he was paid by appellant \$3,101.85, leaving a balance on the original of \$1,673.15. He also claims for extras \$87, making the total amount claimed \$1,760.15, which, with interest, made the total amount of \$1,833.33 awarded by the verdict of the jury. This judgment was affirmed on appeal to the Appellate Court for the First district, and an appeal to this court followed.

At the time the case was called for trial appellee had not filed a joinder to the general issue or replication to the pleas of set-off. He was allowed by the trial court to file a joinder and replications at that time, over the objection of appellant, who then contended, as he does now, that he was entitled to have judgment entered for want of joinder on the plea of general issue and replications to the pleas of set-off. We think otherwise. Under our practice the trial court in any action pending may permit amendments to pleadings or proceedings in form or substance, for the furtherance of justice. We think it would have been error for the trial court to have refused to allow appellee to file the pleadings in question. City of East St. Louis v. Thomas, 102 Ill. 453, is not in point. Appellee claims that he had fully performed his agreement as to the work in question. There was no written contract, although there were some memoranda on a card which was introduced in evidence, and the plans and specifications in accordance with which the appellant claims the work was to be prosecuted. The defense was that appellee failed to comply with certain provisions called for by the plans and specifications and that the work was done in an unskillful manner, making the building per

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

manently defective; and, further, that appellee could not recover for the alleged extras, as the appellant did not authorize the extra work. Appellee testified that he was told by appellant that one Stevens was to act as superintendent as to the work in question, and that he (appellee) should take orders from Stevens. This is denied by both appellant and Stevens. Appellant moved, at the close of plaintiff's evidence and again at the close of all the evidence, that the court direct a verdict for defendant, both of which motions were overruled and exceptions duly taken.

Whether the evidence justified the amount of the verdict, whether Stevens was authorized to act as superintendent, whether the contract was performed in accordance with the agreement, in a workmanlike and skillful manner, whether the work was accepted by appellant after its completion (as contended by appellee but denied by appellant), and other questions of fact urged in the appellant's brief are all controverted, and, as there is evidence in the record tending to support the appellee's contentions on all these points, the judgment of the trial court on the verdict, which has been affirmed by the judgment of the Appellate Court, conclusively settles those controverted questions of fact in this court. We have nothing to do with the preponderance or weight of the evidence. *Blakeslee's Express Co. v. Ford*, 215 Ill. 230, 74 N. E. 135; *Chicago & Eastern Illinois Railroad Co. v. Snedaker*, 223 Ill. 395, 79 N. E. 169; *Donnelly v. Chicago City Railway Co.*, 235 Ill. 35, 85 N. E. 233. This court can only inquire whether the rules of law were properly followed in the trial court in the admission of evidence, the giving of instructions, and the like.

Counsel for the appellant earnestly insists that recovery could not be had under the declaration filed in this case, as the contract was not fully performed as originally agreed. The declaration had two special counts alleging the oral contract and the common counts. It has been frequently held by this court that where a contract has been performed, and it only remains for the contract price for labor and material to be paid, recovery may be had under the common counts. *Concord Apartment House Co. v. O'Brien*, 228 Ill. 360, 81 N. E. 1038; *Expanded Metal Fire Proofing Co. v. Boyce*, 233 Ill. 284, 84 N. E. 275. As we have said, there was no written agreement, and it is not contended that by oral agreement any architect's certificate was required to be given. Even though there were slight variations from the agreement as originally entered into on some portions of the work, as contended for by appellant, we think, under the authorities just cited, appellee could still recover under the common counts, as he testified that the work was performed in accordance with the agreement.

What we have said with reference to recovery under the common counts we think practically disposes of all objections to the admission or exclusion of evidence raised by appellant. It is sufficient to say we find no reversible error on those questions.

Appellant argues that an impeaching instruction given for the appellee was erroneous because it omitted the word "willfully" in the clause, "If you believe any witness has knowingly testified falsely to any material issue." While the words "knowingly" and "willfully" are usually coupled together in such an instruction, if a person knowingly testified falsely, we think he must be held to have willfully testified falsely. The two words are equivalents. *Fry v. Hubner*, 85 Or. 184, 57 Pac. 420. "Intentionally" is given as one of the meanings of each of these words. *Standard Dict.* This court has held that by a willful violation of the law is meant a violation of its provisions knowingly and deliberately. *Catlett v. Young*, 143 Ill. 74, 32 N. E. 447. We have also held that, if a person consciously omitted to comply with a statutory requirement, this constituted a willful violation. *Spring Valley Coal Co. v. Greig*, 226 Ill. 511, 80 N. E. 1042. We do not consider this instruction erroneous.

Appellant also complains of the second instruction given for appellee, which stated that substantial compliance with the terms of the agreement was all that the law requires, arguing that this instruction, considered by itself, submitted to the jury the question of performance without telling them what was a substantial compliance, and that, therefore, under *Estep v. Fenton*, 66 Ill. 467, this was reversible error. This instruction did not direct a verdict, and several of the instructions given for appellant plainly set forth what was meant by a substantial compliance with the contract. Instructions must be considered as a series, and, taking them together, we do not think there was any possibility of the jury being misled on this point. *Helbig v. Citizens' Ins. Co.*, 234 Ill. 251, 84 N. E. 897. Appellant, while admitting that this court in *Keeler v. Herr*, 157 Ill. 57, 41 N. E. 750, laid down the rule that a substantial compliance was sufficient, and that where there has been no willful departure from the terms of the contract and no omission in essential points and it has been honestly and faithfully performed in its material and substantial particulars, recovery can be had even though there have been technical or unimportant omissions or defects, and that we have sanctioned that ruling in *Shepard v. Mills*, 173 Ill. 223, 50 N. E. 709, *Evans v. Howell*, 211 Ill. 85, 71 N. E. 854, *Bauer v. Hindley*, 222 Ill. 319, 78 N. E. 626, *Concord Apartment House Co. v. O'Brien*, supra, and other decisions, argues that the *Keeler v. Herr* Case, supra, relied on the New York authorities to support this rule, and attempts, by citing a long list of au-

thorities from New York, to show that the courts of that state do not uphold the rule laid down. It would serve no useful purpose to attempt to review the New York decisions cited. This rule has been so repeatedly sanctioned by this court that it must now be held to be the settled law of the state.

We do not think the third instruction is subject to the criticism that the jury would be authorized to find for the appellee regardless of whether there are any hidden defects in the work, unknown to appellant at the time of his alleged acceptance. Neither do we think the jury would be led by this instruction to disregard the evidence of appellant which was offered for the purpose of showing the damages, if any, caused by such alleged defects.

Several objections are raised to appellee's fifth instruction. The first is that there was no evidence that Mr. Stevens was authorized to act as superintendent. As we have already stated, there was evidence tending to show that he was to act as superintendent, so that this was a controverted question of fact and properly left to the jury. We do not think the instruction on that point was misleading. Neither do we think that it was misleading in showing that the court thought that Stevens was the superintendent. We think also it plainly states that the superintendent must act within the scope of the authority. The further criticism that as the instruction directs a verdict it was erroneous because it does not contain all the necessary facts is without foundation. What we have said of this instruction practically disposes of the criticism of appellee's seventh instruction. The question whether or not the appellant accepted the building was properly covered by this instruction. We do not think there was any error in the modification or refusal of the appellant's instructions. The instructions given for him fully and fairly covered the law in his behalf.

Appellant further contends that counsel for the appellee made improper remarks in his closing address to the jury. We do not find it necessary to pass on this question, as appellant, as shown by the abstract, did not object to that part of the address which he is now criticising. Furthermore, while he did object to another part of the address, he preserved no exception to the ruling of the court. A party litigant can only complain where he has objected to and obtained a ruling of the court and excepted to it or excepted to a refusal of the court to act. *City of Salem v. Webster*, 192 Ill. 369, 61 N. E. 823; *McCann v. People*, 226 Ill. 562, 80 N. E. 1061.

We find no reversible error, and the judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

(237 Ill. 431.)

**NAGLE v. KELLER.**

(Supreme Court of Illinois. Dec. 15, 1908.)

**1. INTOXICATING LIQUORS (§ 297\*)—CIVIL DAMAGE LAW—PERSONS ENTITLED TO SUE.**

Where plaintiff, who was without means and unable to earn a livelihood, was supported by her brother, on whom the duty to support was imposed by Hurd's Rev. St. 1908, c. 107, plaintiff could sue for damages to her means of support by the sale of liquor to her brother under Dramshop Act (Hurd's Rev. St. 1908, c. 43) § 9, though plaintiff could not herself have enforced her brother's duty to support her.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 432; Dec. Dig. § 297.\*]

**2. APPEAL AND ERROR (§ 1082\*)—APPEAL FROM APPELLATE COURT—SCOPE OF REVIEW.**

On an appeal from the Appellate Court, appellant may not review objections to instructions not urged in the Appellate Court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4281-4284; Dec. Dig. § 1082.\*]

Appeal from Branch Appellate Court, First District, on Appeal from Circuit Court, Cook County; R. W. Clifford, Judge.

Action by Catherine Nagle against John Keller and others. Judgment for plaintiff was affirmed by the Appellate Court, and defendant Keller appeals. Affirmed.

Goldzier, Rodgers & Froelich, for appellant. C. H. Pendleton and W. W. Mattison, for appellee.

DUNN, J. The appellee, Catherine Nagle, brought suit, under section 9 of the dramshop act (Hurd's Rev. St. 1908, c. 43), against John Keller, the appellant, Peter McCarthy, and Victor Briard, for damages to her means of support caused by the sale of intoxicating liquors to her brother, John W. Nagle. The cause was discontinued as to Victor Briard during the trial, and judgment for \$3,000 was rendered against the remaining defendants. John Keller appealed. The Appellate Court affirmed the judgment, and he has now appealed to this court.

It is argued that the appellee is not a person entitled to bring suit under the act. The section provides that "every husband, wife, child, parent, guardian, employer or other person, who shall be injured in person or property, or means of support, by an intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons."

So far as the question whether or not the appellee received support from her brother is concerned, it is concluded by the judgment of the Appellate Court. It is contended, however, that the appellee had no legal right to the support she received, and therefore no

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

claim for damages on account of being deprived of it. The declaration averred, and as the record is presented in this court it is to be taken as true, that the appellee had been for 30 years infirm and of delicate health, and unable to earn a livelihood, and had been supported by and dependent for her support on her brother, John W. Nagle; for 25 years before the acts complained of; that prior to said acts said John W. Nagle was engaged in business from which he derived a substantial income, and was possessed of property, by means whereof he was able to provide a comfortable maintenance for the appellee, but that the appellant, by selling and giving him intoxicating liquors, caused him to become habitually intoxicated, and in consequence thereof he neglected his business, squandered his money, became reduced and ruined in mind, body, and estate, and failed to provide employment for himself or support for the appellee, and in further consequence of such habitual intoxication he died.

The statute gives a cause of action to any person who shall be injured in person, property, or means of support, either by an intoxicated person or in consequence of the intoxication of any person, against the person causing such intoxication. There seems to be no room for construction. It is not necessary that the person injured should sustain any business or personal relation to the intoxicated person. Any person sustaining an injury of the kind mentioned, whether directly by the act of an intoxicated person or indirectly in consequence of his intoxication, may maintain the action. *King v. Haley*, 86 Ill. 106, 29 Am. Rep. 14. The appellee was, in fact, supported by her brother. She was dependent upon him, and he was legally liable for her support. She was wholly without means and unable to earn a livelihood. Under the circumstances disclosed by the record, the statute (*Hurd's Rev. St. 1908, c. 107*) imposed upon her brother the duty of supporting her. *People v. Hill*, 163 Ill. 186, 46 N. E. 796, 36 L. R. A. 634; *Danley v. Hibbard*, 222 Ill. 88, 78 N. E. 39. Whether it was a legal right which appellee could have enforced against her brother or not, it was a legal liability which the law imposed upon him and provided means for enforcing, of which she was receiving the benefit, and which she was deprived of in consequence of his intoxication. The statute gives her a cause of action for such deprivation.

Various objections are urged to the third instruction given to the jury. The only objection made to this instruction in the Appellate Court was that it authorized the assessment of exemplary damages against the appellant, who was the owner and lessor of the premises and had nothing to do with the actual sales of intoxicating liquors. That

objection is not made here, but it is now insisted that there are various other valid objections to the instruction not mentioned in the Appellate Court. These objections we do not regard as meritorious, and, in any event, they have been waived by the failure to present them to the Appellate Court. The judgment will be affirmed.

Judgment affirmed.

(237 Ill. 247.)

CUTTER et al. v. WELLS, FARGO & CO.

(Supreme Court of Illinois. Dec. 15, 1908.)

CARRIERS (§ 158\*)—EXPRESS RECEIPTS—LIMITED LIABILITY—AMOUNT.

*Hurd's Rev. St. 1906, c. 27*, provides that when property is received by one carrier to be transported it shall not be lawful for the carrier to limit its common-law liability by any stipulation or limitation expressed in the receipt given for the property. *Held*, that a provision in an express receipt that the carrier should not be liable beyond \$50, at which sum the property was valued, unless a different value was therein stated, followed by a blank for the insertion of figures stating the value of the shipment, was a limitation of the carrier's common-law liability and invalid.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 663-667; Dec. Dig. § 158.\*]

Appeal from Branch Appellate Court, First District, on Appeal from Municipal Court of Chicago; Edward A. Dicker, Judge.

Action by Henry W. K. Cutter and another against Wells, Fargo & Co. Judgment for plaintiffs, affirmed by the Appellate Court (140 Ill. App. 324), and defendant appeals. Affirmed.

This is an appeal by Wells, Fargo & Co. from a judgment of the Branch Appellate Court for the First district affirming a judgment for the sum of \$207.50 and costs of suit recovered by Henry W. K. Cutter and Charles H. Crosette, copartners doing business as Cutter & Crosette, appellees, against appellant, in the municipal court of Chicago, for the loss of certain goods delivered to it by appellees for shipment.

Appellant is a common carrier engaged in the express business. On April 26, 1906, it received from appellees five cases of shirts, of the value of \$728, to be shipped by express to Charles A. Lewis in San Francisco, Cal. One of these cases, valued at \$207.50, was lost by appellant and never delivered. At the time of the delivery of the goods to appellant appellees paid to it the sum of \$98.10, express charges, and were given a receipt covering the goods, and containing a provision which appellant regards as limiting its liability in this instance to \$50.

A certificate of importance was granted to appellant. It here contends that the \$50 clause in the receipt given to appellees is binding upon them, and that their recovery in this case should not exceed that amount.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Holt, Wheeler & Sidley, for appellant.  
Musgrave, Platt & Lee, for appellees.

SCOTT, J. The statute of this state provides that, when property is received by a common carrier to be transported from one place to another, it shall not be lawful for the carrier to limit its common-law liability by any stipulation or limitation expressed in the receipt given for such property. Hurd's Rev. St. 1906, c. 27. The printed portion of the receipt given by the carrier in this case contained this language: "Nor in any event shall said company be held liable beyond the sum of \$50, at not exceeding which sum the said property is hereby valued, unless a different value is herein above stated." Following the printed part of the receipt was a blank for the insertion of figures stating the value of the shipment, but no figures were placed in that space. It appears that if the correct value had been given a higher rate would have been imposed by the company than the one by which the charge was in fact determined. The municipal court instructed the jury on the theory that the quoted language was a stipulation or limitation limiting the common-law liability of the express company. Appellant contends that the court erred in so doing; that this provision as to the valuation of the goods shipped was not a limitation upon the common-law liability of the carrier, but was a stipulation made in the interest of fair dealing between the parties, which was necessary to enable the carrier to fix a proper charge for carriage and for exercising needful precautions in handling and safeguarding the goods; and, further, that it was a stipulation made to liquidate the amount for which the carrier would be liable in case of loss through its own negligence.

This court has frequently held provisions identical in meaning with the one now under consideration, when contained in the receipt given for the property, to be an attempt by the carrier to limit its common-law liability. *Adams Express Co. v. Haynes*, 42 Ill. 89; *Adams Express Co. v. Stettaners*, 61 Ill. 184, 14 Am. Rep. 57; *Boscowitz v. Adams Express Co.*, 93 Ill. 523, 84 Am. Rep. 191; *Chicago & Northwestern Railway Co. v. Chapman*, 133 Ill. 96, 24 N. E. 417, 8 L. R. A. 508, 23 Am. St. Rep. 587. Appellant concedes this to be true, but states that the case of *Oppenheimer v. United States Express Co.*, 69 Ill. 62, 18 Am. Rep. 506, and the greater weight of authority in other jurisdictions, both English and American, is to the contrary effect, and seeks to have this court improve this opportunity to make the law of this state harmonize with the great trend of legal opinion in reference to this matter. The *Oppenheimer* case was explained in *Boscowitz v. Adams Express Co.*, supra, and as there explained is not in conflict with the other Illinois cases

cited above. While the authorities outside this state are not uniform, it is true, as stated by appellant, that by far the greater array thereof supports the doctrine for which it contends. We have so long held the law to be the other way, however, that we do not think we should now change the rule in Illinois.

It is unnecessary to consider the other questions discussed in the briefs.

The judgment of the Branch Appellate Court will be affirmed.

Judgment affirmed.

(237 Ill. 284)

ULREY et al. v. KEITH et al.

(Supreme Court of Illinois. Dec. 15, 1908.)

1. INJUNCTION (§ 59\*)—RESTRAINING BREACH OF CONTRACT.

A suit to enjoin the violation of a contract is governed by the rules applicable to a suit for specific performance.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 59.\*]

2. SPECIFIC PERFORMANCE (§ 32\*)—CONTRACTS ENFORCEABLE—MUTUALITY.

Where, at the time of the filing of a bill to enforce specific performance of a contract executory on both sides, defendant, himself free from fraud or other personal bar, cannot have the remedy of specific performance against plaintiff, the contract is so lacking in mutuality that equity will not compel defendant to perform, but will leave plaintiff to his remedy at law.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 89-99; Dec. Dig. § 32.\*]

3. SPECIFIC PERFORMANCE (§ 32\*)—CONTRACTS ENFORCEABLE—MUTUALITY.

An oil and gas lease for five years, and as much longer as oil or gas is found in paying quantities, which gives the lessee, on the payment of \$1, the right to surrender the lease for cancellation and avoid all payments and liabilities subsequently accruing under the lease, cannot be specifically enforced by the lessor.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 89-99; Dec. Dig. § 32.\*]

4. INJUNCTION (§ 59\*)—RESTRAINING BREACH OF CONTRACT—NATURE OF REMEDY.

An injunction restraining the breach of a contract is a negative specific enforcement of such contract.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 114; Dec. Dig. § 59.\*]

5. SPECIFIC PERFORMANCE (§ 3\*)—DISCRETION OF COURT.

The exercise of the jurisdiction to enforce specific performance of a contract rests in the sound, legal discretion of the chancery court, in view of the terms of the contract and the surrounding circumstances.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 17, 18; Dec. Dig. § 3.\*]

6. INJUNCTION (§ 59\*)—CONTRACTS—RESTRAINING BREACH OF CONTRACT.

A stipulation in an oil and gas lease for five years, and as much longer as oil or gas is found in paying quantities, which gives to the lessee, on the payment of \$1, the right to surrender the lease for cancellation and avoid all payments and liabilities thereafter accruing under the lease, deprives the lessee of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

right to enjoin a violation of the lease by the lessor.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 59.\*]

**7. INJUNCTION (§ 59\*)—RESTRAINING BREACH OF CONTRACT.**

A decision of the Supreme Court that an oil and gas lease is a valid contract does not necessarily carry with it the right of the lessee to enjoin the lessor from violating the lease.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 59.\*]

**8. SPECIFIC PERFORMANCE (§ 131\*)—DENIAL OF ENFORCEMENT—EFFECT.**

There is a distinction in equity between a mutuality of obligation of contracts and a mutuality of remedy under them, and denying specific performance of a contract only determines that the case is not one of equitable cognizance, and it does not deny the legality or obligation of the contract.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 131.\*]

Appeal from Circuit Court, Clark County; E. R. E. Kimbrough, Judge.

Suit by Clarence Ulrey and another against A. P. Keith and others. From a decree for complainants. defendants appeal. Reversed and remanded.

Appellees, Clarence Ulrey and the Illinois Oil & Gas Company, a corporation organized under the laws of the state of West Virginia and licensed to do business in Illinois, filed their bill in the circuit court of Clark county, alleging that on the 25th day of January, 1905, A. P. Keith, being the owner in fee of the S.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$ , the S. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$ , and the N. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$ , of section 31, township 10 N., range 13 W., in Clark county, Ill., and Dill Keith, being the owner in fee of the E.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 32, in said township 10, Clark county, Ill., executed to Clarence Ulrey a writing commonly called an "oil and gas lease," which lease is identical in form and substance, except as to the names of the lessors and the property therein described, with the lease set out in full in *Poe v. Ulrey*, 233 Ill. 58, 84 N. E. 46, that on the 17th day of May, 1905, for a valuable consideration, Ulrey assigned and transferred to the Illinois Oil & Gas Company an undivided fifteen-sixteenths of said lease. The bill further alleges that in April, 1905, the appellees, with the knowledge and consent of appellants, commenced drilling for oil and gas on the said premises, and completed a large producing gas well on or before the 1st day of May, 1905, that a packer and tubing necessary for a marketable gas well were placed in said well and the well closed in, and that appellees continued drilling wells in the district mentioned in and required by the lease, but found no other paying well. The bill alleged that appellees had complied with and fulfilled the terms of the lease on their part, and were ready and willing to continue to keep and perform their agreement in said lease, but

that appellants refused to permit them to do so; that appellees were ready, willing, and had offered to drill other wells on the premises belonging to appellants, but appellants had refused to allow them to enter upon said premises for that purpose, and have notified appellees that, if they entered upon said premises they would have to do so with force. The bill further alleges that while the well drilled upon appellants' premises is a large, paying gas well, appellees had no market for the gas, but had tendered appellants the rental provided in the lease for said well, but the tender was refused by appellants, and that appellants had refused to accept gas from said well for two dwelling houses, as provided in the lease, although appellees had repeatedly offered to furnish it if the appellants would make their own connections, as required by the lease. The bill alleged that the appellants had entered into some agreement with one Everett Keith, the terms of which were unknown to appellees, by which said Everett Keith was to drill on said premises for oil and gas; that he had entered upon said premises with a rig and drilling outfit, and was proceeding to drill a well for the production of oil and gas, and declared his purpose and intention, if he found oil and gas in paying quantities, to convert the same to his own use, and that this would be an irreparable damage to appellees. The bill prayed that A. P. Keith, Dill Keith, and Everett Keith, who were made defendants, be required to answer, not under oath, and that they, their agents, attorneys, employees, and servants be enjoined from drilling any well or wells, and from erecting any derricks, rigs, or other structures, laying pipe lines, using water, or doing any other act tending toward the development of oil or gas on the premises described in the lease. A temporary writ of injunction was ordered by the master in chancery. The appellants answered the bill, denying that they executed the lease is substance containing the terms and conditions set out in the bill, but admitting they did execute a lease to Clarence Ulrey on the 25th day of January, 1905, and set out a copy of the lease. The answer averred that Ulrey paid no consideration for the execution of said lease when it was executed, and did not afterwards at any time pay the \$1 therein mentioned to appellants. The answer denies that the Illinois Oil & Gas Company is a corporation organized under the laws of West Virginia, and licensed to do business in the state of Illinois; denies that, in pursuance of the lease, appellees, in April, 1905, entered upon the lands described in said lease and drilled and completed a well on or before the 1st day of May, 1905, which was a large producing gas well. The answer admits that appellees or some one else, in April or May, 1905, pretended to drill a well on said premises, and avers that the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

well that was so pretended to be completed was tubed and packed and securely closed in, and no gas was ever produced from it. The answer further denies that the appellees have complied with or fulfilled the terms of the lease on their part, or that they are ready and able to do so; denies they have repeatedly applied to appellants for permission to enter said premises to drill wells and carry out the terms of the lease, but avers no permission was asked of appellees to do so after the well drilled in April and May, 1905, was packed; denies appellees had no market for gas if it could have been produced; denies appellees offered to appellants, or that appellants refused, gas for dwelling houses, as provided for in the lease, and avers that appellants repeatedly demanded gas, and that appellees informed them that they would not furnish it. The answer further avers that appellees abandoned said gas well and leasehold premises as worthless, and refused to operate said well for oil and gas, and never, before bringing this suit, attempted to develop appellants' lands either for oil or gas, but abandoned said premises, and relinquished all right, title, and interest they ever had in said real estate by virtue of the said lease. The answer further avers that the consideration for the lease was the speedy development of the premises for oil and gas, but that appellees failed to use due diligence in such development, whereby the consideration for the lease failed and the lease became void. The answer avers that there is a surrender clause in the lease whereby the lessees and their assigns had the right, upon the payment of \$1, at any time to surrender the said lease and relieve themselves from any further liability by reason thereof; that said lease is therefore unilateral and inequitable, and that it cannot be enforced in a court of equity. It is further averred that appellants A. P. Keith and Dill Keith, who are husband and wife, occupied the premises as a homestead, and that there was no release or waiver of their homestead estate in their lease, and that the same had never been in any manner set off to them. Upon a hearing the court entered a decree sustaining the lease as to all the lands except the 20 acres in section 31, which was found to be occupied by the Keiths as a homestead. Among other things, the court found the lease was one of a block of leases taken by appellee Clarence Ulrey in the same neighborhood from the respective owners of various tracts of land, among whom were J. V. and Mary E. Poe; that appellees had complied with the terms of their lease by drilling and completing a paying gas well on appellants' land within the time required; that they had been diligent in developing said block of leases by drilling a well upon the land leased by John McNurland, and had offered to drill wells on the farms of others of the lessors of the said block but were refused permission; that they had thereupon

tendered the rentals of all of said leases to the lessors, and had kept the tender good; that they had offered to furnish gas to appellants as provided in the lease, but appellants refused to accept it; that appellees had kept and performed all of the covenants of the lease on their part, and that in the fall of 1905 appellants ratified and confirmed said lease in them. The decree further found that appellants had with force and arms prevented appellees from further entering upon the land to drill wells, and that Everett Keith had been permitted to enter thereon for that purpose, with the intention of taking all the oil and gas from under said land; that appellees had the right to enter upon and develop said lands, except the homestead, under the terms and conditions of the lease, and enjoined appellants from entering upon said lands for the purpose of operating or producing oil and gas so long as the appellees complied with the terms of their said lease; also enjoined appellants from in any manner interfering with or preventing appellees from entering upon and developing said lands for oil and gas. From that decree defendants to the bill have prosecuted this appeal to this court.

Abram Simmons and Hollenbeck & Connelly, for appellants. Golden, Scholfield & Scholfield, for appellees.

FARMER, J. (after stating the facts as above). The principal grounds urged by appellants for a reversal of the decree, and discussed in the briefs of both parties, are: (1) That the oil and gas company was a West Virginia corporation, that the assignments of fifteen-sixteenths of the lease were made to it April 30, and May 17, 1905, and that said corporation did not secure a license to do business in Illinois until July 2, 1905; (2) that drilling the so-called gas well on appellants' premises was not a compliance with the terms of the lease, for the reason that the well was not a paying well, as shown by the evidence; (3) that the real consideration for the lease was not the quarterly rentals provided therein, but was the speedy development of the premises for oil and gas, and that appellees did not comply with the requirement of the lease in that respect, but utterly failed, and, in fact, abandoned the premises; (4) that an injunction restraining the breach of a contract is a negative enforcement of it, and that, as the lease contained a clause by which appellees were authorized to surrender it at any time, specific performance would not have been decreed in favor of appellants, and therefore the negative enforcement of it will not be decreed in favor of appellees. In the view we take of the case it will not be necessary to discuss any but the last of these propositions, for in our opinion, conceding the decree otherwise to be supported by the law and the facts, this question is decisive of this case.

The suit to enjoin the violation of a contract is governed by the same rules as a suit to enforce specific performance. The decisions of the various courts of this country have not all been harmonious in applying the same rules to a suit to enjoin a breach of a contract that are applied to suits to enforce specific performance, but this court is committed to the application of the same rules in both cases. In *Pomeroy's Equity Jurisprudence* (volume 6, § 768) the author lays down the true rule, applicable to suits to enforce specific performance, to be: "If, at the time of the filing of the bill in equity, the contract being yet executory on both sides, the defendant, himself free from fraud or other personal bar, could not have the remedy of specific performance against the plaintiff, then the contract is so lacking in mutuality that equity will not compel the defendant to perform, but will leave the plaintiff to his remedy at law. This rule, it is believed, covers the circumstances in equity where, according to the weight of authority, the court refuses its aid for lack of mutuality." This is the rule uniformly followed by this court in specific performance cases. A distinction has been made by some courts in the application of the rule in suits to enjoin the breach of contracts. The most numerous class of those cases have been suits to enjoin the breach of a contract for personal services, such as a singer or an actor. In the earlier English cases it was held that as specific performance could not be enforced, courts would not interfere by injunction to prevent a breach of the contract; but in later cases, following *Lumley v. Wagner*, 1 De G., M. & G. 604, English courts have held that, while specific performance could not be decreed in such cases, courts would restrain the parties, by injunction, from rendering services elsewhere during the existence of the contract. Both lines of decisions have their adherents in the courts of this country. The lease in this case contained the following clause: "It is agreed that upon the payment of one dollar, at any time, by the parties of the second part, their successors or assigns, to the parties of the first part, their successors or assigns, said parties of the second part, their successors or assigns, shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine and this lease becomes absolutely null and void." It is clear that on account of such provision a court of equity could not enforce specific performance of the lease at the instance of the lessor; and, if the law as declared in this state is that, where there is a lack of mutuality in remedy, courts of equity will aid neither of the parties in the enforcement of the contract, but will leave them to their remedy at law, then the decree in this case is erroneous.

*Bauer v. Lumaghi Coal Co.*, 209 Ill. 316, 70 N. E. 634, was a suit for specific per-

formance of an agreement to convey a right of way for a switch track, when demanded in writing and upon the payment of \$300. The court held specific performance could not be decreed, and said (page 319 of 209 Ill., page 635 of 70 N. E.): "The contract is also lacking in mutuality. It is said in *Beach on Modern Law of Contracts* (volume 2, § 885): 'As a general rule, specific performance will not be decreed in any case where mutuality of obligation and remedy does not exist.' And in a note to this text it is said: 'The general principle is that, where the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other.' In *Beard v. Linthicum*, 1 Md. Ch. 345, Chancellor Johnson held 'that if one of the parties is not bound, or is not able to perform his part of the contract, he cannot call upon the court to compel specific performance by the opposite party.' And in the subsequent case of *Duvall v. Myers*, 2 Md. Ch. 401, the same judge said, in substance, 'that the right to the specific execution of a contract depends upon whether the agreement is obligatory upon both parties, so that, upon the application of either against the other, the court can compel a specific performance.' We quoted the above authorities with approval in the case of *Tryce v. Dittus*, 199 Ill. 189, 65 N. E. 220. Also, see 22 Am. & Eng. Ency. of Law (1st Ed.) p. 1019. One cannot read the contract in this case without being impressed with the fact that it was so worded that if, in the future, the coal business should prove profitable, and *Rupprecht* or his assigns could gain an advantage by taking an easement, then they would have a right to demand it, and could compel *Bauer* to convey, but if the coal business did not open up favorably, and it would be no advantage to *Rupprecht*, then *Bauer* would have no right to compel a specific performance, and would be powerless to force *Rupprecht* to do anything. It was therefore lacking in that element of mutuality required under the decisions above quoted, and therefore could not be specifically enforced in a court of equity."

In *Lancaster v. Roberts*, 144 Ill. 213, 33 N. E. 27 (which was a specific performance case), the court quoted with approval from *Fry on Specific Performance*: "Whenever \* \* \* the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other, though its execution in the latter way might, in itself, be free from the difficulty attending its execution in the former."

In *Winter v. Trainor*, 151 Ill. 191, 37 N. E. 869 (a specific performance case), the court said (page 195 of 151 Ill., page 870 of 37 N. E.): "Unless a contract can be specifically enforced as to all parties, equity will not interfere."

*Marble Co. v. Ripley*, 10 Wall. 339, 19 L. Ed. 955, was a suit for specific performance

of a contract to furnish the complainant quantities of marble at his mill for such time as he might desire. The contract contained a provision that he might abandon it at any time on giving one year's notice. The court said (page 359 of 10 Wall. [19 L. Ed. 955]): "Another reason why specific performance should not be decreed in this case is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the marble company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might, in itself, be free from the difficulty attending its execution in the former." This is considered a leading case on the subject of specific performance, and is much cited by courts and text-writers.

In *Karrick v. Hannaman*, 168 U. S. 323, 336, 18 Sup. Ct. 135, 138, 42 L. Ed. 484, the court said: "Especially where, by the partnership agreement, as in the case at bar, the defendant is to supply all or most of the capital, and the plaintiff is to furnish his personal services, the agreement cannot be specifically enforced against the plaintiff, and will not be enforced against the defendant." The same court, in treating the same subject in *Express Co. v. Railroad Co.*, 99 U. S. 191, 200, 25 L. Ed. 319, said: "But we need not pursue the subject further, because there is one provision of the contract in this case which is fatal to the relief sought. A court of equity never interferes where the power of revocation exists. *Fry on Specific Performance*, 64. The contract stipulated that after the first year it shall cease upon the payment of \$20,000 and interest. This might be made immediately upon the rendition of the decree. The action of the court would thus become a nullity."

*Rust v. Conrad*, 47 Mich. 449, 11 N. W. 265, 41 Am. Rep. 720, was a suit to enforce the specific performance of a contract to make a mining lease. By the terms of the lease to be given under the contract the lessee might terminate it at any time, on giving 30 days' notice. The opinion by Cooley, J., holds that, as the continuance of the lease, if given, would depend upon the will of the lessees, who might immediately elect to terminate it, the contract could not be enforced. In the opinion it is said (page 455 of 47 Mich., page 267 of 11 N. W., and page 722 of 41 Am. Rep.): "But the court will also refuse to interfere in any case where, if it were to do so, one of the parties might nullify its action through the exercise of a discretion which the contract or the law invests him with. The refusal, in such case, does

not depend, of necessity, upon any illegality, inequality, or unfairness, but it is sufficiently based upon the impropriety of imposing on the judge the labor, and on the public the expense, of an investigation of disputes when the circumstances are such as to preclude any judgment that may be rendered from being final. No court can with reason be called upon to do a vain thing." The same rules are announced in *Benedict v. Lynch*, 1 Johns. Ch. (N. Y.) 370, 7 Am. Dec. 484; *Smith v. Smith*, 36 Ga. 184, 91 Am. Dec. 761; *Buck v. Smith*, 29 Mich. 163, 18 Am. Rep. 84; *Hissam v. Parish*, 41 W. Va. 686, 24 S. E. 600, 56 Am. St. Rep. 892. Many other cases might be cited to the same effect, but we have referred to enough decisions of this and other courts to show what the rule is with reference to mutuality of remedy in the enforcement of specific performance of contracts.

We will now examine the authorities in cases where it was sought to enjoin the breach of the contract.

*Chicago Municipal Gaslight Co. v. Town of Lake*, 130 Ill. 42, 22 N. E. 616, was a bill to enjoin the town of Lake from interfering with the gas company laying pipes in the street under permission of an ordinance which was repealed after it had been accepted by the gas company. It is unnecessary to cite authorities to prove that such an ordinance, when accepted, becomes a contract. The court said (page 60 of 130 Ill., page 619 of 22 N. E.): "The bill of complaint in this case, though not strictly a bill for the specific performance of a contract, is, in substance, a bill of that kind. In *Pomeroy's Equity Jurisprudence* (section 1341) it is said: 'An injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrine and rules. It may be stated, as a general proposition, that whenever the contract is one of a class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms permit.' The exercise of the jurisdiction to enforce the specific performance of a contract rests in the sound legal discretion of the chancery court, in view of the terms of the contract and all the surrounding circumstances."

*East St. Louis Railway Co. v. City of East St. Louis*, 182 Ill. 433, 55 N. E. 533, was a suit by the railway company against the city of East St. Louis to enjoin the city, its officers, agents, and employes from preventing or interfering with the railway company laying its tracks in the street. The railway company claimed the right to such use of the streets under an ordinance. The court held that the suit was in the nature of a suit for

specific performance, and approved and followed Chicago Municipal Gaslight Co. v. Town of Lake, *supra*.

Welty v. Jacobs, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98, was a suit by the manager of a theatrical troupe to enjoin the manager of the theater from violating his contract with the manager of the troupe to furnish a theater for performances for a certain period of time. The bill alleged that the damages to the complainant could not be actually or approximately determined, and that the defendant was financially irresponsible. The court said (pages 629, 630 of 171 Ill., page 724 of 49 N. E. [40 L. R. A. 98]): "Strictly speaking, the bill was not one for specific performance, but for injunction only. It is clear from its allegations, and from the authorities bearing upon the question, that specific performance of the contract could not be decreed. It is not, and cannot be, contended that appellant could have been compelled, by any writ the court could have issued, to occupy the theater with his company of actors and give the performances contracted for, any more than a public singer or speaker can be compelled specifically to perform his contract to sing or speak. Negative covenants not to sing or perform elsewhere at a certain time than a designated place have been enforced by the injunctive process, but further than this such contracts have not been specifically enforced by the courts, by injunction or otherwise. *Lumley v. Wagner*, 1 De G., M. & G. 604; *Daly v. Smith*, 38 N. Y. Super. Ct. 158. In *Lumley v. Wagner* there was an express covenant not to sing elsewhere than at the complainant's theater, and the injunction was placed on that ground. \* \* \* Before a contract will be specifically enforced there must be mutuality in the contract, so that it may be enforced by either; and, as this contract was of such a nature that it could not have been specifically enforced by appellee Jacobs, it should not be so enforced by appellant."

*Cleveland v. Martin*, 218 Ill. 73, 75 N. E. 772, 8 L. R. A. (N. S.) 629, was a bill to enjoin the defendant from doing certain acts alleged to be in violation of his contract with complainant. The court again quoted from *Pomeroy* the same section quoted in *Chicago Municipal Gaslight Co. v. Town of Lake*, *supra*, and, applying the same rules, denied the relief prayed.

The most recent case in this court upon this subject is *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 84 N. E. 53. In that case Nancy E. Shipman, owner of the undivided one-tenth of certain real estate, executed an oil lease for the whole of the premises. The lease appears to have been in the same form as the one here involved and contained the same surrender clause. By successive assignments the leasehold passed to the Watford Oil & Gas Company. The bill averred that, while it was in full force and effect,

Nancy E. Shipman and her co-tenants made a similar lease to another party, and were attempting to defeat and destroy the rights of the Watford Oil & Gas Company, and prayed an injunction and for a division and partition of the premises between Nancy E. Shipman and her co-tenants, and that the Watford Oil & Gas Company be decreed to have the right to go upon the portion of the premises set off to Nancy E. Shipman and develop the same for oil and gas. This court denied the relief prayed, upon two grounds: First, that the lease gave the lessee no interest in the premises that entitled it to a partition; and second, because of the surrender clause of the lease. Upon this subject the court said (page 13 of 233 Ill., page 54 of 84 N. E.): "Aside from the imperfection in the title of appellant above pointed out, there is another reason why a court of equity will refuse appellant the relief sought. The lease in question contains the following clause: 'It is expressly agreed that upon the payment of one dollar by the parties of the second part, their successors or assigns, to the party of the first part, their heirs or assigns, they shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine and this lease absolutely become null and void.' Under this clause appellant may surrender the lease for cancellation at any time, and thereby relieve itself from all future liability under it. The option of appellant to terminate the lease at any time upon payment of \$1 deprives appellant of the right to specific performance, directly or indirectly, until it has performed the contract or placed itself in such position that it may be compelled to perform the contract on its part. If the relief here sought should be granted, appellant, under the cancellation clause of the lease, may nullify the decree by exercising its option not to proceed further. A court of equity will not do a vain and useless thing by rendering a decree settling the rights of parties which one of them may set aside at his will"—citing cases.

Appellees contend that, the court having denied the relief sought in that case upon the ground that the lease gave the lessees no interest that entitled them to ask for partition, the surrender clause was a mere incident, and not essential or necessarily involved in the case. They further contend that the surrender clause of the lease was directly involved in *Poe v. Ulrey*, 233 Ill. 58, 84 N. E. 46, and that the decision in that case sustains appellees' right to the injunction notwithstanding the surrender clause in the lease. We do not so understand this decision. The whole lease was before the court in the Watford Oil & Gas Company Case, and the determination of the rights of the parties thereunder involved all that

was passed upon by the court in the opinion delivered; and, while that case decided the very question here involved, it applied rules and principles of law announced and sustained in many previous decisions of the court. In *Poe v. Ulrey*, supra, the suit was instituted by the lessor to set aside the lease. One of the grounds upon which it was claimed the lease was invalid was that there was a want of mutuality between the parties because the lease contained a surrender clause by which appellee might terminate it upon the payment of \$1. We held the surrender clause did not invalidate the lease; that while the lease had the option to surrender it, the lessor could not compel a surrender. The question of the lessee's right to enjoin a breach of the contract by the lessor was not involved in that case. We adhere to the law as laid down in *Poe v. Ulrey*, supra, but it does not follow that to hold the lease a valid contract, necessarily implies or carries with it the right to enjoin the lessors from violating it. As to very many valid contracts, equity will not interfere to enforce their performance or to prevent their violation. It should be borne in mind, also, that there is a distinction in equity between a mutuality in the obligation of contracts and a mutuality of remedy under them. As stated by Cooley, J., in *Rust v. Conrad*, supra: "Denying specific performance does not deny the legality or obligation of the contract. It denies merely that the case is one of equitable cognizance." We might cite many other cases from courts of last resort supporting the views of this court upon the question here involved. There are also cases holding a different view. But, however that may be, the question is so thoroughly settled, and by such a uniform line of decisions in this state, that we would not feel at liberty to adopt a contrary view if we felt disposed so to do. In *Watford Oil & Gas Co. v. Shipman*, supra, it was pointed out that cases of the character there involved were distinguishable from the cases holding that option contracts for the sale of real estate may be enforced by the party holding the option, who, within the time specified, elects to make the purchase and pays or tenders the purchase price.

Counsel have also in their brief contended that, because of the character of the question here, involving, it is said, a new line in the development of the resources of our state, and because of what is claimed to be the more modern tendency of the courts to adopt an opposite view, we should depart from the rules announced in the previous decisions of this court. We do not regard the circumstances and conditions surrounding and entering into this case as sufficient to justify us in departing from a rule of law so firmly settled and so long adhered to in this state.

The decree of the circuit court is reversed

and the cause remanded to that court, with directions to dismiss the bill.

Reversed and remanded, with directions

(237 Ill. 94)

FARRENKOPF et al. v. HOLM.

(Supreme Court of Illinois. Dec. 15, 1908.)

1. INSURANCE (§ 724\*)—MUTUAL BENEFIT INSURANCE—WAIVER—RELATIONSHIP OF BENEFICIARY.

Where the agent of a beneficial insurance society made the policy recite that the beneficiary was insured's cousin when he knew she was his affianced wife, the society waived its right to object to the validity of the certificate on the ground that the relationship of the beneficiary was not correctly stated.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1866; Dec. Dig. § 724.\*]

2. INSURANCE (§ 769\*)—MUTUAL BENEFIT INSURANCE — BENEFICIARIES — AFFIANCED WIFE.

Under Hurd's Rev. St. 1905, c. 73, § 258, and Act 1893, p. 130, as amended by Act 1895, p. 178, relating to benefit societies, and providing that benefits may be made payable to "heirs, blood relations, affianced husband or affianced wife, or to persons dependent upon members," an affianced wife may become a beneficiary though not dependent, and though the constitution and by-laws of the society limited the beneficiaries to relatives and dependent members.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1837; Dec. Dig. § 769.\*]

3. INSURANCE (§ 795\*)—MUTUAL BENEFIT INSURANCE—RIGHTS OF REPRESENTATIVES OF BENEFICIARY.

Where a mutual benefit certificate described the beneficiary as insured's cousin when she was in fact his affianced wife, an affianced wife being a proper beneficiary under its charter, and the company having waived the objection, insured's heirs could not object to the misdescription of the beneficiary in the policy.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 795.\*]

4. INSURANCE (§ 819\*)—MUTUAL BENEFIT INSURANCE—SUFFICIENCY OF EVIDENCE.

In an action by insured's heirs against the beneficiary of a benefit certificate held by him, evidence held insufficient to show that insured's relations with such beneficiary were immoral.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 819.\*]

5. INSURANCE (§ 819\*)—MUTUAL BENEFIT INSURANCE—SUFFICIENCY OF EVIDENCE.

In an action by the heirs of insured for the amount of a benefit policy payable to defendant, who claimed to be insured's affianced wife, evidence held to sustain the chancellor's finding on conflicting evidence that such relation existed.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 819.\*]

6. APPEAL AND ERROR (§ 1078\*)—ASSIGNMENTS OF ERROR—WAIVER.

Errors assigned in the Appellate Court are deemed waived if not raised in the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4256; Dec. Dig. § 1078.\*]

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, Winnebago County; A. H. Frost, Judge.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by Peada Farrenkoph and others against Anna Holm. From a judgment for defendant, plaintiffs appeal. Affirmed.

The appellee resided in Rockford, Ill., and John V. Smith (otherwise known as Valentine Trunk) boarded at her home for several years before and after the death of her husband, in 1902. Smith was accidentally killed August 25, 1906, leaving a benefit certificate for \$2,000 in the Order of Columbian Knights, payable to the appellee, Anna Holm, named therein as "cousin." She claimed this fund from the insurance order, and later the appellants, who are sisters and a brother of the deceased, also laid claim to it. The insurance order filed a bill of interpleader in the circuit court of Winnebago county, admitting its liability on the certificate and alleging its willingness to pay to the persons entitled to the benefit and asking the court to determine to whom such payment should be made at the same time offering to pay the money into court, subject to the court's order, which was thereafter done. Appellee answered, admitting that she was not the cousin of the said Smith, but claiming the fund in controversy as his affianced wife and also as a dependent upon him. Appellants filed a joint answer, claiming the insurance as heirs of said Smith, under the laws of the order, and denying that appellee was ever the affianced wife of or dependent upon the deceased. The court heard the proof and ordered the fund, less costs of \$50, to be paid to the appellee. On an appeal by appellants to the Appellate Court for the Second district, that decree was affirmed, and a further appeal has been prosecuted to this court.

The insurance order in question was incorporated under the act of 1893, p. 180, relating to benefit societies, as amended by the act of 1895, p. 178. The act provides that benefits shall be paid only to the families, heirs, blood relations, affianced husband or affianced wife or to persons dependent upon the members, or, in certain cases, to religious or charitable institutions. Hurd's Rev. St. 1905, p. 1222, c. 73, § 258. Section 250 of the by-laws of the order, among other things, provides: "Each applicant shall enter upon his application the name or names, residence, relationship or dependence of the person or persons of the classes in the next section embraced \* \* \* to whom \* \* \* he desires his benefit paid." Section 251 of said by-laws, among other things, provides that the benefit may be payable to any one or more persons of a certain class, including the wife, children, grandchildren, parents, cousins of the first degree, and other relatives, and that in no such cases shall proof of dependency be required. A second class is provided, including "an affianced wife, or to any person who is dependent upon the member for maintenance (food, clothing, lodging or education), in either of which cases written evidence of the affianced rela-

tion or nature of the dependency, within the requirements of the laws of the order, must be furnished to the satisfaction of the supreme secretary before the beneficiary certificate can be issued."

Fred E. Carpenter, for appellants. R. K. Walsh, for appellee.

CARTER, J. (after stating the facts as above). Appellants contend that the designation of appellee as "cousin" was false and fraudulent, and therefore she is not entitled to take the fund. The evidence shows that when the deceased was talking about the policy to Reed, who took the application as agent of the order, he first stated that appellee was "a sort of cousin," and on further inquiry, as testified by Reed, the deceased said to him, in substance, that if he (Reed) would not "blab it around" he would tell him what the real situation was, and on the understanding that nothing would be said about it the deceased told Reed that he and the appellee were engaged and were going to be married, and then, at Reed's suggestion that it did not make any particular difference, appellee was put down as "cousin," Reed at the same time telling Smith that when the marriage took place the certificate should be changed to show that fact. The validity of an insurance policy is not affected by false answers inserted by the agent. *Royal Neighbors v. Boman*, 177 Ill. 27, 52 N. E. 264, 69 Am. St. Rep. 201. The knowledge of the agent is binding upon the organization under such facts as here set out. *Order of Foresters v. Schweitzer*, 171 Ill. 325, 49 N. E. 506; *Coverdale v. Royal Arcanum*, 193 Ill. 91, 61 N. E. 915. Under such circumstances the order has waived its right to object to the validity of the certificate on the ground urged. *Farmers' & Mechanics' Life Ass'n v. Caine*, 224 Ill. 599, 79 N. E. 956. Under the charter issued to this fraternal society an affianced wife may become a beneficiary without being dependent, even though its constitution and by-laws did limit the class of its beneficiaries to relatives and dependent members. *Wallace v. Madden*, 168 Ill. 356, 48 N. E. 181; *Murphy v. Nowak*, 223 Ill. 801, 79 N. E. 112, 7 L. R. A. (N. S.) 398; *Wood v. Mystic Circle*, 212 Ill. 532, 72 N. E. 783. It has been held that if a member of a benefit society, in naming his stepchildren as beneficiaries, describes them as "my children," such misdescription, if material, can be taken advantage of only by the society, and cannot be objected to by a rival claimant to the benefit fund; and, if a member of a benefit society misdescribes the beneficiaries and their relation to him, the society may waive the defect and ratify the agreement. *Tepper v. Royal Arcanum*, 61 N. J. Eq. 638, 47 Atl. 460, 88 Am. St. Rep. 449. Substantially to the same effect is *Cowlin v. Hurst*, 124 Mich. 545, 83 N. W. 274, 88 Am. St. Rep. 344. In a California case it was held that where the certifi-

cate was made payable to a woman designated therein as the "fiancée" of the deceased, the proof showing that he, at the time the policy was issued, was married to another woman, still the description "fiancée" might be disregarded as merely descriptive and the fact that she could not become engaged to the insured would not preclude judgment in her favor. *Woodmen of the World v. Rutledge*, 133 Cal. 640, 65 Pac. 1105. If the insurance order cannot raise this question, neither can appellants.

The further contention is made that as deceased roomed and boarded with appellee for some four years before her husband's death, and shortly thereafter ceased paying board and assumed the expenses of the household, and spent money freely on her and her little granddaughter, the relations between them must have been immoral. No immoral act is testified to. The only foundation for this charge is apparently the fact that the deceased boarded with the appellee before her husband's death, and continued, under the circumstances mentioned above, for years thereafter to live in the same house. We do not think the evidence in this record upholds this contention of appellants.

In this connection it is also urged that the proof is not sufficient to justify the court's finding that appellee was the affianced wife of the deceased. Smith so stated to the insurance agent, and several witnesses testified that both appellee and deceased had stated the same to them. It is true, several witnesses testified that Smith denied that appellee and he were engaged; but the evidence was heard by the chancellor in open court, and while it is conflicting in some particulars, we do not think it is of a nature to authorize us to reverse such findings of fact. *Wildmayer v. Davis*, 231 Ill. 42, 83 N. E. 87.

We have covered all the points urged in the appellants' brief filed in this court. Other errors were urged in the Appellate Court, but as they are not raised here they must be deemed waived.

We find no error in the record, and the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(37 Ill. 211.)

#### SOUTH PARK COM'RS v. AYER et al.

(Supreme Court of Illinois. Dec. 15, 1908.)

#### 1. REMOVAL OF CAUSES (§ 70\*)—PROCEEDINGS TO PROCURE REMOVAL—TIME TO APPLY.

Act Cong. Aug. 13, 1888, c. 806, § 3, 25 Stat. 435, requires a party desiring to remove the cause to the federal court to file a petition in the state court at the time defendant is required by the laws of the state to answer or plead. Eminent Domain Act (Hurd's Rev. St. 1903, c. 47) § 4, provides that service of summons and publication of notice to nonresidents shall be made as in cases in chancery. Chancery Act (Hurd's Rev. St. 1903, c. 22) § 16

provides that one summoned by publication shall be deemed to plead on the return day of the summons. *Held*, that the day on which the notice in eminent domain proceedings, served on a nonresident, is returnable, is the day for answering; and though the law does not require the filing of a written pleading, and though no default is taken, a petition for removal not filed until after such day comes too late.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 141-146; Dec. Dig. § 79.\*]

#### 2. EVIDENCE (§ 142\*)—CONDEMNATION PROCEEDINGS—COMPENSATION—VALUE OF OTHER PROPERTY.

In proceedings to condemn land, it is not competent to prove what petitioner has paid for other property purchased by it for use in the same enterprise, such a purchase being in the nature of a compromise.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 416; Dec. Dig. § 142.\*]

#### 3. EVIDENCE (§ 142\*)—COMPENSATION—VALUE OF OTHER PROPERTY.

In proceedings to condemn land adapted for use as a site for manufacturing purposes, and so situated that freight, on switching privileges being obtained, could be loaded and unloaded from cars on the land, the testimony of a witness that he had had experience with the council of the city in similar cases in another part of the city, and had been unable to obtain an ordinance granting permission to construct and operate switches, was inadmissible.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 142.\*]

#### 4. EMINENT DOMAIN (§ 184\*)—COMPENSATION—ELEMENTS.

Where, in proceedings to condemn land adapted for use as a manufacturing site, and so situated that, on switching privileges being obtained, freight could be loaded and unloaded on the premises, it appeared that railroad tracks were in the same block, so that it was possible that the owner could make the required arrangements for switching privileges, the jury in estimating the compensation must take into consideration the possibility of effecting arrangements for such privileges, though witnesses testified that they regarded the possibility too remote.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 356; Dec. Dig. § 134.\*]

#### 5. EMINENT DOMAIN (§ 262\*)—TRIAL—SEPARATE TRIALS—PREJUDICIAL ERROR.

Defendant, in proceedings to condemn a half of a block, owned the south two-thirds and his codefendant owned the other one-third. Defendant sought to have his case tried separately on the ground that there had been an agreement between the petitioner and codefendant as to the compensation for the north third. The land sought to be taken was adapted for manufacturing purposes, and, on switching privileges being obtained, freight might be loaded and unloaded on the premises. Witnesses for petitioner fixed the value of the land without considering the possibility of procuring switching privileges, while witnesses for defendant in fixing compensation considered such possibility. During the trial, the jury learned of the existence of an agreement between the petitioner and codefendant as to the compensation for the north third. The jury allowed defendant compensation substantially at the rate fixed by petitioner's witnesses, though other witnesses fixed a higher value. The cause as to the north third was submitted on the testimony of the petitioner. *Held*, that the refusal to give defendant a separate trial was prejudicial error, since the jury were prejudiced because they were shown that the owner of the north third

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

had agreed to take the sum fixed by petitioner's evidence.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 282.\*]

**6. EMINENT DOMAIN (§ 220\*)—AWARD OF COMPENSATION—VIEW OF PREMISES.**

The jury, in viewing the premises in proceedings to condemn land, should on a consideration of all the evidence, including the view, determine the compensation to be awarded.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 559; Dec. Dig. § 220.\*]

**7. EMINENT DOMAIN (§ 222\*)—COMPENSATION—INSTRUCTIONS.**

An instruction in condemnation proceedings which authorizes the jury viewing the premises to fix the value on their judgment, founded solely on their inspection, is erroneous as leading the jury to believe that they may fix the value without considering all the testimony.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 564; Dec. Dig. § 222.\*]

Appeal from Circuit Court, Cook County; John Gibbons, Judge.

Proceedings by the South Park Commissioners to condemn the lands of Frederick F. Ayer and others for park purposes. From a judgment awarding compensation, certain of the defendants appeal. Reversed and remanded.

On July 3, 1907, the South Park Commissioners, a municipal corporation, filed its petition in the circuit court of Cook county to condemn for small park purposes certain lots in the city of Chicago, being half a block owned by Frederick F. Ayer and Jacob Rodgers, trustees under the will of James C. Ayer, deceased, Frederick F. Ayer, Henry S. Ayer, and Leslie Josephine Pearson, appellants, and others. The half block fronts on La Salle street, and extends back 120 feet to a 10-foot alleyway running north and south, which adjoins the elevated right of way of the Chicago, Rock Island & Pacific, the Lake Shore & Michigan Southern and the Chicago & Eastern Illinois Railroads. It is bounded on the north by Twenty-Fifth and on the south by Twenty-Sixth street. Immediately opposite the property in question, on the west side of La Salle street, is a block of ground owned by appellee which is used as a small park or playground. Appellants owned the south two-thirds, and the National Fireproofing Company owned the north one-third, of the half block sought to be condemned. A part of appellants' lots were vacant and unimproved, and the remainder were improved and were occupied by tenants. All of the appellants were citizens and residents of the state of New York except Jacob Rodgers, who was a citizen and resident of Massachusetts. The other defendants named in the petition were residents of the state of Illinois.

On January 24, 1908, appellants filed a petition in said court, signed by William C. McHenry as their agent, for the removal of the cause to the United States Circuit Court

for the Eastern Division of the Northern District of Illinois. This petition the court denied. On February 17, 1908, appellants, upon leave of court, filed a second petition to remove the cause, which was also denied.

Upon the hearing appellants moved the court that a separate trial be awarded to them, for the reason that they were the sole owners of and interested in separate and distinct lots and improvements from the lots and improvements of the other respondents in said suit. The motion was refused. They then moved the court for permission to call witnesses to testify as to the value of lots in the same block which appellee sought to take, other than those owned by appellants, for the reason that as to all the other owners and parties interested in lots and improvements in the half block of land in question the owners thereof had been settled with, and the prices of said lots and improvements thereon had been agreed upon between petitioner and said other respondents out of court; and for the additional reason that, if respondents (appellants here) were not permitted to show by respondents' witnesses the value of said lots in said block other than respondents' lots, it would appear to the jury that there had been a settlement and an agreement made as to the prices to be paid for all of the lots other than respondents' lots; that petitioner's witnesses would testify to certain values, and that there would be no other testimony as to the value of all lots other than said respondents', and that such fact, as the trial developed, would seriously affect and injure the said above-named respondents (appellants here) and prevent their being given a fair and impartial trial. Upon the denial of this motion appellants moved the court that, there being no conflict or issue as to the values or amounts to be awarded by the jury for the taking of all the lots and improvements in said half block in question in this suit other than the lots and improvements in said half block of which appellants were the owners, there be a trial as to appellants' lots and improvements, and that when the jury had rendered a verdict in respect to such lots and improvements said jury be again directed to retire and to award a verdict upon an agreed valuation as to all of the other lots and improvements. This motion was also denied.

The value of the ground owned by appellants was placed by witnesses at from \$140 to \$275 per front foot. The jury by their verdict fixed appellants' compensation at \$60,000 for ground taken without any allowance for improvements, being at the rate of \$150 per front foot for all of the ground belonging to appellants that was taken, and judgment for that amount was entered in their favor for their ground without improvements. Appellants owned only a small portion of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

improvements on their ground, and for those improvements the jury in their verdict made a separate award of \$2,929. No complaint is made of this allowance for improvements. Appellants regard the \$80,000 for the ground as insufficient. Other improvements on their ground were owned by tenants.

Appellants in this court urge: (1) The court erred in refusing to order the removal of the cause; (2) the court erred in overruling appellants' motion for a separate trial; (3) the court erred in passing upon objections to evidence; (4) the court erred in instructing the jury; (5) the verdict of the jury is inadequate in amount, and in that respect is contrary to the evidence.

George P. Merrick, for appellants. Hallett, Sauter & Henkel, for appellee.

SCOTT, J. (after stating the facts as above). It is first argued that the court erred in refusing to remove the cause to the federal court so far as it concerned the appellants in this proceeding. Appellee contends that the petition was not timely. Section 3 of the act of Congress to regulate the removal of causes from state courts, as amended August 13, 1888, c. 866, 25 Stat. 435, provides, with reference to cases of this character, that the party desiring to remove the cause shall file a petition in the state court "at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff" (Hurd's Rev. St. 1908, p. 83). The eminent domain act (section 4) provides that service of summons and publication of notice to nonresidents shall be made as in cases in chancery (Hurd's Rev. St. 1908, c. 47). Section 16 of the act on chancery practice provides that every person who shall be summoned, served with a copy of the bill or petition, or notified by publication, shall be held to except, demur, plead, or answer on the return day of the summons, or, in case of service by notice, at the expiration of the time required to be given (Hurd's Rev. St. 1908, c. 22). Notice was given to appellants by publication, and that notice was returnable on the third Monday of August, 1907. The first petition for removal was filed January 24, 1908. No default was taken against the appellants. The law does not require them to file a written pleading of any character, and it is contended, under these circumstances, by the appellants, that the petition for removal was filed in apt time. With this contention we do not agree. If the appellants did not appear on the return day of the notice they could be defaulted, and it is our judgment that the day upon which the notice was so returnable was, within the meaning of the federal statute, the time when the appellants were required by the laws of this state to answer or plead. The mere fact that the default

was not taken on this day or any other day does not extend the time within which an application for removal may be made. *Kansas City, Ft. Scott & Memphis Railroad Co. v. Daughtry*, 138 U. S. 298, 11 Sup. Ct. 306, 84 L. Ed. 963; *Moon on Removal of Causes*, § 156.

Appellants owned the south two-thirds of the half block. The north one-third of the half block belonged to another, but was included in this proceeding, and the same jury fixed the compensation for the entire half block in the same trial and by the same verdict. The verdict in each instance fixed the compensation for the ground separately from the compensation which it fixed for the improvements. The ground in the half block, without the improvements, was all of the same general character. The witnesses for petitioner testified that the south one-third of the ground was a little more desirable than the north one-third, which, in turn, was a little more desirable than the middle one-third. This solely on account of the location of the various parts of the half block. Appellants sought, unsuccessfully, to have the case, so far as it related to their property, tried separately, basing their application upon the contention that there had been an agreement between the petitioner and the owners of the north one-third of the ground in reference to the compensation that should be allowed those owners; that this agreement would necessarily appear to the jury and would be prejudicial to the interests of appellants, for the reason that the jury would be inclined to fix the value of appellants' ground upon the same basis as that which the petitioner and the owners of the north one-third of the ground had adopted in agreeing as to the value of that one-third.

No counsel representing the owner of the north one-third of the ground took any part in the trial. No witness was called or testified in its behalf, but the cause as to that ground was submitted to the jury upon the testimony adduced by the petitioner. The witnesses for the petitioner in each instance fixed the value of the ground apart from the value of the improvements. Efforts made by the counsel for the appellants to examine or cross-examine with reference to the north one-third of the ground were in the trial successfully met by the objection that the counsel did not represent the owners of that property. Just before the case went to the jury, counsel representing the owners of certain buildings located on the property owned by appellants appeared in court and stated verbally: "If the court please, we have also agreed as to the values of certain barns standing upon some of the lots, so that there will be no occasion for me or the clients I represent to give any testimony; but my understanding, your honor, was that the amounts agreed upon should be written into the verdict before it goes into the hands of

the jury. To that Mr. Sauter objects for some reason or other, and it leaves the matter at large in the hands of the jury." The Mr. Sauter referred to was one of the attorneys for the petitioner.

It is entirely apparent to us, and must have been to the jury, that some agreement had been entered into by which the owners of the north one-third of the ground had agreed to accept as compensation a sum fixed by the evidence for the petitioner as the value of that property. The law is that it is not competent to prove what the petitioner has paid for other property purchased by it for use in the same enterprise. The property owner, realizing the power of the petitioner to take his property, may prefer to take less than the real value rather than incur the expense of a litigation, where he can in no event obtain more than its actual value. As is said by the authorities, such a sale is in the nature of a compromise, and for that reason is not a fair measure of value. *Peoria Gas Light & Coke Co. v. Peoria Terminal Railway Co.*, 146 Ill. 372, 34 N. E. 550, 21 L. R. A. 373; *Chicago & Alton Railroad Co. v. Scott*, 225 Ill. 352, 80 N. E. 404.

The course pursued by appellee in the trial court resulted in its obtaining, indirectly, the benefit of a state of facts, evidence of which, if offered directly, would have been incompetent. Appellee seems unable to point out anything which moved the court, in the exercise of its discretion, to compel the appellants to submit their cause with that of the owners of the north one-third of the half block. It does not appear that a separation of the cause of appellants could have worked any injury to the petitioner or to any of the owners of the property, or could have required more than a few minutes' additional time to dispose of the entire subject-matter of the suit. It seeks, however, to show that the error, if any, was harmless.

This ground, located as it is, seems well adapted for use as a site for a building for warehouse or manufacturing purposes. Immediately east of this half block, running north and south through the block, was a public alley 10 feet in width. Immediately east of that alley, upon an embankment about 15 feet above the surface of the ground, were the lines of several railway companies, which run north and south through that part of the city. Properties directly north and south of this, abutting upon and west of this alley but in other blocks, enjoy switching facilities; that is, a switch track is extended across the alley to the second story of the building, or a viaduct or platform is built from the second story across the alley to a switch track, so that freight can be loaded upon and unloaded from freight cars at the door without teaming. In order to enjoy switching privileges of that character, it is necessary for the property owner to make a contract therefor with one of the railroad companies, and also to obtain from the city

council permission to build over or upon the alley; and the question whether or not the property involved in this suit is now entitled to enjoy, or can at the option of the owners readily obtain, such switching privileges, was one much discussed in the trial of the case. Three witnesses testified as to the value of the ground without the improvements on the part of the petitioner, and a like number testified as to that value on the part of the appellants. Two of those who testified for appellee fixed the value of the ground of appellants at \$140 per front foot. The third of those who testified for appellee fixed the value of the ground at \$150 per front foot. The testimony of these witnesses was that this ground would be worth about one-third more if it was in the enjoyment of the switching facilities owned by the properties abutting upon the same alley in blocks north and south. Their testimony was based upon the theory that no such switching facilities existed, and one of them was improperly permitted to state, over objection, that he had had experience with the city council in similar cases in another part of the city and had been unable to get an ordinance passed granting permission. The witnesses who testified for appellants fixed the value of the same ground at from \$240 to \$275 per front foot. This testimony was based upon the assumption that the owners of this property had, or would be readily able to obtain, switching connections with a railroad by means of a platform, viaduct, or similar structure over the alley.

The compensation allowed by the jury for appellants' ground was at the rate of \$150 per front foot. Appellee states that the evidence was offered on two theories: One that the property had or could readily obtain the switching facilities; the other that it was not entitled to such switching facilities; that the amount allowed was the highest amount fixed by any witness who testified upon the latter theory, and, inasmuch as the proof does not show that the owner of the property is now entitled to place any permanent platform, viaduct, or like structure upon or over the alley, and does not show that the necessary contract with a railway company has been negotiated, no harm has been done the appellants by requiring them to submit their cause to the jury with that of the owners of the north one-third of the ground, because the amount allowed was the highest amount fixed by any witness as the value of the property without the right in question; in other words, the insistence is, appellants have been awarded the greatest amount that could have been awarded had their cause been tried separately. We do not think this argument well considered. In the first place, it cannot be said, as a matter of law, that the question of the value of the property can be determined alone on the theory that the owners cannot obtain these switching privileges merely because they do not now have them. The fa-

cilities can be obtained if the necessary contract can be made with the railroad companies, and if the requisite permission can be obtained from the city. It is possible, on account of its proximity to the tracks, that the owners of this property can make the required arrangements. If the tracks were not in the same block, greater difficulty would be encountered in obtaining the very desirable rights now under consideration. In that event it is highly probable they could not be acquired at all. In determining the value of the ground, the owners thereof are entitled to have the jury take into consideration the possibility of effecting the needed arrangements. If that possibility adds to the value of the ground, the owners are entitled to the addition. It appears, upon an examination of the testimony of the three witnesses who testified for appellee, that, while they say they took into consideration the proximity of the railroad tracks to this property in fixing its value, they did not consider the possibility of obtaining the switching facilities as increasing the value of the property. They regarded that possibility as too remote, but the jury was not necessarily bound by that conclusion of these witnesses. Appellee argues that, as the right to the switching facilities did not exist, the proximity of the railroad tracks was an actual damage to the property on account of the noise and dust necessarily attendant upon the operation of the trains. Under the circumstances, it is entirely clear to us that the fact that the owners of the north one-third of the ground were willing to take a price fixed by the evidence for appellee would be regarded by the jury as an indication that the price fixed, upon the same basis, by the same witnesses, for the property of appellants immediately adjoining, was a fair valuation of that property. The jury viewed the premises, and might reasonably, under the proof in this case, have fixed the value of this ground at more than \$150 per front foot although the owners do not now possess the switching rights.

No reason is apparent upon this record for the action of appellee in insisting upon having the question of the compensation to be paid for the entire half block determined by the jury at one time, other than a desire to prejudice appellants by showing to the jury that the owners of the north one-third of the property had agreed to take a sum fixed by appellee's evidence for their ground. The course pursued in this regard resulted in appellants being deprived of a fair trial.

The twenty-eighth instruction given at the request of the petitioner was in reference to the right of the jury to act upon their view of the premises in fixing the amount of the compensation. It is not materially different from the instruction condemned by this court in *Peoria Gas Light Co. v. Peoria Terminal*

Railway Co., *supra*, and of which we there said (page 381 of 146 Ill., and page 552 of 34 N. E. [21 L. R. A. 373]): "This instruction clearly authorized the jury to base their estimate of compensation and damages solely upon their own inspection of the premises, provided, only, they were of opinion that such inspection furnished a more reliable basis for an assessment than did the evidence of the witnesses. While it required them to consider the evidence, and directed them not to reject any of it arbitrarily and without reason, it gave to them a clear intimation that, if in their opinion their inspection of the premises furnished a more reliable basis for an estimate of damages, such conclusion would of itself furnish a sufficient reason for wholly disregarding the testimony of the witnesses. Such, in our opinion, is not the law." That case has been referred to with approval by this court in *Chicago & State Line Railway Co. v. Mines*, 221 Ill. 443, 77 N. E. 896, and must be regarded as the law of the state. The holding of that case is not modified by the opinion of this court in *Guyer v. Davenport, Rock Island & Northwestern Railway Co.*, 196 Ill. 370, 63 N. E. 732. The earlier case is not referred to in the *Guyer* case, and it is clear that the court did not by the latter intend to change the law on this subject.

The jury's view of the premises is in the nature of evidence. It should be considered by them with all the other evidence in the case, and upon a consideration of all the evidence, including their view of the premises, they should determine the compensation to be awarded for property taken. An instruction which affords them basis for the belief that they may fix the value of the property upon their judgment, founded alone upon their inspection of the premises, is just as objectionable as would be an instruction which would lead them to believe that they might fix the value of the property upon a basis reached by a consideration of the testimony of but one of many witnesses.

We deem it unnecessary to discuss other questions presented.

The judgment will be reversed, and the cause will be remanded to the circuit court for further proceedings consistent with the views above expressed.

Reversed and remanded.

(267 Ill. 74.)

MERCER COUNTY v. WOLFF et al.  
(Supreme Court of Illinois. Dec. 15, 1908.)

1. EMINENT DOMAIN (§ 90\*)—DAMAGES TO LAND NOT TAKEN—RECOVERY.

Damages resulting to an owner of land, no part of which has been physically taken, are not within the eminent domain act, but the owner is remitted to his action at law.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 233; Dec. Dig. § 90.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

## 2. COUNTIES (§ 105\*)—COUNTY BUILDINGS—STATUTES.

The duty of a county board to erect, or otherwise provide, necessary county buildings, including a courthouse and jail, as required by Hurd's Rev. St. 1908, c. 34, § 26, is imperative, but the county board has a discretion as to the kind, cost, size, and other conditions of the buildings.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 165; Dec. Dig. § 105.\*]

## 3. EMINENT DOMAIN (§ 18\*)—CONDEMNATION OF LAND FOR COUNTY JAIL—STATUTES—"PUBLIC WORK."

Under Hurd's Rev. St. 1908, c. 34, §§ 22, 24, 26, providing that each county shall be a body politic and corporate, with power to purchase and hold real estate necessary for the uses of the county, and requiring the county board to erect or otherwise provide, a suitable courthouse, jail, and other necessary county buildings, a county may condemn land for a county jail, under Eminent Domain Act (Hurd's Rev. St. 1908, c. 47) § 2, providing that, where the right to construct or maintain any public work has been conferred on any corporate or municipal authority, public body, etc., the party authorized to construct the public work may proceed to condemn the land necessary; a county being a public municipal corporation, and a county jail being a "public work."

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 55; Dec. Dig. § 18.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5838, 5839; vol. 8, p. 7774.]

## 4. EMINENT DOMAIN (§ 68\*)—POWER TO CONDEMN—PROPERTY—JUDICIAL REVIEW.

Where the county board of a county having a jail in use determined to condemn other property for a new jail, and showed the conditions necessary to exercise the right of eminent domain, the court could not inquire into the questions of whether the county board should repair the old jail, or build a new one; the questions as to what was a suitable jail, whether the county should repair the old one or build a new one, the location, size, and cost of the new one, and the kind and quality of its materials being committed to the exclusive decision of the county board.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 169, 170; Dec. Dig. § 68.\*]

## 5. EMINENT DOMAIN (§ 170\*)—CONDEMNATION OF PROPERTY—AGREEMENT WITH LAND-OWNER.

The fact that one owner of land could agree with a county desiring to condemn land for a jail did not affect another owner not agreeing with the county.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 170.\*]

## 6. EMINENT DOMAIN (§ 170\*)—CONDEMNATION OF PROPERTY—AGREEMENT WITH LAND-OWNER.

Where an owner of land, sought to be taken by a county under the right of eminent domain, declined to accept the offer of the county, and stated that he could not give an answer within a week, there was a failure to agree, authorizing the county to institute proceedings to condemn.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 462-464; Dec. Dig. § 170.\*]

## 7. EMINENT DOMAIN (§ 216\*)—EXAMINATION OF JUROR—QUESTIONS.

In condemnation proceedings, a juror, who stated on his voir dire that he had no knowledge of the value of property in the city, could not be asked whether he would take the evidence introduced on the witness stand, and the

law as given by the court, and render a verdict on that evidence and law alone, since, under the statute authorizing a view by the jury, the jury may rely on their own observation, in connection with the evidence.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 216.\*]

## 8. EMINENT DOMAIN (§ 219\*)—TRIAL—ISSUES.

Under the statute authorizing the compensation in condemnation proceedings for separate parcels of property to be assessed by the same jury, or by different juries, as the court may direct, the denial of a motion for separate trials in condemnation proceedings is not erroneous, in the absence of an abuse of discretion.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 219.\*]

## 9. EMINENT DOMAIN (§ 216\*)—TRIAL—ISSUES.

Where, in condemnation proceedings, a party objected to the venire being made returnable within less than 10 days, and excepted to the overruling of the objection, but no motion was made before the trial to quash the venire, and the parties proceeded with the impaneling of the jury without objection, the objection to the venire was waived.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 216.\*]

## 10. EMINENT DOMAIN (§ 216\*)—TRIAL—ISSUES.

Where, in condemnation proceedings, the venire was quashed, the court having ordered another jury could, under Eminent Domain Act, § 7 (Hurd's Rev. St. 1908, c. 47), direct the issuance of a new venire returnable instant.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 216.\*]

## 11. EMINENT DOMAIN (§ 198\*)—TRIAL—ISSUES.

In proceedings by a county to condemn land for a county jail, the decision of the county board on the question whether the finances of the county justified the building of the jail was not before the court.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 528; Dec. Dig. § 198.\*]

## 12. EMINENT DOMAIN (§ 202\*)—AWARD OF COMPENSATION—EVIDENCE—ADMISSIBILITY.

In condemnation proceedings, the amount at which the assessor assessed the property sought to be taken was immaterial, though the assessor might testify to his judgment of value.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 202.\*]

## 13. EMINENT DOMAIN (§ 220\*)—AWARD OF COMPENSATION—EVIDENCE—VIEW.

The jury in condemnation proceedings may, in viewing the premises, consider what they learned from such view in passing on the testimony of the witnesses.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 559; Dec. Dig. § 220.\*]

## 14. EMINENT DOMAIN (§ 262\*)—COMPENSATION—INADEQUATE COMPENSATION.

Where, in condemnation proceedings, the evidence was conflicting, and the jury viewed the premises, the verdict within the range of the testimony would not be set aside as not supported by the weight of the evidence.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 685; Dec. Dig. § 262.\*]

Appeal from Circuit Court, Mercer County; Henry E. Burgess, Judge.

Condemnation proceedings by the county of Mercer to condemn the lands of Edward L. Wolff and others for a site for a county jail.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

From a judgment of condemnation, defendants appeal. Affirmed.

Robert L. Watson, for appellants. William J. Graham, State's Atty., for appellee.

DUNN, J. The board of supervisors of the county of Mercer, having resolved to build a jail, and being unable to agree with the owners of the site selected upon the compensation to be paid therefor, caused a petition for the condemnation thereof to be filed in the county court. Edward L. Wolff and Don S. Prentiss, the owners of the land, were made defendants. The executors of the will of Thomas Maddux, deceased, appeared and filed a cross-petition, alleging that Thomas Maddux died seised of real estate adjoining the tract sought to be condemned; that as executors they have control of said real estate, and that it will be greatly damaged by the condemnation and use for a jail of the site sought by the county. They, therefore, prayed to be made defendants and have their damages assessed. A motion to strike this cross-petition from the files was denied; motions by the cross-petitioners and Wolff for separate trials were denied; a jury was impaneled. After hearing all the evidence the cross-petition was dismissed on motion of the county, and the jury returned a verdict, fixing the compensation of Wolff and Prentiss at \$1,200 each. A motion for a new trial having been overruled, and judgment of condemnation entered in accordance with the verdict, Wolff and the executors of Thomas Maddux have appealed.

Error is assigned on the order dismissing the executors' cross-petition. No part of the premises of the cross-petitioners was sought to be taken. No direct physical damage to their property was contemplated. The damages to be sustained, if any, were entirely consequential. For such actual damages, though consequential only, as may be sustained by an owner of abutting land through the taking of adjoining premises for a public use a remedy is given, and the owner may have his compensation ascertained by a jury, as required by the Constitution in a common-law action. But when no part of the land of an abutting owner is taken, the Constitution does not require the ascertainment and payment of his consequential damages before entry can be made upon adjoining property. Damages resulting to an abutting proprietor, no part of whose land is physically taken, are not within the contemplation of the eminent domain act, but he is remitted to his action at law for his damages. *Penn Mutual Life Ins. Co. v. Helss*, 141 Ill. 35, 31 N. E. 138, 33 Am. St. Rep. 273; *Parker v. Catholic Bishop*, 146 Ill. 158, 34 N. E. 473; *White v. West Side Elevated Railroad Co.*, 154 Ill. 620, 39 N. E. 270. The cross-petition was rightly dismissed.

It is contended that a county has no authority to acquire, by condemnation, property on which to build a jail. Each county is giv-

en power, by the statute, to purchase and hold the real estate necessary for the uses of the county, and to make all contracts, and do all other acts in relation to property and concerns of the county, necessary to the exercise of its corporate powers. *Hurd's Rev. St. 1908, c. 34, § 24*. It is made the duty of the county board to erect, or otherwise provide, when necessary and the finances of the county will justify it, and keep in repair, a suitable courthouse, jail, and other necessary county buildings. *Hurd's Rev. St. 1908, c. 34, § 26*. This duty is imperative, though the county board has a discretion as to the kind, cost, size, and other conditions of the building. *People v. La Salle County*, 84 Ill. 303, 25 Am. Rep. 461; *Andrews v. Knox County*, 70 Ill. 65. Section 2, Eminent Domain Act (*Hurd's Rev. St. 1908, c. 47*), provides that, in all cases where the right to construct or maintain any public road, railroad, plankroad, turnpike road, canal, or other public work or improvement has been conferred by general law upon any corporate or municipal authority, public body, officer, or agent, person, commissioner, or corporation, and the compensation to be paid for the property sought to be appropriated cannot be agreed upon by the parties interested, it shall be lawful for the party authorized to construct the public work to apply to the judge of the circuit or county court to have the compensation assessed in the manner provided by the act. A county is such a municipal authority as may avail itself of the provisions of this act. Counties are declared by the statute to be bodies politic and corporate. *Hurd's Rev. St. 1908, c. 34, § 22*. They are public municipal corporations created for the purposes of convenient local government, and existing only for public purposes connected with the administration of the state government. *Millikin v. County of Edgar*, 142 Ill. 528, 32 N. E. 493, 18 L. R. A. 447; *Wetherell v. Devine*, 116 Ill. 631, 6 N. E. 42; *Marion County v. Lear*, 108 Ill. 343. The erection of a common jail is a public work. The administration of justice and the enforcement of the criminal laws of the state are committed in large measure to the counties. As the laws now exist and are enforced, a jail is a public necessity. Its use concerns the public at large, for the whole state is interested in the enforcement of the law in each county.

Our attention is called to the case of *City of East St. Louis v. St. John*, 47 Ill. 463, as sustaining the proposition that the use of land for a jail is not a public use, and that land cannot be condemned for that purpose. The city of East St. Louis was there seeking to condemn a site for a city prison, and the question of its power to do so arose upon the construction of the special charter of the city. The charter did not require the erection of a city prison, though authority was given to the city council to erect and establish a workhouse. Authority to appropriate property for this purpose was sought to be derived from

the fourth article of the charter, which provided that the city council should have power "to acquire, to open and to lay out public grounds or squares, streets, alleys and highways, and to alter, widen, contract, straighten and discontinue the same. \* \* \* They shall cause all streets, alleys and highways, or public squares or grounds laid out by them, to be surveyed, described and recorded in a book to be kept by the clerk, showing accurately and particularly the proposed improvements and the real estate required to be taken, and the same, when opened and made, shall be public highways and public squares." It was held that a grant to a municipal corporation of the power to condemn private property for a specific purpose must be confined to the purpose named, and that the provision of the charter authorizing the city to condemn lands for streets, alleys, lanes, highways, public squares, and grounds, for the travel and common use and enjoyment of the entire public, did not include the power to condemn private property for a city prison.

It is argued that the property sought to be condemned is not necessary for the use of the county; that the county had a jail which was in use at the time the petition was filed; that it had other property on which the jail could be located, and still other property had been offered to it as a site for the jail. Where the power to condemn property exists, the courts will not inquire into the necessity or propriety of its exercise. Courts have the right to determine whether or not the use for which private property is proposed to be taken is public, but the right to determine whether or not the right to take the property shall be exercised is a legislative question, with which the court has no concern. *Chicago, Rock Island & Pacific Railroad Co. v. Town of Lake*, 71 Ill. 333; *Schuster v. Sanitary District*, 177 Ill. 626, 52 N. E. 855. The statutory conditions necessary to the exercise of the right of eminent domain in this case were that the petitioner was a municipal corporation, that it had resolved to build the jail on the premises proposed to be taken, and that it had been unable to agree with the owners upon the compensation to be paid. The county board was required to provide and keep in repair a suitable jail. What was a suitable jail, whether it should repair the old jail or build a new one, its location, size, and cost, and the kind and quality of its materials were all questions which were committed to the decision of the county board, into which the courts cannot inquire. *People v. La Salle County*, supra; *Andrews v. Knox County*, supra.

The appellants object that it is essential to allege and prove that the petitioner cannot agree with the owners upon the compensation to be paid, and that the evidence shows that they could agree with Prentiss, and that Wolff was negotiating with the county when the petition was filed. Whether

or not the petitioner could agree with Prentiss did not affect the appellants. Wolff had declined to accept the offer of the county; and, while it is true that he stated that he could not give an answer within a week, the county board was not compelled to wait that length of time. If he would not accept the offer, that was a failure to agree.

The court refused to permit the counsel for appellants, while examining the jury, to ask a juror, who stated that he had no knowledge of the value of property in Aledo, if he would take the evidence introduced on the witness stand, and the law as given by the court, and render a verdict on that evidence, and that law alone. The question was improper, if for no other reason because the statute authorizes a view of the premises by the jury, and the jury may rely upon their own observation thus made, in connection with the evidence introduced on the witness stand. *Pittsburg, Ft. Wayne & Chicago Railway Co. v. Lyons*, 159 Ill. 576, 43 N. E. 377; *Indiana, Illinois & Iowa Railroad Co. v. Stauber*, 185 Ill. 9, 56 N. E. 1079.

Complaint is made of the denial of appellants' motion for separate trials. The statute authorizes the compensation for separate parcels of property to be assessed by the same jury, or by different juries, as the court or judge may direct, and no abuse of the discretion thus conferred is shown. *Concordia Cemetery Ass'n v. Railroad Co.*, 121 Ill. 199, 12 N. E. 536.

The venire issued was quashed on the appellants' motion, and the court ordered another jury drawn in accordance with section 6, Eminent Domain Act (Hurd's Rev. St. 1908, c. 47), and a venire issued returnable 2 days later. The appellants objected to the venire being made returnable within less than 10 days, but the court overruled the objection, and appellants excepted. No motion was made before the trial to quash this venire, but the parties proceeded with the impaneling of the jury without objection. Whatever objection there may have been to the venire was therefore waived, but in view of the provision of section 7, Eminent Domain Act (Hurd's Rev. St. 1908, c. 47), directing the issue of another venire, returnable instant, if the panel be not full, by reason of nonattendance or be exhausted by challenges, the court did not err in making the venire returnable 2 days after its issue.

It is objected that the evidence does not show that the finances of the county would justify the building of the jail. The decision of this question by the county board was conclusive, and it was not a proper subject of inquiry by the court.

The appellants offered to prove by the assessor's book the assessed value of the property for 1907. The evidence was incompetent. The assessor might have testified to his judgment of its value, but the amount at which he assessed it was immaterial.

The following instruction was asked by the appellants and refused: "The court instructs the jury in this case that, if they have no personal knowledge of the values of real estate in the vicinity of the property in question in this suit, then, in determining the amount of damages to be awarded to the defendants, you shall consider the testimony of the witnesses produced in court, and from that alone determine the amount of the damages to be awarded." The jury viewed the premises. Their conclusions drawn from such view are in the nature of evidence, and what they learn from their examination of the premises may be considered by them in passing upon the testimony of the witnesses. *Lanquist v. City of Chicago*, 200 Ill. 69, 65 N. E. 681. The instruction was therefore properly refused.

Appellants claim that the amount of the verdict is inadequate and opposed to the weight of the evidence. The jury viewed the premises, and the verdict is within the range of the testimony, which was conflicting. We cannot say that it is not supported by the evidence. *Lanquist v. City of Chicago*, supra; *Rock Island & Peoria Railway Co. v. Leisy Brewing Co.*, 174 Ill. 547, 51 N. E. 572.

The judgment will be affirmed.  
Judgment affirmed.

(237 Ill. 194.)

**DUKEMAN v. CLEVELAND, C. & ST. L. RY. CO.**

(Supreme Court of Illinois. Dec. 15, 1908.)

**1. APPEAL AND ERROR (§ 1094\*)—REVIEW—DECISION OF INTERMEDIATE COURT—QUESTIONS OF FACT.**

On appeal from a judgment of affirmance of the Appellate Court, the Supreme Court will not weigh the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4324; Dec. Dig. § 1094.\*]

**2. NEGLIGENCE (§ 136\*)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**

Contributory negligence becomes a question of law when the evidence is so clearly insufficient to establish due care that all reasonable minds would reach the conclusion that there was such negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 286; Dec. Dig. § 136.\*]

**3. RAILROADS (§ 350\*)—ACCIDENTS AT CROSSINGS—QUESTIONS FOR JURY.**

A failure to look and listen before driving over a railroad crossing is not negligence as a matter of law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1169-1186; Dec. Dig. § 350.\*]

**4. RAILROADS (§ 830\*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.**

One who drives over a railroad crossing has a right to presume that the speed of trains will not exceed the limit of the speed ordinance, and contributory negligence cannot be imputed to such person for failure to anticipate a violation of the ordinance.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1074; Dec. Dig. § 830.\*]

**5. RAILROADS (§ 834\*)—CONTRIBUTORY NEGLIGENCE—INSTINCT OF SELF-PRESERVATION—EVIDENCE.**

The natural instinct of self-preservation and the avoidance of injury may be considered by the jury in determining the question of due care on the part of a person driving over a railroad crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1027; Dec. Dig. § 834.\*]

**6. RAILROADS (§ 350\*)—ACCIDENTS AT CROSSINGS—QUESTIONS FOR JURY.**

Whether deceased was guilty of contributory negligence in driving over a railroad crossing held, under the evidence, a question for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1169-1186; Dec. Dig. § 350.\*]

**7. DEATH (§ 79\*)—LOSS RESULTING FROM DEATH—NOMINAL DAMAGES.**

Where deceased, who was survived by two sons, was the housekeeper of one of them and did her own housework, and also assisted the family of the other during sickness, an instruction that nothing more than nominal damages could be recovered for her wrongful death was properly refused.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 97; Dec. Dig. § 79.\*]

**8. DEATH (§ 58\*)—RELATIONSHIP—PRESUMPTION AS TO DAMAGES.**

Where next of kin claiming damages for wrongful death sustained a lineal relation to the deceased, the law presumes substantial damages from the relationship alone, and the question whether they received pecuniary assistance from the deceased is immaterial.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 77; Dec. Dig. § 58.\*]

**9. TRIAL (§ 295\*)—ERRONEOUS INSTRUCTION—CORRECTION BY OTHER INSTRUCTIONS.**

Though an instruction in the language of *Hurd's Rev. St. 1905*, c. 114, § 87, that if plaintiff's intestate was killed by defendant's train while she was in the exercise of ordinary care and the defendant was running its train at an unlawful speed, then the law presumes that the death was caused by defendant's negligence, is objectionable because it omits to state that the unlawful speed of the train must have been the proximate cause of the injury, the objection is obviated by instructions on defendant's behalf correctly announcing the rule as to proximate cause.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.\*]

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, Coles County; *E. R. E. Kimbrough*, Judge.

Action by James Dukeman, administrator of Cynthia Dukeman, deceased, against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

George B. Gillespie (H. A. Neal, Hamlin, Gillespie & Fitzgerald, and L. J. Hackney, of counsel), for appellant. J. H. Marshall, for appellee.

**VICKERS, J.** This is an action on the case brought by James Dukeman, as administrator of the estate of Cynthia Dukeman, deceased, against the Cleveland, Cincinnati,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Chicago & St. Louis Railway Company, for wrongfully causing the death of plaintiff's intestate. The declaration contains four counts. The first alleges careless and improper operation of the train. The second, that the train was running in excess of the limit of the speed ordinance of the city of Charleston. The third is a common-law count upon the operation of the train at a dangerous rate of speed. The fourth charges a failure to ring the bell and blow the whistle for the crossing where the accident occurred. The jury found the defendant guilty, and assessed plaintiff's damages at \$1,200. The judgment rendered by the court upon this verdict has been affirmed by the Appellate Court for the Third district. By its further appeal the railroad company brings the record to this court, and insists upon a reversal for the following reasons: First, because the court refused, at the conclusion of all the evidence, to direct a verdict in favor of appellant; second, because the court erred in giving and refusing instructions upon the question of damages, and in holding that appellee was entitled to recover more than nominal value; third, because the court erred in giving, refusing, and modifying instructions upon the question of negligence.

The negligence charged in the second count of the declaration is not controverted. The engineer of appellant's train testifies that the train was running 85 miles an hour at the time of the accident. Another witness, who timed the train with a stop-watch, testifies that the train was running 68 miles an hour. There is no contention on the part of appellant that the speed of the train was within the 10 mile per hour limit fixed by the ordinance of the city of Charleston.

Appellant's contention in support of the error assigned upon the refusal of the court to direct a verdict is limited to the alleged contributory negligence of appellee's intestate. It is not the province of this court to weigh the evidence and determine, as a matter of fact, whether appellee's intestate was guilty of contributory negligence. The affirmation of the judgment of the Appellate Court is conclusive of all controverted questions of fact. The question of contributory negligence only becomes a question of law when the evidence is so clearly insufficient to establish due care that all reasonable minds would reach the conclusion that there was such contributory negligence. *Hoehn v. Chicago, Peoria & St. Louis Railway Co.*, 152 Ill. 223, 38 N. E. 549; *Beidler v. Branshaw*, 200 Ill. 425, 65 N. E. 1086; *Chicago & Eastern Illinois Railroad Co. v. Crose*, 214 Ill. 602, 73 N. E. 865, 105 Am. St. Rep. 135.

On October 25, 1905, the deceased, Cynthia Dukeman and her husband, George Dukeman, aged, respectively, about 65 and 72 years, were driving north on E street, in the city of Charleston, about 8 o'clock in the afternoon. The appellant's railroad runs east and west, and E street north and south.

The evidence tends to show that up to a point within 35 or 40 feet south of the railroad crossing on E street the view to the west along appellant's track was obscured by a coal shed and by a row of peach trees which at that time had not shed their foliage, but further north and nearer the railroad track there was an unobscured view of the railroad track westward for a considerable distance. Clyde Ely, a boy 11 years of age, and the only witness who testifies to having seen the deceased and her husband as they drove along E street before the crossing was reached, testifies that he was playing in a lot on the west of that street, south of the right of way, and that he saw the deceased and her husband as they drove north on that street; that the mules were being driven by the husband of the deceased at a slow trot. He testifies that the deceased and her husband appeared to be reading something which he thought was soap wrappers, as he saw soap on the lap of the deceased. He says that the speed of the mules was not increased as they approached the crossing, and that neither the deceased nor her husband appeared to notice the approach of the train until about the time the train struck the buggy, when he saw the deceased throw up her hands. This witness does not testify that the deceased did not look to see whether the train was approaching. His inference that the deceased was reading is shown to be incorrect by the fact that the deceased was illiterate and unable to read, and James Morris, who sold the deceased some soap 15 or 20 minutes before she was killed, testifies that he wrapped the soap up in wrapping paper that he had no printed matter on it. The evidence does not show that the deceased failed to look or listen for the approach of the train, and, if it did, such failure would not be negligence per se. A failure to look and listen cannot be said to be negligence as a matter of law, since there may be many circumstances excusing such failure. *Chicago & Northwestern Railway Co. v. Hansen*, 166 Ill. 623, 46 N. E. 1071; *Chicago & Alton Railroad Co. v. Pearson*, 184 Ill. 386, 56 N. E. 633; *Elgin, Joliet & Eastern Railway Co. v. Lawlor*, 229 Ill. 621, 82 N. E. 407. The deceased had a right to presume that appellant would not run its train in violation of the ordinance of the city, and contributory negligence could not be imputed to her for a failure to anticipate that appellant would approach this crossing at a rate of speed prohibited by the ordinance. In connection with the other circumstances surrounding the accident, the natural instinct prompting to the preservation of life and the avoidance of injury, and consequent suffering and pain, may also enter into the consideration of the jury in determining the question of the due care of the deceased. *Chicago & Eastern Illinois Railroad Co. v. Beaver*, 199 Ill. 34, 65 N. E. 144. We are not prepared to say, as a matter of law, that the deceased was guilty of such

contributory negligence as to preclude a recovery. We think this question was properly submitted to the jury as one of fact.

It is next insisted by appellant that the court erred in refusing the following instruction:

"Nominal damages mean one dollar or one cent, or some such nominal sum, merely sufficient to carry a judgment for costs against the defendant; and in this case you are instructed that there can be no recovery of more than nominal damages, although you may find the issues in favor of the plaintiff."

The contention of appellant is that there is no evidence of pecuniary damage to the next of kin, and for that reason the court erred in not instructing the jury as requested. To this contention it may be replied: (1) There is evidence of pecuniary damage to the next of kin of the deceased. (2) The next of kin in this case were the sons of the deceased, and being the lineal kinsmen, the law presumes some substantial damages. The deceased left surviving her, her husband, George Dukeman (who was killed in the same accident in which the deceased lost her life, but who survived the deceased a few hours), and Louis and James Dukeman, her sons. Louis Dukeman was married and lived with his family, while James, though 42 years of age, was unmarried and lived at home with his father and mother. The evidence shows that the deceased was the housekeeper for her husband and her son James, and that the three lived together on a rented farm; that the deceased did all of the cooking, washing, and other housework without any assistance, except at harvest time, when she had help; that the deceased was in good health, and not only did her own housework, but rendered assistance to the family of her married son when his wife was sick. Under this evidence the court properly refused to instruct the jury that nothing more than nominal damages could be recovered. But aside from this, the rule is established in this state that, where the next of kin sustained a lineal relation to the deceased, the law presumes some substantial damages from the relationship alone. *Chicago, Peoria & St. Louis Railroad Co. v. Woolridge*, 174 Ill. 330, 334, 51 N. E. 701, 702. In the case above cited, this court said: "This act has been construed: (1) That 'next of kin' means those standing in that relation in a technical sense. *Chicago & Alton Railroad Co. v. Shannon*, 43 Ill. 338. (2) That, if the next of kin are collateral, it is a material question whether they were in the habit of claiming and receiving pecuniary assistance from the deceased. If they were not, they can only recover nominal damages; if they were lineal, the law presumes pecuniary loss from the fact of death"—citing *City of Chicago v. Scholten*, 75 Ill. 468, and *Chicago & Northwestern Railroad Co. v. Swett*, 45 Ill. 197, 92 Am. Dec. 206.

Appellant concedes that the *Woolridge*

Case is against its contention, but insists that what was there said on this subject was not necessary to the decision of the case, and therefore is not binding authority. This court had under consideration, in the case referred to, the admissibility of evidence that an adult son of the deceased was a cripple, and that he was for that reason dependent upon his father for support. The evidence was held erroneously admitted, and the judgment reversed, and the case remanded for that reason. In replying to the contention in support of the ruling below, this court announced the rule as stated in the above excerpt from the opinion. The language there employed seems to have been used with deliberation, and was intended for a guide to the retrial of the case by the court to which the cause was remanded. We do not regard what was there said as dictum, but, if under the strict rule it should be held to fall within that class of judicial utterances, it seems to us that it is clearly right under the previous decisions of this court which are cited in support thereof. We think that the court properly refused the instruction now under consideration.

Appellant next contends that the court erred in giving instruction No. 1 for appellee. That instruction is as follows:

"The court instructs the jury that if they believe, from a preponderance of the evidence, that the deceased, Cynthia Dukeman, was killed within the corporate limits of the city of Charleston by a railroad train of the defendant company while she was in the exercise of ordinary care for her own safety, and that the defendant company was at the time running its said train at a greater rate of speed than 10 miles an hour, that then the law presumes the death of the said Cynthia Dukeman to have been caused by the negligence of the defendant or its agents."

The objection pointed out to this instruction is that it does not include proximate cause as one of the facts from which the presumption is drawn that the death of Cynthia Dukeman was caused by the appellant's negligence. Section 87 of chapter 114 (*Hurd's Rev. St. 1905*, p. 1581) reads, in part, as follows: "Whenever any railroad corporation shall, by itself or agents, run any train, locomotive engine, or car, at a greater rate of speed in or through the incorporated limits of any city, town or village, than is permitted by any ordinance of such city, town or village, such corporation shall be liable to the person aggrieved for all damages done the person or property by such train, locomotive engine or car; and the same shall be presumed to have been done by the negligence of said corporation or their agents."

In *Chicago, Burlington & Quincy Railroad Co. v. Haggerty*, 67 Ill. 113, this court had before it an instruction in substantially the same language as the one now under consideration, and, while the instruction was crit-

icised by this court, it was pointed out that the instruction was in the language of the statute, and it was said: "We can hardly pronounce it to be error the laying down of the law in the words of the law itself." And again, in the case of Chicago & Eastern Illinois Railroad Co. v. Crose, supra, this same instruction was again brought into consideration, and we held, on the authority of the Haggerty Case and Illinois Central Railroad Co. v. Ashline, 171 Ill. 313, 49 N. E. 521, that the instruction was not so misleading as to constitute reversible error in view of the other instructions given in the case. It was said in the Crose Case, on page 615 of 214 Ill., on page 869 of 73 N. E. (105 Am. St. Rep. 135): "The criticism made upon this instruction is that it fails to state that the unlawful speed of the train must have been the proximate cause of the injury, and that it in express terms declares a fixed and absolute liability. It is doubtless subject to criticism, and, standing alone, might have been calculated to mislead the jury to the prejudice of the defendant." It was then pointed out that other instructions given in the series informed the jury that the plaintiff could not recover without proof that the injury was the proximate result of the excessive rate of speed. The same disposition may be made of appellant's complaint in the case at bar.

Instruction No. 6 given on behalf of appellant told the jury that the plaintiff could not recover without proof that "she was herself in the exercise of due care and caution for her own safety, and her death was the proximate result of the excess of the rate of speed at which the train was running at the time the accident occurred." Instructions Nos. 5 and 9 given for appellant also contain a similar direction to that contained in No. 6. These instructions obviate the objection pointed out to instruction No. 1 given on behalf of appellee.

There are no other reasons urged upon our attention for reversing this judgment. The judgment of the Appellate Court for the Third district is accordingly affirmed.

Judgment affirmed.

DUNN, J., took no part in the decision of this case.

(237 Ill. 250.)

BECK COAL & LUMBER CO. et al. v. H. A. PETERSON MFG. CO.

(Supreme Court of Illinois. Dec. 15, 1908.)

**1. MECHANICS' LIENS (§ 277\*)—ENFORCEMENT—PETITION—VARIANCE.**

A petition in proceedings to enforce a mechanic's lien alleged that the petitioner made an estimate of the materials required in the construction of a building with the price, which was accepted by the contractor, a copy of which estimate was attached to the petition as an exhibit to be taken as a part of the petition. The

petition also alleged that impliedly the materials were to be paid for the first day of the month succeeding the final delivery thereof. The exhibit attached to the petition stated the terms to be 30 days. *Held*, that the acceptance of the proposition fixed the terms, and that the allegation as to an implied provision in the contract was a conclusion of the pleader, not justified by the facts, and should be disregarded, in determining the question whether there was a variance between the contract alleged and the proof.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 277.\*]

**2. MECHANICS' LIENS (§ 260\*)—ENFORCEMENT—LIMITATIONS.**

In proceedings to enforce a mechanic's lien, it was undisputed that part of the material was delivered on January 8th, on 80 days' credit, which would expire on February 7th. *Held*, that the bringing of the proceeding to enforce the lien on June 5th was within four months of the expiration of the term of credit, and was therefore brought in proper time.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 456-468; Dec. Dig. § 260.\*]

**3. MECHANICS' LIENS (§ 122\*)—PROCEEDINGS TO PROTECT—NOTICE.**

Under Hurd's Rev. St. 1905, c. 82, § 38, requiring a notice to be given the owner of a building to perfect a mechanic's lien, such notice need not state when payment became or would become due; the statute not requiring those particulars.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 163; Dec. Dig. § 122.\*]

**4. CONTRACTS (§ 305\*)—PERFORMANCE—WAIVER OF DEFECTS.**

Where some of the brick used in a building were of inferior quality, but were inspected by the owner's president before they were bought and selected by him as the kind to be furnished for the building, the contractor cannot be held liable for their quality.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1398, 1399, 1467-1475; Dec. Dig. § 305.\*]

**5. MECHANICS' LIENS (§ 47\*)—RIGHT TO LIEN—NATURE OF IMPROVEMENTS.**

After a building had been completed, lumber was furnished and used in the construction of benches, but was not used for any part of the building. *Held*, that there was no lien on the building for the lumber.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 50; Dec. Dig. § 47.\*]

**6. APPEAL AND ERROR (§ 226\*)—PRESENTATION IN LOWER COURT OF GROUNDS OF REVIEW—SOLICITOR'S FEES.**

Where the question of allowance of solicitor's fees is not presented in the lower court, it cannot be considered on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 226.\*]

Appeal from Branch Appellate Court, First District, on Appeal from Circuit Court, Cook County; Lockwood Honore, Judge.

Action by the Beck Coal & Lumber Company and others against the H. A. Peterson Manufacturing Company. From a judgment of the Appellate Court affirming a judgment for plaintiffs, defendant appeals. Reversed in part and remanded.

J. A. Coleman (Steele & Thompson, of counsel), for appellant. Frederic R. De Young, Chester Firebaugh, and Simon P. Gary, for appellees.

DUNN, J. This is an appeal from a judgment of the Appellate Court, which affirmed a decree of the circuit court establishing liens in favor of appellees for work and material furnished in the erection of a factory building for appellant. Edward Raymond was the contractor, and the Beck Coal & Lumber Company, which sold him material for the building, filed the petition. Raymond filed a cross-petition, and the Eagle Tank Company filed an intervening petition. The amounts respectively found due the Beck Coal & Lumber Company and the Eagle Tank Company being less than \$1,000, a certificate of importance was granted by the Appellate Court as to their claims.

Three objections are made to the claim of the Beck Coal & Lumber Company: (1) A variance between the allegations and the proof as to the contract; (2) that suit was not begun until more than four months after the last payment became due; and (3) the notice of lien to the owner was defective in not stating when the amount became or would become due.

As to the first objection, the petition avers that the petitioner made an estimate of the bill of items of materials required, with the prices, which was accepted by Raymond, (a copy of which estimate is attached to the petition as an exhibit and prayed to be taken as a part of the petition), and that impliedly the materials were to be paid for on the first day of the month succeeding the final delivery thereof. The exhibit states the terms to be 30 days. The acceptance of the proposition fixed the terms, and there was therefore no variance. The allegation that impliedly the materials were to be paid for at a different time is a conclusion of the pleader not justified by the facts and must be disregarded. In regard to the extra material, the allegation and proof are that the petitioner agreed to furnish Raymond the materials enumerated in the estimate at the prices stated, together with such other materials of the same nature as Raymond might need in the construction of the building and might order from time to time. The materials mentioned in the estimate and the other materials furnished were all sold under one contract and on the same terms of credit.

The suit was begun June 5, 1906. Petitioner claimed to have made the last delivery of material February 20th. It is undisputed that part of the material was delivered on January 8th. The 30 days' credit would expire on February 7th, which was less than four months prior to the filing of the petition, on June 5th.

The notice to the appellant was not defective because it did not state when payment became or would become due. The law does not require such statement. Hurd's Rev. St. 1905, p. 1325, c. 82, § 33.

The contract provided for the completion of the work in 65 days and for the payment by the contractor of \$10 per day damages for each day's delay of completion beyond that

time. The appellant claimed, as against Raymond, damages at the stipulated rate for 133 days and \$1,800 damages for the reconstruction of the outer wall, which it claims will have to be done on account of the inferior brick used therein, and that the building has never been completed to the satisfaction of H. A. Peterson, the superintendent, as required by the contract. The delay in the completion of the work arose, in part, from the fault of the contractor, in part from the fault of the appellant. Changes made in the work by the order of the appellant, delay in furnishing materials required to be provided by the appellant, slowness in making payments required of the appellant, and extra work done by the contractor on the appellant's order, all contributed to the delay. It is impossible to tell how much of the delay was the fault of the contractor and how much that of the appellant, and there is no basis for an apportionment of the damages. An examination of the evidence satisfies us that there has been a substantial performance of the contract by Raymond, and that acceptance by the superintendent, Peterson, who was the president of appellant, was waived by the conduct of the parties and by their act in submitting their dispute to the arbitration of L. G. Hallberg, expressly waiving all provisions in the contract in regard to the certificates. The evidence shows that some of the brick were soft and of inferior quality, though the proportion of that kind is very indefinite. These brick, however, were inspected by H. A. Peterson, the president of the appellant, before they were bought, and were selected by him as the kind to be furnished for the building. Under these circumstances, the contractor cannot be held liable for their quality.

The greater part of the claim of the Eagle Tank Company was for two cisterns and several tanks furnished, to be used in connection with the manufacturing business carried on in the building. The tanks stood in pits excavated for the purpose, and tanks and cisterns are all connected by pipes with the boilers and are part of the fixtures, apparatus, and machinery of the factory. The evidence in regard to their price sustains the amount claimed. As to the lumber, there is no proof that it was furnished for the purpose of being used in the building, or that it was so used. At the time it was furnished the building had long been completed, and the evidence is that the lumber was used for benches, but not for any part of the building. The amount of this item was \$38.00, and for it no lien existed.

The allowance of solicitor's fees is assigned for error. The question of solicitor's fees was not presented in the appellate court and cannot be considered here.

The judgment of the Appellate Court will be affirmed, except as to the Eagle Tank Company, and as to the Eagle Tank Company the judgment of the Appellate Court and the decree of the circuit court will be reversed, and the cause remanded to the circuit court,

with directions to enter a decree in favor of the Eagle Tank Company for \$342.40. The Eagle Tank Company will pay one-sixth of the costs in this court and the appellant five-sixths.

Reversed in part and remanded, with directions.

(227 Ill. 229)

# HOHENADEL v. STEELE.

(Supreme Court of Illinois. Dec. 13, 1908.)

## 1. PARENT AND CHILD (§ 2\*)—CUSTODY OF CHILD.

A parent has the right to the custody of his child as against the world, unless he has forfeited his right, or the welfare of the child demands that he should be deprived of it.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 4-32; Dec. Dig. § 2.\*]

## 2. PARENT AND CHILD (§ 3\*)—SUPPORT OF CHILD.

A parent cannot absolve himself from parental duties by an agreement with another that they jointly should be the guardians of the child, until her majority, that her home should be with the other person, that she should be educated at certain specified schools, the expense of her education to be borne by both, and that the parties to the agreement should have the custody of the child alternately for specified periods; but it was competent for the parent to enter into such an agreement, so far as his personal rights were concerned, and its effect was to surrender a portion of his rights as a parent.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 33, 35; Dec. Dig. § 3.\*]

## 3. EQUITY (§ 416\*)—CONSENT DECREE—"JUDICIAL DECREE."

A decree, entered by agreement, and not as the result of findings by the court, is not in a strict legal sense a "judicial decree," but is in the nature of a solemn contract between the parties entered by the court.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 945; Dec. Dig. § 416.\*]

For other definitions, see Words and Phrases, vol. 4, p. 3854.]

## 4. EQUITY (§ 443\*)—REHEARING—CONSENT DECREE.

A rehearing will not be allowed on a decree entered by agreement and not the result of a judgment of the court.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1075; Dec. Dig. § 443.\*]

## 5. EQUITY (§ 443\*)—BILL OF REVIEW—DECREES REVIEWABLE.

A decree by agreement of the parties cannot be impeached or set aside upon a bill of review for errors of law apparent on its face, or on account of additional evidence, but can only be set aside by an original bill in the nature of a bill of review.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1075; Dec. Dig. § 443.\*]

## 6. PARENT AND CHILD (§ 2\*)—CUSTODY OF CHILD.

A decree as to the custody of a child is exceptional in its nature and is always regarded as temporary, and, where such a decree has been entered by consent of the child's father and another person, the court will modify the decree on a showing that there had been a ma-

terial change in the condition of the parties affecting the welfare of the child.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 4-32; Dec. Dig. § 2.\*]

## 7. APPEAL AND ERROR (§ 460\*)—SUPERSEDEAS—OPERATION OF APPEAL.

Neither the prayer for an appeal from an order modifying a consent decree as to the custody of a child, nor the allowance of the appeal, operates as a supersedeas; but the filing and approval of an appeal bond, conditioned on the compliance by the appellee with the original consent decree, operates as a supersedeas until the final determination of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 460.\*]

## 8. APPEAL AND ERROR (§ 485\*)—SUPERSEDEAS—OPERATION AND EFFECT.

A supersedeas on an appeal from an order modifying a consent decree as to the custody of a child confers no affirmative right, but prevents the court from entering any further order in execution of the modifying order appealed from.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2267, 2268; Dec. Dig. § 485.\*]

## 9. CONSTITUTIONAL LAW (§ 273\*)—"DUE PROCESS OF LAW"—PUNISHMENT FOR CONTEMPT.

It is not "due process of law" to condemn a party without an opportunity to be heard on a charge of contempt not committed in the presence of the court, but he must be allowed to answer and offer evidence in his own behalf.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 939; Dec. Dig. § 273.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2227-2256; vol. 8, p. 7644.]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; Thomas G. Windes and R. S. Tuthill, Judges.

Action by John P. Hohenadel against Jesse O. Steele. From two orders filed in the case, plaintiff appealed, and from a third order committing defendant for contempt, defendant appealed. The Appellate Court affirmed the first order and reversed the other two, and plaintiff appeals. Affirmed.

Richard W. Morrison, for appellant. William Stack and Jacob C. Le Bosky, for appellee.

CARTWRIGHT, C. J. On May 14, 1906, John P. Hohenadel, appellant, filed his bill of complaint in the circuit court of Cook county against Jesse O. Steele, the appellee, alleging: That Elizabeth Vinni Steele, who would be four years old on July 21, 1906, was the daughter of Jesse O. Steele and Julia Steele, the deceased daughter of complainant; that Jesse O. Steele misused his wife in her lifetime and drove her and the child from home; that they came to the home of complainant and remained there until the death of Julia Steele, on April 29, 1906; that the defendant was unfit to have the care and custody of his child and had no home where she could have proper care and attention; and that it was for the best interest of the child to continue to live with the complain-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ant and be brought up in his family. The bill sought to have the defendant removed as natural guardian and the complainant appointed as guardian. Defendant answered the bill, denying the charges of cruelty, or that he was an unfit person to have the custody of his child, and on June 14, 1906, he filed a cross-bill, alleging that it was best for the future welfare of the child that he should have its custody, and that Hohenadel was unfit morally and unable financially to take care of her. Hohenadel answered the cross-bill on the same day, denying the charges against him. Replications were filed, and the cause was referred to a master in chancery, who reported that upon the conclusion of the evidence the parties, at his suggestion, reached an amicable agreement regarding the custody, care, and maintenance of the child, and agreed to a decree, a draft of which was submitted with the report, which bore the O. K. of the solicitors for both parties and the approval of the master. In view of the agreement the testimony was not reported. In pursuance of the report and recommendation of the master, the consent decree reported by him was entered by Hon. Charles M. Walker, one of the judges of said court. That decree appointed Hohenadel and Steele joint guardians of the person of the child until her majority and provided: That her home should be with Hohenadel; that when she arrived at the proper age, not prior to her sixth birthday, she should be placed in a Roman Catholic school and attend the same until she was eight years of age, when she should be sent to a boarding school, known as the Christian Sisters of Charity, the Josephinum, or some similar Roman Catholic school to be selected by the said guardians, and the expense to be borne by both; and that the parties were to have the right to the custody of the child alternately for specified periods, with other provisions for vacations, etc.

On April 18, 1907, Steele filed a petition in the court praying that the consent decree be modified and changed so as to give him the sole custody of the child. The court dismissed the petition but gave leave to file an amended petition, which was filed on April 27, 1907. It averred that there had been a material change in conditions, that petitioner then had a suitable home for the child, that the conditions at Hohenadel's home had become unsuitable, and alleging various other reasons why the petitioner should have the sole custody. The petition was sworn to, and Hohenadel answered it under oath on May 11, 1907, denying that there had been any material change in the conditions and circumstances, denying all charges tending to show that his home was not the proper place for the child, and alleging that he had fully respected and carried out the decree. The amended petition was heard by Hon. Thomas G. Windes, one of the judges of the circuit court, on the verified petition and answer

thereto and numerous affidavits, and that method of determining the issue is not questioned by either party. On May 14, 1907, said judge entered an order finding that since the decree entered by agreement there had been material changes in the situation of the parties and of the ward, which are recited in the order, that it was prejudicial to the interest of the child to be in the custody of two different persons alternately, that it interfered with her education and discipline, and that Steele was then a proper person to have the care, control, and education of the child and was then maintaining a suitable home for her. It was therefore ordered that the decree of June 16, 1906, be modified, and the sole care, custody, and education of the child were given to Steele, and her permanent abode was fixed at his home. From that order Hohenadel appealed to the Appellate Court for the First District, and his appeal bond was filed and approved on May 18, 1907.

On June 24, 1907, Hohenadel filed his petition praying for the custody of the child pursuant to the terms of the consent decree of June 16, 1906, and on a hearing of the petition, Judge Windes having announced a decision, the petitioner dismissed the petition. On July 18, 1907, Hohenadel filed another petition, addressed to Hon. Richard S. Tuthill, another judge of the circuit court, reciting the consent decree and compliance therewith, the filing of the petition by Steele and the amended petition, the order of May 14, 1907, giving the custody of the child to Steele, and the appeal of Hohenadel therefrom. The petition alleged that when the order modifying the decree was entered it was understood and stated in court that the decree of June 16, 1906, would remain in full force and binding upon both parties until the appeal was determined; that one of the conditions inserted in the appeal bond by Hohenadel, on the demand of Steele's solicitor, was that he should comply with the original consent decree until the final determination of the appeal; that at the time of the entry of the modifying order the child was in Hohenadel's care under the original decree; that she remained there until May 16, 1907, when Steele came to take possession, and, being entitled to the custody of the child for 30 days under that decree, the possession was given to him; and that it was his duty to return the child on June 16, 1907, but he did not do so and refused to return her. The petition prayed for an order directing Steele to return the child as provided in the original consent decree, and that he be ruled to show cause why he should not be adjudged guilty of contempt. On July 18, 1907, Judge Tuthill, upon the presentation of that petition, entered an order that Steele forthwith deliver the child to Hohenadel, to be held under the original consent decree until the Appellate Court should decide the appeal. On the next day an order was entered reciting that Steele had

been served with a certified copy of the order and had not complied with it, and further ordering that he stand in contempt of the court, and that a writ of attachment issue to the sheriff commanding him to bring Steele before the bar of the court to show cause, if any he had, why he should not be punished for contempt. On July 19th, the writ of attachment having been served on Steele, and he being present in court, Judge Tuthill said: "Well, what have you got to say? Are you going to obey the order of the court?" Steele's solicitor asked for leave to answer, and the court replied: "There is only one thing here, and that is to obey the order of the court. That is all. Obey the order of the court first, and then you can make answer. You are standing in contempt now." The solicitor stated that unless the court was satisfied there had been a willful disobedience he would not hold respondent in contempt of court, and asked for an opportunity to make answer under oath; but the court refused leave to answer and committed Steele to jail for 30 days for contempt. From that order of commitment Steele appealed to the Appellate Court for the First District and assigned errors on the record. Hohenadel assigned as cross-errors the same errors assigned previously on the record in his appeal, and the two cases were consolidated in the Appellate Court. That court affirmed the decree of May 14, 1907, altering the consent decree, and reversed the orders of July 18 and 19, 1907. From the judgment of the Appellate Court Hohenadel appealed to this court.

A parent has the right to the custody of his child as against the world, unless he has forfeited his right, or the welfare of the child demands that he should be deprived of it. *Cormack v. Marshall*, 211 Ill. 519, 71 N. E. 1077, 67 L. R. A. 787; *Sullivan v. People*, 224 Ill. 468, 79 N. E. 695. When the bill was filed by Hohenadel, the parties agreed to a decree appointing them joint guardians of the child and providing that her home should be with Hohenadel, but they were to have her custody alternately, and other provisions were made. While Steele could not absolve himself from parental duties by such an agreement, it was competent for him to enter into it so far as his personal rights were concerned, and by the agreement he surrendered at least a portion of his rights as a parent. The decree entered by agreement was not, in a strict legal sense, a judicial decree, but it was in the nature of a solemn contract between the parties entered by the court. There had been no finding by the court that Steele was not a fit or proper person, or that Hohenadel was, or that the welfare of the child demanded that she should be left in the custody of Hohenadel, or that the other stipulations of the decree should be carried out. The decree being by agreement, and not the result of the judgment of the court, a rehearing could not be allowed, and it could not be impeached or set aside upon a bill of review for errors of

law apparent on its face or on account of additional evidence. It could only be set aside by an original bill in the nature of a bill of review. *Armstrong v. Cooper*, 11 Ill. 540; *Knobloch v. Mueller*, 123 Ill. 554, 17 N. E. 696; *Cox v. Lynn*, 138 Ill. 195, 29 N. E. 857; *First Nat. Bank of Joliet v. Illinois Steel Co.*, 174 Ill. 140, 51 N. E. 200; *Krieger v. Krieger*, 221 Ill. 479, 77 N. E. 909; 5 *Ency. of Pl. & Pr.* 961. There was no bill filed for the purpose of setting aside the decree, and nothing in the petition would have justified the court in setting it aside if the proceeding had been proper for that purpose. The parties, however, could not by their agreement surrender the rights of the child, and, if there was a material change in the conditions, the court, having in view the welfare of the child, would change any decree when necessary, on proper application. A decree respecting the custody of a child is exceptional in its character and is always regarded as temporary. *Petition of Smith*, 13 Ill. 138; *Cormack v. Marshall*, *supra*. Although Steele could not impeach the decree entered under his agreement or set it aside, we are of the opinion that he might present to the court, by his petition, the fact that material changes had taken place in the condition of the parties affecting the welfare of the child.

The affidavits were contradictory in the extreme and wholly irreconcilable on every question involved. The affidavits presented by each party extolled such party as a paragon and condemned the opposite party as wholly unfit to take care of a child, and upon reading them we are unable to say that the decision of the court was wrong or contrary to the evidence. Neither the prayer for an appeal from that order nor the allowance of the appeal operated as a supersedeas, but the filing and approval of the bond did have that effect. *Holmes v. City of Chicago*, 205 Ill. 536, 68 N. E. 1109. The supersedeas did not confer any affirmative right, but it did prevent the court from entering any further order in execution of the modifying order appealed from. No process was necessary to carry into effect the order appealed from, but, if any further order should be required to compel obedience, the court would have no power to enter it and could only preserve the existing status. *Barnes v. Typographical Union*, 232 Ill. 402, 83 N. E. 932. The petition to Judge Tuthill did not ask for an enforcement of the order appealed from, but for the enforcement of a decree which had been changed and altered by the modifying order, which had been appealed from. When Steele was brought before the court to show cause why he should not be adjudged guilty of contempt, his solicitor asked leave to answer and claimed his right to do so; but that right was denied to him by the judge. It is not due process of law to condemn a party without an opportunity to be heard on a charge of contempt not committed in the presence of the court. In direct contempt committed in the

presence of the court there is no need of evidence to prove to the court what is already manifest, but in a constructive contempt the party charged must be accorded the privilege of being heard in his own defense. Steele had a right to answer and deny the charge against him or present any defense he might have, and, as he was adjudged guilty without a hearing, the order committing him for contempt was void. For a contempt out of the view and hearing of the court an offender must be allowed to answer and offer evidence in his own behalf, otherwise the judgment on such a charge, without a hearing or opportunity to present a defense, has no resemblance to a proceeding in a court of law. 4 Ency. of Pl. & Pr. 788. The order of commitment being void, the Appellate Court did not err in reversing it, and there was no error in affirming the modifying order.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(237 Ill. 154)

PEOPLE ex rel. ARDERY, County Collector,  
v. ILLINOIS CENT. R. CO.

(Supreme Court of Illinois. Dec. 15, 1908.)

HIGHWAYS (§ 139\*)—TAXATION—REQUISITES  
AND VALIDITY OF LEVY.

Hurd's Rev. St. 1905, c. 121, § 247, provides that, if an election for the levy of a tax to construct a hard road shall be in favor of such tax, the commissioners of highways of the township or road districts shall levy a tax in accordance with such vote, and certify the same to the town clerk or to the district clerk, who shall certify the amount voted to the county clerk, who shall extend the same on the tax books for the current year. A tax was voted for three years. *Held*, that the entire tax for the three years could be included in one tax levy and certificate.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 139.\*]

Appeal from Boone County Court; William C. De Wolf, Judge.

Action by the People, on the relation of Arderly, county collector, against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

R. K. Welsh, for appellant. P. H. O'Donnell, State's Atty., and William Blester, for appellee.

HAND, J. This is an appeal from a judgment and order of sale of the county court of Boone county rendered against the property of appellant to pay a special tax levied by the town of Flora, in said county, under the provisions of an act entitled "An act to authorize the construction and maintenance of gravel, rock, macadam or other hard roads," approved June 18, 1883, and in force July 1, 1883. Hurd's Rev. St. 1905, p. 1762, c. 121.

It appears from the record that at the annual town meeting of the township of Flora,

held April 4, 1905, pursuant to a petition theretofore filed with the town clerk of said township, the proposition to levy a special tax of 30 cents on each \$100 assessed valuation of all the taxable property, including railroads, in said township, for the period of three years, for the purpose of constructing two hard roads in said township, was carried; that thereafter, during the year 1905, and before September 5th of that year, the commissioners of highways of said township levied a special tax of 30 cents on the \$100 for three years, for the purpose of constructing said two hard roads, in accordance with said vote, and made a certificate of said tax levy and filed the same with the town clerk of said township; that on the 5th of September, 1905, the town clerk of said township made a certificate of said tax levy and delivered the same to and it was filed with the county clerk of Boone county, and the county clerk extended upon the tax books for the year 1907 the special tax falling due in that year for the purpose of constructing said two hard roads, at the rate of 30 cents on the \$100 valuation. The objection made to the portion of said tax extended upon the tax books for the year 1907, which was overruled by the court, was that no valid tax levy for that year was made by the commissioners of highways and certified to the town clerk of said township or was certified by the town clerk of the township to the county clerk; it being the contention of appellant that it was the duty of said commissioners of highways to levy a tax of 30 cents on the \$100 valuation, and certify the same to the town clerk, and the town clerk to certify a tax of 30 cents on the \$100 valuation for each of said three years for which said tax was authorized to be levied, and that the entire tax voted for the three years could not be made at one time and included in one certificate, while it was the contention of the appellee that the commissioners of highways had the power to make one tax levy of 30 cents on the \$100 valuation for three years and to certify the same to the town clerk, and the town clerk had the power to certify a tax levy of 30 cents on the \$100 valuation for three years to the county clerk, in accordance with the levy and certificate of the commissioners of highways—in other words, that a separate tax levy and certificate for each of said three years were unnecessary, but that the entire tax for the three years could rightfully be included in one tax levy and one certificate.

Section 1 of said act provides that upon the petition of 50 landowners (who are legal voters) of any township to the town clerk thereof, in counties under township organization, the town clerk, when giving notice of the time and place for holding the next annual town meeting, shall also give notice that a vote will be taken at said election for or against the proposition of levying a tax not

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to exceed \$1 on each \$100 assessed valuation of all the taxable property, including railroads, in the township, for the purpose of constructing and maintaining gravel, rock, macadam, or other hard roads, which petition shall state the location and route of the proposed road or roads, not exceeding two, and shall also state the rate per cent, not exceeding \$1 on each \$100, and the number of years, not exceeding five, for which said tax shall be levied. Section 2 provides the form of ballot to be used at said election, and section 3 reads as follows: "If a majority of all the ballots cast at said election shall be in favor of said special tax, then it shall be the duty of the commissioners of highways of the township or road district to levy a tax in accordance with said vote, and certify the same to the town clerk in counties under township organization, or to the district clerk in counties not under township organization, as the case may be, who shall certify the amount voted to the county clerk, who shall cause the same to be extended on the tax books for the current year: Provided, that the length of time for which the special tax levy shall continue shall not exceed five years, and also the road or roads to be improved must be designated in the petition. The commissioners may also receive donations in money, labor, materials or other valuable things, to aid in the construction of said road."

It will be observed that said section 3 provides, if there be a majority of all the votes cast at said election in favor of the tax, that then it shall be the duty of the commissioners of highways of the township "to levy a tax in accordance with said vote, and certify the same to the town clerk, \* \* \* who shall certify the amount voted to the county clerk." It seems, therefore, clear that the tax to be levied by the commissioners of highways and certified to the town clerk, and by the town clerk certified to the county clerk, is the amount of the tax voted, which in this case was a tax of 30 cents on the \$100 valuation for the period of three years. There is no provision in the statute requiring the commissioners of highways to make a tax levy in each year for the number of years for which a tax is authorized, or that a tax certificate shall be made by the commissioners of highways for each year during which a tax is authorized to be levied to the town clerk, or the town clerk to make a separate certificate for each year to the county clerk of the county in which the tax is levied. We think it apparent, therefore, that the Legislature contemplated that one tax levy for the entire tax voted should be made and certified by the commissioners of highways to the town clerk, and that one certificate be made of such tax by the town clerk for the entire tax levy, and that annual levies and certificates are not contemplated by the statute.

Much stress in the argument of appellant

is laid upon the words found in section 3 of the statute, to the effect that the county clerk shall cause said tax to be "extended on the tax books for the current year." True, the tax levy and the certificate of the levy which are required to be made by the commissioners of highways, and the certificate required to be made by the town clerk, are the basis upon which the extension of the tax by the county clerk is to be made. The tax books, however, which the law requires the county clerk to make, are made annually, and necessarily the tax for each year provided by the vote of the township would have to be extended upon the tax books for the current year; that is, the year in which the amount of the tax for each year would fall due. No reason appears, however, why the tax levy, or the certificate of the commissioners of highways, or of the town clerk, should cover only the taxes which fall due in one year. The statute providing for the levy of the tax should have a reasonable construction, and we can discover no reason why, the tax levy of 30 cents on the \$100 valuation having been voted by said township to be raised in each year for three years for the construction of two hard roads, the tax should not be levied by the commissioners of highways immediately after the tax had been declared carried for the three years and certified by the commissioners of highways to the town clerk and in turn by him to the county clerk, and thereafter the portion of the tax which is due in each year extended by the county clerk upon the tax books for the year in which the tax falls due, rather than to require the officers of the township to go through the form of making a separate tax levy for each year during the time the tax is to run, which would seem to require of the township officers the doing of a useless and unnecessary thing, which the law will never be presumed to require.

We therefore conclude that the county court did not err in overruling the objections filed to the rendition of judgment by the appellant for the tax due in 1907.

The judgment of the county court will be affirmed.

Judgment affirmed.

(237 Ill. 312)

PEOPLE ex rel. GEORGE v. CAIRO, V.  
& C. RY. CO.

(Supreme Court of Illinois. Dec. 15, 1908.)

1. COUNTIES (§ 191\*) — TAXATION — PURPOSES OF LEVY — DESIGNATION.

A levy for "court expenses" without subdivision of such purpose is a sufficient compliance with Revenue Law (Hurd's Rev. St. 1908, c. 120) § 121, providing that, when county taxes are to be raised for several purposes, the county board shall state the amount for each purpose separately.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 305; Dec. Dig. § 191.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

## 2. COUNTIES (§ 191\*) — TAXATION — PURPOSES OF LEVY—DESIGNATION.

An item for "printing books and stationery" is stated with sufficient certainty.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 191.\*]

## 3. COUNTIES (§ 191\*) — TAXATION — PURPOSES OF LEVY—DESIGNATION.

An item for "supplies and repair for poor farm and salary of warden" is not sufficiently definite; but the purposes should be separated.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 191.\*]

## 4. COUNTIES (§ 191\*) — TAXATION — PURPOSES OF LEVY—DESIGNATION.

An item "for salary of county judge, mine inspector, janitor, matron of rest room and turnkey of jail," is sufficiently definite without separation.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 191.\*]

## 5. COUNTIES (§ 191\*) — TAXATION — PURPOSES OF LEVY—DESIGNATION.

In the item "for supplies, light, heat and water for court house and jail" there should have been a separation of the courthouse supplies, light, and water, and such as were for the jail.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 191.\*]

## 6. TOWNS (§ 56\*) — TAXATION — PURPOSES OF LEVY—DESIGNATION.

There is no law requiring that the amount of taxes to be raised for town purposes shall be separately stated as regards the purposes; Revenue Act (Hurd's Rev. St. 1908, c. 120) § 121, being limited to county taxes.

[Ed. Note.—For other cases, see Towns, Cent. Dig. § 98; Dec. Dig. § 56.\*]

## 7. TOWNS (§ 56\*) — TAXATION — INCIDENTALS.

When contingent expenses necessarily incurred for the use and benefit of a town are deemed town charges, the town meeting may levy a tax for incidentals.

[Ed. Note.—For other cases, see Towns, Cent. Dig. § 98; Dec. Dig. § 56.\*]

## 8. MUNICIPAL CORPORATIONS (§ 969\*) — TAXATION — PURPOSES OF LEVY—DESIGNATION.

The term "miscellaneous purposes" is not a sufficient designation of the purposes for which an item of tax is to be used, within Hurd's Rev. St. 1908, c. 24, § 111, relative to levy of city taxes, providing that the city council, after ascertaining the total amount of appropriations for corporate purposes to be collected from the tax levy for the year, shall by ordinance "specifying in detail" the purposes for which such appropriations are made, and the sum appropriated for each purpose, levy the amount so ascertained.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 969.\*]

Appeal from Christian County Court; James H. Morgan, Judge.

Proceedings by the People, on the relation of John E. George, against the Cairo, Vincennes & Chicago Railway Company to enforce taxes. From an adverse judgment, defendant appeals. Affirmed in part, and reversed in part, and remanded, with directions.

George B. Gillespie (Hamlin, Gillespie & Fitzgerald and Hogan & Wallace, of counsel), for appellant. R. C. Neff, State's Atty., for appellee.

VICKERS, J. The county court of Christian county overruled appellant's objections, and entered judgment against its land for delinquent county, town, and city taxes for the year 1907, whereupon appellant prayed an appeal to this court.

The total levy for county purposes amounted to \$73,000, and objections were filed by the appellant as to the following items: For court expenses, bailiffs, and jurors, \$15,000; for supplies and repairs for poor farm and salary of warden, \$2,000; for salary of county judge, mine inspector, janitor, matron of rest room, and turnkey of jail, \$4,000; for printing, books, and stationery, \$800; for supplies, light, heat, and water for courthouse and jail, \$4,000. It is contended by appellant that the above items levied a lump sum for more than one purpose without stating the amount required for each purpose separately, and that therefore such levy is not in compliance with the provisions of section 121 of the revenue law (Hurd's Rev. St. 1908, c. 120), which provides that the county board shall determine the amounts of all taxes to be raised for county purposes, and, when for several purposes, the amount for each purpose shall be stated separately. The question covered by this objection has frequently been before this court, and it has been held that a tax levy under this section is illegal and void when levied for several purposes without stating the amount for each purpose separately. *Cincinnati, Indianapolis & Western Railway Co. v. People*, 213 Ill. 197, 72 N. E. 774; *Chicago, Burlington & Quincy Railroad Co. v. People*, 213 Ill. 458, 72 N. E. 1105; *Chicago & Eastern Illinois Railroad Co. v. People*, 214 Ill. 23, 73 N. E. 310; *People v. Cincinnati, Indianapolis & Western Railway Co.*, 224 Ill. 523, 79 N. E. 657; *People v. Cleveland, Cincinnati, Chicago & St. Louis Railway Co.*, 231 Ill. 209, 83 N. E. 111. Levies made for "current expenses," "county purposes," "county revenue for payment of county claims (janitor's services, supplies, repairs, improvements, and current expenses), \$12,000," have been by this court held illegal and void.

In the case at bar the first item objected to is levied for "court expenses, bailiffs, and jurors, \$15,000." It is contended that this levy is void because not sufficiently definite. The provision of section 121 of the revenue law requiring the county board to state separately the several purposes for which county taxes are levied should have a reasonable construction. The first case that came before this court involving this section of the statute was the case of *Chicago, Burlington & Quincy Railroad Co. v. People*, supra. The levy in that case was the full amount produced by a 75-cent levy upon the \$100 valuation of all the property within Adams county. This levy was made under an order of the board of supervisors "for the expenses

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the current year for county purposes." There was no attempt to state more definitely the purposes for which the levy was made. In disposing of that case this court, on page 466 of 213 Ill., on page 1107 of 72 N. E., stated: "We have held in many cases that a grant of power to levy taxes must be strictly construed and that the methods prescribed by the legislature must be substantially followed, and that a failure to comply with statutory requirements is not a mere irregularity but is a fatal omission, which violates the tax." There can be no question as to the power of the taxing officers who levied this tax. The only question is whether the methods prescribed by the Legislature have been substantially followed. Manifestly it was never intended that taxes could not be legally levied without an itemized list of all the detailed purposes for which such tax was to be used. The object to be accomplished by requiring the purposes for which the taxes are levied to be separately stated is to give the taxpayer an opportunity, if necessary, to prevent unjust and illegal levies and assessments. *People v. Cleveland, Cincinnati, Chicago & St. Louis Railway Co.*, supra. County taxes are levied for a number of different purposes, and any levy which groups these several purposes under a general designation, such as "current expenses," or "county purposes," or "payment of county claims," cannot be sustained, for the reason that in such cases there is no attempt to state separately the different purposes for which such taxes are levied. One of the purposes for which county taxes are levied is to defray the expenses of the courts. This is a legitimate county charge. When a levy is made for court expenses, the taxpayer is afforded full information in respect to the purposes for which the tax is levied. It is true that the county board might subdivide this purpose into all of the various items that fall under the designation of "court expenses." Thus a sum might be levied for jury fees, another for bailiff fees, another for stenographer fees, another for foreign witness fees, etc., but, after all, the taxpayer would have no useful information. All these items would still be "court expenses," and the taxpayer could not object to the taxes because the amounts levied for the different items were too small or too large. It would be impracticable for the county board to determine in advance the amount that ought to be levied for each item. The several items that enter into court expenses do not always maintain the same relation to each other. They vary very substantially, according to the character of the business before the courts, so that any attempt to apportion the court expenses in advance would lead to embarrassment and confusion. A levy for "court expenses" is a sufficient compliance with section 121, supra, since it states with substantial accuracy the purposes for which

the tax is levied. In *Chicago, Peoria & St. Louis Railway Co. v. People*, 225 Ill. 463, 80 N. E. 295, this court sustained a levy by the city of Alton which was levied for "water-works, \$9,700; light, \$13,000; police, \$11,000; salaries, \$7,000; fire department, \$9,000," levied under a statute that required the city council to levy taxes "by an ordinance specifying, in detail, the purposes for which such appropriations are made and the sum or amount appropriated for each purpose, respectively." "Court expenses" would seem to be as definite and certain as the items for which the tax was levied in the case as above cited. The objections of appellant were properly overruled to this item.

The next item objected to was levied for "printing, books and stationery, \$800." This item was stated with sufficient certainty, and the objections were properly overruled.

The next item to which the objection applies in the county taxes was levied for "supplies and repairs for poor farm and salary of warden, \$2,000." This, we think, is not sufficiently definite. The purposes for which the tax was levied in this item should be separated.

The next item to which the objection applies was levied "for salary of county judge, mine inspector, janitor, matron of rest room and turnkey of jail, \$4,000." The only objection urged is that these items should be separated. We do not see what right the taxpayer is deprived of by this levy. In our opinion this levy is sufficiently definite.

The next item to which the objection applies is "for supplies, light, heat, and water for courthouse and jail, \$4,000." We are also of the opinion that there should have been a separation in the levy of the courthouse supplies, light, heat, and water and such as were furnished the jail.

Appellant also objects to the levy of the town tax of the town of Pana upon the ground that the certificate of levy calls for \$2,000, including an item of \$100 for incidentals. It is insisted that the classification of incidentals is not sufficiently definite to designate a purpose for which such tax was levied. The record shows that the tax was levied at the annual town meeting of the town of Pana, and that it was certified to the clerk of the county court by the town clerk on the 12th day of April, 1907. Section 8, art. 13, c. 139, Hurd's Rev. St. 1908, provides, among other things, that "contingent expenses necessarily incurred for the use and benefit of the town" shall be deemed town charges. We are not referred to any provision of the law which requires that the amounts of taxes raised for town purposes shall be stated separately. When contingent expenses necessarily incurred for the use and benefit of the town are deemed town charges, it is certainly not improper for the town meeting to levy a tax for incidentals. The provision in section 121 of the revenue

act is limited to the levy of county taxes. There was no error in overruling the objections to this item.

Appellant objects to the item in the city taxes of \$2,000, denominated "miscellaneous purposes," on the ground that it is not a sufficient designation of the purposes for which the tax is to be used and is therefore void. The provision of the law with reference to levying of city taxes (Hurd's Rev. St. 1908, c. 24, § 111, p. 329), reads: "The city council . . . shall annually . . . ascertain the total amount of appropriations for all corporate purposes legally made and to be collected from the tax levy of that fiscal year; and, by an ordinance specifying in detail the purposes for which such appropriations are made and the sum or amount appropriated for each purpose respectively levy the amount so ascertained upon all the property subject to taxation within the city or village as the same is assessed and equalized for state and county purposes for the current year." "Miscellaneous purposes" cannot be held a statement in detail of the purposes for which the tax was levied. In the case at bar there is no appropriation ordinance in the record, as there was in Chicago, Peoria & St. Louis Railway v. People, supra, to aid the ordinance. We are therefore of the opinion that the item "miscellaneous purposes, \$2,000," is not sufficiently definite to comply with the statute under which it was levied. The county court erred in overruling appellant's objections to this item.

The judgment of the county court of Christian county is affirmed in part and reversed in part and remanded, with directions to enter a judgment in accordance with the views herein expressed.

Reversed in part and remanded.

(237 Ill. 324)

PEOPLE ex rel. HOLMQUIST, County Collector, v. ILLINOIS CENT. R. CO.

(Supreme Court of Illinois. Dec. 15, 1908.)

1. COUNTIES (§ 191\*)—TAXATION—PURPOSES OF LEVY—DESIGNATION.

The statute providing that, when a levy by the county board for county purposes is for several purposes, the amount for each purpose shall be stated separately, is satisfied by an item "for salaries county officers, deputies and clerks," as it must be assumed the item is for such officers, deputies, and clerks as the law authorizes to be paid out of the county treasury.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 191.\*]

2. COUNTIES (§ 191\*)—TAXATION—PURPOSES OF LEVY—DESIGNATION.

A designation by a county board of the purpose of an item of a county tax as "for incidentals \$1,000" is sufficient; the amount being small, in view of the county being large and populous, of which fact the court will take judicial notice.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 191.\*]

3. COUNTIES (§ 191\*)—TAXATION—PURPOSES OF LEVY—DESIGNATION.

Designations of the purposes of items of a county tax levy as for "jury certificates and witness fees," and for "printing and stationery" are sufficient.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 191.\*]

4. COUNTIES (§ 191\*)—TAXATION—PURPOSES OF LEVY—DESIGNATION.

The designation of an item of a county tax levy as "for pauper accounts and poor master" is insufficient. The amount for each should be separate.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 191.\*]

5. COUNTIES (§ 191\*)—TAXATION—PURPOSES OF LEVY—DESIGNATION.

An item for "courthouse and jail" in a county tax levy without designating the purposes for which the amount is to be used for the courthouse and jail, or the amount to be used on each building, is insufficiently designated.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 191.\*]

Appeal from Winnebago County Court; Louis M. Reckhow, Judge.

Proceeding by the People, on the relation of Holmquist, county collector, against the Illinois Central Railroad Company to enforce taxes. From a judgment sustaining objections to certain items of taxes, the People appeal. Reversed in part and remanded, with directions.

Harry B. North, State's Atty., for appellant. R. K. Welsh, for appellee.

FARMER, J. This is an appeal from a judgment of the county court of Winnebago county sustaining objections to certain items of taxes levied against the lands of appellee, the Illinois Central Railroad Company, for county purposes for the year 1907. Upon application being made by the county collector of said county for judgment, appellee filed objections to the county tax to the extent of \$769.54, being the amount levied upon objector's property for the following items: For salaries county officers, deputies, and clerks, \$20,000; for pauper accounts and poor master, \$5,500; for almshouse and farm, \$6,500; for courthouse and jail, \$5,000; for jury certificates and witness fees, \$3,000; for printing and stationery, \$8,000; for incidentals, \$1,000. The court sustained the objections to the taxes for all of the above items except that for "almshouse and farm," and overruled the objection to that item and entered a judgment against appellee for \$108.96, the amount of the tax extended against appellant under said levy for "almshouse and farm." From the judgment sustaining the objections to the other items the case is brought to this court by appeal.

Questions similar in character to those here involved have frequently been before this court. The statute under which the county board gets its authority for levying taxes for county purposes provides that,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

when a levy is made for several purposes, "the amount for each purpose shall be stated separately," and the county court held that the sums levied as to which objections were sustained were invalid for the reason that the purposes for which they were levied were not stated separately, as required by statute. We are of opinion the objections should have been overruled as to the items "for salaries county officers, deputies and clerks, \$20,000," "for incidentals, \$1,000," for "jury certificates and witness fees, \$3,000," and for "printing and stationery, \$8,000." The tax for "salaries county officers, deputies, and clerks" we must assume was levied for the purpose of providing money to make such payments to county officers, deputies, and clerks as the law authorizes to be made out of the county treasury, and we are of opinion the statute does not require a separation of this item. In *People v. Toledo, St. Louis & Western Railroad Co.*, 231 Ill. 498, 83 N. E. 113, we held a levy for county purposes of \$8,000 "for contingent" was not in compliance with the requirements of the statute. In that case the amount of the levy, as will be seen from the opinion, was an important element in determining the invalidity of the levy. It has never been held that the fact that a levy was made for "incidentals" or "contingent" expenses rendered the levy invalid. In the nature of things the levy for such purposes should always be small, and municipalities will not be permitted to levy large sums under such designation. It may be that the authorities are unable to anticipate every expense the county may lawfully incur and provide taxes to meet it by a particular designation in the levy, and in our opinion it is not a violation of the statute to levy small sums for that purpose. In this case the court will take judicial notice of the fact that Winnebago county is a large and populous county, and \$1,000 is therefore a small sum of money when considered in connection with the wealth and entire population of the county. We are also of opinion the items for "jury certificates and witness fees" and "printing and stationery" was a sufficient designation of the purposes for which the tax was levied. *People v. Cairo, Vincennes & Chicago Railway Co.*, 86 N. E. 721.

As to the remaining items, we are of opinion the county court correctly sustained the objections. The statute makes it the duty of counties where the poor are not supported by towns to relieve and support the poor who are lawful residents, and the board is authorized to procure and maintain a farm and necessary buildings to be used in connection with the support of the poor. For those purposes a tax may be lawfully levied. The county board is also authorized to appoint a keeper of the poorhouse and fix his compensation therefor, and the money to meet this

expense may be raised by taxation. One item of the levy in this case was \$5,500 "for pauper accounts and poor master." The amounts for each should have been separate. Another item of \$5,000 was "for courthouse and jail." For what purposes this amount was to be used for the courthouse and jail does not appear. An item in the levy, which was not objected to, was \$720 "for janitor of courthouse," so that no part of the money could have been desired for that purpose. Whether the money was intended to be used in the repair of the courthouse or of the jail, or both, does not appear, nor is it in any way indicated by the levy how much of the money was intended to be used on each of the buildings.

To enter into a fuller discussion for the purpose of giving more comprehensive reasons for the views herein expressed would be but to repeat substantially what we have said in numerous decisions. We refer to *Chicago, Burlington & Quincy Railroad Co. v. People*, 213 Ill. 458, 72 N. E. 1105; *People v. Cleveland, Cincinnati, Chicago & St. Louis Railway Co.*, 231 Ill. 209, 83 N. E. 111; *People v. Illinois & Indiana Railroad Co.*, 231 Ill. 377, 83 N. E. 112; *People v. Kankakee & Southwestern Railroad Co.*, 231 Ill. 100, 83 N. E. 115; *People v. Cairo, Vincennes & Chicago Railway Co.*, 231 Ill. 438, 83 N. E. 116; *People v. Kankakee & Seneca Railroad Co.*, 231 Ill. 490, 83 N. E. 117; *People v. Belleville & Eldorado Railroad Co.*, 232 Ill. 454, 83 N. E. 950; *Cincinnati, Indianapolis & Western Railway Co. v. People*, 213 Ill. 197, 72 N. E. 774; *People v. Cincinnati, Indianapolis & Western Railway Co.*, 224 Ill. 523, 79 N. E. 657.

We are of opinion the county court erred in sustaining the objections to the levy "for salaries county officers, deputies and clerks," to the levy "for incidentals," to the levy for "jury certificates and witness fees," and to the levy for "printing and stationery," and as to those items the judgment is reversed, but as to the levy for the other sums and purposes mentioned the objections were properly sustained, and as to them the judgment will be affirmed and the case will be remanded, with directions to the county court to overrule the objections of the appellee to the levy "for salaries county officers, deputies and clerks," "for incidentals," "jury certificates and witness fees," and for "printing and stationery."

Reversed in part and remanded, with directions.

(237 Ill. 223)

CROWLEY v. McCAMBRIDGE.

ALSDURF v. SAME.

(Supreme Court of Illinois. Dec. 15, 1908.)

1. COURTS (§ 219\*)—APPELLATE JURISDICTION—FREEHOLDS.

A bill for partition was amended to allege that decedent, through whom complainant

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

claimed, conveyed to defendant, and that part of the price was unpaid, and prayed a money decree. The decree found that the land was conveyed to defendant, a fact not controverted after the amendment, and ordered certain payments between the parties. *Held*, that the Supreme Court has no jurisdiction of an appeal on the ground that a freehold is involved.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 557-573; Dec. Dig. § 219.\*]

**2. APPEAL AND ERROR (§ 1033\*)—JURISDICTION—FREEHOLDS—DECISION IN APPELLANT'S FAVOR.**

A bill for partition was amended to allege that decedent, through whom complainant claimed, conveyed to defendant, and that part of the price was unpaid, and prayed a money decree. The decree found that the land was conveyed to defendant, a fact not controverted after amendment, and ordered certain payments between the parties. *Held* that, even if a freehold was involved, the Supreme Court has no jurisdiction of an appeal by defendant, since, the decision being in his favor as to title to the land, he could not assign errors upon it, and complainant has assigned no cross-errors.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4052; Dec. Dig. § 1033.\*]

**Appeal from Circuit Court, Grundy County; S. O. Stough, Judge.**

Bill by Marcella Crowley and action by J. H. Alsdurf, administrator, against Patrick McCambridge. From the decree, defendant appeals. Appeal transferred.

Appellee, Marcella Crowley, filed her bill in the circuit court of Grundy county for partition of 200 acres of land, alleging that she was the owner of the undivided one-fourth thereof, and that she derived title thereto by inheritance from her grandfather, Patrick Lamb, who the bill alleged was the owner in fee of said land at the time of his death, in February, 1903. The bill alleged that Patrick Lamb left surviving him his widow, Mary Lamb, his two sons, Richard F. and Michael H. Lamb, Florence and Loretta Issler, only children of a deceased daughter, and complainant, only surviving child of another deceased daughter, as his only heirs at law, and that the land was subject to certain incumbrances set out in the bill. The bill further alleged that in July, 1902, before his death, Patrick Lamb entered into a written agreement with John H. Kane by which he agreed with said Kane to convey to him on the 1st day of March, 1903, said lands for the consideration of \$20,000, \$1,000 of which was cash in hand and the remaining \$19,000 to be paid on March 1, 1903, but complainant alleged she was unable to furnish the court either the original or a copy of said agreement; that divers persons were conspiring and confederating together to deprive complainant of her rights in said lands, and had on November 23, 1903, fraudulently obtained and caused to be filed for record what purported to be a warranty deed from Patrick Lamb and his wife conveying all of said premises to Patrick McCambridge, and had also filed for record what purported to be a

mortgage from Patrick McCambridge to Mary Lamb to secure a note for \$4,000. The bill alleged these purported conveyances were clouds on complainant's title, and prayed that they be so decreed, and that said purported conveyances and the agreement between Kane and Patrick Lamb be set aside and that the land be partitioned in accordance with the rights of the respective parties. A guardian ad litem was appointed for the Issler children, who were minors, and he filed the usual formal answer, neither admitting nor denying the allegations of the bill, but praying that strict proof be required.

Patrick McCambridge, John H. Kane, and Patrick Welsh, a tenant on the premises, filed a joint and several answer denying that Patrick Lamb owned the lands at the time of his death, and averring that July 9, 1902, said Patrick Lamb and his wife entered into a written agreement with respondent Kane for the sale of said lands to him for \$20,000, which written agreement is set out in full as a part of the answer. By the terms of said agreement Kane was to pay \$1,000 cash, the receipt of which is acknowledged, assume payment of a \$5,000 mortgage, and a \$1,000 mortgage, give a second mortgage on the premises to secure \$4,000, and pay the remaining \$9,000 in cash March 1, 1903, at which time a deed conveying the premises would be delivered to him. The answer avers that Kane paid the \$1,000 in cash, and on October 30, 1902, with the advice and consent of Patrick Lamb and his wife, assigned said agreement to Patrick McCambridge for the consideration of \$800, which was then paid, and on the same date said Lambs signed, sealed, and delivered the warranty deed for said premises to Patrick McCambridge, and then and there said Patrick Lamb, and his wife made said Kane their agent to deliver the said deed to said McCambridge, and then and there authorized and empowered said Kane to receive the consideration for it; that said Patrick Lamb and wife authorized and empowered said Kane to hold said deed in escrow until the 1st day of March, 1903, and then deliver it to said McCambridge, all of which was also agreed to by him. The answer further avers that Patrick McCambridge received the deed from Kane March 2, 1903, and on said date paid the full consideration therefor in accordance with the terms of said written agreement, and became thereby the owner of the said premises in fee simple, subject to the mortgage liens, and entered into possession thereof. Mary Lamb, the widow, died December 10, 1903. On the 26th of June, 1905, J. H. Alsdurf was on petition of Mary Crowley, appellee, appointed administrator of the estate of Patrick Lamb. In September following said administrator brought an action of assumpsit against Patrick McCambridge to recover \$13,000 alleged to be the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

balance due on the purchase price of said lands. To this action the defendant pleaded the general issue.

In September, 1903, Patrick McCambridge filed a cross-bill in the partition suit. The cross-bill recites, in substance, the answer to the original bill, and sets up the appointment of an administrator of Patrick Lamb's estate, the bringing of the action of assumpsit, and alleges that the action of assumpsit involves the same subject-matter involved in the chancery suit; that the cross-complainant is vexed and annoyed by a multiplicity of suits involving the purchase of said real estate, brought for the purpose of annoying him and to cause him to spend large sums of money defending said suits, to deprive him of the use and enjoyment of his land, and to depreciate its value. The cross-bill further alleges on information and belief, that in February, 1903, Patrick Lamb made and delivered to Kane a statement in writing designating the manner in which the proceeds of his real estate should be distributed among his heirs; that Kane delivered the deed for said premises to Richard F. Lamb to be delivered to cross-complainant, and at the same time delivered to said Richard F. Lamb the statement in writing of Patrick Lamb directing the manner of the distribution of the proceeds among his heirs; that the cross-complainant is informed and believes that Richard F. Lamb, after receiving the money arising from the sale of the land, distributed it among the heirs of Patrick Lamb according to his directions, and that all of said heirs had received their full shares except Marcella Crowley, complainant in the original bill, and that she refused to accept her share, although said Richard F. Lamb is, and always since March 2, 1903, has been, able, ready, and willing to pay her. The cross-bill prays that the administrator of the estate of Patrick Lamb be enjoined from further prosecuting the action of assumpsit; that the court determine that the agreement between Patrick Lamb and Kane for the sale of said real estate, and the assignment thereof by Kane to cross-complainant, were fair and legal; that the deed from Patrick Lamb to cross-complainant was legally executed and delivered to him; and that he is the owner in fee simple thereof, subject to certain mortgage liens.

In April, 1903, complainant, by leave of court, amended her original bill. The amendment alleged that complainant was informed, and now believes, that Patrick Lamb conveyed the lands described in her bill to Patrick McCambridge October 30, 1902, and that at the time of the death of Patrick Lamb there was due him from Patrick McCambridge \$13,000; that the defendants Patrick McCambridge, Michael H. Lamb, Richard F. Lamb, and others to complainant unknown, had conspired and confederated together for the purpose of defrauding her and the two

Issler children out of their several portions of said money, which the said defendants, or some of them, held and had so held since March 3, 1903, and refused to pay over to the persons to whom it belonged or to the administrator of the estate of said Patrick Lamb. To this amendment a prayer was added that, in the event the court found the title was transferred from Patrick Lamb to McCambridge, a decree be entered directing McCambridge, Michael H. Lamb, and Richard F. Lamb to pay, to the administrator of the estate of Patrick Lamb the indebtedness owed by them to said estate as unpaid balance of the purchase price of said land.

Issues were joined on the pleadings, and at the request of the respective parties thereto an order was entered that the assumpsit suit be consolidated with the chancery case, and they were thereafter tried together by the court. The court found that the deed from Patrick Lamb and wife to Patrick McCambridge was delivered to him and vested in him the fee-simple title, subject to a mortgage for \$5,000 to Julia Ray; that payment of the balance of the consideration for said conveyance (\$19,000) was to be made by McCambridge assuming the mortgage of \$5,000 to Julia Ray, a mortgage of \$1,000 on said premises to said Patrick McCambridge, and by giving a mortgage to Patrick Lamb to secure \$4,000, the balance of \$9,000 to be paid in cash on March 1, 1903. The decree further found that Patrick Lamb died February 10, 1903, before the deed was delivered by Kane to McCambridge, and before all the balance of the purchase money had been paid. The decree further found that on March 3, 1903, McCambridge paid the balance due on the purchase money (\$9,219.11) to Richard F. and Michael H. Lamb, \$4,000 of which was paid by giving a note for that amount secured by mortgage on the land, but that said payment did not discharge his liability to the estate of Patrick Lamb except in so far as it paid Richard F. Lamb and Michael H. Lamb the amounts that would be due them on their distributive shares of their father's estate after the payment of the debts against it and costs of administration. The decree found that Richard F. Lamb was indebted to the estate in the sum of \$6,039.50 and Michael H. Lamb in the sum of \$1,000; that the net value of Patrick Lamb's estate at the time of his death, made up of amounts due from McCambridge and Richard F. Lamb and Michael H. Lamb, was \$16,258.61, making the shares of Richard F. Lamb and Michael H. Lamb and appellee, Marcella Crowley, \$4,064.65, and the Issler children each one-half that amount. The decree further found that the indebtedness of Richard F. Lamb to his father's estate exceeded his inheritable share \$1,974.85. Richard F. Lamb was ordered by the decree to pay the administrator, for the use of Marcella Crowley and the Issler children, \$1,248.61.

Patrick McCambridge was ordered to pay \$9,616.62, and execution was awarded the administrator for the collection of each of said sums so ordered paid, and it was further ordered that upon the payment by McCambridge to the administrator of the said sum so ordered to be paid the assumpsit suit be dismissed. It was also ordered and adjudged that Patrick McCambridge have and recover from Richard F. Lamb and Michael H. Lamb the said sum of \$9,616.62.

A. C. Norton and J. W. Rausch, for appellant. Cornelius Reardon and C. F. Hanson, for appellees.

FARMER, J. (after stating the facts as above). Patrick McCambridge has appealed direct to this court, and asks a reversal of the decree. The decree recites how the amounts ordered paid by Richard F. Lamb and appellant are arrived at, but, as the correctness of this decree cannot be determined by this court upon this appeal, we have not deemed it necessary to set out that portion of it. Originally the pleadings involved a freehold, but the amendment made by the appellee to her original bill and her amended prayer eliminated any freehold question by conceding the claim of appellant that Patrick Lamb had conveyed to him the premises described in the bill, and claiming that \$13,000 of the purchase money was still unpaid, and praying a money decree. It is true the decree finds that the deed from Patrick Lamb and wife was delivered to and vested title to the lands in appellant, but that was in accordance with the claims of the parties by their pleadings after the amendment was filed and was not really a controverted question. But, if it were, the decision of the court was in favor of appellant, and he has not assigned, and could not assign, errors upon a finding and decree in his own favor and appellee has assigned no cross-errors. The decree is essentially one for the payment of money only, and not a single one of the 32 errors assigned by appellant raises any question that authorizes this court to take jurisdiction of the appeal.

The appeal should have been prosecuted to the Appellate Court for the Second District, and it will therefore be transferred to said court.

Appeal transferred.

(237 Ill. 114)

# COMMERCIAL LOAN & TRUST CO. v. MALLERS.

(Supreme Court of Illinois. Dec. 15, 1908.)

## 1. APPEAL AND ERROR (§ 1094\*)—REVIEW—DECISIONS OF INTERMEDIATE COURTS—QUESTIONS OF FACT.

A finding by the Appellate Court on a controverted question of fact, such as nonpay-

ment of a note, cannot be reviewed on further appeal to the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322-4352; Dec. Dig. § 1094.\*]

## 2. APPEAL AND ERROR (§ 711\*)—REVIEW—DECISIONS OF INTERMEDIATE COURTS—QUESTIONS CONSIDERED—SCOPE OF INQUIRY.

The question whether a certain transaction constitutes an extension of time so as to release a guarantor, though considered in the trial court and in the Appellate Court, is not presented by the record in the absence of a plea setting up such defense, and cannot be raised on appeal to the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2950; Dec. Dig. § 711.\*]

## 3. APPEAL AND ERROR (§ 1082\*)—REVIEW—DECISIONS OF INTERMEDIATE COURTS—CROSS-ASSIGNMENTS.

Where appellant in the Supreme Court was appellee in the Appellate Court, but failed there to assign cross-error on a ruling of the trial court, it is not reviewable on appeal to the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4281; Dec. Dig. § 1082.\*]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; C. M. Walker, Judge.

Action by the Commercial Loan & Trust Company against John B. Mallers. From a judgment of the Appellate Court reversing a judgment for defendant, he appeals. Affirmed.

The appellee, the Commercial Loan & Trust Company, was the owner of a promissory note for \$2,500 executed by the American Fire Extinguisher Company and bearing the indorsement of appellant guaranteeing its payment. This note matured August 9, 1895, and was then renewed by the maker giving a new note for the same amount due in 90 days, bearing an indorsement guaranteeing its payment, to which the name of appellant was signed by Edward B. Mallers. Edward B. Mallers was the son of the appellant and the treasurer of the American Fire Extinguisher Company. It is claimed that he was not authorized to execute the guaranty. The American Fire Extinguisher Company kept a bank account with the appellee and had a balance due it on August 8, 1895, of \$664.86. The proceeds of the renewal note, after deducting the interest until its maturity (\$2,482.50), were credited to this account, a check was drawn on it in favor of appellant for \$3,028.43, the original \$2,500 note was canceled and surrendered, and the remainder of the check was applied to the payment of other items of indebtedness from the appellant to appellee. The renewal note remaining unpaid after maturity, appellee began an action of assumpsit against appellant in the circuit court of Cook county, declaring in one count upon the guaranty of the first note, in another upon the guaranty of the second note, and filing also the common counts. The appellant filed pleas of the general issue, denial of the execution of the guaranties and payment of the first note. On a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

trial without a jury the court rendered judgment in favor of the appellant. The Appellate Court has reversed this judgment and rendered judgment against appellant for the amount of the note, with interest. To reverse the judgment of the Appellate Court the appellant prosecutes an appeal to this court.

Thurman, Stafford & Hume, for appellant. Horace G. Stone and Ira C. Wood, for appellee.

DUNN, J. (after stating the facts as above). The appellant's claims are (1) that the giving of the check and the cancellation and surrender of the old note at the time the renewal note was discounted amounted to a payment of the old note; (2) that the taking of \$37.50 interest in advance at the time of the renewal constituted an extension of time of payment and released appellant, the surety; (3) that the surrender of the note, stamped "Paid," enabled the maker to present it to appellant, a surety, and thereby procure the surrender of collateral securities held for his indemnity.

As to the first claim, the Appellate Court has made a special finding that nothing has been paid on either of the notes, and that question of fact is not open to review in this court. *Hecker v. Illinois Central Railroad Co.*, 231 Ill. 574, 83 N. E. 486.

As to the second claim, there was no plea setting up such extension of time, and the question here sought to be raised, if considered in the courts below, is not presented by the record.

As to the third claim, there was no plea setting up such defense, and the trial court rightly held, at appellee's request, that under the pleadings appellant could not avail himself of that claim. No cross-error was assigned in the Appellate Court on this holding and it is not now open to review.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(237 Ill. 264)

# WILLIAMS v. MORRIS et al.

(Supreme Court of Illinois. Dec. 15, 1908.)

## 1. VENUE (§ 22\*)—PRIVILEGE OF CODEFENDANT—EFFECT OF DISMISSAL.

Practice Act, § 2 (Starr & C. Ann. St. 1896, c. 110, par. 2), authorizes plaintiff to sue two or more defendants in the county where either resides, and to have his writ directed to any county where the other defendants may be found, provided that, if no verdict is found or judgment rendered against the resident defendant, judgment shall not be rendered against the nonresidents, unless they appear and defend. *Held*, that where, in an action against a corporation, an individual, and a firm, the members of which resided and were served in another county, and who appeared and defended, it was not shown that the firm was joined with the resident defendants solely for the purpose of obtaining jurisdiction and with the view of later dismissing as to the resident defendants, that a verdict was returned for the individual defendant, and plaintiff dismissed as to the corpora-

tion, did not entitle the partners to withdraw their plea of not guilty, and to plead to the jurisdiction.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 37; Dec. Dig. § 22.\*]

## 2. MASTER AND SERVANT (§ 216\*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMPTION OF RISK.

Defendants were endeavoring to raise the floor of an ice chamber situated above the cooling room in their building, and directed plaintiff, a common laborer, unfamiliar with the construction of the chamber, and with no connection with the repairs and no knowledge of the way in which the floor was being raised, to remove debris and meat out of the way of the men making the repairs under the direction of defendant's vice principal. The jacks used in raising the floor buckled, and one of them fell against an upright post which had supported the timbers beneath the ice chamber, but which had been released, and knocked it out of position, whereupon the floor and ice fell, injuring plaintiff. *Held*, that plaintiff did not assume the risk of injury through the negligence of the men making the repairs.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 216.\*]

## 3. MASTER AND SERVANT (§ 196\*)—MASTER'S LIABILITY FOR INJURIES TO SERVANTS—FELLOW SERVANTS.

Plaintiff was not a fellow servant of the employes making the repairs.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 196.\*]

## 4. MASTER AND SERVANT (§ 205\*)—MASTER'S LIABILITY FOR INJURIES TO SERVANT—RISKS ASSUMED BY SERVANT.

A servant assumes only the usual and ordinary risks of his employment, and not extraordinary hazards arising from the negligence of the vice-principal of the master, of which he has no notice and from which he has no reasonable grounds to fear danger or opportunity to protect himself.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547-549; Dec. Dig. § 205.\*]

## 5. EVIDENCE (§ 472\*)—OPINION EVIDENCE—MATTERS IN ISSUE—DUE CARE.

The floor beneath an ice chamber in defendant's building, containing about 100 tons of ice, settled, and defendant's vice principal was attempting with a crew of men to raise it by means of timbers and jacks. The floor was raised clear of one of the upright permanent timbers supporting it, when the jacks buckled, and one of them fell against the timber, knocking it over, and the floor and ice fell on plaintiff, an employe, who was removing meat and debris from the room beneath the chamber. *Held*, in an action for the injuries, that opinion evidence that the attempt to raise the floor without blocking up the timbers beneath it, so that, if the jacks buckled, the floor would not fall, was a negligent and careless way of doing the work, was admissible in view of the difficult nature of the undertaking.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2186; Dec. Dig. § 472.\*]

## 6. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of the evidence, if erroneous, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.\*]

Error to Appellate Court, Third District, on Appeal from Circuit Court, Macon County; William C. Johns, Judge.

Action by Charles H. Williams against Ira Morris and others. A judgment for plaintiff was affirmed by the Appellate Court for the Third District, and defendants bring error. Affirmed.

This was an action on the case commenced in the circuit court of Macon county by the defendant in error to recover damages for a personal injury. The action was commenced against Morris & Co., a corporation (hereinafter called the corporation), Nelson Morris, Ira Morris, and Edward Morris, partners doing business under the firm name of Nelson Morris & Co. (hereinafter called the partnership), and one Hal W. Pyburn, the local manager of the partnership. The case was tried upon an amended declaration, which contained six counts, to which declaration the corporation and the partnership filed a joint and Pyburn a several plea of not guilty, and upon a trial the jury returned a verdict of not guilty as to Pyburn and a verdict in favor of the defendant in error for the sum of \$2,500 against the corporation and the partnership. Motions for a new trial were made by the corporation and the partnership, whereupon the defendant in error dismissed as to the corporation, and thereupon the court overruled the motion for a new trial as to the partnership, and rendered judgment upon the verdict in favor of defendant in error, from which judgment an appeal was prosecuted to the Appellate Court for the Third District by the partnership, where the judgment of the circuit court was affirmed, and, Nelson Morris having died, Ira Morris and Edward Morris, as surviving partners, have sued out a writ of error from this court to review the judgment of the Appellate Court.

The evidence introduced by the defendant in error fairly tended to prove that the partnership was engaged in the wholesale meat business in a portion of a building in Decatur which the partnership had built upon ground leased by it from one Thatcher; that the building was 28 feet wide and 150 feet long, the front 80 feet of the building being occupied by the partnership and the rear 70 feet of the building by the corporation, which was engaged in the poultry business. The building was two stories high, the center portion of the first story of which was used by the corporation and the partnership as cooling rooms, and immediately above the cooling rooms was situated an ice chamber, which had stored therein about 100 tons of ice. The floor beneath the ice chamber had settled and the water from the melting ice had run into the lower story and caused the floor and walls to decay. The partnership was engaged in making repairs beneath the ice chamber, the work being carried on under the direction of one Ferguson, who was the vice principal of the partnership. The defendant in error was a common laborer, and had been in the employ of the corporation for some time. On the morning

of the accident, he was directed by his foreman to go to the portion of the building occupied by the partnership and assist in the work going on in the first story of the part of the building occupied by the partnership; it being understood that he would be paid for his work by the partnership. He was engaged in carrying out from that portion of the building loose boards which the workmen had removed from the floor of the building and in removing meat stored in that part of the building. The floor of the ice chamber was supported by heavy timbers which ran crosswise of the building, the center ends of which rested upon a similar timber situated immediately beneath and running in the same direction as said timbers, the center of which rested upon an upright post which stood upon a timber which was placed upon concrete pillars. The post which acted as a support for said cross-timbers had settled, and the workmen, under the direction of Ferguson, with jackscrews were attempting to raise the floor to its original position. This was done by cribbing up from the ground floor, with timbers, for a foot or two, and then placing the jacks upon the cribbing beneath posts which extended from the jacks, four in number, up to the timber upon which the center ends of the cross-beams beneath the ice chamber rested. The floor beneath the ice chamber was sufficiently sprung, by turning the jack screws, to raise the weight from the upright post which supported the timbers beneath the ice chamber, which threw all the weight of the ice in the chamber upon the jacks, when they "buckled," and one of them fell over against the upright post which had been released, knocking it out of position, when the ice chamber collapsed and the floor and ice fell, and defendant in error was caught beneath the falling ice and in the debris, and severely injured.

Le Forgee & Vail, for plaintiffs in error.  
John R. Fitzgerald, for defendant in error.

HAND, J. (after stating the facts as above). After the jury returned a verdict in favor of Pyburn and the defendant in error had dismissed as to the corporation, both of whom had been served with process in Macon county, Nelson Morris, Ira Morris, and Edward Morris, who composed the partnership and all of whom resided in and had been served with process in Cook county, asked leave to withdraw their plea of not guilty, and that they be allowed to file a plea in abatement to the jurisdiction of the court on the ground that they were not residents of Macon county and had not been served in that county. The court overruled their motion, and the first reason urged in this court as a ground of reversal is the action of the trial court in disposing of said motion.

Section 2 of the practice act reads, in part, as follows: "It shall not be lawful for any

plaintiff to sue any defendant out of the county where the latter resides or may be found, except in local actions, and except that in every species of personal actions in law where there is more than one defendant, the plaintiff commencing his action where either of them resides, may have his writ or writs issued directed to any county or counties where the other defendant or either of them may be found: Provided, that if a verdict shall not be found or judgment rendered against the defendant or defendants resident in the county where the action is commenced judgment shall not be rendered against those defendants who do not reside in the county, unless they appear and defend the action." 3 Starr & C. Ann. St. 1896 (2d Ed.) p. 2979. And the disposition of the question here raised involves a consideration of the proviso to said section, which provides that no judgment shall be rendered against a defendant out of his county who does not waive his privilege, and who is not joined with a resident defendant against whom a verdict shall be found or judgment rendered, unless he "appears and defends the action." In this case the partnership did appear and defend the action, and therefore falls clearly within the terms of the proviso. If it had been made to appear that the members of the partnership had been joined with its local manager or with the corporation, who had been served in Macon county, solely for the purpose of obtaining jurisdiction of the members of the partnership in that county, and with the view, after they had appeared and defended to the action, to dismiss as to the local manager and the corporation, the motion should have been allowed. But such does not appear to have been the case.

In *Lehigh Valley Transportation Co. v. Post Sugar Co.*, 228 Ill. 121, 132, 81 N. E. 819, 822, it was said: "The appellant was brought in as a defendant to this suit under section 2 of the practice act, which authorizes the plaintiff to commence his action against two or more defendants in the county where either defendant resides, and to have his writ or writs issued directed to any county or counties in the state where the other defendants, or either of them, may be found. This section contains the proviso that 'if a verdict shall not be found, or judgment rendered, against the defendant or defendants resident in the county where the action is commenced, judgment shall not be rendered against those defendants who do not reside in the county, unless they appear and defend the action.' Appellant contends that by reason of this proviso the court was without jurisdiction to render judgment against it. While a plaintiff will not be permitted to avail himself of the provisions of this statute by making a resident of a county a defendant to a suit for the mere purpose of conferring apparent jurisdiction upon the courts of that county over persons

found in other counties, yet where, as here, the resident is made a defendant in good faith and under a reasonable belief that a cause of action exists against him, and the nonresident defendants appear and defend the action, under the plain provisions of the statute the court in which the suit is pending has jurisdiction to render judgment against the nonresident defendants, even though the court directs a verdict in favor of the resident defendant." The court did not err in declining to allow the members of the partnership to withdraw their plea of not guilty and to plead to the jurisdiction of the court.

It is next urged as a ground of reversal that the court erred in declining to submit to the jury, by the instructions given upon behalf of the plaintiff and by certain instructions which were offered by defendants and refused, the question of assumed risk, as it is urged that as the plaintiff was engaged, with other workmen in the employ of the partnership, in repairing said building, he assumed the risk of being injured in consequence of the changing conditions in said building, and that the accident which caused his injury was an assumed risk, and that he could not rightfully recover for the injury which he sustained by the collapse of said ice chamber. The evidence, without contradiction, showed that the plaintiff was unfamiliar with the conditions of the ice chamber; that he had nothing to do with the repairs which were being made; that he had no knowledge of the manner in which the floor beneath the ice chamber was being raised, and that he was only acting as a common laborer in removing debris and meat out of the way of the men who were making the repairs at the time he was injured. We are of the opinion this case falls within the doctrine announced in the case of *American Car & Foundry Co. v. Hill*, 226 Ill. 227, 80 N. E. 784, which is very similar, upon its facts, to the case at bar, and that the defendant in error did not assume the risk of being injured by the negligence of the mechanics who were engaged in making the repairs which were being put into the building under the direction of Ferguson, and that he was not a fellow servant with those men at the time the ice chamber collapsed and that he did not assume the risk of being injured by their negligence—in other words, that the question of assumed risk was not in the case, and that the court did not err in declining to instruct the jury upon that question. A servant only assumes the usual and ordinary risks of the employment in which he is engaged, and not extraordinary hazards which may arise in the course of his employment from the negligence of the vice principal of the master and of which he has no notice, and from which he has no reasonable grounds, from the employment in which he is engaged, to fear danger or an opportunity to protect himself from injury. City

of *La Salle v. Kostka*, 190 Ill. 130, 60 N. E. 72; *Chicago & Eastern Illinois Railroad Co. v. Heerey*, 203 Ill. 492, 68 N. E. 74; *Leighton & Howard Steel Co. v. Snell*, 217 Ill. 152, 75 N. E. 462; *Springfield Boiler & Manf. Co. v. Parks*, 222 Ill. 355, 78 N. E. 809.

It is finally contended that the court erred in admitting in proof opinion evidence that the manner in which Ferguson attempted to raise the floor beneath the ice chamber was a negligent and unsafe way to raise said floor. At the time the ice chamber collapsed it contained something like 100 tons of ice. It appeared that the floor beneath the chamber had settled, and it was being jacked up into place. It is apparent that it was a difficult undertaking, with the weight of the ice upon the floor, to get the floor back into its original position, and it is apparent we think that the proper method of doing said work was not a matter of common knowledge, as clearly only men who were skilled workmen in that line of work could successfully accomplish the undertaking. We think, therefore, the court did not err in admitting proof that the attempt to raise said floor with jacks in the manner in which Ferguson attempted to raise the floor in question, without blocking up the timbers underneath the floor, so that in case the jacks buckled the floors would not fall, was a negligent and careless way of performing said work. In any event, we do not think the admission of the evidence complained of constituted reversible error. *Gundlach v. Schott*, 192 Ill. 509, 61 N. E. 332, 85 Am. St. Rep. 348. In the case of *Yarber v. Chicago & Alton Railway Co.*, 235 Ill. 539, 85 N. E. 928, the undertaking was not like that in the case at bar, but was a simple matter which might be readily explained to and understood by the jury.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(237 Ill. 363.)

#### VILLAGE OF DOWNERS GROVE v. FINDLAY et al.

(Supreme Court of Illinois. Dec. 15, 1908.)

#### 1. MUNICIPAL CORPORATIONS (§ 302\*)—PUBLIC IMPROVEMENTS—ORDINANCE—PUBLICATION.

A village ordinance, providing for a local improvement at an estimated cost of less than \$100,000, without imposing any fine, penalty, imprisonment, or forfeiture, or without making any appropriation, in force from and after "its passage, approval, and publication," is not within Local Improvement Act, § 11 (Hurd's Rev. St. 1903, c. 24, § 517), requiring publication of the proceedings of the board of trustees before the passage of an ordinance for a local improvement in specified cases, and is not within City and Village Act, art. 5, § 3 (Hurd's Rev. St. 1903, c. 24, § 64), requiring publication of certain ordinances within one month after its pas-

sage, but is within the provision of the section declaring that all other ordinances shall take effect from and after their passage, unless otherwise provided therein, and a publication of the ordinance a little more than two months after its passage and approval is sufficient, in the absence of any statute or ordinance fixing the time of publication.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 302.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 472\*)—LOCAL IMPROVEMENT—SPECIAL ASSESSMENT—MODIFICATION.

In proceedings to confirm a special assessment for the cost of a street improvement, it appeared that the assessment on each corner lot was \$419, while on each inside lot it was \$180.70. Most of the witnesses estimated the present value of the inside lots at \$350 and corner lots at \$500. Some witnesses testified to a ratio of seven to nine, and stated that inside lots selling at \$7 a front foot would be worth \$14 with the improvement, and corner lots at \$10 a front foot would sell for \$20. The testimony of other witnesses was to the effect that the relative proportion of benefits as between corner lots and inside lots would be the same percentage of the present value. *Held*, that under Local Improvement Act, § 47 (Hurd's Rev. St. 1903, c. 24, § 553), requiring the court on objection to inquire whether an assessment is equitable, the court, on allowing the assessment of each inside lot to remain at \$180.70, must reduce the assessment of each corner lot to \$258.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 472.\*]

Appeal from Du Page County Court; William L. Pond, Judge.

Proceeding by the Village of Downers Grove for the confirmation of a special assessment to pay for the cost of a local improvement, in which John Findlay and others appeared and filed objections. From a judgment of confirmation, the objectors appeal. Reversed and remanded.

Joseph H. Fitch, for appellants. G. H. Bunge, for appellee.

CARTWRIGHT, C. J. John Findlay and 40 other owners of lots in the village of Downers Grove appealed from the judgment of the county court of Du Page county confirming a special assessment against their property, levied by said village to defray the expense of curbing with concrete curbs and gutters and paving with brick the roadways of a district including nine streets.

The objections which were interposed to the assessment and overruled by the court were what are termed in the local improvement act (Hurd's Rev. St. 1903, c. 24, § 554) "legal objections," and the first one was that the ordinance for the improvement never took effect. The ordinance was passed on April 7, 1903, and approved the same day, and section 9 was as follows: "This ordinance shall be in force and take effect from and after its passage, approval and publication." It was not published until June 19, 1903, more than two months after it was passed, when it was published in a newspaper in the village. The estimated cost of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the improvement was a little less than \$100,000, and the ordinance did not come within the provision of section 11 of the local improvement act (Hurd's Rev. St. 1908, c. 24, § 517), requiring publication in the proceedings of the board of trustees before its passage. It did not impose any fine, penalty, imprisonment, or forfeiture, or make any appropriation, and therefore did not come under the provision of section 3, art. 5, of the city and village act (Hurd's Rev. St. 1908, c. 24, § 64), requiring publication within one month after passage; but it was within the provision of that section that all other ordinances shall take effect from and after their passage, unless otherwise provided therein. It was otherwise provided, and the ordinance was not to take effect until the publication; but there was no limitation, either by statute or ordinance, as to the time when the publication should take place. The publication made was within such a reasonable time that no inference against the ordinance or the intention that it should take effect upon publication could arise out of the lapse of time. The court did not err in overruling that objection.

The other objection relied upon by the property owners, and concerning which a great number of witnesses testified both for the village and the objectors, was made under section 47 of the local improvement act (Hurd's Rev. St. 1908, c. 24, § 553), which requires the court, upon objection, to inquire whether or not the assessment as made and returned is an equitable and just distribution of the cost of the improvement among the parcels of property assessed. The assessment against property aggregated \$94,848.37, and the public benefits were fixed at \$152.25, showing scrupulous and conscientious care to ascertain the exact amount of benefit which would accrue to the public. Upon the trial it was proved that Downers Grove is a suburban village of about 3,000 inhabitants, 21 miles from Chicago, with cheap transportation, and the district assessed is a residence section about one-half built up with frame dwellings occupied mainly by persons of moderate means employed in Chicago. The improvement is of a very expensive nature as compared with the character of the property, and there was much evidence on that subject; but the question raised and argued on this appeal is whether the distribution between the inside lots and corner lots was equitable and just. The assessment on inside lots was \$180.70 each, and on corner lots \$419 each. The court, after hearing the evidence, reduced the assessment on the corner lots 10 per cent. and confirmed it as so reduced; but our search of the record for any evidence sustaining the conclusion of the court that the assessment as reduced was a just and equitable distribution of the cost of the improvement as between the cor-

ner lots and inside lots has been entirely fruitless. It is true that a few of the witnesses gave testimony that corner lots would be benefited \$419, or even more, and that lots worth \$500 would be doubled in value. Perhaps the judgment of the court was based on testimony of that character, but that was not the question under consideration. The question raised by the objection was, not how much could be charged against corner lots for benefits, but what would be just and equitable as between the corner lots and inside lots. The testimony of the same witnesses would justify an assessment against inside lots of nearly double the amount of the assessment which was left undisturbed as to them. Most of the witnesses estimated the present value of inside lots at \$350 and corner lots at \$500, which would be at the ratio of seven to ten. Some witnesses for the village testified to a ratio of seven to nine, and said that inside lots selling at \$7 a front foot would be worth \$14 with the improvement, and corner lots at \$10 a foot would afterward sell for \$20. The lots had a frontage of 50 feet on the street and a depth of 182 feet. The testimony of every witness, when analyzed with the figures given, was to the effect that the relative proportion of benefits as between corner lots and inside lots would be the same percentage of present value. The great majority of the witnesses fixed the relative values at seven to ten, and all estimated the benefits in the same relative proportion. The evidence affords no basis for charging corner lots with benefits to the amount of about \$878 as against \$180.70 for inside lots. The only conclusion to be drawn from the evidence as to what would be a just and equitable distribution as between the two classes of lots is that, if inside lots are assessed \$180.70, corner lots should be assessed \$258. In sustaining the objection the court should have reduced the assessment on the corner lots to that amount, and the court erred in reducing the assessment on corner lots only 10 per cent.

The judgment of the county court is reversed, and the cause is remanded to that court, with directions to reduce the assessment on corner lots to the sum of \$258 each.

Reversed and remanded, with directions.

(237 Ill. 100)

PEOPLE ex rel. HANAWALT v. SMALL et al.

(Supreme Court of Illinois. Dec. 15, 1908.)

1. GUARDIAN AND WARD (§ 11\*)—APPOINTMENT OF GUARDIAN BY WILL.

A decree of divorce for the husband's fault which gives to the wife the exclusive custody of a child, subject to the right of the husband to visit the child at the mother's home, takes from the husband all authority over the child, and confers entire control on the wife, who may

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

thereafter, under Hurd's Rev. St. 1908, c. 64, §§ 4, 5, relating to the custody of children, and authorizing the appointment of testamentary guardians, dispose of the custody of the child by will by appointing a guardian.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 36; Dec. Dig. § 11.\*]

**2. GUARDIAN AND WARD (§ 11\*)—APPOINTMENT BY WILL—AUTHORITY.**

The power to appoint a testamentary guardian does not exist at common law, but the power is statutory.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 36; Dec. Dig. § 11.\*]

**3. HABEAS CORPUS (§ 99\*)—CUSTODY OF CHILDREN—DECREE—MODIFICATION—PROCEEDINGS.**

A decree of divorce is conclusive as between the parties and their representatives, and in habeas corpus by a husband for the custody of a child of the marriage, awarded by the decree to the wife, who appointed a third person testamentary guardian, the court cannot consider whether circumstances authorize a modification of the decree as to the custody of the child.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 99.\*]

Error to Appellate Court, Second District, on Error to Circuit Court, Grundy County; Edgar Eldredge, Judge.

Writ of habeas corpus by the People, on the relation of Casper G. Hanawalt, against May Small and another. There was a judgment of the Appellate Court, affirming a judgment denying relief, and plaintiff brings error. Affirmed.

J. W. Rausch, for plaintiff in error. C. F. Hanson, for defendants in error.

DUNN, J. This writ of error is prosecuted to reverse a judgment of the Appellate Court, which affirmed a judgment of the circuit court of Grundy county upon a writ of habeas corpus remanding Maude M. Hanawalt, a girl 12 years old, to the custody of May Small, her maternal grandmother. The petitioner for the writ was Casper G. Hanawalt, the father of Maude. He was married to Myrtle M. Small, the daughter of the respondents, D. S. Small and May Small, on November 26, 1893, and Maude is the daughter of that marriage. His wife procured a divorce from him on March 16, 1900, on the ground of extreme and repeated cruelty. By the decree she was awarded \$15 per month alimony and the custody of the child, except that the father might have her for 30 days beginning June 15th and 30 days beginning November 15th in each year. In October, 1901, the decree was modified by giving the exclusive custody of the child to the mother, subject to the father's right to visit her on the 1st and 2d days of each month at the mother's home. On July 2, 1907, Mrs. Hanawalt died, leaving a will, which was admitted to probate, giving all her property to her mother and appointing her mother guardian of the child. The father then claimed the right to the custody of the child's person and demanded

to be allowed to direct her education; and, this claim being disputed, he applied for a writ of habeas corpus to obtain possession of his daughter.

In *Wilkinson v. Deming*, 80 Ill. 342, 22 Am. Rep. 192, it was held that a decree of divorce for the husband's fault, awarding to the mother absolutely the custody of children, nullifies the rule of the common law, takes from the father all authority over the children, and confers entire control upon the mother, who may thereafter, by virtue of the statute, dispose of their custody and tuition by her will. The statute in force when that decree was rendered was chapter 47 of the Revised Statutes of 1845, and some changes have been made in the provisions on this subject by the statute now in force (Hurd's Rev. St. 1908, c. 64, §§ 4, 5); but they are not regarded as affecting substantially the right of testamentary disposition in such case. The parents of a minor are declared to have equal powers, rights, and duties concerning the minor. These powers, rights, and duties are, however, subject to the jurisdiction of a court of chancery in a proper case, and, after a decree, are such as the decree provides.

Our attention has been called to various decisions of the courts of other states holding that a divorced wife to whom the custody of children has been given cannot make a testamentary disposition of their custody. The power to appoint a testamentary guardian of an infant did not exist at common law, and in some of the states whose decisions are cited no statute has conferred that power on the mother; in others, the statute giving the right differs from ours. In any event, we are not inclined to depart from the construction given the statute in *Wilkinson v. Deming*, supra.

The decree, until modified, is conclusive as between the husband and wife and their representatives. Circumstances, if any exist, which might move the court to modify the decree, cannot be considered in this proceeding, but should be presented to the court by which that decree was rendered.

The order of the circuit court was right, and the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(237 Ill. 126)

**NORTHWESTERN UNIVERSITY v. HANBERG**, County Treasurer.

(Supreme Court of Illinois. Dec. 15, 1908.)

**1. TAXATION (§ 204\*)—EXEMPTIONS—CONSTRUCTION OF STATUTES.**

The rule that statutes granting exemption from taxation shall be strictly construed in favor of the taxing power, and that all doubts must be resolved in favor of an exercise of such power, does not relieve the court of the duty of interpreting the exemption by the ordinary

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

rules of construction in order to carry out the intention of the Legislature.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 322; Dec. Dig. § 204.\*]

2. **TAXATION (§ 242\*)—EXEMPTIONS—UNIVERSITIES—CONSTRUCTION OF STATUTES—AFTER-ACQUIRED PROPERTY—“ALL PROPERTY OF WHATEVER KIND AND DESCRIPTION, BELONGING TO OR OWNED BY SAID CORPORATION.”**

Act Feb. 14, 1855, amending the charter of Northwestern University (Priv. Laws 1855, p. 483), exempting from taxation “all property, of whatever kind and description, belonging to or owned by said corporation,” applies to real estate acquired subsequent to the adoption of such amendment, though such corporation has acquired such a large amount of real estate within the village in which it is situated as to impair the revenues of such village.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 242.\*]

Appeal from Circuit Court, Cook County; Charles M. Walker, Judge.

Action by the Northwestern University against John J. Hanberg, county treasurer. From a decree for plaintiff, defendant appeals. Affirmed.

See, also, 99 U. S. 809, 25 L. Ed. 387; 206 Ill. 64, 69 N. E. 75.

Harry A. Lewis, William F. Struckmann, and A. C. Wenban, for appellant. John P. Wilson and H. H. C. Miller, for appellee.

DUNN, J. On a bill filed by the appellee the circuit court of Cook county, after a hearing on the pleadings and evidence, entered a decree perpetually enjoining the collector of Cook county from selling certain premises of the appellee under a judgment which had been rendered against them for the taxes of 1906, and from collecting, or attempting in any manner to collect, said taxes. An appeal has been taken from that decree, and the question presented is whether the premises are exempt from taxation under the fourth section of an amendment to the charter of appellee, approved February 14, 1855, which enacted “that all property, of whatever kind or description, belonging to or owned by said corporation shall be forever free from taxation for any and all purposes.” Priv. Laws 1855, p. 483. That this amendment was a contract between the state and the university whose obligation could not be impaired by subsequent legislation imposing taxes upon the property of the corporation was decided by the Supreme Court of the United States in the case of *Northwestern University v. People*, 99 U. S. 809, 25 L. Ed. 387, reversing the decision of this court in the same case. 80 Ill. 333, 22 Am. Rep. 187. Many years later the board of assessors of Cook county assessed certain real estate of the university for taxation, and it was sought to sustain the assessment on the ground that, the real estate having been acquired prior to the passage of the amendment to the charter, the exemption therein granted

did not apply to it. This contention was overruled, and it was decided that the amendment clearly exempted from taxation all the property of the corporation acquired prior to the amendment. In re *Northwestern University*, 206 Ill. 64, 69 N. E. 75.

The property involved in this case was acquired in March, 1905, and the position is now taken by the appellant that the amendment does not apply to any property acquired by the corporation after the amendment. Applying the well-known rule of construction in claims for exemption from taxation that a doubt is fatal to the claim and that the exemption cannot exist by implication only, but must be plainly and unmistakably granted, counsel argue that the amendment is reasonably capable of two constructions, the one restricting the exemption to the property owned by the corporation when the amendment was adopted, the other extending it to all property owned by the corporation at any time, and that the more restricted meaning must be adopted. But the rule of strict construction in favor of the state, just referred to, does not relieve the court of the duty of interpreting the exemption by the ordinary rules of construction and carrying out the intention of the Legislature if it can be ascertained. The fact that a controversy as to the construction has arisen does not determine the interpretation of the statute. The exemption exists by virtue of a contract, which is to be construed so as to accomplish the intention of the Legislature. If, after the application of all rules of interpretation for the purpose of ascertaining such intention, a well-founded doubt exists, then an ambiguity occurs, which may be settled by the application of the simple rule which resolves the doubt against the grant. But the possibility of a doubt is not sufficient. It is out of such possibilities that controversies arise, and it is the duty of courts to ascertain by judicial interpretation, not whether a doubt may be asserted, but whether any ambiguity really exists. *Citizens' Bank v. Parker*, 192 U. S. 73, 24 Sup. Ct. 181, 48 L. Ed. 346; *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. Ed. 495; *Washington University v. Rouse*, 8 Wall. 439, 19 L. Ed. 498.

It is fairly to be implied from the language of the Supreme Court of the United States in the case of *Northwestern University v. People*, supra, that the benefit of the exemption was extended to property acquired after the passage of the amendment. The court said (page 322 of 99 U. S., 25 L. Ed. 387): “It is possible if that question had been fully investigated, and all the facts necessary to decide it were before the court, it might not appear that all the lands subjected to taxation by the judgment of the Supreme Court were brought after the date of the amended charter or donated on the faith of that exemption. But it does appear by a stipula-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion made for that purpose that since the granting of said amended charter the corporation has expended in the erection and purchase of buildings, apparatus, and other facilities and appliances for education and for the promotion of the objects stated in and contemplated by the act of incorporation, over \$200,000 realized from donations and the sale of lots and land, and has built up a university, with several departments of learning, in which more than 500 students are taught the higher branches of learning. It is, perhaps, a fair inference from this statement, and in deference to the holding of the Supreme Court that there was such acceptance of the act of 1855 and such investments made on the faith of it, that at least some portion of the property now in question is protected by contract, if the exemption clause lawfully covers it. It will readily be conceded that the language of the fourth section of the act of 1855 is broad enough for that purpose; that is, the language is broad enough to cover investments made since the amendment of 1855.

When the amendment granting the exemption was passed, the university owned less than \$40,000 worth of real estate. The exemption seems not to have been questioned until 1873, when it was attacked on the ground of its violating the Constitution of 1848. After the decision of that question, as above mentioned, no attack was made on the exemption for more than 20 years. Its constitutionality was then again questioned, and it was insisted that in any event the exemption could not apply to property owned at the time it was granted. This contention being overruled, as we have seen, it is now insisted, by a complete change of front that the exemption could not apply to subsequently acquired property. The language is broad enough for that purpose. The object intended to be accomplished was the encouragement of the establishment of a university by granting to it perpetual freedom from taxation of its property. It was not intended that the exemption should be granted to the property but to the university; not that the property then owned by the university should be forever free from taxation, no matter into whose ownership it should thereafter come, but that the university should be forever free from taxation of its property.

It is urged by the appellant that the property involved in this case constitutes about one-eighteenth of the village of Wilmette;

that its exemption from taxation will cast upon the other property of that village an increased burden of taxation; that by the acquisition of more property the university could still further increase the burden of taxation so as to make the holding of property in the village impracticable; that by the acquisition of 2,000 acres—the limit which its charter imposes upon its holding of real estate—in the heart of the city of Chicago, exempt from taxation, a condition of enormous injustice and absurdity would be brought about; and that such special privilege imposes a burden and inflicts a wrong upon the community which the Legislature could not have intended. The changed conditions with which the university is now surrounded cannot affect the meaning of the amendment passed in 1855. Doubtless the Legislature did not foresee the enormous growth of the city of Chicago, the increase in the value of property, the growth in the wealth, and the work, the wants and necessities of the university. The university was not then regarded as an incubus on the community. Schools of higher learning were scarce, and the Legislature which granted this exemption to Northwestern University granted to various other schools perpetual exemption from taxation of all the property they should ever acquire. Priv. Laws 1855, pp. 880, 884, 503, 511, 518. Even now the Legislature appropriates yearly for the University of Illinois from money raised by taxation sums vastly greater than those released to the Northwestern University through this exemption. Had the Legislature of 1855 foreseen the present situation, we cannot say that they would not have granted the exemption of the after-acquired property of the university from taxation, and we certainly cannot say, because of the present situation, they did not do so. In granting to the corporation perpetual freedom from taxation they exempted it from taxation on all property owned by it, whether acquired before or after the grant.

A claim that the exemption relied upon had been adjudicated in favor of the appellee by the county court of Cook county was set up in the amended bill and relied upon in the argument, but since our view of the meaning of the amendment to the charter disposes of the whole question we have not discussed this claim.

The decree is affirmed.

Decree affirmed.

(237 Ill. 64)

**HOFFNER et al. v. CUSTER et al.**

(Supreme Court of Illinois. Dec. 15, 1908.)

**1. WILLS (§ 439\*)—CONSTRUCTION—INTENT.**

The object of construction of a will is to ascertain testator's intent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955; Dec. Dig. § 439.\*]

**2. WILLS (§ 440\*)—CONSTRUCTION—INTENT.**

The intention of testator to be sought is not that which may be supposed to have been in his mind, but that which he has expressed in his will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. § 440.\*]

**3. WILLS (§ 441\*)—CONSTRUCTION—CONSIDERATION OF SURROUNDING CIRCUMSTANCES.**

It is proper to consider all the circumstances surrounding the testator, his purpose and motives, his relation to the beneficiaries, and the nature and situation of the property, to determine the meaning of the words employed in his will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 958; Dec. Dig. § 441.\*]

**4. WILLS (§ 449\*)—CONSTRUCTION—PRESUMPTION AGAINST TESTACY.**

The presumption is that a testator intended to dispose of all his property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 965; Dec. Dig. § 449.\*]

**5. WILLS (§ 487\*)—CONSTRUCTION—EXTRINSIC EVIDENCE.**

Where it is uncertain to which of two plats the description used by testator was intended to refer, extrinsic evidence is admissible to show what property he intended to devise.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 487.\*]

**6. WILLS (§ 560\*)—CONSTRUCTION—PROPERTY DEVISED.**

Where testator owned only a small strip of comparatively trifling value in the northeast quarter of a block according to an old plat, and understood that he owned three-fourths of the block, which was true only according to a new plat, and frequently spoke of owning three-fourths of the block, and said that if he could get the northwest quarter he would own the entire block, and devised the south half of the block which he owned according to the new plat, but not according to the old, and supposed he had devised all his property in the block, as he placed no residuary clause in his will, which supposition was true only according to the new plat, the description used, northeast quarter, described the property which he owned in the block according to the new plat, and it is manifest that it was that property that he intended to devise.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 560.\*]

**7. WILLS (§ 489\*)—CONSTRUCTION—EVIDENCE—DECLARATIONS OF TESTATOR.**

Declarations of a testator, indicating an intention to provide for a person, are incompetent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1040; Dec. Dig. § 489.\*]

**8. APPEAL AND ERROR (§ 931\*)—REVIEW—PRESUMPTIONS.**

The presumption is that incompetent evidence admitted on a trial to the court was not considered by it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3766; Dec. Dig. § 931.\*]

**9. WILLS (§ 490\*)—CONSTRUCTION—EVIDENCE—DECLARATIONS BY TESTATOR.**

Declarations by a testator, showing that he was in the habit of using the words "block 5" as referring to a tract of land west of a railroad, and not to the original block, were competent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1049; Dec. Dig. § 490.\*]

**10. WITNESSES (§ 140\*)—COMPETENCY.**

On a cross-bill to construe a will, claiming that it devised certain premises to cross-complainant, a nephew and heir of testator, whose interest was adverse to cross-complainant, who called him, was a competent witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 605; Dec. Dig. § 140.\*]

**11. WILLS (§ 459\*)—DESCRIPTION—CORRECTION BY COURT.**

Where the description "the northeast quarter," used by testator, does not include all the land he owned in the north half of the block, the court has no power to correct the description.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 978; Dec. Dig. § 459.\*]

Error to Circuit Court, De Witt County; Solon Philbrick, Judge.

Bill for partition by Parmelia Z. Hoffner and others against Mira Custer and others. Mira Custer answered and filed a cross-bill. There was a decree in her favor, and plaintiffs bring error. Reversed and remanded, with directions.

M. J. Hinchcliff and E. B. Mitchell (Lemon & Lemon, of counsel), for plaintiffs in error. P. R. Barnes and Herrick & Herrick, for defendants in error.

DUNN, J. James C. Rucker died in 1900, being 83 years old, leaving a will, whereby he devised to Mira Custer the northeast quarter of out-block 5, in the city of Clinton. His heirs, who were his nephews and nieces, filed a bill for the partition of other real estate, and included therein a part of said out-block 5, described as follows: Commencing 71.28 feet east of the northwest corner of said out-block 5; thence east 66 feet; thence south 140.25 feet; thence west 66 feet, to the southeast corner of the John A. Phares tract; thence north 140.25 feet, to place of beginning—of which premises it was alleged Mira Custer was in possession by virtue of some pretended right under the will of James C. Rucker. Mira Custer answered, claiming the premises last described by virtue of the will, and filed a cross-bill asking the court to construe the will in the light of the surrounding circumstances at the time it was made and decree that the will devised said premises to her. The decree was in favor of the complainant in the cross-bill, and a writ of error has been sued out to reverse this decree.

The original town of Clinton was surveyed in 1835, and on the plat then made out-block 5 was shown as a lot 264 feet square. Some years later a part of the east half of the out-block was occupied by the Illinois

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Central Railroad Company for its right of way. In 1869 a resurvey and new plat of the town were made, showing the railroad occupying a strip off the east side of the plat. East street is the most easterly street shown on these plats, and the following is a representation of the portions of the respective plats east of East street:

ORIGINAL	RE-SURVEY.
66	274 56
264 1 264	1 264
4 264 264	4 264
ST. 5 264	ST. 5 264
8 264 264	8 264
9 264 264	9 264
EAST 18 264 264	EAST 18 264
19 264 264	19 264
34 264 264	34 264
	ILL. CENTRAL RAIL ROAD 36# 56

The railroad right of way was 100 feet wide and ran almost north and south through the block, leaving a strip from 16 to 18 feet wide of the east half of the block on the west side of the right of way, and a strip from 21 to 24 feet wide east of the right of way. The latter strip was not fenced, but was used for a driveway. The testator acquired title to that portion of the premises in controversy on May 11, 1881, by a deed from James Walker, in which the premises were described as follows: Commencing at a point 137.28 feet east of the northwest corner of out-block No. 5, in Clinton; running thence south 198 feet to a lot owned by

C. H. Moore; thence west along the north line of said Moore lot 137.28 feet to East street; thence north along the east side of East street 57½ feet; thence east 71.28 feet; thence north 140¼ feet to Main street; thence east 66 feet to the place of beginning. Also all that part of the east half of out-block 5, in Clinton, which lies west of the right of way of the Illinois Central Railroad Company, and supposed to be a strip 16 feet wide east and west and 232 feet long north and south on the west side of said east half—said tracts being situated in the city of Clinton, De Witt county, Ill.

The testator owned, in his lifetime, all of that part of original out-block 5 west of the railroad, except a tract in the northwest corner 140.25 feet long north and south and 71.28 feet wide east and west. Two houses were built on the north part of the premises, facing Main street, which ran north of the lot, and two on the south part of the premises, facing East street, which ran west of the lot. The east house on the north part of the lot is so situated that the dividing line between the east and west halves of the block as originally platted runs through it two or three feet west of the east side of the house. If the will devises the northeast quarter of the original out-block, Mira Custer will take only a strip of land 16 feet wide in the north half of the block adjoining the right of way of the railroad and including about three feet of the east side of the east house. She claims that lot 5 in the will, in the light of the circumstances surrounding its execution, means that part of the lot west of the railroad, and that the devise to her was of all the testator's interest in the north half of that part of the lot.

Mira Custer was not related to the testator, but she was taken into his family in 1855, at the age of seven or eight years, and remained there until her marriage, in 1869. Mira was regarded and treated as a member of the family, and was a dutiful, faithful daughter, rendering all the services that would be expected of one in that natural relation. A feeling of tender affection existed between her and the testator. After her marriage a constant association continued between her and her husband and the testator. Frequent visits were made, and the affectionate nature of their relation continued. In 1894 she returned to his home in Clinton with her husband and remained with the testator, caring for him until the necessity of taking her husband, who had been paralyzed, to California required her to leave Mr. Rucker.

The object of construction of a will is to ascertain the intention of the testator. The intention to be sought is not that which may be supposed to have been in the mind of the testator, but that which he has expressed in the words of his will; but it is not always necessary to adopt the literal or primary

meaning of the words. It is proper to take into consideration all the circumstances surrounding the testator, his purpose and motives in the disposition of his property, his relation to the beneficiaries of the instrument, the nature and situation of the property, and in the light of all these circumstances determine the meaning of the words employed. The presumption of the law is that a testator intends to dispose of all his property. It was the manifest intention of the testator to make a beneficial provision for Mira Custer. If the words of the will refer to the northeast quarter of the original out-block 5, he has done neither. The 16-foot strip is of comparatively slight value, and the testator has failed to dispose of his two dwelling houses in the north half of the block. The plat of the resurvey shows block 5 bounded on the east by the railroad. There is nothing in that plat to indicate that the north and south lines of the lot cross the railroad. A deed which described the west half of out-block 5 as shown on the plat of the resurvey of the town of Clinton, of record in Book 2 of the Record of Deeds, on page 310, would convey only the west half of the inclosed tract marked "5" on that plat, all of which is west of the railroad. A deed which described the west half of out-block 5 as shown on the original plat of the town of Clinton would convey the west half of the original out-block, including the part now east of the railroad. The description used by the testator is: "The northeast quarter of out-block five (5), situate in the city of Clinton." To which plat does this description refer? Here is a description apparently clear and unambiguous, but the collateral matter of the two plats shown by extrinsic evidence makes the meaning uncertain. Extrinsic evidence is therefore admissible to show which lot was intended. *Slosson v. Hall*, 17 Minn. 95 (Gil. 71). The evidence leaves no doubt on the subject. The testator owned only a small strip, of comparatively trifling value, in the northeast quarter, according to the old plat. He understood that he owned three-fourths of out-block 5, which was true only according to the new plat. He frequently spoke of his owning three-fourths of the block, and said if he could get hold of the northwest quarter he would own the entire block. He devised the south half of out-block 5, which he owned according to the new plat but not according to the old. He supposed he had devised all his property in out-block 5, for he placed no residuary clause in his will; but this supposition was true only according to the new plat. The county atlas contained a map of the city showing out-block 5 entirely west of the railroad, and the municipal authorities levied a special assessment on the property as the east 78.72 feet of out-block 5. Whether he had any knowledge of either or both

of the plats, it is manifest that the description used described the property which he owned in out-block 5 according to the new plat, and that it was that property which he intended to devise.

It is insisted that the court erroneously admitted evidence of the declarations of the testator. So far as such declarations indicated an intention to provide for Mira Custer, they were incompetent, and it is presumed were not considered by the court. Without them the result would be the same. So far as his statements show that he was in the habit of using the words "block 5" as referring to the tract of land west of the railroad, and not to the original block, they were competent.

Mrs. Custer and O. W. Haynie testified, and it is objected that they were incompetent. Haynie was a nephew and heir of the testator. His interest was adverse to Mrs. Custer, who called him, and he was therefore competent. Whether Mrs. Custer was competent generally, or not, there is ample evidence to sustain the decree disregarding her testimony.

There is one particular, however, in which the decree is wrong. It gives to Mira Custer more land than the will devises to her. Doubtless, the testator supposed the description "the northeast quarter" to include all the land he owned in the north half of the block; but it does not do so, and the court has no power to correct the description. The north line of the tract west of the railroad is 152.76 feet. The decree gives to Mrs. Custer all of the north half of the tract except the west 71.8 feet, thus giving her 4.58 feet more than she is entitled to.

The decree will therefore be reversed, and the cause remanded to the circuit court of DeWitt county, with directions to enter a decree finding Mira Custer to be the owner in fee simple of the following described premises, viz.: Commencing 76.38 feet east of the northwest corner of out-block 5, in the city of Clinton; running thence east to the west line of the right of way of the Illinois Central Railroad Company; thence south along the west line of said right of way to the center line of said out-block 5; thence west along the center line of said out-block 5 to a point midway between the west line of said right of way and the west line of said out-block 5; thence north to the place of beginning—and directing partition to be made of the remainder of the premises in out-block 5 owned by James C. Rucker at the time of his death among the same parties and in the same proportions as directed in the original decree, and for further proceedings not inconsistent with this opinion. Each party will pay one-half the costs of this court.

Reversed and remanded, with directions.

(237 Ill. 98)

**ROCKHILL v. CONGRESS HOTEL CO.**

(Supreme Court of Illinois. Dec. 15, 1908.)

**1. COURTS (§ 219\*)—CERTIFICATE OF IMPORTANCE—POWER TO GRANT.**

Practice Act, § 119 (Laws 1907, p. 464), provides that the Appellate Court may make a certificate of importance and grant an appeal in any case decided by it in which an appeal or writ of error from that court to the Supreme Court is not allowed by the act. The municipal court act (Laws 1907, p. 226) does not make the judgment of the Appellate Court final in cases of the fourth class removed to that court by writ of error, and the practice act does not provide for an appeal from or writ of error to the Appellate Court in a case of that kind. *Held*, that the Appellate Court is authorized to grant a certificate of importance in a case of the fourth class.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 219.\*]

**2. TRIAL (§ 154\*)—DEMURRER TO EVIDENCE—FORM AND REQUISITES.**

A demurrer to the evidence must be in writing, and set out particularly the facts which the evidence fairly tends to prove, and not the evidence which tends to prove the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 351; Dec. Dig. § 154.\*]

**3. TRIAL (§ 155\*)—DEMURRER TO EVIDENCE—QUESTIONS RAISED.**

In an action against a hotel company for the value of a hand bag and contents lost by a guest, a demurrer to the evidence treated by both parties as a motion to find for defendant for want of any evidence to prove a cause of action did not raise the question of the right to recover for jewelry in the hand bag, as that related only to the amount of damages.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 155.\*]

**4. INNKEEPERS (§ 11\*)—CARE REQUIRED OF INNKEEPERS.**

An innkeeper owes the duty of safely keeping the property of his guests.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. §§ 17, 22; Dec. Dig. § 11.\*]

**5. INNKEEPERS (§ 11\*)—LOSS OF OR INJURY TO PROPERTY OF GUEST—ACTIONS—PRESUMPTIONS AND BURDEN OF PROOF.**

The loss of the goods of a guest while at an inn raises a presumption of negligence against the innkeeper, and casts the burden on him to exonerate himself.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. § 37; Dec. Dig. § 11.\*]

**6. INNKEEPERS (§ 11\*)—LOSS OF OR INJURY TO PROPERTY OF GUEST—STATUTES LIMITING LIABILITY.**

The innkeepers' act (Laws 1861, p. 133), providing that an innkeeper who shall keep a safe and post the notices required shall not be liable for money, jewelry, or other valuables lost if not delivered for deposit, unless such loss occurred through the negligence of himself or servants, affords no protection against a loss occurring by the negligence of the porter or servants of an innkeeper.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. §§ 17, 22; Dec. Dig. § 11.\*]

**7. INNKEEPERS (§ 11\*)—LOSS OF OR INJURY TO PROPERTY OF GUEST—ACTIONS—QUESTIONS FOR JURY.**

Whether jewelry and valuables in a hand bag of the value of \$519 came within the proviso of the innkeepers' act (Laws 1861, p. 133) that the exemption of an innkeeper from liability for money, jewelry, or other valuables not left for

deposit in his safe shall not apply to such an amount of money and valuables as is usually common and prudent for a guest to retain in his room or about his person was a question of fact.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. § 39; Dec. Dig. § 11.\*]

**8. INNKEEPERS (§ 11\*)—LOSS OF OR INJURY TO PROPERTY OF GUEST—STATUTES LIMITING LIABILITY.**

The innkeepers' act (Laws 1861, p. 133), providing that an innkeeper who shall keep an iron safe and post the notices required shall not be liable for any money, jewelry, or other valuables lost, if not delivered for deposit, did not apply where a guest had packed her goods to leave the hotel and given them to a porter sent to receive them.

[Ed. Note.—For other cases, see Innkeepers, Dec. Dig. § 11.\*]

Appeal from Appellate Court, First District, on Writ of Error to the Municipal Court of Chicago; W. N. Gemmill, Judge.

Action by Valette R. Rockhill against the Congress Hotel Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant, on a certificate of importance by the Appellate Court, appeals. *Affirmed*.

Goodrich, Vincent & Bradley (Joseph M. Griffen, of counsel), for appellant. W. S. Oppenheim, for appellee.

CARTWRIGHT, C. J. Valette R. Rockhill, appellee, brought this suit in the municipal court of Chicago against Congress Hotel Company to recover the value of a hand bag and contents lost while she was a guest at the Auditorium Annex, one of the defendant's hotels. The case was tried upon a written stipulation as to the facts, which was submitted to the court, and defendant thereupon demurred to the evidence. The demurrer was overruled, and the defendant then moved the court to enter a judgment against it for \$66, being the value of the hand bag and certain articles named in the stipulation. The court denied the motion, and found the issues for the plaintiff and entered judgment for \$585 and costs. A writ of error was sued out from the Appellate Court for the First district, and the judgment was there affirmed. The Appellate Court granted a certificate of importance, by virtue of which the case is brought to this court by appeal.

A preliminary question is raised as to the power of the Appellate Court to grant a certificate of importance in a case of the fourth class, which by the municipal court act can be reviewed only by writ of error sued out from the Appellate Court. The act in relation to a municipal court in Chicago (Laws of 1907, p. 226) and the act in relation to practice in courts of record (Laws of 1907, p. 444) were approved on the same day. Section 119 of the practice act provides that the Appellate Court may make a certificate of importance and grant an appeal in any case

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

decided by that court in which an appeal or writ of error from the Appellate Court to this court is not allowed by said act. The municipal court act does not make the judgment of the Appellate Court final in cases of the fourth class removed to that court by writ of error, and the practice act does not provide for an appeal from or writ of error to the Appellate Court in a case of this kind. We are of the opinion that the practice act authorized the appeal. The case was tried in the municipal court without a jury on the stipulation of facts, and the demurrer to the evidence was verbal. The practice of demurring to evidence is but seldom resorted to, and it has always been the rule that a demurrer of that kind must be in writing and set out particularly the facts which the evidence fairly tends to prove, and not the evidence which tends to prove the facts, and admitting the facts leaves the court nothing to do but to apply the law to them. *Creach v. Taylor*, 2 Scam. 277; *Crowe v. People*, 92 Ill. 231. Whether the practice of demurring to the evidence is applicable to the municipal court exercising its jurisdiction in cases of the fourth class, where there are no written pleadings and the procedure resembles that of justice courts, is not here considered. Counsel on both sides treat the demurrer as a motion to the court to find for the defendant for want of any evidence tending to prove a cause of action, and, whether considered as a demurrer to the evidence or as such a motion, the court was clearly right in the ruling, since even on the theory of the defendant it was liable for the loss of the hand bag and of certain articles contained in it, which it admits are usually and ordinarily carried and used by travelers and guests of hotels. The effort in this court is to obtain a decision that the municipal court erred in permitting a recovery for jewelry, for the loss of which defendant claims it was not liable; but that question was not raised by the demurrer to the evidence and relates only to the amount of damages. The defendant presented to the court a number of alleged propositions of law, one of which was held and the others refused, and it is insisted that the court erred in such refusal.

The facts admitted by the stipulation were, in substance, as follows: The plaintiff, with her husband, her mother, her sister, and another lady, forming one party, were guests at the Auditorium Annex, and occupied a suite of rooms. The party had with them at the hotel, in their rooms, two trunks, two hand bags, a dress suit case and a wooden box. One of the hand bags belonged to the plaintiff, and she had packed in it a number of articles for use, which, with the hand bag, amounted in all to \$66, and she also had in it various articles of jewelry and ornaments, making a total value of \$585 for the hand bag and its contents. The stay of the party at the hotel came to an end, and their bag-

gage was packed for the purpose of leaving. The plaintiff notified the clerk of the defendant that she was about to leave the hotel, and to send up to her room for the baggage. She remained in the room until a porter of the defendant came up for the baggage and it was delivered to him. She told the porter to take the checks for the baggage to the head porter's desk, and she would go there and get them. When she went to the desk to obtain the checks, she was given one less check than the number of pieces of baggage, and the hand bag with its contents was missing. It had been lost while in charge of the porter to whom it was delivered or in the custody of other servants of the defendant. The defendant had complied with the innkeepers' act of this state, and the plaintiff never gave any notice to the defendant that the hand bag contained the articles shown in the stipulation, and the defendant had no notice of such contents or the value of the bag.

An innkeeper owes the duty and assumes the obligation of safely keeping the property of his guests, and, if the property is lost, all that is necessary to make a prima facie case is to show the relation of innkeeper and guest and the loss. The burden is then cast on the innkeeper to exonerate himself, and this he may do by showing that there has been no negligence on the part of himself or his servants, or that the loss was caused by the personal negligence of the guest or some one for whom the guest was responsible, or by superior force. The loss of the goods of the guest while at an inn raises a presumption of negligence on the part of the innkeeper or his servants, and prior to the passage of the innkeepers' act guests at an inn were not bound to deposit money or valuables with the innkeeper, although they knew that an iron safe was provided for that purpose. *Metcalf v. Hess*, 14 Ill. 129; *Johnson v. Richardson*, 17 Ill. 302, 63 Am. Dec. 369. The innkeepers' act (Laws 1861, p. 183) provides that every innkeeper who shall keep an iron safe in good order and suitable for the purpose and shall post the notices provided for shall not be liable for any money, jewelry, or other valuables, of gold, silver, or rare and precious stones that may be lost, if the same are not delivered to the innkeeper, his agent, or clerk for deposit, "unless such loss shall occur by the hand or through the negligence of the landlord or by a clerk or servant employed by him in such hotel or inn." It is contended that the court erred in overruling the demurrer to the evidence for the reason that this act exempted the defendant from liability. No matter what the effect of the act might be, the court did not err, since the bag and part of its contents were not within the terms of the act. But the act did not apply to this case, for the reason that the loss occurred by the negligence of the porter or servants of the defendant, and the statute affords no protec-

tion against such a loss. The act further provides that nothing contained in it shall apply to such an amount of money and valuables as is usual, common, and prudent for any guest to retain in his room or about his person, and the question whether the amount of jewelry and valuables in the hand bag came within the proviso and were such an amount as is usual, common, and prudent for a guest to retain in his room or about his person was purely a question of fact. It could not be raised by the demurrer, which presented nothing but a question of law, and the question of fact has been finally settled by the judgment of the Appellate Court. The innkeepers' act did not apply to the situation at all. The stay of the plaintiff at the defendant's hotel as a guest was about to terminate, and, if she was responsible for the care and protection of the jewelry up to that time for the reason that she did not deposit it with the defendant, the property could not remain in the iron safe while she was taking her departure from the hotel with it. When she packed her goods to leave the hotel and gave them in charge of the porter sent to receive them, there was no requirement of the statute that they should be on deposit in the safe.

The supposed propositions of law submitted to the court were with one exception not propositions of law, but depended upon the conclusion of the court as to matters of fact. The only one which could be termed a proposition of law was marked by the court "held."

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(287 Ill. 362.)

PEOPLE ex rel. LEE, County Collector, v. KANKAKEE & S. W. R. CO.

(Supreme Court of Illinois. Dec. 15, 1908.)

1. COUNTIES (§ 192\*)—TAXATION—TAX LEVY—PURPOSES—SUFFICIENCY.

A tax levy by the county board of a county for "salaries of the officers" sufficiently designates the purpose of the tax as being to pay salaries payable out of the county treasury from money received by general taxation.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 192.\*]

2. HIGHWAYS (§ 127\*)—TAX LEVY—STATUTES—COMPLIANCE.

Hurd's Rev. St. 1905, c. 121, § 16, requires the commissioners of highways to certify the amount of their levy for road and bridge purposes to the town clerk, who shall file such certificate in his office and who shall certify the levy to the county clerk for extension. The commissioners of highways of a town delivered to the clerk duplicate copies of the certificates as to an alleged contingency and of the written consent of the auditor and assessor, and duplicate copies of the certificate of the levy. Both copies of the certificate of levy were signed by each of the commissioners. The town clerk placed on file in his office a copy of each of these documents, and transmitted the other copy of

each to the county clerk, together with a copy of the record of a town meeting levying an additional road and bridge tax. The documents transmitted to the county clerk did not bear the file mark of the town clerk. Held, that the certificate of levy transmitted to the county clerk was a copy, and the court properly permitted the town clerk to amend his certificate so as to show that the duplicate of the certificate of levy on file with the county clerk was a copy of the original certificate of levy in his office.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 127.\*]

3. BRIDGES (§ 12\*)—TAXES—STATUTE—"CONTINGENCY."

A certificate of the commissioners of highways of a town, which recites that in the opinion of the commissioners an additional tax levy is necessary "in view of the contingency that it is necessary, on account of their destruction, to rebuild immediately nine bridges," does not show the existence of a contingency within Hurd's Rev. St. 1905, c. 121, § 14, authorizing the commissioners of highways to make an additional tax levy, where in their opinion a greater levy is needed in view of some "contingency," since the "contingency" contemplated is something that does not occur regularly in the ordinary course of events.

[Ed. Note.—For other cases, see Bridges, Dec. Dig. § 12.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1497, 1498.]

4. TAXATION (§ 645\*) — PROCEEDINGS FOR JUDGMENT—OBJECTIONS—HEARING.

Where there is but one application by a taxing power for judgment for delinquent taxes and all objections are made by the same property owner, the objections may properly be joined and heard in the same proceeding, though several taxes are involved, the statute providing that the objections shall be heard and determined in a summary manner without pleadings.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 645.\*]

5. TAXATION (§ 638\*) — PROCEEDINGS FOR JUDGMENT—OBJECTIONS.

In a suit by a taxing power for judgment for delinquent taxes, technical opposition by the taxing power to the objections interposed by the taxpayer as to the validity of the taxes should not receive consideration.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 1301; Dec. Dig. § 638.\*]

Appeal from Kankakee County Court; A. W. Deselm, Judge.

Action by the People, on the relation of Daniel G. Lee, county collector of Kankakee county, against the Kankakee & Southwestern Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

See, also, 231 Ill. 109, 83 N. E. 115; 231 Ill. 490, 83 N. E. 117.

W. B. Hunter (John G. Drennan, of counsel), for appellant. J. Bert. Miller, State's Atty., for appellee.

SCOTT, J. At the June term, 1908, of the county court of Kankakee county, Daniel G. Lee, the county collector of that county, made application for judgment against the lands of appellant for taxes for the year 1907 alleged to be delinquent. Upon a hearing the objections interposed were overruled.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed, judgment entered for the taxes, and this appeal is prosecuted.

The appellant objected to certain taxes, amounting to \$148.37, extended for county purposes under an item designated in the levy as "salaries of the officers," on the ground that the purpose stated was not sufficiently specific. It also objected to the road and bridge tax of the town of Otto extended against its property; the amount of this tax so extended being \$234.81. The basis of the objection to the last-mentioned tax will be hereinafter stated. The county board levied \$12,500 for "salaries of the officers." We are of opinion the purpose of this tax was sufficiently designated by the words just quoted. The taxpayer would understand therefrom that this sum was levied to pay salaries which were payable out of the county treasury from money raised by general taxation. He could ascertain the approximate amount so payable, and, if the levy was greater than it should be, he could then object to the excess. The town of Otto is operated under the "cash system." The tax levied in that town for road and bridge purposes was 100 cents on each \$100; 40 cents of the levy being made to meet an alleged contingency. The statute requires that the commissioners of highways shall certify the amount of their levy to the town clerk, that he shall keep that certificate on file in his office, and that he shall certify the levy to the county clerk for extension. Hurd's St. 1905, c. 121, § 16. It is first objected to this tax that the town clerk filed with the county clerk the original of the certificate made by the commissioners, instead of a certified copy thereof. It appears that the commissioners delivered to the clerk duplicate copies of the certificate to the auditors and assessor in reference to the alleged contingency, duplicate copies of the written consent of the auditors and assessor, and duplicate copies of the certificate of the levy. Both copies of the certificate of levy were signed by each of the commissioners. One copy of each of these documents the town clerk placed on file in his office, and the other copy of each he transmitted to the county clerk in the manner hereinafter pointed out. At the town meeting in 1907 the voters of the town of Otto, being under a misapprehension as to their power, adopted a motion levying a road and bridge tax additional to the 60 cents on the \$100. When the town clerk sent the duplicates of the certificates left with him by the commissioners to the county clerk, he attached thereto a copy of that part of the record of the town meeting which pertained to this tax. All of the papers so sent were attached together and delivered as one document, and they were so arranged that in reading them the certificates and the consent of the board of auditors and assessor came first and appeared in their chronological order and the copy of the part of the record came last. Following that, and at-

tached thereto, was the certificate of the town clerk stating that the document which purported to be a copy of a part of the record of the town meeting was such copy, and no other certificate of the town clerk accompanied the instrument. It is conceded that the action of the voters was without legal effect, and their action is only referred to here that the facts may be clearly understood in regard to the papers filed with the county clerk. Upon the hearing, on motion of appellee, leave was given the town clerk to amend his certificate so as to show that the duplicate of the commissioners' certificate of levy on file was a copy of the original certificate of levy remaining in his office. Pursuant to that leave he did so amend his certificate.

We think the contention that the document filed with the county clerk was the original certificate of levy is without merit. When the certificate was made in duplicate and both copies delivered to the town clerk, he might properly treat one copy as the original and use the other copy for the purpose of certifying the levy to the county clerk. The copy which he filed in his office was an original. The fact that the copy which he sent to the county clerk was made and signed by the commissioners is immaterial. The original certificate actually filed with the town clerk was not filed with the county clerk, and the document filed with the county clerk had attached thereto a certificate which was not as full and complete as it should have been, yet all the papers were filed with the county clerk as one document, and the certificate of the town clerk was to the effect that the last portion thereof was a copy of the record of the town meeting. The other instruments which preceded the copy of the record and were attached thereto did not bear the file-mark of the town clerk, as the original of the commissioners' certificate of levy should have done. We think, under these circumstances, the presumption would be that the instrument filed showing the commissioners' levy was a copy, and not the original. This case is in this way distinguished from *People v. Belleville & Eldorado Railroad Co.*, 232 Ill. 454, 83 N. E. 950, where there was nothing whatever to show that the papers filed with the county clerk were copies rather than originals. In other cases relied upon by appellant the originals were, in fact, filed with the county clerk. The court was right in permitting the amendment of the town clerk's certificate. *Toledo, St. Louis & Western Railroad Co. v. People*, 225 Ill. 425, 80 N. E. 283.

Forty cents on the \$100 of this road and bridge tax is further objected to on the ground that the certificate of the highway commissioners to the auditors and assessor does not state the existence of a contingency within the meaning of section 14, c. 121, Hurd's Rev. St. 1905. This certificate recites

that in the opinion of the commissioners the additional levy is necessary "in view of the contingency that it is necessary, on account of their destruction, to rebuild immediately nine bridges." The location of each bridge is then given, and it is further stated that to repair them will cost the town \$1,890, and that it will take all of the levy of 60 cents to pay for other repairs and road work. It is urged against this certificate that the necessity of rebuilding bridges that have been destroyed does not create a contingency unless the bridges were destroyed by storm or fire or some like event, and that the certificate is entirely consistent with the destruction of the bridges by the natural processes of decay, in which event, it is urged, no additional levy is authorized by the law. In *Toledo, St. Louis & Western Railroad Co. v. People*, 226 Ill. 557, 80 N. E. 1059, we said the contingency contemplated is something that does "not occur regularly in the ordinary course of events." In *People v. Peoria & Pekin Union Railway Co.*, 232 Ill. 540, 83 N. E. 1054, one of the contingencies mentioned in the certificate was the necessity of providing for the protection of the piers of a certain bridge. We held this did not show the existence of a contingency; that if the necessity arose from the action of such high water as occurs occasionally every year, or from the wash of ordinary rainfall or other like causes, no contingency existed, while if the necessity resulted from a change in the course of the stream, or from some other like unexpected cause, a contingency did exist. Tested by these cases, the certificate now before us does not satisfy the statute. Whether the destruction of the bridges creates a contingency depends entirely upon the character of the forces which worked the ruin, and this the certificate fails to show.

Appellee demurred to the objections. Upon the demurrer being overruled, it moved to strike the objections from the files. Upon the denial of that motion, it moved to compel the appellant to elect upon which of its several objections it would proceed. This motion was also overruled. The appellee by assignment of cross-error questions each of these three rulings. These various dilatory steps taken by appellee seem to have been the result of its view that the objections were "double," that the objections to each tax should be tried in a separate proceeding distinct from the trial of the objections to each other tax, and that the objections to the several taxes should not be joined in the same proceeding. Where there is but one application by the taxing power, and all objections, as in this case, are made by the same property owner, the objections may properly be joined and heard in the same proceeding although several taxes be involved. Such has been the universal practice for more than 90 years, and it will not be

changed now. The statute provides that these objections shall be heard and determined "in a summary manner, without pleadings," and the courts should not allow applicants to interfere with the right so conferred upon the property owners by pleading as at common law or by the interposition of technical rules of the common law which do not go to the merits of the objections. Illegal taxation is unjust taxation. The man who is illegally taxed has placed upon him an unfair burden. He must either pay the wrongful charge or bear the expense of litigating its validity in a suit with the public. In the conduct of that suit technical opposition by the applicant to the objections should not receive consideration.

The judgment of the county court will be reversed and the cause will be remanded, with directions to sustain the objections as to 40 cents on the \$100 of the road and bridge tax of the town of Otto, to overrule the objections in every other respect, and to enter judgment accordingly.

Reversed and remanded, with directions.

(257 Ill. 247)

#### CITY OF CHICAGO v. WEST SIDE METAL REFINING CO.

(Supreme Court of Illinois. Dec. 15, 1908.)

COURTS (§ 219\*)—SUPREME COURT—APPELLATE JURISDICTION—CERTIFICATE OF IMPORTANCE.

Where a judgment for \$100 penalty and costs against defendant for violation of Chicago Municipal Code was reversed by the Appellate Court without remand, a further appeal could not be taken to the Supreme Court without a certificate of importance.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 1775; Dec. Dig. § 219.\*]

Appeal from Appellate Court, First District, on Appeal from Municipal Court of Chicago; John C. Scovel, Judge.

Action by the City of Chicago against the West Side Metal Refining Company. Judgment for plaintiff reversed by the Appellate Court (140 Ill. App. 599) without remand, and plaintiff appeals. Dismissed.

George H. White (Henry M. Seligman, of counsel), for appellant. Benjamin E. Cohen (H. J. Rosenberg of counsel), for appellee.

FARMER, J. This suit was begun by appellant, the city of Chicago, filing a præcipe in the municipal court in said city for a summons against appellee. The bill of particulars stated that the city of Chicago claimed a penalty, not exceeding \$100, for the violation of section 2040 of the Revised Municipal Code of the city of Chicago by appellee for carrying on in said city the business of junk dealer without first obtaining a license so to do. Summons was issued as prayed, and served. Trial was had in the municipal court, and a judgment entered against appellee for \$100 debt and costs of suit and an

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

execution awarded therefor. Appellee here, who was defendant below, appealed from the judgment of the municipal court to the Appellate Court. That court reversed the judgment of the municipal court without remanding the case, and the city of Chicago has brought the case to this court by appeal.

The Appellate Court made no certificate of importance. The statute does not warrant appeals from the Appellate Court to this court in such cases, and the appeal is dismissed.

Appeal dismissed.

(237 Ill. 374)

**REITER v. STANDARD SCALE & SUPPLY CO.**

(Supreme Court of Illinois. Dec. 15, 1908.)

**1. APPEAL AND ERROR (§ 1094\*)—REVIEW—DECISION OF INTERMEDIATE COURT—QUESTION OF FACT.**

Where the facts are controverted, the judgment of the Appellate Court is conclusive on the Supreme Court on all questions of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4322; Dec. Dig. § 1094.\*]

**2. MASTER AND SERVANT (§ 80\*)—ACTION FOR WAGES—DISCHARGE OF SERVANT—QUESTION FOR JURY.**

In an action by a servant to recover his salary, evidence held to present a question for the jury whether plaintiff had been discharged by defendant, and hence not entitled to salary.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 80.\*]

**3. MASTER AND SERVANT (§ 80\*)—ACTION FOR WAGES—INSTRUCTIONS.**

In an action by a servant to recover his salary, instructions on the issue as to whether plaintiff had been discharged by defendant held sufficient.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 80.\*]

**4. APPEAL AND ERROR (§ 1066\*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.**

In an action by a servant to recover his salary, defendant having requested an instruction that there should be deducted from plaintiff's salary whatever was paid to other persons who took charge of defendant's business during plaintiff's absence, error, if any, in modifying such instruction so as to make it applicable to a single item of expense, was harmless, where there was no evidence that any other expense was incurred on account of such absence.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1066.\*]

**5. MASTER AND SERVANT (§ 80\*)—ACTION FOR WAGES—EVIDENCE.**

In an action by a servant to recover his salary, it was proper to exclude evidence offered by defendant as to the expenses of a person who called on plaintiff to interview him in regard to complaints made by defendant as to plaintiff's incompetency and his absence from his work, where defendant did not attempt to show that such person made the trip on account of such complaints.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 80.\*]

**6. TRIAL (§ 48\*)—RECEPTION OF EVIDENCE—EVIDENCE ADMISSIBLE IN PART.**

In an action by a servant to recover his salary in which defendant claimed that plaintiff had been discharged, letters written by plain-

tiff to defendant demanding his salary, and asking information as to when plaintiff was expected to resume his work, were properly admitted on the issue of plaintiff's readiness to perform, though plaintiff's right of action did not depend on a demand for payment of his salary; the court having given an instruction limiting the effect of the letters.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 120; Dec. Dig. § 48.\*]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; John Gibbons, Judge.

Action by Edward Reiter against the Standard Scale & Supply Company. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant appeals. Affirmed.

Winkler, Baker & Holder, for appellant. Ashcraft & Ashcraft (Charles F. Rathbun and E. M. Ashcraft, of counsel), for appellee.

CARTER, J. This is an action of assumpsit brought November 6, 1906, in the circuit court of Cook county, to recover installments of salary of appellee for the months of May to October, 1906, inclusive, at \$300 a month. Judgment for \$1,700 was entered on the verdict, and, the Appellate Court for the First District having affirmed the judgment, the cause was thereupon appealed to this court.

The agreement was in writing, and originally made with the Standard Scale & Supply Company, Limited, and afterward assumed by appellant. It provided that appellee should act as manager of said company's branch house in Chicago for the period from March 1, 1904, to December 31, 1911, at \$3,600 a year, payable in monthly installments of \$300, and a certain share of the net profits of said branch house, and should give "his best services for the promotion and welfare of the business." The evidence tends to show that as early as October, 1905, appellant had become dissatisfied with the results of the Chicago branch, and asked for appellee's resignation. He remained in his position, however, in charge of the office and his salary was paid up to and including April, 1906. During a part of May and June appellee was ill and away from the office a portion of the time. July 3, 1906, appellant wrote that it was an opportune time for appellee to offer his resignation. Appellee by letter refused to do this. Appellant on July 17th wrote again, stating that the appellee's "management of the business has been so unprofitable as to make it necessary for us to have your resignation. We are not liable for unearned salary during your absence. We desire to close the matter speedily and amicably, if possible, and will be glad to have a proposition from you so as to wind up the affair at once, and only a reasonable proposition can be considered." Apparently appellee did not reply to this letter, and on July 31st, when he went back to the office, he was shown by

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Mindrum, one of the salesmen who had been temporarily in charge of the office during appellee's sickness, a telegram directing Mindrum to "assume charge Chicago house; refuse to recognize Mr. Reiter as manager." Appellee thereupon collected his personal effects and left the office. The next day he received a letter again asking his resignation. August 5th Frank Gill, then president of appellant company, came to Chicago and talked the matter over with appellee. Appellee testifies that he told Gill that he was ready to go back to work the next morning and take the management, and Gill replied, "No; we want you to resign;" that substantially this answer was returned to a number of appellee's suggestions, and appellee said he would not resign, that he was going to hold them to the contract; that he also asked Gill if he was to consider that he had been discharged, and the only answer was, "We want you to resign." The appellee testified that he and Gill had another interview a few days later at the Grand Pacific Hotel, in Chicago, and substantially the same conversation was had; that appellee then said to Gill: "I won't resign. If I don't resign, I suppose you have got to discharge me, or else I will go back to work." Gill said, "I think you would rather resign"—that Gill asked him to make a proposition, and finally appellee said he would resign and cancel the contract if the company would pay him \$5,000. Gill then made a counter proposition that he would give the appellee \$1,000 and a further sum contingent on a certain claim; that no agreement was reached, and, on their separation, Gill stated that he was to be in Chicago several days and in the meantime appellee should consider the counterproposition. Appellee replied that he could not consider it, and asked if he should go down to the office Monday morning, "and he [Gill] said, 'No,' don't come to the office until I notify you." Those were the last words we had with each other." Appellee testified that he never saw Gill thereafter. On August 20th, and again on October 1st, he wrote letters to the company, saying, among other things, that he had refused to resign as requested, and was left in doubt as to whether he was expected to remain in charge of the business as manager; that he had called at the office to take charge of the business, and Mindrum stated that under instructions from the company he could not permit it. Appellee further testified that he had kept himself in readiness from the time he had talked with Mr. Gill to go back to work at any time. Gill's testimony was not taken, but an affidavit was allowed to be introduced in evidence stating that, if he was present, he would testify to certain things. For the purpose of this decision, it is unnecessary to consider or state the contents of this affidavit.

As we understand appellant's argument, it is contended that the proof shows that the appellee was discharged when Mindrum took

possession of the office under the telegram of instructions; that he could not recover in this action for wages after that date; that whatever he did recover must be in an action for damages for his discharge; and that he should only have recovered for the months of May, June, and July for what his services were actually worth, and that the jury allowed a greater sum for those months than the evidence justified. Most, if not all, of these are questions of fact to be determined by the jury, the trial court, and the Appellate Court. This court has consistently held in numerous decisions since the Appellate Court act was passed, some 30 years ago, that it was not the province of this court to determine or pass upon such questions further than to ascertain whether or not there was in the record evidence fairly tending to prove the facts alleged in the declaration. The weight to be given to the evidence must be submitted to the jury, and, when their finding of fact has been approved by the trial and Appellate Courts, no question of fact as to whether one witness' story is more reasonable or credible than another, whether the evidence is sufficient to support the verdict, or whether the weight or preponderance of the evidence is against the verdict of the jury, can be raised here. We can, therefore, only examine the record so far as to enable us to determine whether there is any evidence fairly tending to support plaintiff's cause of action and whether the rules of law have been properly applied by the trial court. *Frazer v. Howe*, 106 Ill. 563; *Lake Shore & Michigan Southern Railway Co. v. Richards*, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33; *Cicero & Proviso Street Railway Co. v. Meixner*, 160 Ill. 320, 43 N. E. 823, 31 L. R. A. 331; *Offutt v. World's Columbian Exposition*, 175 Ill. 472, 51 N. E. 651; *Libby, McNeill & Libby v. Cook*, 222 Ill. 206, 78 N. E. 599. The question whether the evidence fairly tends to establish a cause of action can only be preserved for review in this court by asking the trial court to give written instructions to direct a verdict as was done in this case. *Variety Manf. Co. v. Landaker*, 227 Ill. 22, 81 N. E. 47.

The appellant's main contention is that the appellee was discharged and could not recover in an action for wages after the month of July, 1906; that no particular form of words is necessary to constitute a discharge; that any form, whether written or verbal, which conveys the idea that a person's services are no longer required and will not be accepted, is sufficient to constitute a discharge. 20 Am. & Eng. Ency. of Law (2d Ed.) p. 26, and cases there cited; *Mee v. Bowden Gold Mining Co.*, 47 Or. 143, 81 Pac. 980. Conceding this to be the law, did the evidence of appellee considered by itself fairly tend to establish appellee's claim that he was not discharged before November 1, 1906, up to which time the jury allowed him for wages? Manifestly he was not considered discharged

at the time of his last interview with Gill, August 11th, and the statement of Gill when they separated on that date that appellee should consider the proposition of settlement, and not to come to the office until notified, was plainly of such a character as to justify the question of fact whether he was then discharged to be submitted to the jury. The appellee had no further direct communication from any officer of the company who had authority to discharge him. In view of this last statement of Gill to him, he certainly had a right to wait a reasonable time for a notification as to whether he should go back to work. No notification came, and on August 20th, and again on October 1st, he wrote to the company, calling attention to the fact that he did not consider himself discharged, and asking information on that point, but received no reply to either letter. It would have been a very simple matter for the company to have written him in plain terms that he was discharged. Apparently from this record appellant did not desire to discharge appellee, but to force him to resign. Ordinarily, whether an employé has been discharged is a question of fact to be determined from the evidence to be submitted to the jury. We think, under the circumstances shown on this record, appellee's testimony fairly tended to support the allegations in the declaration, and hence the question as to whether he was discharged before November 1, 1906, was rightly submitted to the jury.

In this connection appellant contends that appellee recovered for the last three months for wages for constructive services after his discharge, and that under the great weight of authority wages for constructive services cannot be recovered; that, as appellee was prevented by appellant from rendering services for these three months, this fact of prevention practically amounted to a discharge; that the trial court should have so held as a matter of law—citing in support of this contention, among others, the following authorities: *Olmstead v. Bach*, 78 Md. 132, 27 Atl. 501, 22 L. R. A. 74, 44 Am. St. Rep. 273; *Curtis v. Lehmann Co.*, 115 La. 40, 38 South. 887; *Leopold v. Salkey*, 89 Ill. 412, 31 Am. Rep. 93. The facts in these cases are so very different from the facts here that it would serve no useful purpose to review them. Appellant, by several instructions, varying in form, had presented to the jury the question whether or not, under the facts as shown in this record, appellee had been discharged. The jury were told that, if appellee was discharged, he could not recover for any salary under the contract. They were also told that if appellee had been requested to resign, and informed through an agent or employé, by authority of defendant, that he would no longer be recognized nor permitted to act as manager, and was not thereafter so recognized or permitted to act, such action amounts to a discharge. The jury were also told that a discharge might

be by acts of the employer as well as by express words, and that, if appellant adopted means reasonably clear to convey to plaintiff the fact that it desired to discharge him, this amounted to a discharge. They were again also instructed that any information given to him to the effect that his services were no longer desired, and that he would not be permitted to work, and he was not thereafter permitted to work, constituted a discharge. If the question of what amounted to a discharge was properly submitted to the jury, as we think it was on the evidence in this record, then these instructions fully covered every aspect of the law and evidence now contended for by appellant. Appellant asked other instructions on this same point which were refused. We think there is no error in this, both for the reason stated by the trial court, that they assume certain disputed facts as true, and for the further reason that they were fairly covered by other instructions given.

Appellant does not contend on the point that the jury allowed too large an amount for services for the months of May, June, and July that the question of what should be paid during these months should not have been submitted to the jury. The question having properly been submitted to the jury, its verdict thereon approved by the decision of the trial and Appellate Courts is conclusive on this court, except in so far as we are required to examine whether the trial court properly applied the law as to the admission and exclusion of evidence and instructions. The evidence showed that appellee had looked after the business while he was at home, sick, by having letters brought out to him and by talking over matters with Mindrum, who was immediately in charge of the office, and it also appeared that Mindrum had been paid \$100 extra during the months appellee was away. Appellant asked an instruction on this point, which stated that there should be deducted from plaintiff's salary whatever was paid to other parties who took charge in his absence. The trial court modified the instruction by stating that if the evidence showed that Mindrum has been paid \$100, or any other sum above his regular salary, by reason of appellee's sickness, then appellant was entitled to have that amount credited. The jury actually did deduct \$100. As the evidence in the record does not tend to disclose that any other expenses had been incurred by appellant on account of appellee's sickness during these months, the modification could not have harmed appellant.

In this connection appellant complains of the refusal of the trial court to permit evidence showing Gill's expenses on his trip from Pittsburg, where the home office was located, to Chicago, when he had his interviews with appellee. No attempt was made to show that Gill made this trip because appellee was sick or because of the trouble. On this state of the record the objections to

questions asked as to Gill's expenses in coming to Chicago were properly sustained.

Appellant also contends that the letters of the appellee of August 20th and October 1st were improperly admitted. While no demand for salary was necessary, it was proper for appellee to show his readiness to perform the contract, and it was not reversible error to admit those letters, limited in their effect, as we think they were, by an instruction given for appellee that they were admitted solely for the purpose of showing that notice had been given to appellant that appellee did not understand he had been discharged.

We find no reversible error in the record. The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(237 Ill. 334)

# **BYRNE v. MARSHALL FIELD & CO.**

(Supreme Court of Illinois. Dec. 15, 1908.)

## **1. LIMITATION OF ACTIONS (§ 127\*) — COMMENCEMENT OF ACTION—EFFECT OF AMENDMENT.**

A declaration in an action by an administrator for the death of his intestate, which alleges that intestate's parents and sisters, whom intestate left surviving him had been deprived of their means of support, alleges, though defectively, that the intestate left next of kin and hence is sufficient basis for an amendment filed more than two years after the accrual of the cause of action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.\*]

## **2. LIMITATION OF ACTIONS (§ 127\*) — COMMENCEMENT OF ACTION—EFFECT OF AMENDMENT.**

Where a count in the original declaration in an action for the negligent death of an employee charged that the employer negligently failed to inspect an appliance, the sustaining of a demurrer to the plea of limitations interposed to an additional count, filed more than two years after the accrual of the cause of action, and charging in different terms the same negligence, was not erroneous.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.\*]

## **3. MASTER AND SERVANT (§ 217\*)—INJURY TO SERVANT—ASSUMPTION OF RISK.**

An employé does not assume the risk of injury from a known defect in an appliance, unless he has knowledge of the attendant danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

## **4. MASTER AND SERVANT (§ 295\*) — ASSUMPTION OF RISK—INSTRUCTIONS.**

Where, in an action for the death of an operator of a passenger elevator, the evidence showed that a proper inspection prior to the accident would have enabled the employer to ascertain a defect, and that such defect was only discoverable by an inspection, and there was no evidence that the operator knew or should have known of the danger or that he was charged with the duty of making an inspection, or that he possessed the necessary skill to make an in-

spection, the issue of assumption of risk was not in the case.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 295.\*]

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; Homer Abbott, Judge.

Action by John Byrne, administrator of Thomas P. Byrne, deceased, against Marshall Field & Co. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

On May 17, 1907, John Byrne, administrator of the estate of Thomas P. Byrne, deceased, the appellee, secured a judgment for the sum of \$5,000 in the superior court of Cook county against Marshall Field & Co., appellant, for damages to the next of kin of appellee's intestate. The deceased was killed on November 5, 1902, by the falling of a passenger elevator which he was operating in appellant's retail store in the city of Chicago. From the judgment of the Appellate Court for the First District affirming that judgment appellant has prosecuted this appeal.

The declaration was filed on April 16, 1903, and originally consisted of three counts. On February 23, 1905, the plaintiff filed two additional counts, and on May 1, 1907, he amended each of the three original counts. The amendments did not affect the averments of negligence. The various counts charged that defendant negligently permitted the elevator and its various parts and appliances (naming them) to become and remain in an unsafe and dangerous condition, and that the defendant negligently failed to have the elevator and its appliances properly and sufficiently inspected. Each of the original counts alleges that, by reason and in consequence of the death of said Thomas P. Byrne, his mother, Mary P. Byrne, his father, John Byrne, and his sisters, Katherine Byrne, Irene Byrne, Margaret Byrne, and Bernice Byrne, whom he, the said Thomas P. Byrne, left him surviving, had been deprived of their means of support, and had been deprived of large sums of money which he had been accustomed to and would have continued to contribute to their support, and that they had sustained a pecuniary loss, as a direct result of his death, amounting to \$5,000. Neither of these counts contained any other averment in reference to survivorship, heirship, or next of kin, and it will be observed the allegations just recited do not expressly state who were next of kin to the deceased. On December 31, 1903, the defendant interposed the general issue. In each of the additional counts it was averred that the parents and sisters of the deceased (naming them as they were named in the original counts) were his next of kin and his sole heirs him surviving. The amendment made to each of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the original counts was to the effect that the parents and sisters of the deceased named therein were the next of kin and sole heirs him surviving. To the additional and amended counts, defendant interposed pleas of the general issue and of the statute of limitations. To the latter the plaintiff filed a general demurrer, which the court sustained.

During the afternoon of November 5, 1902, the elevator, with Byrne in it, fell from the ninth floor to the basement of the building, and from the effects of this fall he died. He was unmarried and without descendants. It appears that this elevator had not been working properly for several days prior to this time, and that this fact had been reported by Byrne to a foreman of the appellant, who had charge of the elevators in the building. No evidence was offered, however, to show that the condition of the elevator was such at the time Byrne made his report as would indicate to him or the foreman that it was dangerous to continue in its operation. On the day following the accident the car was examined by two elevator inspectors for the city of Chicago, and it was discovered that the safety dogs beneath the car had become so rusted that they had failed to work, and stop the fall of the car, as they would have done in a short distance had they been in proper condition. Appellant proved that it had the elevator inspected in April, 1902, and that it was then in first-class condition. There was no proof that it was inspected after that time prior to the accident.

It is contended by the appellant (1) that the original declaration did not state a cause of action, and that the court erred in sustaining the demurrers of appellee to appellant's plea of the statute of limitations to the additional counts and the original declaration as amended; (2) that the second additional count sets up a different cause of action from that set up in the original declaration, and that the court erred in sustaining appellee's demurrer to appellant's plea of the statute of limitations to such additional count; (3) the court erred in instructing the jury.

Paul Brown, for appellant. Winston, Payne, Strawn & Shaw (John Barton Payne, of counsel), for appellee.

SCOTT, J. (after stating the facts as above). It is said by appellant that the demurrer to the plea of the statute of limitations should have been overruled as the original counts failed to state a cause of action by reason of the omission of words stating explicitly that the parents and sisters mentioned as surviving the deceased were his next of kin; the amendments to the original counts being made and the additional counts being filed more than two years after the death of the deceased. The authorities upon which appellant relies hold that a declaration in a case of this character must aver that the deceased left a widow or next of

kin. If a man dies leaving parents and sisters, he leaves next of kin. It therefore appeared from the original counts that the deceased left next of kin. In the case of Chicago City Railway Co. v. Hackendahl, 188 Ill. 300, 58 N. E. 930, which was a case of the same character as this, the original declaration averred that the plaintiff, who was the father of the deceased and his administrator, "as the father and next of kin" of the deceased had sustained damages on account of his death, and alleged nothing further as to next of kin. More than two years after the cause of action accrued, the plaintiff amended the declaration so that it averred that the deceased left surviving him as his next of kin his parents and certain brothers and sisters, naming them. To the amended declaration a plea of the statute of limitations was interposed, and it was urged, upon a demurrer being filed to this plea, that there was no allegation in the original declaration that there was a widow or next of kin, and that it therefore failed to state any cause of action whatever. This court held that the original declaration alleged the existence of next of kin in an imperfect manner, and that it stated a cause of action, though defectively. We think that case warranted the trial court in holding against the appellant on this proposition. Here, as in that case, it appeared from the original declaration that there were next of kin, although the averments were not as full and complete as they should have been.

It is then urged that the demurrer to the plea of the statute of limitations as to the second additional count should have been overruled in any event, for the reason that this count states a cause of action other than that stated in either of the original counts. A comparison of the second additional count and the third original count shows that both, though in varying terms, charge the same negligence, viz., that the defendant negligently failed to properly and sufficiently inspect the elevator.

Appellant complains of the court's refusal to give its second instruction, which was to the effect that if the deceased knew, two or three days before the accident, that the elevator was out of order, but continued to operate the same, he thereby assumed the risk incident to the defective condition of the elevator. Before it can be said that the deceased assumed the risk which resulted in his death in this case, it must appear, not only that he knew of the defective condition of the elevator, but that he knew, or was chargeable with knowledge, of the attendant danger. This instruction omits the element of knowledge of the danger.

Complaint is also made of the first and fourth instructions given on behalf of the plaintiff. Each of these instructions stated the circumstances under which a recovery could be had, and the objection is that both ignore the doctrine of assumed risk. While

the evidence shows that the deceased knew that the elevator was in bad order and not running properly, there is absolutely no evidence to indicate that he knew, or should have known, that there was any danger of the elevator falling. In fact, the evidence fails to show what caused the elevator to start to fall. It does appear from the testimony of the inspectors who examined the elevator after the accident that the safety dogs, which were under the platform of the elevator, were so badly rusted that they did not work, and that had they been in working condition when the elevator started to fall they would have stopped it. The proof also shows that a proper inspection within a reasonable time prior to the accident would have enabled appellant to ascertain the defective condition of these dogs. It was only by inspection, however, that the precise nature of any difficulty with the elevator was discovered. There was no evidence that the deceased knew, or should have known, anything about the danger, or that he was charged with the duty of making, or had any right to make, an inspection of the elevator and its appliances, or that he possessed the necessary skill and knowledge to make an inspection. There was therefore no proof upon which an instruction stating the doctrine of assumed risk could have been based.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(383 Ill. 38)

### MCCARTHY v. CRAWFORD.

(Supreme Court of Illinois. Dec. 15, 1908.)

#### 1. RECEIVERS (§ 126\*)—RECEIVERS' CERTIFICATES—TRANSFER.

The debt evidenced by a nonnegotiable certificate of indebtedness which recited that the company was indebted to the holder in a certain sum, with interest, payable to the registered holder, issued by the receiver of a street car company, is a chose in action, which is assignable.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 126.\*]

#### 2. RECEIVERS (§ 126\*)—RECEIVERS' CERTIFICATES—TRANSFER.

The assignment of a nonnegotiable certificate of indebtedness, issued by the receiver of a street car company, substitutes the assignee for the original certificate holder, so that he would share in any distribution of the corporate assets to the same extent as his assignor, and could compel the registration of the transfer to him.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 126.\*]

#### 3. FACTORS (§ 52\*)—LIABILITIES OF PRINCIPAL—LIABILITIES TO THIRD PARTIES.

A factor cannot pledge, exchange, or sell the goods of his principal, even though the pledgee or vendee has no knowledge of the existence of the relation and the factor sells the goods as his own, but, if he is held out to the world as owner with the principal's consent

whereby he is enabled to obtain credit on the faith of the goods, the principal will be bound.

[Ed. Note.—For other cases, see Factors, Cent. Dig. § 83; Dec. Dig. § 52.\*]

#### 4. CORPORATIONS (§ 129\*)—CORPORATE STOCK—TRANSFER—TRANSFER IN BLANK.

As between the parties, the transfer of stock by delivery of the certificate, indorsed in blank, or with power of attorney, passes title without transfer on the company's books, though the by-laws provide to the contrary, and the transferee may fill in the blank, and it may be filled in with the name of a remote transferee; the name inserted being immaterial to the transferor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 479-482; Dec. Dig. § 129.\*]

#### 5. RECEIVERS (§ 126\*)—RECEIVERS' CERTIFICATES—TRANSFER.

Though a nonnegotiable certificate of corporate indebtedness containing forms for its assignment in blank, with power of attorney, was not a certificate of stock, it being intended to be assigned in the same manner, its assignment would have the same effect as an assignment of stock.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 126.\*]

#### 6. RECEIVERS (§ 126\*)—RECEIVERS' CERTIFICATES—TRANSFER.

A nonnegotiable certificate of corporate indebtedness is subject to all the equities existing against it when in the hands of an innocent holder.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 215; Dec. Dig. § 126.\*]

#### 7. BROKERS (§ 100\*)—RIGHTS AND LIABILITIES AS TO THIRD PERSONS—UNAUTHORIZED ACTS.

Where defendant assigned in blank, with a power of attorney, to a broker, a nonnegotiable certificate of corporate indebtedness for the purpose of selling it, and the broker thereafter transferred it to complainant in payment of a prior individual indebtedness, defendant was estopped from claiming that the brokers were not assignees for value; he having enabled them to dispose of the certificate as their own.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 100.\*]

#### 8. BROKERS (§ 100\*)—RIGHTS AND LIABILITIES AS TO THIRD PERSONS—UNAUTHORIZED ACTS.

A nonnegotiable certificate of indebtedness assigned in blank with power of attorney was delivered by defendant to a broker to sell, and the latter pledged it as his own to plaintiff to secure the delivery of some stock which plaintiff had paid for, and thereafter plaintiff agreed to take the certificate, instead of the stock, the amount he paid for the stock being applied to the payment of the certificate, plaintiff not knowing that the broker did not own the certificate. *Held*, that the pre-existing debt was a valuable consideration, and plaintiff would be protected in the same manner as if he had paid a new consideration.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 100.\*]

Appeal from Branch Appellate Court, First District, on Appeal from Superior Court, Cook County; George A. Dupuy, Judge.

Action by Matthew H. McCarthy against Henry Crawford. From a judgment for defendant, complainant appeals. Reversed and remanded, with directions to enter decree for complainant.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In 1908 the United States Circuit Court for the Northern District of Illinois appointed James H. Eckels and Marshall E. Sampson receivers for the Chicago Union Traction Company. The receivers, acting under the authority of an order entered July 10, 1905, with the consent of all the parties, issued to the appellee, Henry Crawford, a certificate of indebtedness, in which the receivers certified that the Chicago Union Traction Company was indebted to Crawford in the sum of \$10,815.24, with interest at 6 per cent. per annum, payable to the registered holder of the certificate quarterly at the office of the treasurer of said company; that the certificate was one of a series executed by the receivers in conformity with the order of July 10, 1905, to which reference was had; that the registered holder had in all things complied with the conditions of said order, and the claim upon which said certificate was issued had been audited and approved by the receivers under said order as a valid claim against the Chicago Union Traction Company; and that said certificate was registered and transferable only on the books of the company by the holder thereof, or his attorney, upon surrender of the same. On the back of the certificate was a printed form of assignment and power of attorney authorizing a transfer on the books of the company, with blank spaces left for the names of the assignor, assignee, and attorney. Crawford signed the certificate on the back in blank and delivered it to A. J. Whipple & Co., brokers in the city of Chicago, with directions to sell for him. On August 24, 1905, the appellant, Matthew H. McCarthy, employed Whipple & Co. to purchase for him 100 shares of Atchison, Topeka & Santa Fé railroad stock. The brokers represented that they had purchased the stock, and on August 28, 1905, McCarthy paid them \$8,616.30, being, with \$500 theretofore paid, the balance in full therefor. They told him the stock had come from New York, but had to be sent back to be transferred, because it was made out in the wrong name. The statements were false. The stock was not bought and paid for, but the entire amount paid by McCarthy was appropriated by the brokers to the payment of their own debts. In response to the demands of McCarthy for the stock or for his money or security, Whipple & Co. early in September delivered Crawford's certificate of indebtedness to McCarthy to hold as security for the delivering of the stock, telling him that Whipple was the owner of the stock. A few days later McCarthy proposed to buy the certificate of Whipple, and a sale was agreed on at a price of 95 per cent. of its face, or \$10,274.49. The money McCarthy had paid on the stock purchased was credited on the price of the certificate. The balance, \$1,158.19, McCarthy agreed to pay, and he has ever since retained the certificate. Meanwhile, Whipple & Co. having reported to Crawford that they had been unable to obtain an offer

for his certificate that they cared to submit to him, on October 9, 1905, Crawford demanded the immediate return of the certificate. Whipple answered that he could not deliver it then because it had been sent to New York, where there were some people who wanted to bid on it. On October 13th a petition in bankruptcy was filed against Whipple & Co., and they were adjudged bankrupts and a receiver appointed. On October 14th McCarthy presented the certificate to the receivers of the traction company, having first written Crawford's name as assignor and his own name as assignee and attorney in the spaces left therefor in the printed transfer on the back, above the signature of Crawford, and he requested the receivers to issue a new certificate to him, which they refused to do. McCarthy subsequently filed his bill in the superior court of Cook county against Crawford, the Chicago Union Traction Company, and its two receivers, alleging that he was entitled to the transfer of the certificate by the receivers of the traction company and was the equitable owner thereof, and praying that the traction company be directed, through its receiver, to make the transfer, and that Crawford be enjoined from setting up any claim of right, title, or interest to the certificate.

The answer of Crawford admitted the issue to him of the certificate, and alleged that he employed Whipple & Co., as brokers, to negotiate its sale for cash at a designated price; that it was not delivered to them when defendant employed them or for a considerable period thereafter, and was not delivered in order that any intending purchaser could inspect it, the signature of the defendant to the blank assignment on the back having been placed there long before the employment of said brokers. He also filed his cross-bill, in which he prayed that the court would decree that he was the lawful owner of the certificate; that the assignment to McCarthy on the back of said certificate was without consideration or authority; that McCarthy should be enjoined from setting up any title or right of possession; and that the certificate be surrendered to the complainant in the cross-bill. McCarthy answered the cross-bill, and on the final hearing the court rendered a decree finding that Crawford was the lawful owner of the certificate, directing its delivery to him, and enjoining the receivers from recognizing the assignment to McCarthy or issuing a new certificate to him. The Appellate Court having affirmed this decree, an appeal has been taken to this court.

Julie F. Brower and Samuel B. King, for appellant. Julius A. Johnson (Charles H. Aldrich, of counsel), for appellee.

DUNN, J. (after stating the facts as above). The certificate was not an ordinary receiver's certificate issued for money borrowed or a liability incurred by the receivers in the performance of their duties. It was merely

evidence of the existence of a debt in favor of the appellee against the corporation whose property the court was administering. It was not a negotiable instrument. The debt, however, of which the certificate was the evidence, was a chose in action, and was assignable in equity. That it was expected and intended that the certificates, which by the order of the court were substituted for the original evidences of indebtedness of the corporation, would be transferred, is manifest from the fact that it was stated on the face of each certificate that it was registered and transferable only upon the books of the company upon surrender of the certificate, that the interest was made payable to the registered holder, and that on the back of the certificate was printed, for convenience of transfer, a form of assignment and power of attorney similar to those ordinarily found on the back of certificates of corporate stock. The effect of an assignment would be to substitute the assignee for the original certificate holder, to enable him to share in any distribution which might be made of the assets, and to enforce his rights in the pending proceeding to the same extent as the original holder. The registration of transfers enables the receivers and all others interested to know who were the parties interested.

Whipple & Co. were the agents of Crawford for the sale of his certificate. He contends that he is not bound by their sale because they were brokers, and the sale was beyond their authority because not made in the usual course of business or for cash, but in settlement of an existing indebtedness from themselves to the vendee. There can be no question of the rule that a factor cannot pledge the goods of his principal, that he cannot dispose of them by way of exchange or barter, and that he cannot sell them for a prior debt. And this is so even though the pledgee or vendee does not know that the factor is such, and though the factor is in possession of the goods and sells them as his own. But this case is not to be decided on that principle. The rule is subject to the qualification mentioned by Kent in laying down the doctrine, that "to guard against abuse and fraud it is admitted that if the factor be exhibited to the world as owner with the assent of his principal, and by that means obtains credit, the principal will be liable." 2 Kent's Com. 627. Whenever the factor has bartered or disposed of goods in a manner not within the ordinary and accustomed modes of transacting the like business, the principal may follow and reclaim the property, and in such case it is wholly immaterial whether the person dealing with the factor knew him to be such or not. But, if the principal has by any act of his been the means of imposing upon the person dealing with the factor and inducing him to believe the factor was clothed with authority to dis-

pose of the goods in the manner in which he did, the principal is bound by such disposition. *Potter v. Dennison*, 5 Gilman, 590. In *Williams v. Fletcher*, 129 Ill. 350, 21 N. E. 783, this principle was announced in language quoted from *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341, as follows: "It must be conceded that as a general rule, applicable to property other than negotiable security, the vendor or pledgor can convey no greater right or title than he has. But this is a truism predicable of a simple transfer from one party to another where no other element intervenes. It does not interfere with the well-established principle that where the true owner holds out another, or allows him to appear, as the owner of or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance."

The law has been generally established that as between the parties the transfer of stock by delivery of the certificate, with power of attorney or indorsed in blank, passes title without transfer on the books of the company, even when the by-laws of the company provide to the contrary. *Otis v. Gardner*, 105 Ill. 436; *Rice v. Gilbert*, 173 Ill. 348, 50 N. E. 1087. Such blank transfer on the back of the certificate, to which the holder has affixed his name, is a good assignment, and the party to whom it is delivered is authorized to fill it up. It may be filled up with the name of a remote transferee, and the name to be inserted concerns only the purchaser. *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Johnston v. Laffin*, 108 U. S. 800, 28 L. Ed. 532; *White v. Vermont & Massachusetts Railroad Co.*, 21 How. 575, 16 L. Ed. 223. The form in which the certificate was issued, the usage and practice indicated thereby as to the method of assignment, the appellee's own act in signing the power of attorney, all correspond with the customary rules with reference to the assignment of similar documents. Though this is not a certificate of stock, it is manifest that it was intended to be assigned in the same manner, and no reason is seen why it may not be so done and with the same effect.

By signing the transfer and power of attorney in blank, from whatever motive, and delivering the certificate so indorsed to Whipple & Co., the appellee clothed them with the customary indicia of absolute ownership. He had done all that was necessary for him to do—

all that was possible for him to do to indicate to all persons interested that they owned the certificate. With the transfer on the books of the company he had nothing to do. It did not concern him. Its object was the protection and convenience of the assignee or the receivers. Appellee by this positive act enabled Whipple & Co. to deceive appellant, as they could not otherwise have done, to induce him to believe they were the owners of the stock and to sell the stock to him. The certificate, not being negotiable paper, was subject in the hands of appellant to all the equities existing against the certificate itself, to all equities against the original holder or in favor of the maker; but appellee could set up no equities against appellant, because by his writing he had estopped himself from claiming that Whipple & Co. were not his assignees for value. In *Otis v. Gardner*, supra, the owner of a certificate of stock in a corporation indorsed it in blank, and delivered it to his brother, taking a receipt, in which the brother recited that he had borrowed the stock and agreed to return it on demand. Being indebted, the brother pledged the stock to secure his notes. The owner of the stock having died, his administrator brought suit against the pledgee to recover possession of the stock. In disposing of this question, on page 448 of 106 Ill., the court said: "The intestate placed the certificates in the hands of Chauncey T. Bowen, with a blank assignment written thereon, authorizing an absolute transfer of the stock to the assignee under the by-laws of the company. The exact use the assignee should make of the stock does not appear from anything in the record, but, as the use he might make of it was in no way limited by the terms of the assignment, it is reasonable to presume the assignee was authorized to make any legitimate use of it that a rightful owner might; that is, he might sell it or pledge it in the usual course of business. That was done in this case. It was pledged to Gardner, in the usual course of business, as collateral security for the indebtedness of the holder, and was taken in good faith, without the slightest knowledge that any one other than the pledgor claimed or had any interest in the stock represented by the certificates. As has been seen, the certificates of stock were placed in the hands of Bowen by the intestate in such condition they could be readily sold or hypothecated by him, and, if his assignee made an improper use of them, the assignor, if living, could get no relief against that which he deliberately authorized to be done if it would affect injuriously an innocent purchaser for value, and his personal representative can have no relief that could not be granted on a like bill by the intestate, if living. The principle is that when one of two or more persons must suffer loss, upon him whose conduct made it possible for loss

to occur should the consequences ultimately rest."

It is claimed that appellant's purchase was not in the usual course of business, and for a valuable consideration. The certificate was first delivered to appellant in response to his demand for security to secure the delivery of the railroad stock to him. After some delay, he proposed to take the certificate instead of completing the purchase of the stock. There is no basis in the evidence for supposing this was anything other than an ordinary proposition to buy the certificate or that there was in it any concealed or unfair purpose. His proposition was accepted, and the \$9,116.30 he had paid for the purpose of being used in the purchase of the stock was applied to the payment for the certificate. Whipple & Co. were clothed with all the indicia of ownership, and appellant, with no knowledge or reason to suspect any infirmity in their title purchased the certificate. Under such circumstances, the pre-existing debt is a valuable consideration, and he is entitled to be protected to the same extent as if he had paid a new consideration. *Butters v. Haughwout*, 42 Ill. 18, 89 Am. Dec. 401; *Schwabacker v. Rush*, 81 Ill. 810; *Kranert v. Simon*, 65 Ill. 344.

It is insisted by appellee that appellant's bill and his answer to the cross-bill are inconsistent, and that the facts proved do not sustain the bill. The inconsistency is more imaginary than real. The answer sets up the facts more in detail than the bill, but they are not inconsistent. Both concede that the absolute ownership of the certificate was in appellee; that he delivered it to Whipple & Co., not as purchasers or owners, but solely as brokers, to sell for appellee. Both allege the payment of the money to Whipple & Co., the order to buy stock, their failure to do so, their offer to appellant of the certificate instead of the stock, and its acceptance by appellant and the filling of the blank in the assignment. Both allege that by means of the premises the appellant became the equitable owner of the certificate. Whether Whipple & Co. purported to act as agents of appellee or as owners of the certificate is not alleged in either bill or answer, but the facts are stated with differences only in the extent of detail. There is no substantial difference in the claim attempted to be stated in appellant's different pleadings, and on the evidence he was entitled to the relief prayed for.

The judgment of the Appellate Court and the decree of the superior court will be reversed and the cause remanded to the superior court, with directions to enter a decree in accordance with the prayer of the bill upon the payment by appellant, for the use of appellee, of \$1,153.19, with 5 per cent. interest from September 11, 1905.

Reversed and remanded, with directions.

(237 Ill. 419)

**SMYTHE v. CHARLES P. PARISH & CO.**  
(Supreme Court of Illinois. Dec. 15, 1908.)

**1. APPEAL AND ERROR (§ 1082\*)—REVIEW—DECISIONS OF INTERMEDIATE COURT—QUESTIONS NOT RAISED IN APPELLATE COURT.**

Questions not raised in the Appellate Court on appeal from a judgment of the trial court cannot be considered in the Supreme Court on writ of error to review the judgment of the Appellate Court affirming the judgment of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1133; Dec. Dig. § 1082.\*]

**2. APPEAL AND ERROR (§ 1094\*)—REVIEW—DECISIONS OF INTERMEDIATE COURT—QUESTIONS OF FACT—AMOUNT OF RECOVERY.**

The question whether a verdict in a personal injury action is excessive is finally determined by the judgment of the Appellate Court affirming the judgment of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4324; Dec. Dig. § 1094.\*]

**3. TRIAL (§ 260\*)—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS COVERED BY THOSE GIVEN.**

It is not error to refuse instructions fully covered by the instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.\*]

**4. COSTS (§ 260\*)—APPEAL AND ERROR—PENALTY FOR PROSECUTION OF ERROR FOR DELAY.**

Where, on writ of error to review a judgment of the Appellate Court affirming a judgment for plaintiff in a personal injury action, plaintiff raised questions not raised in the Appellate Court, urged that the verdict was excessive, that the trial court erred in the giving of an instruction previously adjudged correct by the Supreme Court, and that the court erred in refusing instructions covered by those given, it appeared that the writ of error was prosecuted for delay authorizing the Supreme Court, on affirming the judgment of the Appellate Court, to direct the rendition of a judgment against plaintiff in error for a penalty.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 983; Dec. Dig. § 260.\*]

Error to Appellate Court, First District, on Error to Superior Court, Cook County; A. H. Frost, Judge.

Action by Frank R. Smythe against Charles P. Parish & Co. There was a judgment of the Appellate Court (140 Ill. App. 405), affirming a judgment for plaintiff, and defendant brings error. Affirmed.

John Stuart Roberts (Ira C. Wood, of counsel), for plaintiff in error. Lee D. Mathias, for defendant in error.

**SCOTT, J.** On February 25, 1905, Frank R. Smythe, defendant in error, recovered a judgment for the sum of \$5,000 in the superior court of Cook county against Charles P. Parish & Co., plaintiff in error, for personal injuries alleged to have been sustained by him through the negligence of the plaintiff in error while he was engaged in the operation of a punch press at the manufacturing establishment of plaintiff in error in Chicago Heights. That judgment has been affirmed by the Appellate Court for the First Dis-

trict, and to review the judgment of that court plaintiff in error has sued out a writ of error from this court.

It is now contended that there is in the record no evidence which tends to prove the averments of the declaration, and that for this reason the superior court erred in denying plaintiff in error's motion, made at the close of all the evidence, for a directed verdict. It is also urged that there was a fatal variance between the proof and the declaration. Upon leave obtained defendant in error has filed in this court a certified copy of the brief and argument filed by plaintiff in error in the Appellate Court. It appears therefrom that neither of these questions was raised in that court. For this reason we cannot consider them.

It is argued here that the amount of the verdict is excessive. That question was finally determined by the judgment of the Appellate Court.

It is insisted that the trial court erred in giving to the jury the second instruction requested by defendant in error. The precise point so presented was decided by this court in *West Chicago Street Railroad Co. v. McCallum*, 169 Ill. 240, 48 N. E. 424, adversely to the contention now made. No attempt is made to distinguish that case or to show that it was not decided correctly. We therefore deem it unnecessary to again consider the question.

It is then urged that the court erred in refusing the defendant's requested instructions 1 and 2. The propositions contained in those two instructions are fully covered by certain other instructions that were given. Defendant in error by his brief points this out, and plaintiff in error by its reply brief makes no response on this point. No other assignments are relied upon. We are of opinion that the writ of error from this court was prosecuted for delay.

The judgment of the Appellate Court will be affirmed, and, in addition, a judgment of this court in favor of defendant in error and against plaintiff in error for the sum of \$500 will be entered by the clerk of this court.

Judgment affirmed.

(171 Ind. 457)

**LAKE SHORE SAND CO. v. LAKE SHORE & M. S. RY. CO.** (No. 21,083.)<sup>1</sup>

(Supreme Court of Indiana, June 3, 1908. On Rehearing, Dec. 17, 1908.)

**1. EMINENT DOMAIN (§ 262\*)—CONDEMNATION PROCEEDINGS—APPEAL—PARTIES—STATUTORY PROVISIONS.**

Under Burns' Ann. St. 1901, §§ 4183, 4184, 5160, relating to condemnation of real property, an appeal from an interlocutory order appointing or refusing to appoint appraisers was not authorized. This rule was changed by Acts 1905, p. 61, c. 48, § 5, providing that an appeal might be taken from such an order. Burns' Ann. St. 1908, §§ 675, 676 (Acts 1895, p. 179, c.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup> Rehearing denied, 86 N. E. 754.

86), changed the existing rule that all parties affected by the judgment appealed from must be included in the appeal by authorizing an appeal by any part of coparties against whom a judgment has been taken when the appeal is taken under section 650, Burns' Ann. St. 1901, relating to term time appeals. *Held* that, since the existing rule as to parties on appeal was changed by sections 675, 676, only as to appeals taken under section 650, sections 675 and 676 do not apply to appeals authorized by Acts 1905, p. 61, c. 48, § 5, and hence an appeal under such latter section in which all coparties are not made parties on appeal will be dismissed.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 262.\*]

#### On Rehearing.

#### 2. APPEAL AND ERROR (§ 77\*)—JUDGMENT—FINALITY.

A judgment establishing a drain and approving the assessments therefor, under the circuit court drainage law of 1881 (Acts 1881, p. 399, c. 43, § 4; Rev. St. 1881, § 4276) and the circuit court drainage law of 1885 (Acts 1885, p. 134, c. 40, § 4; Burns' Ann. St. 1901, § 6625), was final.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 77.\*]

#### 3. DRAINS (§ 36\*)—DECISIONS REVIEWABLE—FINALITY.

A judgment establishing a drain and approving the assessments therefor, under the circuit court drainage law of 1881 (Acts 1881, p. 399, c. 43, § 4; Rev. St. 1881, § 4276) and the circuit court drainage law of 1885 (Acts 1885, p. 134, c. 40, § 4; Burns' Ann. St. 1901, § 6625), being final, an appeal therefrom was authorized, in term time or vacation, by Rev. St. 1881, §§ 638, 640 (Burns' Ann. St. 1901, §§ 650, 652; Burns' Ann. St. 1908, §§ 679, 681).

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. § 44; Dec. Dig. § 88.\*]

#### 4. APPEAL AND ERROR (§ 77\*)—JUDGMENT—DISMISSING DRAIN PROCEEDING—FINALITY.

A judgment of the circuit court, dismissing a proceeding to establish a public ditch, was a final judgment, because it finally disposed of the proceeding in that court.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 77.\*]

Appeal from Circuit Court, Lake County; W. C. McMahan, Judge.

Condemnation proceedings by the Lake Shore & Michigan Southern Railway Company against the Lake Shore Sand Company. From an interlocutory order appointing appraisers, defendant appeals. Appeal dismissed.

Crumpacker & Crumpacker, for appellant. G. R. Call, J. B. Peterson, Knapp, Haynes & Campbell, and Glennen, Cary, Walker & Howe, for appellee.

MONKS, J. This proceeding was brought by appellee under "An act concerning proceedings in the exercise of eminent domain," approved February 27, 1905 (Acts 1905, p. 59, c. 48; section 893 et seq., Burns' Ann. St. Supp. 1905; section 929 et seq., Burns' Ann. St. 1908). The complaint of appellee named as defendants the Lake Shore Sand Company, appellant, Hugh Spencer, and a number of others. It is alleged in the complaint that "the Lake Shore Sand Company is the owner

of record \* \* \* and Hugh J. Spencer is the owner and holder of a mortgage" on the real estate sought to be appropriated, and that each of the defendants claims some interest in said real estate, "the extent and character of which the plaintiff is not informed." Appellant and said Hugh J. Spencer appeared, and each filed separate and several objections to the complaint and proceeding. Some of said objections challenged the sufficiency of the complaint, and others presented questions of fact for trial. The judge heard the evidence, and overruled all of said objections, and appointed appraisers under said act in vacation. From said interlocutory order appointing appraisers in vacation appellant appealed, and has not made any of its coparties to said interlocutory order coappellants with it in this court.

Appellee insists that this court has no jurisdiction of this appeal because appellant has not made its coparties to the interlocutory order appealed from coappellants in this court, and moves to dismiss this appeal for that reason. It was held by this court that an appeal was not authorized from an interlocutory order appointing or refusing to appoint appraisers under sections 4183, 4184, 5160, Burns' Ann. St. 1901, which provide for the condemnation of real estate under the power of eminent domain. *Lafayette, etc., R. Co. v. Butner*, 162 Ind. 460, 70 N. E. 529; *Noblesville, etc., Co. v. Evans*, 163 Ind. 700, 72 N. E. 128. Section 5 of the act (Acts 1905, pp. 61, 62, c. 48), being section 933, Burns' Ann. St. 1908 (section 897, Burns' Ann. St. Supp. 1905), under which this proceeding was brought, however, expressly provides that an appeal may be taken from an interlocutory order overruling the objections and appointing appraisers "upon filing with the clerk of such court a bond with such penalty as the court, or judge, shall fix, with sufficient surety, payable to the plaintiff, conditioned for the diligent prosecution of such appeal and for the payment of the judgment and costs which may be affirmed and adjudged against the appellants. Such appeal bond shall be filed within ten days after the appointment of such appraisers. All the parties shall take notice of and be bound by such appeal. The transcript shall be filed in the office of the clerk of the Supreme Court within thirty days after the filing of the appeal bond." It was held by this court before the taking effect of sections 675, 676, Burns' Ann. St. 1908 (sections 647a, 647b, Burns' Ann. St. 1901; Acts 1895, p. 179, c. 86), that in all appeals, term time as well as vacation appeals, unless the appellant made all his coparties to the judgment coappellants with him in this court, that this court had no jurisdiction to determine the case upon its merits, and that the appeal must be dismissed. It was so held upon the ground that it is an elementary rule in appellate proceedings that all the parties to and affected by the judgment appeal-

\*For other cases see same topic and section NUMBER in Dec. & An. Digs. 1907 to date, & Reporter Indexes

ed from must be included in the appeal, so that one appeal may dispose of all questions in the case in a manner that shall bind all such parties. *Gregory v. Smith*, 139 Ind. 48, 38 N. E. 395; *Benbow v. Garrard*, 139 Ind. 571, 39 N. E. 162; *Wood v. Clites*, 140 Ind. 472, 39 N. E. 160; *Inman v. Vogel*, 141 Ind. 138, 40 N. E. 665; *Gourley v. Embree*, 137 Ind. 82, 36 N. E. 846; *Vordermark v. Wilkinson*, 142 Ind. 142, 39 N. E. 441; *Abshire v. Williamson*, 149 Ind. 248, 48 N. E. 1027. Said sections 675, 676 (Acts 1895, p. 179, c. 86, §§ 647a, 647b) change this rule as to appeals taken under section 679, Burns' Ann. St. 1908 (section 650, Burns' Ann. St. 1901; section 638, Rev. St. 1881), providing "that, whenever a part of any number of coparties against whom a judgment has been taken, shall appeal from such judgment to the Supreme or Appellate Court under the provisions of section 638 of the Revised Statutes of 1881, providing for term time appeals, it shall not be necessary to make such coparties not appealing, parties to the appeal, and it shall not be necessary to name them as appellants or appellees in the assignment of errors, but they shall be bound by the judgment on appeal to the same extent as if they had been made parties. After any such appeal has been perfected, any coparty not joining therein may, at any time, while such appeal is pending, and within one year from the date of the final judgment, assign errors for himself upon the record and have all questions properly presented, decided by the court, and he shall have all the rights in relation to such appeal, that he would have had if he had joined in the appeal originally." It is evident that said sections 675, 676 (Acts 1895, p. 179, c. 86, §§ 647a, 647b), supra, have no application to appeals like the one before us taken under Acts 1905, pp. 61, 62, c. 48, § 5, being section 933, Burns' Ann. St. 1908 (section 897, Burns' Ann. St. Supp. 1905), because said sections are limited to appeals taken under section 638, Rev. St. 1881, being section 679, Burns' Ann. St. 1908 (section 650, Burns' Ann. St. 1901). It is clear that this appeal is governed as to parties in this court by the general rule applicable to appellate proceedings above stated that all the parties to and affected by the judgment appealed from must be made parties on appeal to give the court jurisdiction to determine the case upon its merits. *Kline v. Hagey*, 169 Ind. 275, 277, 278, 81 N. E. 209, and cases cited. The effect of the provision of section 5 of said act of 1905 (Acts 1905, pp. 61, 62, c. 48), under which this appeal was taken, that "all parties shall take notice of and be bound by such appeal," is that no notice need be given to the parties of such appeal, but it does not change the general rule as to who must be made parties to the appeal in this court.

We hold, therefore, that in appeals under said section 5 (Acts 1905, pp. 61, 62, c. 48, being section 933, Burns' Ann. St. 1908 [section 897, Burns' Supp. 1905]) that an appel-

lant must make all his coparties to the interlocutory judgment or order appealed from coparties in this court to give this court jurisdiction to determine the appeal upon its merits, and that, unless this is done, the appeal must be dismissed.

This appeal is therefore dismissed. *Kline v. Hagey*, 169 Ind. 275, 277, 278, 81 N. E. 209; *Lowe v. Turple*, 147 Ind. 690-692, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233.

GILLETT, C. J., took no part in this decision.

#### On Rehearing.

MONKS, J. Appellant in its brief on petition for a rehearing insists that the holding in this case is in conflict with *Stevens v. Templeton* (Ind.) 84 N. E. 148, and *Smith v. Gustin*, 169 Ind. 42, 80 N. E. 959, 81 N. E. 722. *Stevens v. Templeton*, supra, was a drainage proceeding in the circuit court under the drainage law of 1905. Acts 1905, p. 456 et. seq., c. 157. The court under section 5625, Burns' Ann. St. Supp. 1905, being section 4 of said act of 1905, rendered a judgment establishing the proposed drain and approved the assessments made to pay the cost of construction. From this judgment an appeal was taken. It has been uniformly held by this court under section 4 of the circuit court drainage law of 1881 (Acts 1881, p. 399 et. seq., c. 43), being section 4276, Rev. St. 1881, and section 4 of the circuit court drainage law of 1885 (Acts 1885, p. 134 et. seq., c. 40), being section 5625, Burns' Ann. St. 1901, that the judgment of the court establishing the drain and approving the assessments under said sections were final judgments. *Higbee v. Peed*, 98 Ind. 420, 424; *Crumme v. Wilson*, 104 Ind. 583, 587, 4 N. E. 169; *Hudson v. Bunch*, 116 Ind. 63, 64, 18 N. E. 390; *Perkins v. Hayward*, 132 Ind. 95, 102, 31 N. E. 670; *Hoefgen v. Harness*, 148 Ind. 224, 226-229, 47 N. E. 470; *Osborn v. Maxinkuckee, etc., Co.*, 154 Ind. 101, 56 N. E. 33; *Pleasant Tp. v. Cook*, 160 Ind. 533, 537, 67 N. E. 262; *Board, etc., v. Jarnecke*, 164 Ind. 658, 661-664, 74 N. E. 520; *Mak-Saw-Ba Club v. Coffen*, 169 Ind. 204, 210, 82 N. E. 461.

There was no provision for an appeal from such judgments contained in either of said drainage laws, but appeals have been uniformly taken from such judgments, either in term time, under section 638, Rev. St. 1881, being section 650, Burns' Ann. St. 1901 (section 679, Burns' Ann. St. 1908)—*Kelser v. Mills*, 162 Ind. 366, 69 N. E. 142; *Goodrich v. Stangland*, 155 Ind. 279, 58 N. E. 148—or in vacation, under section 640, Rev. St. 1881, being section 652, Burns' Ann. St. 1901 (section 681, Burns' Ann. St. 1908)—*Ex parte Sullivan*, 154 Ind. 440, 56 N. E. 911; *North v. Davison*, 157 Ind. 610, 62 N. E. 447. This was proper, because said judgments were final judgments of the circuit court, and an appeal therefrom was expressly authorized

by said sections. When, therefore, an appeal was taken from such judgments under section 638 (650, 679) *supra*, it was a term-time appeal, and was governed by sections 675, 676, Burns' Ann. St. 1908, being sections 647a, 647b, Burns' Ann. St. 1901, as to who should be named in the assignment of errors as appellants.

Said section 5625 *supra*, being section 4 of said drainage law of 1905, provides that "the order of the court approving and confirming the assessments and declaring the proposed work of drainage established shall be final and conclusive, unless an appeal therefrom to the Supreme Court be taken and an appeal bond filed within thirty days." It will be observed that section 5625, *supra*, does not grant or authorize an appeal from such judgment, but the right to appeal under some other law is recognized by said section. Such right, however, is made to depend on the condition that "an appeal therefrom be taken and an appeal bond filed within thirty days" after the rendition of the final judgment establishing the proposed drain and approving the assessments. It is evident, if said provision requiring the appeal to be taken and the appeal bond filed within 30 days had been omitted from said section, that the right to take either a term-time or vacation appeal would exist under the provisions of the sections of the Code of Civil Procedure above mentioned, the same as from the final judgments establishing drains and approving the assessments under the drainage laws of 1881 and 1885, *supra*.

On account of said provision requiring the appeal to be taken and the appeal bond filed within 30 days, it was held by this court in *Stevens v. Templeton*, *supra*, that it was the intent of the Legislature to limit appeals from judgments establishing drains and approving assessments under said drainage law of 1905 to term-time appeals under said section 638 (650, 679), *supra*, and that therefore the question of who shall be named in the assignment of errors as appellants in such appeals is governed by sections 675, 676, Burns' Ann. St. 1908 (sections 647a, 647b, Burns' Ann. St. 1901), and that under said last-named sections the appellants in said appeal were not required to make their co-parties to the judgments in the court below coappellants with them in the assignment of errors. *Kelser v. Mills*, 162 Ind. 366, 369, 69 N. E. 142; *Goodrich v. Stangland*, 155 Ind. 279, 281, 282, 58 N. E. 148.

*Smith v. Gustin*, 169 Ind. 42, 80 N. E. 959, 81 N. E. 722, cited by appellant, was a proceeding commenced before the board of commissioners for the establishment of a public ditch. An appeal was taken from a final judgment of the board establishing the ditch to the circuit court. On motion of appellees the proceeding was dismissed by the circuit court and judgment rendered against

the petitioners. This was a final judgment, because it finally disposed of said cause in said court. *Kline v. Hagey*, 169 Ind. 275, 81 N. E. 209; *Smith v. Gustin*, 169 Ind. 42, 80 N. E. 959, 81 N. E. 722; *Elliot's App. Proc.* §§ 81-85, 90. The petitioners perfected a term-time appeal therefrom under section 638, Rev. St. 1881 (section 650, Burns' Ann. St. 1901; section 679, Burns' Ann. St. 1908). As the appeal in said case was properly taken under said section 638 (650, 679), *supra*, this court held that appellants were not required to make all the parties against whom judgment was rendered coappellants with them in this court, under sections 675, 676, Burns' Ann. St. 1908 (sections 647a, 647b, Burns' Ann. St. 1901). Said cases, being appeals from final judgments taken under section 638 (650, 679), *supra*, of the Code of Civil Procedure, were correctly decided, and are in no way in conflict with the opinion in this case.

The right to appeal from the interlocutory order made in this case is not granted by said section 638 (650, 679), *supra*, or any other section of the Code of Civil Procedure, but is only authorized by section 5 of said act of 1905 (Acts 1905, pp. 61, 62, c. 48, § 5, being section 933, Burns' Ann. St. 1908 and section 897, Burns' Ann. St. Supp. 1905), and there is nothing in said section changing the general rule stated in the original opinion as to who must be named as appellants in the assignment of errors.

The petition for rehearing is overruled.

(171 Ind. 482)

TOWN OF NEWCASTLE v. GRUBBS.  
(No. 21,025.)

(Supreme Court of Indiana. Dec. 18, 1908.)

1. PLEADING (§ 34\*)—CONSTRUCTION.

Under Burns' Ann. St. 1908, § 385, authorizing a liberal construction of pleadings, a pleading is to be read in the light of all such ultimate facts as must be necessarily intended from the facts which are well pleaded, and matters of substance may often be shown by the narrative of the manner in which an occurrence took place.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 34.\*]

2. MUNICIPAL CORPORATIONS (§ 816\*)—TORTS—DEFECTS IN STREETS—ACTIONS FOR INJURIES—PLEADING.

In an action against a city for injury received by falling from a sidewalk into an excavation in a lot beside the sidewalk, the complaint stated that, by reason of adjacent buildings, the sidewalk was very dark; that the sidewalk was rough and uneven, rendering the walk unsafe for travelers; that the lot beside the walk was from 3 to 10 feet lower than the sidewalk; that the condition of the sidewalk had existed for some two years prior to the accident; that said sidewalk was without any guard or barrier separating it from said lot, and was thereby rendered unsafe for persons traveling thereon; that plaintiff, walking upon said sidewalk when it was very dark, and in the exercise of due care, struck his foot against a pro-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

jection in said sidewalk, and, without negligence on his part, stumbled and fell into the excavation and was injured, which injuries were caused wholly by the negligence of defendant in failing to provide a barrier along the side of said sidewalk. *Held*, that the complaint sufficiently alleged the necessity of a fence or barrier along the sidewalk and the duty of the city to construct the same, and that it was because of the lack thereof that plaintiff received his injuries.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 816.\*]

**8. NUISANCE (§ 62\*)—USE OF PUBLIC PLACES—OBSTRUCTIONS AND ENCROACHMENTS—EXCAVATIONS.**

The maintenance of an excavation beside a sidewalk whereby a traveler thereon may, by a misstep, fall into the excavation is a public nuisance.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 153-157; Dec. Dig. § 62.\*]

**4. MUNICIPAL CORPORATIONS (§ 786\*)—TORTS—OBSTRUCTIONS IN STREETS—EXCAVATIONS.**

While a municipality is not responsible for what private owners do upon their own premises, and is not in general bound to guard against travelers wandering on adjoining grounds along the highway, if, by reason of the condition of the adjoining premises, the way itself is rendered unsafe, and the public authorities may reasonably protect travelers from the danger, it is their duty to do so.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1638; Dec. Dig. § 786.\*]

**5. MUNICIPAL CORPORATIONS (§ 786\*)—TORTS—OBSTRUCTIONS—EXCAVATIONS.**

Where a municipality undertakes to improve a street over its entire width, it is its duty to exercise ordinary care to keep the street reasonably safe for travel from side to side, and if the owners of adjoining property endanger the safety of travelers by dangerous pitfalls adjoining the street, the municipality is liable to a traveler who, while in the exercise of due care, falls into the excavation, owing to an accident of travel.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1638; Dec. Dig. § 786.\*]

**6. MUNICIPAL CORPORATIONS (§ 816\*)—TORTS—ACTIONS—PLEADING.**

A complaint, in an action against a city to recover for injuries received by falling from a sidewalk into an unguarded excavation, which discloses on its face that the accident was not due to contributory negligence, and charges that the injuries were solely caused by the negligence of defendants, shows by exclusion that plaintiff's injuries were not caused by the negligence of any third person, but were caused by the negligence of defendant.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 816.\*]

**7. MUNICIPAL CORPORATIONS (§ 796\*)—TORTS—OBSTRUCTIONS IN STREETS.**

In an action against a municipality for injuries received by falling from a sidewalk into an unguarded excavation, where it appears that neither plaintiff nor a third person caused the injury, but that it was caused by the negligence of the city in failing to place a barrier along the edge of the walk, the city cannot urge that a defect in the sidewalk, for which it was responsible, caused the injuries, rather than the failure to maintain a barrier.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1655; Dec. Dig. § 796.\*]

**8. MUNICIPAL CORPORATIONS (§ 755\*)—TORTS—DEFECTS IN STREETS—LIABILITY.**

Municipalities are liable for negligence in the maintenance of public ways.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1587; Dec. Dig. § 755.\*]

**9. MUNICIPAL CORPORATIONS (§ 821\*)—TORTS—DEFECTS IN STREETS—ACTIONS—QUESTIONS FOR JURY.**

The question whether a guard is needed at a particular point to render travel upon a sidewalk ordinarily safe is usually a question for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1749; Dec. Dig. § 821.\*]

**10. MUNICIPAL CORPORATIONS (§ 821\*)—TORTS—DEFECTS IN STREETS—NEGLIGENCE.**

That a town provides arc lights for the vicinity of a sidewalk past a lot containing an excavation, and that these lights, and those from near-by stores and elsewhere, must have aided plaintiff in discerning the general course of the sidewalk, does not conclusively show that the city was not negligent in failing to guard the excavation, where it is shown that the street light at the next street intersection, toward which plaintiff was walking, was not giving any light at the time, and that such light had not been working properly for several days.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1749; Dec. Dig. § 821.\*]

**11. TRIAL (§ 350\*)—VERDICT—INTERROGATORIES—QUESTIONS TO BE SUBMITTED.**

The question whether officers of a town had notice that a street light was out of repair is a mixed question of law and fact, which it is not proper to submit to the jury directly.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 832; Dec. Dig. § 350.\*]

**12. MUNICIPAL CORPORATIONS (§ 823\*)—TORTS—DEFECTS IN STREETS—ACTIONS.**

In an action against a city for injuries received by stumbling on a sidewalk and falling into an unguarded excavation, a finding by the jury that the sidewalk had been used for a long time, by day and night, by a large number of people without accident is not conclusive, the nature of the defect in the sidewalk and unevenness in its surface being definitely described; and, proof of prior use by the general public without injury, if admissible at all, would only be evidence bearing on the question of due care.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1765; Dec. Dig. § 823.\*]

**13. MUNICIPAL CORPORATIONS (§ 823\*)—TORTS—DEFECTS IN STREETS—CONTRIBUTORY NEGLIGENCE.**

Contributory negligence of the plaintiff, in an action against a city for injuries received by falling from a sidewalk into an unguarded excavation, is not shown by findings of the jury that plaintiff was walking within two or three feet of the inner side of the sidewalk, that he met with his accident by tripping as he stepped to one side of the sidewalk to permit a woman to pass, and that he knew there was no barrier between the sidewalk and the excavation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 823.\*]

**14. TRIAL (§ 358\*)—VERDICTS—INTERROGATORIES—CONFLICTING ANSWERS.**

If answers to special interrogatories are contradictory, they will not influence the general verdict.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 856; Dec. Dig. § 358.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

**15. MUNICIPAL CORPORATIONS (§ 823\*)—VERDICT—INTERROGATORIES.**

Where reasonable minds might differ as to whether the conduct of plaintiff was ordinarily prudent, the question of contributory negligence is one of fact, and cannot be settled by answers to interrogatories.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 823.\*]

**16. MUNICIPAL CORPORATIONS (§ 821\*)—TORTS—DEFECTS IN STREETS—EXCAVATIONS—ACTIONS—EVIDENCE—CONTRIBUTORY NEGLIGENCE.**

Evidence, in an action against the city to recover for injuries by falling from a sidewalk into an unguarded excavation, *held* sufficient to go to the jury on the question of contributory negligence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1754-1756; Dec. Dig. § 821.\*]

**17. MUNICIPAL CORPORATIONS (§ 822\*)—TORTS—DEFECTS IN STREETS—CONTRIBUTORY NEGLIGENCE.**

An instruction, in an action against a city to recover for injuries received by falling from an unguarded sidewalk into an excavation, which denies the right of recovery if any want of care or neglect on the part of plaintiff contributes to his injury, is erroneous, as a slight want of care might not deprive him of the right to recover.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1761; Dec. Dig. § 822.\*]

**18. TRIAL (§ 260\*)—INSTRUCTIONS—REPETITION.**

It is not error to refuse to give an instruction which is covered by instructions already given.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**19. MUNICIPAL CORPORATIONS (§ 822\*)—TORTS—DEFECTS IN STREETS—ACTIONS—INSTRUCTIONS.**

In an action against a municipality for injuries received by falling from a sidewalk into an unguarded excavation, an instruction that it was plaintiff's duty to use his vision and every reasonable means of observation within his power to observe obstructions or defects in the walk was properly refused, as it may have been so dark at the time of the accident, it being in the nighttime, that the effort would have been useless, and the instruction in no way describes the obstructions or defects which caused plaintiff to stumble.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1761; Dec. Dig. § 822.\*]

**20. TRIAL (§ 194\*)—ACTIONS—INSTRUCTIONS.**

In an action against a municipality for injuries received by stumbling on a sidewalk and falling therefrom into an unguarded excavation, defendant requested an instruction that if plaintiff knew of the condition of the walk, and attempted to pass a place where it was dangerous in consequence of the darkness, he could not recover for injuries received on account of the condition of the walk, as in such case he took the risk upon himself, and if the condition of the walk was known to plaintiff, he must have known that there was danger in passing over the walk on a dark night, and could not recover. *Held*, that the instruction was properly refused, as it was obscure and invaded the province of the jury.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 194.\*]

**21. MUNICIPAL CORPORATIONS (§ 822\*)—TORTS—ACTIONS—INSTRUCTIONS.**

In an action against a municipality for injuries from falling from a sidewalk into an unguarded excavation, instructions were properly refused which state that one, who knows of a dangerous obstruction in the sidewalk, and attempts to pass, when, on account of the darkness or other hindering causes, he cannot see so as to avoid it, takes the risk on himself, and that if at the time of the alleged injury there was a low place in a vacant lot outside the limits of the sidewalk, and plaintiff had notice of its existence, and undertook to pass over said low place upon the sidewalk, he was bound to exercise the care commensurate with the danger, and if in making such attempt he could not see the low place because of the darkness or other hindering causes, he took upon himself the risk of passing over the sidewalk, as such instructions take no account of the questions of whether plaintiff was injured by the attempt described, as the risk, if any, which he assumed might not have been the proximate cause of his injury, and they also might lead the jury to infer that plaintiff could not recover because he was passing along the sidewalk.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1761; Dec. Dig. § 822.\*]

**22. NEGLIGENCE (§ 136\*)—PROXIMATE CAUSE—QUESTIONS FOR JURY.**

Proximate cause is in the majority of cases a question for the jury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 327; Dec. Dig. § 136.\*]

**23. TRIAL (§ 267\*)—INSTRUCTIONS REQUESTED—FORM.**

It is proper to refuse a requested instruction if it cannot be given precisely as requested.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 671; Dec. Dig. § 267.\*]

**24. MUNICIPAL CORPORATIONS (§ 822\*)—TORTS—ACTIONS—INSTRUCTIONS.**

In an action against a municipality for injuries received by falling from a sidewalk into an unguarded excavation, instructions that the duty of the town to keep its streets and sidewalks in a reasonably safe condition is absolute is not in conflict with an instruction that a municipal corporation is only bound to use reasonable and ordinary care to keep its sidewalks in ordinary safe condition for ordinary public travel, as the duty of the city in respect to its streets is absolute, and it is bound to exercise reasonable care and diligence to accomplish that end.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1758-1762; Dec. Dig. § 822.\*]

**25. MUNICIPAL CORPORATIONS (§ 822\*)—TORTS—ACTIONS—INSTRUCTIONS.**

In an action to recover for injuries by falling from a sidewalk into an unguarded excavation, the court instructed that, if there was an excavation along the side of the walk on the street which came up to the sidewalk, and such condition had existed for two years before the alleged injury, and plaintiff was injured at such place, and that such excavation was unguarded, and had so existed for two years, and that by reason thereof the sidewalk was rendered dangerous for persons traveling along the walk in the nighttime, it was the duty of the town to maintain a guard or barrier along said walk, and that a failure to do so, after notice of such condition, would be negligence. *Held*, that it was not error to give this instruction, although the question whether the sidewalk was unsafe without a guard was a question for the jury, as

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in the hypothesis stated in the instruction the court correctly charged concerning negligence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 822.\*]

**26. MUNICIPAL CORPORATIONS (§ 822\*)—TORTS—ACTIONS—INSTRUCTIONS.**

In an action against a municipality for injuries by falling from a sidewalk into an unguarded excavation, the court instructed that the negligence complained of is in failing to place a guard or barrier along the sidewalk in front of the excavation, and that the jury, in determining whether defendant was guilty of negligence in failing to place said guard, might consider the nature of the lot, its location and condition as to the sidewalk, and all other conditions and surroundings bearing upon the question. *Held*, that the instruction was not erroneous, as it merely directs the attention of the jury to facts that might be considered in determining the question of negligence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 822.\*]

**27. MUNICIPAL CORPORATIONS (§ 791\*)—TORTS—DEFECTS IN STREETS—NOTICE OF DEFECT.**

It is not necessary for a municipality to have notice of a defect in its sidewalk, for it will be liable if it might have obtained notice by the exercise of reasonable diligence, as the law charges it with knowledge under those circumstances.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1047-1051; Dec. Dig. § 791.\*]

**28. APPEAL AND ERROR (§ 232\*)—PRESENTATION IN LOWER COURT OF GROUND OF REVIEW—OBJECTIONS TO EVIDENCE.**

Where evidence introduced by plaintiff is objected to by defendant, and is withdrawn from the jury, and subsequently, on a redirect examination, plaintiff's counsel again introduces the evidence without objection, the question of the admissibility of the evidence is not presented on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 232.\*]

**29. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—INTRODUCTION OF EVIDENCE.**

In an action against a municipality for injuries by falling from a sidewalk into an unguarded excavation, a former owner of the lot containing the excavation testified that there had been a billboard in front of the lot at some time prior to the accident. *Held*, that the admission of the evidence was harmless error.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1050.\*]

**30. DAMAGES (§ 172\*)—PERSONAL INJURIES—EVIDENCE.**

In an action against a municipality for injuries received by falling from a sidewalk into an unguarded excavation, the complaint charged that by the injury plaintiff was permanently disabled and incapacitated from following his usual vocation. *Held*, that evidence as to the amount which plaintiff was earning at the time of the injury was relevant, not as direct proof of damages, but as evidence tending to prove value of plaintiff's time.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 490; Dec. Dig. § 172.\*]

Appeal from Circuit Court, Delaware County; J. G. Leffler, Judge.

Action by Claude Grubbs against the town of Newcastle to recover for injuries received by falling from a sidewalk upon an unguarded excavation. Judgment for plaintiff and defendant appeals. *Affirmed*.

The court in instruction No. 7 charged that, if the jury believed from the evidence that there was an excavation and hole in the vacant lot in question, and that the surface of said excavation and the ground surrounding it were much lower than the surface of the sidewalk, and that the excavation came up to said sidewalk, and that said condition had so existed for a period of two years before the time of the alleged injury to plaintiff, and such place was the place where plaintiff was injured, and that said low ground so adjacent to said sidewalk was without any guard or barrier separating said walk from said low ground, and had so existed for two years prior thereto, and that by reason thereof said sidewalk was rendered unsafe and dangerous for persons walking on said sidewalk in the nighttime in the exercise of due care, then it was the duty of the town to maintain a guard or barrier along said walk, and the failure to do so, after notice of said condition, would be negligence. In instruction No. 8 the court stated that the negligence complained of is in failing to place a guard or barrier across and along the sidewalk in question, and in determining the question of negligence the jury might consider the nature and character of the adjoining lot, its location and condition with reference to the sidewalk, the situation of the buildings about and around the lot, and all other conditions bearing upon the question. Instruction No. 11, requested by defendant and refused, was to the effect that, if plaintiff knew of the condition of the walk, and attempted to pass a place where it was dangerous in consequence of the darkness of the night, he could not complain of the injuries received, as in such case he takes the risk on himself, and if the condition of the sidewalk was known to plaintiff, he could not recover if he attempted to pass over it in a dark night and was injured. Instruction No. 12, requested by defendant and refused, was to the effect that one who knows of a dangerous obstruction in the street or sidewalk, and yet attempted to pass it when, on account of the darkness or other hindering causes, he cannot see so as to avoid it, takes the risk upon himself. Defendant's instruction No. 13, also refused by the court, was that, if at and before the time of the alleged injury to plaintiff there was adjoining the sidewalk in question a low place in a vacant lot outside of the limits of said sidewalk, and if plaintiff had notice of the existence of such low place, and undertook to pass over said low place upon the said sidewalk with full knowledge of its existence, he was bound to exercise care commensurate with any danger that might exist by reason of such condition, and if he attempted to pass the said sidewalk and, on account of the known darkness or other hindering causes, he could not see the same, he took upon himself

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the risk of undertaking to pass over the sidewalk.

Eugene H. Bundy, Thompson & Thompson, and Forkner & Forkner, for appellant. James H. Bingham, Jesse R. Long, Wm. O. Barnard, Wm. E. Jeffrey, and George M. Barnard, for appellee.

GILLETT, J. Action by appellee to recover for personal injuries sustained by him owing to the alleged negligence of appellant in failing to maintain a barrier between a sidewalk and an adjoining low lot. There was an amended complaint in two paragraphs filed, to each of which paragraphs a demurrer for want of facts was overruled. It is contended that the demurrer should have been sustained, for the reasons (1) that to constitute a good complaint for want of a barrier, facts must be stated showing a duty to construct the same, and that this must not be left to inference or conjecture; (2) that the complaint does not aver how low the lot was immediately adjoining the walk, so as to show that a barrier was required; and (3) that the complaint does not show a causal connection between the injury and the want of a barrier, in that it is not shown that appellee's fall off the walk was attributable to the want of a barrier, or that he would have been protected from falling had a barrier been maintained. It is admitted that both paragraphs of the amended complaint are the same, except that the second contains a direct averment of knowledge on the part of the town. We may therefore summarize the material averments of fact of the first paragraph as a proper preliminary to the consideration of said objections. After alleging the corporate character of appellant on, and for a long time prior to, the 4th day of March, 1905, said paragraph alleges that one of the principal streets of said town was Broad street, running east and west through said town, and traversing the main business portion thereof, which said street and the sidewalk thereon were on said day extensively used by the public for travel; that on the north side of said street, between Twelfth and Thirteenth streets, there was on said day, and had been for a long time prior thereto, a vacant lot, abutting upon said Broad street; that adjoining said lot on the west there was a large brick building, three stories high, known as the "K. of P. block," and adjoining said lot on the east there was situated a large brick building, three stories high, known as the "Ward block," and immediately south of said lot, and extending across the same, there was on said day, and for a long time prior thereto, a stone sidewalk; that some of the stones were rough and uneven upon the surface, and in laying and placing said stones the defendant so laid and placed the same, and allowed the same to settle down, so that some of said stones projected above and higher than the others; and

that said walk, by reason of the rough and uneven surfaces and projections as aforesaid, was rendered unsafe and dangerous to the public that traveled thereon; that said lot naturally, and by reason of excavations made therein, was on said day, and for a long time prior thereto, much lower than the surface of the sidewalk, being in some places from 3 to 5 feet lower, and in others from 8 to 10 feet lower than the sidewalk, and that said low and excavated condition of said lot extended up to, and in some places under, the north side of said sidewalk, thereby making an abrupt and perpendicular descent from the surface of said walk to the surface of said lot, and that all of said conditions herein described with reference to said lot and the location and condition of said walk, and the locations of said buildings in relation thereto, existed on said day, and had continuously existed for a period of two years prior thereto; that by reason of said high buildings adjoining said lot, said sidewalk was rendered very dark in the nighttime, and that said sidewalk without any guard, fence, railing, or barriers separating it from said lot was rendered unsafe and dangerous for persons traveling and walking thereon (then follows an averment of negligence in respect to the failure to maintain a guard or barrier); that about 9 p. m. of said day said plaintiff while walking upon said sidewalk when it was very dark, and while in the exercise of due care, struck his foot against a projection in said sidewalk, or upon the uneven surface thereof, and, without any fault or negligence on his part, stumbled and fell from, over, and off said sidewalk and into the hole and excavation aforesaid in said lot, a distance of 10 feet, alighting and striking upon his head, etc., and that said injuries were caused wholly by the fault and negligence of the defendant in failing to place any railing, guard, fence, or barrier along the north side of said sidewalk as aforesaid, to his damage, etc.

Appellants' first point is too general to require us to consider whether the complaint is lacking in a showing concerning the existence of any particular fact necessary to create the duty to construct the barrier. The existence of a duty upon the part of the town might depend upon a number of facts, and it is not fair to this court, or to opposite counsel that what is really mere general assertion should be accepted as a reason. *Pittsburg, etc., R. Co. v. Lighthouse*, 168 Ind. 438, 78 N. E. 1033; *American Food Co. v. Halstead*, 165 Ind. 633, 76 N. E. 251; *Liggett v. Firestone*, 102 Ind. 514, 26 N. E. 201. If we were to reverse this case upon some ground not specified, we should have no assurance that we had done so upon a ground that was in the mind of objecting counsel. Our inference from the citations in support of the point is that it is claimed that the want of a barrier is not shown to have been a proximate cause of the injury, and that the

relation of the lack of a barrier to the injury cannot be shown by inference. With this explanation we shall proceed to consider the objections. It is true that the complaint does not predicate negligence upon the unevenness of or the projections in the sidewalk, nor does it allege that appellee stumbled upon one of the projections theretofore referred to in the complaint as making the sidewalk dangerous. The complaint does, however, allege that by reason of the adjoining high buildings the sidewalk was rendered very dark in the nighttime, and that without any guard or barrier separating it from said lot it was rendered unsafe and dangerous for persons traveling and walking thereon. It is further alleged that the low and excavated condition of the lot, theretofore more particularly described, extended up to, and in some places under, the sidewalk, thereby making an abrupt and perpendicular descent from the surface of the sidewalk down to the surface of said lot. There is an averment of a negligent failure to keep the sidewalk in a safe condition for public travel by the erection of a guard or barrier, and it is then shown that the plaintiff, while it was very dark, was walking upon said sidewalk, and, while in the exercise of due care, struck his foot against a projection in the sidewalk or upon the uneven surface thereof, and without any fault or negligence upon his part, stumbled and fell from, over, and off said sidewalk and into the hole or excavation aforesaid, a distance of 10 feet, alighting upon his head, neck and shoulders, and that his injuries were caused solely by the negligence of the town in failing to place a guard, railing, or barrier along the north side of the sidewalk. We are of opinion that the complaint is not open to the objections indicated. The pleading is to be read in the light of all such ultimate facts as must be necessarily intended from the facts which are well pleaded. A complaint ought to be fairly construed, and it is often the fact that matters of substance are shown by the very narrative of the manner in which an occurrence took place. See section 385, Burns' Ann. St. 1908; Indiana, etc., Co. v. Lippincott, 165 Ind. 361, 75 N. E. 649; Pennsylvania Co. v. Sears, 136 Ind. 461, 34 N. E. 15, 36 N. E. 353; Wabash R. Co. v. Schultz, 30 Ind. App. 495, 64 N. E. 481; 4 Ency. Pl. & Pr. 745. It fairly appears, in our opinion, that a guard was needed to render the sidewalk ordinarily safe, and that it was because of the lack thereof that appellee received his injuries.

Relative to the danger which conditions like the one described subject the public to we may say that the maintenance of an excavation beside a sidewalk, whereby a traveler thereon may, by a misstep, fall into the hole, has been held to be a public nuisance. State v. Society, etc., 42 N. J. Law, 504; Barnes v. Ward, 9 C. B. 392; Pollock on Torts (Webb's Am. Ed.) 635. Of course the municipality is not responsible for what pri-

vate owners do upon their own premises, and it is not in general bound to guard against travelers wandering onto adjoining grounds along the highway; but if the fact be that, by reason of the condition of the adjoining premises, the way itself is rendered substantially unsafe, and the public authorities may reasonably protect travelers from the danger, then it is their duty so to do. This court said, in *Higert v. City*, 43 Ind. 574, 600: "It is abundantly established by the authorities heretofore cited that, if there are dangerous pits, excavations, precipices, walls, stones, or other obstructions situated without the limits of the located highway or traveled track, but so near to it and so situated that they would, without barriers or guards, endanger the safety of passengers using the traveled or made part of the road, in the exercise of ordinary care and diligence to avoid exposure to injury, it is the duty of the city or town to guard against such defects or obstructions by means of a railing or some other proper mode." In *City of Aurora v. Colshire*, 55 Ind. 484, the city was held liable for failing to construct a railing or guard, where it had graded up a street so as to make one side of the fill a stone wall which private owners had constructed upon their own property, the fact being that the plaintiff had fallen from the elevation while passing along the street in the nighttime. It was said by Elliott, J., in *City of Delphi v. Lowery*, 74 Ind. 520, 39 Am. Rep. 98; "The duty resting upon the municipality is not fully discharged by making the traveled part of the highway safe, and such measures as ordinary prudence requires must be taken to prevent persons using ordinary care from falling into dangers placed along the sides, or in close proximity to the termination of the highway of the municipality." In *Alger v. City*, 3 Allen (Mass.) 402, Hoar, J., speaking for the Massachusetts Supreme Court, said: "The true test \* \* \* is not whether the dangerous place is outside of the way, or whether some small strip of ground must be traversed in reaching the danger, but whether there is such a risk to a traveler, using ordinary care in passing along the street, being thrown or falling into the dangerous place that the railing is requisite to make the way itself safe and convenient." In *Bryant v. Town*, 133 N. Y. 70, 30 N. E. 657, the court said: "Negligence on the part of a commissioner of highways may consist as well in the omission to erect barriers in dangerous places in the highway as in leaving the bed of a highway defective." In *Hayden v. Attleborough*, 7 Gray (Mass.) 338, the plaintiff's injury occurred by his falling into a cellar, which was either within the limits of the way, or in such proximity thereto as to render traveling thereon dangerous. The court held that the want of a railing which was necessary for the safety of travelers was a defect in the way itself, and that the

town was liable. So in *Hall v. Town*, 99 Iowa, 698, 68 N. W. 922, 34 L. R. A. 207, a recovery was upheld where the plaintiff, a foot passenger, fell in the darkness from a walk into an excavation, owing to a misstep; and in *Drew v. Sutton*, 55 Vt. 586, 45 Am. Rep. 644, a town was held liable where a traveler drove off a steep and unguarded embankment in the dark, the highway being wrought up to within six inches of the defect. Angell, in his work on Highways (3d Ed.) § 362, says: "It is, moreover, no justification for a defect or obstruction that it is without the traveled path, if from its nature or position it is dangerous to such as use the road. \* \* \* And if a road pass over a bank or bridge, or along the edge of a precipice, it is the duty of a town properly to guard the edge of the road by walls or railings." Where a municipality undertakes to improve a street over its entire width, so as to invite public travel thereon, it is its duty to exercise ordinary care to keep the street reasonably safe for travel from side to side, and if the owners of adjoining property endanger the safety of travelers upon the way, by the creation of dangerous pitfalls adjoining the same, the municipality, since it may reasonably guard against such condition, which is really brought about by the relative heights of the two properties, is clearly liable to a traveler who, while in the exercise of due care, falls into the excavation owing to an accident of travel. See *City of Vincennes v. Spees* (Ind. App.) 72 N. E. 531; *Hall v. Town*, supra; *Zettler v. City*, 86 Ga. 185; *Stockwell v. Fitchburg*, 110 Mass. 305; *Damon v. City*, 149 Mass. 151, 21 N. E. 235; *Bassett v. St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446; *Tiedeman, Mun. Corps.*, § 343; 5 *Thompson, Com. on Neg.* § 6055.

The complaint in question discloses on its face that the accident was not brought about by the contributory negligence of plaintiff, while the charge that his injuries were solely caused by the negligence of the defendant in failing to place a railing or guard along the sidewalk shows by exclusion that his injury was not caused by the negligence of any third person (so far as the street was concerned), but was caused by the negligence of appellant. *Indianapolis, etc., R. Co. v. Houlihan*, 137 Ind. 494, 60 N. E. 943, 54 L. R. A. 787; *Indianapolis, etc., R. Co. v. Waddington*, 169 Ind. 448, 468, 82 N. E. 1030. In the circumstances we are not called on to inquire, so far as the complaint is concerned, as to the precise relation which the projection in the sidewalk had to appellee's fall; for, since it is sufficiently shown that neither appellee nor a third person caused the injury, but that it was caused by the negligence of appellant in failing to place a guard or barrier along the edge of the walk, it results that appellant is not in a position to urge that a defect in the sidewalk, if it was one for which the town was responsible, was a cause, rather than one of the conditions

surrounding the accident. As was said in *City of Elwood v. Addison*, 26 Ind. App. 28, 31, 59 N. E. 47, 48: "We fail to see upon what principle a wrongdoer may be permitted to take advantage of his own wrong by saying that the injury resulted from a more immediate cause, when this immediate cause was put into operation by his own wrongful act." The paragraphs of complaint in this case are by no means models of good pleading, but we think that no one can read them without appreciating the fact that a barrier was required to protect travelers from the chance of falling into the low lot, and that it was for the lack of a sufficient protection that appellant fell off the sidewalk and received his injuries. Although not offered as an objection to the complaint, yet we may here pass upon an insistence that cities and towns are not liable for negligence in the maintenance of public ways. We do not regard this as an open question in this state. *Alken v. City of Columbus*, 167 Ind. 139, 78 N. E. 657, 12 L. R. A. (N. S.) 416, and authorities cited.

The next question which we may consider arises upon the overruling of appellant's motion for judgment in its favor upon the answers of the jury to special interrogatories. We cannot give space to exhibit these findings in this opinion, although we have carefully read them in consultation. The question whether a guard is needed at a particular point to render travel upon the sidewalk ordinarily safe is usually a question for the jury. 15 Am. & Eng. Ency. of Law (2d Ed.) 458. The one hundred and thirty-eighth and one hundred and seventy-first answers to interrogatories seem to be in conflict in respect to what appellee stumbled over. The latter answer implies that it was upon a projection in the sidewalk. It is found that he stumbled while stepping to the north of the sidewalk to avoid a woman, who was walking in the opposite direction. It is also found that the sidewalk was dark. It is true that the town had provided arc lights for the general vicinity, and that these lights, and those from near-by stores and elsewhere, must have been an aid to appellee in discerning the general course of the sidewalk, and yet the street light, at the street intersection toward which appellee was walking, was not giving forth any light at the time, and it is found that said light had not been working properly at times for several days, so that there not only existed the danger at the side, but some degree of darkness entered into the problem of whether, in the absence of a barrier, the way as maintained was ordinarily safe for public travel. In these circumstances, to say nothing of the condition of the sidewalk itself, we can by no means say that appellant was not negligent. The finding upon the question as to whether the officers of the town had notice or knowledge that said street light was out of repair is simply "We do not know"—an altogether in-

sufficient answer. Besides, the question of notice is a mixed question of law and fact, concerning which it is not proper directly to ask the jury. The jury might also have concluded that it was not ordinarily prudent to maintain such a defect, trusting to artificial light to protect travelers using the sidewalk. We cannot regard the findings that the sidewalk in question had been used for a long time, by day and by night, by a large number of people, without accident, as conclusive. In such a case as this, where the nature of the alleged defect can be definitely appreciated, proof of prior use by the general public without injury, if admissible at all, can at the most only be an evidentiary circumstance bearing on the question of due care. *Bauer v. City*, 99 Ind. 56. See *Aldrich v. Pelham*, 1 Gray (Mass.) 510.

We come now to the question whether the findings show as a matter of law that appellee was guilty of contributory negligence. In our opinion they do not. It is true that he was walking within two or three feet of the inner side of the sidewalk, and that he met with his accident by tripping, as he stepped to the north of the sidewalk, as it is found that it was necessary for him to do, to permit a woman to pass. It is also true that he knew there was no barrier between the sidewalk and the lot; but we do not think that the answers show that he knew there was anything in the condition of the sidewalk which might cause him to stumble. The answer to interrogatory No. 163 does not go this far, and we cannot, in construing answers to interrogatories, draw the inference of knowledge from the fact of prior opportunities to acquire it. If he knew of the existence of any unevenness in the edges of the stones or upon their surface, the fact may have been that they were nearer the edge than his general course of travel, or more intensified on the north side, or that he supposed that they were to the north of him. As to his looking, it cannot be said, in view of the answer to interrogatory 118, that as he passed west from the corner of the lot he did not attempt to know or ascertain how near the edge he was walking. If answers are contradictory they will not influence the general verdict. He may have been looking straight ahead of him without looking at anything in particular, and yet have been approximately advised by the lighted store front, facing the street upon the next lot, as to his course of travel. Making due allowance for the fact that in meeting a person in the darkness he doubtless had but little opportunity for deliberation, we are of opinion, upon the whole, that it may fairly be said, in view of the fact that all persons take some risks, that reasonable minds might differ as to whether his conduct was ordinarily prudent, and therefore the question of negligence should be treated as one of fact, and not as settled by the answers to interrogatories. In *Kelly v. Black-*

*stone*, 147 Mass. 448, 18 N. E. 217, 9 Am. St. Rep. 730, where, after nightfall, the plaintiff left the path she was walking on because she heard persons approaching on that side of the road, and went along a path on the other side, which led by a dangerous slope, the court said: "A traveler may have his attention momentarily diverted from the defects in the way, even if known to him, and yet be in the exercise of due care." So in *Van Camp v. KeokuK*, 130 Iowa, 716, 107 N. W. 933, where a boy ran by the plaintiff, causing her to step into a hole, the existence of which she knew, the court said that the circumstance might be regarded as such a diversion of her attention as, in the judgment of a jury, might absolve her from the charge of contributory negligence. See, also, *City of Valparaiso v. Schwerdt*, 40 Ind. App. 608, 82 N. E. 923, for illustrative cases. Assuming that appellee was substantially three feet from the edge as he walked along, as we may do in construing the answers to interrogatories most favorably to appellee, and it might at first thought seem, in view of the fact that the lot was low, that there was some degree of danger in so walking, but that, after all, would be but the practical equivalent of walking in the middle of a sidewalk six feet wide, and people walking abreast, or passing each other, often walk much nearer to the edge of such sidewalks. In view of appellee's probable want of time for deliberation, as he stepped aside to avoid the woman, it is our conclusion, as indicated, that the answers to interrogatories failed to make out a case of contributory negligence. Appellant was not entitled to judgment on the answers to interrogatories.

We do not think that the evidence makes out the defense of contributory negligence. As we understand appellee's testimony, it was at the time he fell that he was traveling two or three feet from the north edge of the sidewalk; that just as he stepped one side to pass the woman, he struck his foot against some obstruction and fell. The sidewalk was dark, according to his testimony, and he was almost upon the woman referred to when he first saw her. He testified on cross-examination that as he was passing her and looking ahead at no special object, he struck his foot on some obstacle on the sidewalk and pitched head foremost into the lot. When asked whether he turned his head either to the right or left as he "walked down there" (meaning, as we understand it, before he turned out), he answered, "I expect I did." He admitted he knew there was no barrier on the north side of the street, and he answered in the affirmative the next question as to whether he had seen and observed the condition of the "street" in the many times that he had passed over it, but we do not think that this answer, susceptible as it is of referring to the pavement (the condition of which was a pertinent circumstance), was necessarily understood by the jury to be

an admission that he knew whatever was shown by other witnesses as to the condition of the surface of the walk. So far as we have observed, he was not examined on this question as to his actual knowledge, so that we do not have his recollection, if any, with reference thereto. But granting that he had knowledge, there is evidence tending to show that the walk had been worn somewhat within the general course of travel; and, in view of the fact that the burden was on appellant to show contributory negligence, that all persons take slight risks, and that appellee's attention was diverted, we cannot say, as a matter of law, that he was guilty of contributory negligence. See *Turner v. Buchanan*, 82 Ind. 147, 42 Am. Rep. 485; *Evansville, etc., R. Co. v. Crist*, 116 Ind. 446, 19 N. E. 310, 2 L. R. A. 450, 9 Am. St. Rep. 865. It was for appellant to show that appellee negligently omitted to take sufficient care for his own safety, and we cannot draw adverse presumptions from any silences of the record as to the care he took. There was evidence sufficient to show appellant's negligence and to support the verdict. There was some evidence to the effect that the sidewalk was dark. The precise degree of darkness, however, is immaterial, in connection with the question under consideration, for we should regard the question of negligence in failing to maintain the guard as one for the jury, even if it had been broad daylight. The accidents of travel are within the contingencies which a municipal corporation must consider in determining whether it is reasonably prudent to leave an excavation adjoining a way without guard or barrier. 5 *Thomp. Com. on Neg.* § 6055.

The court did not err in refusing instructions numbered 1, 6, 8, 9, 10, 11, 12, 13, 14, and 15 tendered by appellant. Of these instructions No. 1 was erroneous because it denied the right of recovery if any want of care or neglect contributed to appellee's injury. A slight want of care might not fall below the standard. *Evansville, etc., R. Co. v. Crist*, supra; *Turner v. Buchanan*, supra; *Lawless v. Connecticut River R. Co.*, 136 Mass. 1. No. 6 was sufficiently covered in instructions given. Said instruction No. 8 was erroneous because it instructed that it was appellee's duty to use his vision and every reasonable means of observation within his power to observe obstructions or defects in the walk, whereas it may have been so dark that the effort would have been useless. Besides this instruction in no way describes the obstructions or defects which caused appellee to stumble, and we cannot affirm that knowledge of the existence of a possible slight defect or obstruction, over which appellee fell, made it his duty, as a matter of law, to look down. There was some conflict in the evidence as to the condition of the walk, and there was evidence that the walk was not so rough where it had been worn by travel, so that it might have been

inferred, from the evidence of some of the witnesses, that the walk was ordinarily safe, except perhaps at the point where appellee stepped near the edge, and consequently out of the beaten path of travel, where the circumstances required him hastily to step aside, to avoid the woman whom he met. We cannot say that he was bound to use his powers of observation to avoid the dangers of a new situation, concerning which there may not have been sufficient time to take thought. The refusal to give instruction No. 9 was rendered harmless by the findings of the jury. Instruction No. 10 was covered, in its essential features, by the court's No. 5. Instruction No. 11 was obscure, and in some respects invaded the province of the jury. It is also within the condemnation of the cases last cited. Instructions 12 and 13 were properly refused, because in instructing that in the circumstances therein set forth appellee took the risk upon himself they take no account of the question whether he was injured thereby. The risk, if any, which he assumed, may not have been the proximate cause of his injury. Proximate cause is, in the majority of cases a question for the jury (*Davis v. Mercer Lumber Co.*, 164 Ind. 413, 73 N. E. 899; *Chicago, etc., R. Co. v. Pritchard*, 168 Ind. 398, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. [N. S.] 857), and, as the court below properly said to the jury in one of its instructions, "The two essential elements of contributory negligence are want of ordinary care by the plaintiff and a causal connection between such want of care and the injury complained of." Said instructions were also calculated to lead to the inference that appellee could not recover because he was passing along the sidewalk. He may have assumed the risk of not being able to walk along the sidewalk without stepping off, but his legal rights would be quite different where, owing to some sudden exigency in travel, he stumbled and fell from the sidewalk. *Cannon v. Lewis*, 18 Mont. 402, 45 Pac. 572. Appellant's instruction No. 14 was open to some of the objections pointed out to instruction No. 8. Concerning the instructions refused, we may also add that it is not error to refuse an instruction unless it ought to be given precisely in the terms prayed. *Knapp v. State*, 168 Ind. 153, 79 N. E. 1076. Instruction No. 15 was sufficiently covered by No. 2 of the court's instructions.

It is contended that instructions numbered 4, 5, 7, 8, 12, 13, 16, 18, and 20, given by the court, were erroneous. The objections urged to instructions 4 and 5 is that the duty of the town in respect to keeping its streets and sidewalks in a reasonably safe condition is stated in absolute terms, and that these instructions are in contradiction of the court's instruction No. 6, wherein the jury was told that a municipal corporation is only bound to use reasonable and ordinary care to keep its sidewalks in ordinarily safe condition for ordinary public travel. If this is error, we

may remark that in appellant's instruction No. 10 there occurs the statement that the corporation "is simply required to keep its streets and sidewalks in a reasonably safe condition for persons traveling in the usual routes by day and night and using ordinary care." We do not think, however, in view of the instructions given, that the jury could have been misled. As was pointed out in *Turner v. City*, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453, the duty of the city in respect to its streets is absolute, and it is bound to exercise reasonable care and diligence to accomplish that end. Apparently the same objection was urged for reversal in *City of Macon v. Holcomb*, 205 Ill. 643, 69 N. E. 79, and the court there said: "It is said the third imposed upon the city the absolute duty of keeping its sidewalks in repair, whereas the law simply required it to exercise diligence in that regard. Concerning the instructions as a whole, it is not subject to the criticism made; but, if it were otherwise, the law is correctly stated in several other instructions given. The most that can be justly said as to either the second or third of plaintiff's instructions is that, standing alone, they might have been calculated to mislead the jury to the prejudice of the defendant." If instructions 4 and 5 were abstractly misleading, however, we should not be disposed to reverse this case, for the low and unguarded lot, for a long time in that condition, was a constant challenge to the municipal authorities to consider whether, in view of the absence of a barrier, the sidewalk, as it actually existed, furnished an ordinarily safe place for public travel. The condition of the sidewalk and the adjoining lot had continued as it was for a long period of time, and we assume that it was the duty of the officers of the city to take notice of the fact that the street light upon the next corner might sometimes not be burning, and therefore, being challenged to consider the problem, there really appears to have been no litigated question of notice in the case, and therefore the question was whether the duty had been discharged of making the sidewalk reasonably safe. What we have said concerning instructions 4 and 5 will suffice to dispose of a like objection to instruction 20. It was not error to give instructions Nos. 7 and 8. The question whether the sidewalk was unsafe and dangerous without a guard was a question for the jury, but in the hypothesis stated in instruction No. 7, the court correctly charged concerning negligence, and instruction No. 8 merely directed the attention of the jury to facts that might be considered in determining the question. The nature of the excavation was sufficiently shown by the evidence. We have already had occasion, in the course of this opinion,

to rule on the proposition of law involved in instruction No. 12. As to instruction No. 13, we have to say that it was not necessary for the jury to find that the town in fact had notice of the defect. If the town might have obtained notice by the exercise of reasonable diligence, the law charges it with knowledge. *City of Michigan City v. Phillips*, 163 Ind. 449, 71 N. E. 205. Instructions 16 and 18 were correct as far as they went, and instruction No. 20 was applicable to certain phases of the evidence. In concluding our consideration of the instructions of the court we may say that, considered as a whole, it appears to us that the jury was very fairly instructed.

Two or three minor questions concerning the introduction of evidence remain. Complaint is made that the court permitted a witness to prove that her father and mother carried a lighted lantern in going to her house on the night of the accident. It appears that the question was saved on the introduction of the witness' testimony in chief. On cross-examination, however, after it appeared that the witness' claim of knowledge was based on the fact that the lighted lantern was on her porch when she reached home, the court, on motion, "withdrew from the jury all that this witness said about her father coming to her house carrying a lighted lantern." On redirect appellee's counsel went into the subject again, but this time without objection. In these circumstances we must hold that the question of the admissibility of the evidence is not presented.

Complaint is made that the court permitted a prior owner of the lot to testify that there had been a billboard in front of it at some time anterior to the accident. It appears to us that the evidence was harmless.

Finally, it is urged that the court erred in permitting a witness to testify to the amount which plaintiff was earning at the time of the injury. The complaint charged that by reason of plaintiff's injuries he was permanently disabled and incapacitated from following his usual vocation. The evidence showed that at the time of his injury, and for some time prior thereto, appellee was in the employ of a piano company; that he was principally engaged in boxing and shipping pianos, but that he did some carpentry work about the plant; that he was earning \$12.25 per week, and that his services were worth that much. In our opinion the objection is not well taken. The testimony was relevant, not as direct proof of damages, but as evidence tending to prove the value of appellee's time. *City of Logansport v. Justice*, 74 Ind. 373, 39 Am. Rep. 79; *Braithwaite v. Hall*, 168 Mass. 38, 46 N. E. 398; *Illinois Steel Co. v. Ostrowski*, 194 Ill. 376, 62 N. E. 822.

We find no error. Judgment affirmed.

(200 Mass. 384)

**BOWLER v. PACIFIC MILLS.**(Supreme Judicial Court of Massachusetts.  
Essex. Jan. 5, 1909.)**1. NEGLIGENCE (§ 32\*)—USE OF PREMISES—LICENSEES.**

A manufacturing company laid out a street over its land for its own purposes. It was largely used by its employes and others in connection with its business. It was impracticable to exclude the public from the street. Notices were posted and maintained, at different places where other streets opened into it, indicating that it was a private way. *Held*, that the use of the street by the public was permissive only, and the members of the public while on the street were licensees.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 43; Dec. Dig. § 32.\*]

**2. NEGLIGENCE (§ 32\*)—DUTY TOWARDS LICENSEE.**

Where the use of a street over defendant's land by the public was permissive only, so that the public had only the rights of licensees, the measure of defendant's duty was to refrain from doing a licensee an intentional injury and from wantonly and recklessly exposing him to danger.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 42; Dec. Dig. § 32.\*]

Report from Superior Court, Essex County; George A. Sanderson, Judge.

Action by Michael Bowler against the Pacific Mills. There was a verdict for defendant, pursuant to the direction of the court, and the cause was reported to the Supreme Judicial Court. Judgment on the verdict.

W. J. Bradley and A. X. Dooley, for plaintiff. J. P. Sweeney and L. S. Cox, for defendant.

**KNOWLTON, C. J.** The question principally argued in this case is whether the plaintiff was traveling on Canal street by invitation of the defendant, or merely as a licensee. The street was laid out and constructed by the defendant, over its own land, for its own purposes, and it has been very largely used by its employes and others, in connection with the business carried on in its mills. The testimony was uncontradicted that it would be impracticable to exclude the public from the street without interfering with the convenient use of it by the defendant and others in the defendant's business. Notices have been posted and maintained at different places where other streets open into it, indicating that it is a private way. Upon the authorities, it must be held that the very extensive use of the street by the public has been only permissive, and that members of the public, while on the street, have only the rights of licensees. *Moffat v. Keeney*, 174 Mass. 311, 54 N. E. 850; *Harobine v. Abbott*, 177 Mass. 59, 58 N. E. 284; *Weldon v. Prescott*, 187 Mass. 415, 73 N. E. 536, 105 Am. St. Rep. 413; *Reardon v. Thompson*, 149 Mass. 287, 21 N. E. 369; *Redigan v. Boston & Maine Railroad*, 155 Mass. 44, 28 N. E. 1133, 14 L. R. A. 276, 31 Am. St. Rep.

520; *Stevens v. Nichols*, 155 Mass. 472, 29 N. E. 1150, 15 L. R. A. 459. In *Sweeney v. Old Colony Railroad Company*, 10 Allen, 368, 87 Am. Dec. 644, there was, in addition to the construction of the crossing, an invitation by the signal of the flagman. The grounds of distinction between *Murphy v. Boston & Albany Railroad Company*, 133 Mass. 121, *Hankens v. Boston & Albany Railroad Company*, 147 Mass. 495, 18 N. E. 218, and *Sweeney v. Old Colony Railroad Company*, *ubi supra*, and cases like the present, are pointed out in the three cases first above cited. It is that in these last cases there was an implied representation that the place was a public street which might be used with safety, and an inducement to use it as such, which inducement, like an express invitation, creates a duty to provide for the safety of the users. In the present case the public were informed by the notices along the street that this was a private way.

The measure of the defendant's duty to the plaintiff was to refrain from doing him an intentional injury and from wantonly or recklessly exposing him to danger. It might use the street and carry on its business and conduct its operations as it chose, so long as it did not transgress in this particular.

It is not contended that the injury to the plaintiff was inflicted intentionally or wantonly, and there is no evidence of a breach of duty on the part of the defendant.

Judgment on the verdict.

(200 Mass. 450)

**CALLAGHAN v. BOSTON ELEVATED RY. CO.**(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 6, 1909.)**STREET RAILROADS (§ 98\*)—INJURIES TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.**

Plaintiff, a cripple about 60 years old, who walked slowly with a crutch, started to cross defendant street railroad's track, though he saw a car approaching at a speed of from six to nine miles an hour. He did not look again, or pay any attention to the car, and disregarded warnings given him in loud tones, when he was within four or five feet of the track, by a bystander. There was no other noise than that of the approaching car. *Held*, that plaintiff was guilty of contributory negligence, precluding recovery.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 204-208; Dec. Dig. § 98.\*]

Report from Superior Court, Suffolk County; William Schofield, Judge.

Action by Dennis J. Callaghan against the Boston Elevated Railway Company. A verdict for plaintiff was set aside, and pursuant to a stipulation made at the trial the case was reported for determination by the Supreme Judicial Court. Judgment for defendant.

W. J. O'Donnell and T. F. Collins, for plaintiff. Robert G. Dodge and Sanford H. E. Freund, for defendant.

**KNOWLTON, C. J.** The only question in this case is whether there was evidence that the plaintiff was in the exercise of due care. He was a man of about 60 years of age, who, by reason of a spinal disease, had been a cripple all his life, and walked slowly with a crutch. The accident happened at the corner of C street and Sixth street in South Boston, which streets cross each other at right angles, C street running nearly north and south and Sixth street running nearly east and west. Sixth street is 50 feet and 4 inches wide between the outer lines on each side, and 34 feet wide from curb to curb. There is a single line of railway tracks in each street. The accident happened on September 25th, at about 10 o'clock in the evening of a bright, clear night, at a place which was well lighted by electricity. The plaintiff was about to cross on the easterly side of C street over Sixth street toward the south. There was no team or vehicle of any kind in the vicinity except the car that struck him, and the street was straight, and free from obstructions between him and the car all the time that he was there before the accident. According to his own testimony, when he was about to leave the sidewalk on the northerly side of Sixth street he looked up the street and saw a lighted car a considerable distance away, and he thought he had time to cross. According to the testimony the car was coming pretty fast, but the highest estimate of its speed given by any of the witnesses was nine miles an hour. Others estimated it at about 6 miles an hour. He started to cross the street, walking very slowly with his crutch, and according to his testimony he did not look again or pay any attention to the approaching car before it struck him. He lived on the southerly side of Sixth street, just westerly of C street, and the testimony of his witnesses showed that, after leaving the sidewalk to cross over, he turned away from the cross-walk and started to go diagonally towards his house. One of his witnesses who stood on the southerly side of Sixth street testified that when the plaintiff got within 4 or 5 feet of the track the witness saw that he was in danger of being struck, and called to him "Hi, hi!" in a loud tone, and started to run to his assistance; that when he reached him the car had just struck him; that he "just got a hold of him by the arm and pulled him as the car struck him." Another witness, called by the plaintiff, who was standing near this witness, testified to substantially the same facts. Although both the witnesses said that the warning was given in a loud tone, the plaintiff paid no attention to it. It was undisputed that there was no other noise except that of the approaching car.

The plaintiff's crippled condition called for peculiar care in crossing before an approaching car. The undisputed evidence indicates

that he took no care from the time when he saw the car from the sidewalk until after the accident. The language of the opinion in *Hollan v. Boston Elevated Railway Co.*, 194 Mass. 74, 80 N. E. 1, 11 L. R. A. (N. S.) 168, is peculiarly applicable to the evidence in this case, and the decisions in *Stackpole v. Boston Elevated Railway Company*, 193 Mass. 562, 79 N. E. 740, *Fitzgerald v. Boston Elevated Railway Company*, 194 Mass. 242, 80 N. E. 224, *Madden v. Boston Elevated Railway Company*, 194 Mass. 491, 80 N. E. 447, *Casey v. Boston Elevated Railway Company*, 197 Mass. 440, 83 N. E. 867, and *Byrne v. Boston Elevated Railway Company*, 198 Mass. 444, 85 N. E. 78, justify the presiding justice in setting aside the verdict for the plaintiff.

Judgment for the defendant.

(200 Mass. 318)

#### COMMONWEALTH v. EDGARTON.

(Supreme Judicial Court of Massachusetts.  
Bristol. Jan. 4, 1909.)

##### 1. CRIMINAL LAW (§ 400\*)—EVIDENCE—BEST EVIDENCE—TALLY SHEETS.

In a trial for falsely counting ballots as an election officer, the tally sheets used in the precinct were properly admitted as the best evidence of accused's count and report.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 400.\*]

##### 2. CRIMINAL LAW (§ 1144\*)—APPEAL—PRESUMPTIONS—OBEDIENCE TO INSTRUCTIONS.

A jury is presumed to have followed an instruction that certain acts should not be considered against accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3083, 3084; Dec. Dig. § 1144.\*]

##### 3. CRIMINAL LAW (§ 398\*)—OFFENSES BY ELECTION OFFICERS—EVIDENCE—OBSERVATIONS BY BYSTANDERS.

Bystanders, who were merely interested as citizens, could testify on the issue as to whether accused as an election officer counted ballots wrongfully.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 398.\*]

##### 4. CRIMINAL LAW (§ 398\*)—OFFENSES BY ELECTION OFFICERS—EVIDENCE.

In a trial for falsely counting and reporting ballots as an election officer, the registrars who recounted the votes could testify respecting their recount; any one who had counted the ballots, or followed the count or tally, being competent to testify thereto.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 398.\*]

##### 5. CRIMINAL LAW (§ 400\*)—OFFENSES BY ELECTION OFFICERS—EVIDENCE—BALLOTS.

In a trial for falsely counting and reporting ballots, the ballots themselves were not the only evidence of the number cast.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 400.\*]

##### 6. WITNESSES (§ 255\*)—REFRESHING MEMORY—ELECTION TALLY SHEETS.

In a trial for falsely counting and reporting ballots as an election officer, it was proper to allow registrars who testified to a recount to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

refresh their recollection by referring to the tally sheets used by them.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 874-890; Dec. Dig. § 255.\*]

**7. WITNESSES (§ 257\*)—ADMISSIBILITY OF WRITING.**

In a trial for falsely counting and reporting ballots as an election officer, the jury were properly allowed to inspect sheets used by the registrars who made a recount, to assist them in passing upon the registrars' credibility.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 892; Dec. Dig. § 257.\*]

**9. ELECTIONS (§ 329\*)—OFFENSES BY OFFICERS—RECOUNT—PROCEEDINGS—MATERIALITY.**

In a trial for falsely counting and reporting ballots as an election officer, it is immaterial that accused had no notice of, and was not present at, a recount relied on to show his guilt, or that certain statutory requirements were not observed at the recount, where failure to observe the requirements did not affect the correctness of the recount.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 329.\*]

**9. ELECTIONS (§ 329\*)—OFFENSES BY OFFICERS—EVIDENCE—SUFFICIENCY.**

Evidence held to warrant a finding that accused as an election officer knowingly made a false count and report of votes.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 329.\*]

**10. ELECTIONS (§ 329\*)—"COUNTING" BALLOTS—"CANVASSED."**

That accused as an election officer made marks on a tally sheet as another officer called off the votes warranted a finding that accused "counted" and "canvassed" the votes; it being unnecessary that he handle each ballot.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 329.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 951, 952.]

**11. CRIMINAL LAW (§ 1156\*)—APPEAL—REVIEW—REFUSAL OF NEW TRIAL—DISCRETION OF TRIAL COURT.**

A decision of the trial judge denying a new trial, asked because of a separation of the jury, is not reviewable, unless there was error as a matter of law in his rulings or findings.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1156.\*]

**12. CRIMINAL LAW (§ 927\*)—NEW TRIAL—GROUNDS—SEPARATION OF JURY.**

The trial judge did not abuse his discretion in refusing a new trial, asked because, while the jury were out and 11 were taken to a meal, the twelfth was allowed to remain alone in the jury room with the key on the outside of the door, where the judge found that the remaining juror acted in good faith and saw or spoke to no one, and that nothing occurred during their absence to influence his verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2257-2262; Dec. Dig. § 927.\*]

**13. CRIMINAL LAW (§ 913\*)—NEW TRIAL—GROUNDS—HARMLESS ERROR.**

Sound public policy requires that the safeguards which have been established to insure verdicts free from all improper influences be strictly maintained; but a new trial should not be granted for unintended and unprejudicial irregularities.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 913.\*]

Exceptions from Superior Court, Bristol County; William Schofield, Judge.

William J. Edgerton was convicted of misconduct as an election officer, and he brings exceptions. Exceptions overruled.

James M. Swift and Frank B. Fox, for the Commonwealth. John B. Lowney and Joseph Walsh, for defendant.

**MORTON, J.** This was an indictment in two counts under St. 1907, pp. 725, 767, c. 580, §§ 270, 410, charging the defendant with willfully performing his duty as an election officer contrary to law by knowingly making a false count of votes on the license question, and by knowingly making a false report of the result of a canvass of votes on said question at the municipal election for the city of New Bedford, held December 3, 1907.

There was a verdict of guilty on each count, and the case is here on exceptions by the defendant to the refusal of the court to direct a verdict for the defendant, and to the refusal of the court to give other rulings requested by the defendant; also to the admission of evidence, and to the findings of fact and rulings of law made upon a motion for a new trial, which was filed by the defendant.

It appeared that the defendant was duly appointed an election officer and acted as such at the election in question in precinct 9 of ward 3, and that he was assigned by the warden or presiding officer to work with one Jennings in canvassing and counting the ballots which were cast in that precinct. It also appeared that after the polls were closed the ballots were taken from the ballot box and arranged by the election officers, of whom, including the defendant, there were six, in blocks or packages of 50 ballots each. There was testimony tending to show that in canvassing and counting the ballots the course pursued by Jennings and the defendant was as follows: Jennings would take a block of ballots and call off from each ballot the names of the persons voted for, and "yes" or "no" or "blank" according as the license question was answered "yes" or "no," or not at all, and the defendant would make a mark upon a tally sheet under the name of the person voted for and against the word "yes" or "no" or "blank," according to the announcement made by Jennings. There was a tally sheet for each block or part of a block. After a block had been thus canvassed and counted the defendant would slide the tally sheet over to Jennings, who would announce the totals, and the defendant would enter the figures thus given in a column headed "totals" at the right of the tally sheet. The tally sheet was then signed by Jennings and the defendant and folded up and placed with the ballots in the envelope

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

from which the latter had been taken, and afterwards the totals on each tally sheet were entered by the clerk on a sheet called the total vote sheet. After the ballots had all been counted they were placed in a box which was sealed up and sent with the tally sheets, total vote sheets, a book called the precinct book containing the result of the votes cast in the precinct, as ascertained by the election officers, the check lists, unused ballots and ballot box, to the city clerk. After the election there was recount of the ballots by the registrars of voters on the license question, and the results of their count of blocks 3, 5 and 6 differed materially from the results of the counts of those blocks as shown by the tally sheets kept by the defendant. These blocks and block 9 were specified by the district attorney, in answer to the defendant's motion for a bill of particulars, as those in regard to which the alleged false count and report were made by the defendant. There was also other evidence tending to show that the defendant's count of these blocks was not correct. All of the other election officers were summoned by and testified as witnesses for the commonwealth. The defendant was a witness in his own behalf.

1. The city clerk was called as a witness by the district attorney, and produced the tally sheets, 12 in number, used by the election officers in the precinct on the day of election, and they were offered in evidence by the district attorney, and admitted, subject to the defendant's objection and exception that they were not competent to prove the charges contained in the indictment and specifications. It was part of the commonwealth's case to show, if it could, that the count and report made by the defendant were wrong. In order to do that it was necessary to show what the count and report made by the defendant were. The tally sheets kept by him of the blocks specified were the best evidence of the count and report made by him of the ballots contained in those blocks, and were plainly competent. No objection was made to the admission of the tally sheets on the ground that they included tally sheets kept by other officers. If there had been, no doubt such tally sheets would have been excluded. Moreover the court carefully instructed the jury that any acts or irregularities in which the defendant took no part should have no effect against him, and the jury must be presumed to have followed the instruction thus given.

2. The testimony of the bystanders Gar-side and Cram was plainly admissible on the issue whether the defendant wrongly counted and reported the ballots counted and reported by him. The fact that they were not election officers and were interested in the election only as citizens did not render their testimony as to what they observed in regard to the defendant's conduct inadmissible.

3. The testimony of the registrars of voters in regard to the recount was also plainly admissible on the question whether the ballots had been correctly counted and reported. The defendant contends that the ballots themselves should have been produced for the jury to count as the best evidence. It may be doubted whether their production could have been compelled. But, however that may be, the question was whether the tally kept by the defendant was a correct tally or count, and any one who had counted the ballots or who had followed the count or tally kept by another could testify thereto, as to any other competent fact within his own observation. While in a sense the ballots themselves were the best evidence of the number cast pro and con on the license question, they were not from the nature of the case the only evidence. The number was a matter of computation and the computation could be testified to by any one who made it. The registrars were properly allowed to refresh their recollection by referring to the sheets used by them at the recount, and the jury were properly allowed to inspect the sheets for the purpose of assisting them in passing upon the credibility of the registrars. The jury were expressly instructed that the sheets thus used by the registrars to refresh their recollection were not evidence and could not be considered by them. The fact that the defendant had no notice of and was not present at the recount was immaterial. The statute contains no provision for such notice in a case like the present. St. 1907, p. 736, c. 560, § 300. Neither was the fact that certain requirements of the statute were not observed at the recount material. The legality or illegality of the recount was not in issue; and the failure to observe the statutory requirements which it was contended were not observed was not shown and could not have been found to have affected the correctness of the recount.

4. The defendant asked the court to instruct the jury that there was no evidence that he counted any votes, or knowingly and willfully made a false count, or knowingly made a false report of any count or canvass of votes. The court refused to do so and the defendant excepted. Full instructions were given to which no objection was made except to the refusal to give the above instructions. We think that the presiding judge was right in refusing to give the instructions requested. It could not have been ruled that there was no evidence that the defendant counted any votes or made a report of a count and canvass. He made marks on the tally sheet as Jennings called off the answers, for the purpose of keeping an account of the votes, and the jury were warranted in finding that this constituted a counting and canvassing of the votes by him. It was not necessary that he should handle

each ballot in order to count and canvass the votes. The count and canvass was none the less a count and canvass by the defendant because made by Jennings and himself, each assisting the other, Jennings handling the ballots and the defendant keeping the count. The jury were also warranted in finding that the tally sheets signed by Jennings and the defendant constituted and were intended to constitute reports of the results of the votes counted and canvassed by them and were so regarded by those charged with the duty of declaring the results of the election. There was also evidence warranting the jury in finding that the defendant willfully and knowingly made a false count and canvass and a false report of the votes counted and canvassed by him. There was testimony tending to show that in blocks 3, 5 and 6 there was an error of 42 votes—the recount showing 21 less votes in favor of license, 15 more against it, and 6 more blanks. The total number of ballots in these three blocks was 150. Jennings was a witness for the commonwealth and testified in substance that he called off the votes correctly. The whole number of votes in the city on the license question was upwards of 8,000. The majority for license on the original count of the whole vote was 180. On the recount this was reduced to 93. Of the 87 votes thus shown to have been wrongly counted for license, 38, or almost one-half, were shown or could be found to have been shown to be in the three blocks of ballots of 50 each, counted and canvassed by the defendant. This warranted the jury in finding either that he was grossly incompetent or that the errors were committed by him willfully and knowingly. There was also evidence tending to show that, after he became aware that Garside and Cram were following the count, the defendant kept the tally correctly. There was likewise evidence of conversation with and statements made by the defendant which the jury may have thought more consistent with guilty knowledge on his part than with any other reasonable explanation. The rulings requested by the defendant could not therefore have been properly given.

5. The jury retired to deliberate upon their verdict about 11 o'clock. They were all taken to dinner. About 7 o'clock in the evening the officer in charge of them asked if they cared for supper, and upon being told that they did, made preparations accordingly. One jurymen said that he did not feel well and did not care for supper and would stay and smoke. The other jurors were taken to supper by the officer and this jurymen was left in the jury room, which was locked and the key was left outside near the door, in its accustomed place. When the jury returned the juror was found in the jury room with the door locked. The jury deliberated all night and did not reach a verdict until

after breakfast about 10 o'clock the next morning. The court had adjourned when the jury were taken out to supper, and the matter of leaving the juror alone in the jury room was not therefore brought to its attention at that time. After the verdict was rendered the defendant filed a motion for a new trial, one ground of which was that the jury had been allowed to separate after the case had been submitted to them and before they had arrived at their verdict. The court overruled the motion and the defendant excepted thereto. The decision of the presiding judge is not open to revision here unless there was as matter of law some error in his rulings or findings. *Nichols v. Nichols*, 136 Mass. 256. He found as matter of fact that the officer and the juror acted in good faith and the reasons which the juror gave for not wanting to go to supper were true; that he remained locked in the jury room alone all the time the other jurors were absent, saw no one and spoke to no one; and nothing occurred during their absence to influence his mind in arriving at a verdict. The judge also found that there was no talk between the other jurors at the supper table in regard to the case, and that, even if some of the jurors did talk about the case in going from and returning to the court house, what was said was of a casual and informal nature and could not reasonably be considered as a part of the deliberations of the jury; and he found that, although the juror might have heard and have been influenced by the remarks made by some of the jurors in going to and returning from supper, the argument was too unsubstantial to justify setting aside the verdict, and the facts did not show a reasonable probability that the rights of the defendant had been violated. He ruled as matter of law that on the facts found by him, the defendant was not entitled to a new trial, and he refused to allow the motion as a matter of discretion. We do not see how it can be said as matter of law that there was any error in his rulings or findings. The only difference between this case and *Commonwealth v. Gagle*, 147 Mass. 576, 18 N. E. 417, is that in that case the juror was permitted by the court to remain in the jury room under the charge of an officer. But if what took place in that case did not constitute as matter of law such a separation as to prejudice the rights of the defendant, we do not see how what took place here can be held as matter of law to have constituted such a separation. See, also, *Nichols v. Nichols*, 136 Mass. 256. Sound public policy requires that the safeguards which have been established to insure verdicts free from all improper influences should be strictly maintained, but as was said in *Nichols v. Nichols*, supra, the court "ought not to be swift to grant a new trial on account of irregularities not attended with any intentional wrong,

and while it is made satisfactorily to appear that the party complaining has not and could not have sustained any injury from them." Exceptions overruled.

(200 Mass. 423)

**SKINNER v. BOSTON & M. R. R.**

(Supreme Judicial Court of Massachusetts. Middlesex. Jan. 5, 1909.)

**MASTER AND SERVANT (§ 236\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.**

Decedent was employed by defendant to carry mails between the post office and defendant's trains. While returning to the post office after having delivered mail to a train, he was killed by one of defendant's trains while crossing the railroad track pushing the cart in which he carried the mails. When he crossed the track he was looking down and straight ahead. Held, that his conduct in failing to watch for passing trains constituted contributory negligence, which would bar recovery for his death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 739; Dec. Dig. § 236.\*]

Exceptions from Superior Court, Middlesex County; John H. Hardy, Judge.

Action by Leora C. Skinner against the Boston & Maine Railroad. Verdict for defendant, and plaintiff brings exceptions. Exceptions overruled.

George S. Littlefield and Calvin S. Tilden, for plaintiff. Trull & Wier, for defendant.

**BRALEY, J.** This is an action of tort brought by the widow under Rev. Laws 1902, c. 106, § 71, to recover for the death of her husband, an employé of the defendant, who was struck and instantly killed by a locomotive as he was crossing the tracks at one of its stations in the performance of his duties as a mail carrier. By the statute, unless the decedent if he had survived could have maintained an action, the plaintiff cannot prevail. Upon recourse to the evidence it appears that he was employed by the defendant to carry mails between the post office and the trains, and for this purpose used a hand car provided by the railroad, which he pushed before him, as he walked. On the day of the accident, after having delivered the mail to the inward bound train, he waited on the platform until it had partly passed over the plank crossing, when he left the platform and started to pass over this crossing to return to the post office for the mail which was to go on the outward bound train, and while on the outward bound track, over which he had nearly passed, the locomotive struck him. If a finding would have been warranted that in the performance of his duties he was expected to cross the tracks, and that when killed he was about his work in the usual way, all the witnesses who saw and described the accident agreed that, at the time, he walked pushing the cart in front, with his head slightly bent forward, looking down, and straight ahead. According to common

experience, to walk or stand on a railroad track over which, as the decedent knew, notwithstanding his brief experience as an employé, trains were very often passing, in itself was attended with great danger. But, even if intent on his work, he may have followed passengers who preceded him, when, without looking to see if a train was coming, or giving any attention to his surroundings, he started across, his conduct must be held to have been so careless as to amount to contributory negligence which bars any recovery. *Barstow v. Old Colony Railroad Co.*, 143 Mass. 535, 10 N. E. 255; *Cannon v. New York, New Haven & Hartford Railroad Co.*, 194 Mass. 177, 80 N. E. 450; *Winslow v. Boston & Maine Railroad*, 165 Mass. 269, 42 N. E. 1133.

Exceptions overruled.

(200 Mass. 343)

**HOYT v. WOODBURY.**

(Supreme Judicial Court of Massachusetts. Essex. Jan. 4, 1909.)

**1. NEGLIGENCE (§ 44\*)—USE OF LAND.**

An owner of a lot of land on a slight hillside and abutting on a street descending the hill may improve his real estate in any reasonable way, and he may maintain on it a building of several stories, and maintain on the first floor two stores, separated by an entrance to upper stories, and so arrange the means of access to the three entrances as to adapt them to the varying grade of the adjacent sidewalk.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 44.\*]

**2. NEGLIGENCE (§ 44\*)—BUILDINGS.**

Owners of store buildings may proceed in the construction of the buildings on the theory that customers entering or leaving stores are not oblivious of the prevailing conditions that the floors of the buildings are not of the same elevation as the sidewalk, and may assume the exercise of ordinary circumspection of customers.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 44.\*]

**3. NEGLIGENCE (§ 44\*)—BUILDINGS.**

An owner may maintain approaches to the stores on the first floor of his building and to the upper floors at different levels, because of the erection of the building on a hillside, of from 2½ to 3¼ inches, with a step in ordinary form between, and he is not liable for injuries to a customer stumbling on account of the difference in level of the approaches.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 44.\*]

Exceptions from Superior Court, Essex County; Edward P. Pierce, Judge.

Action by Mary A. Hoyt against John Woodbury, trustee. There was a directed verdict for defendant, and plaintiff brings exceptions. Overruled.

Starr Parsons, H. Ashley Bowen, and O. D. C. Moore, for plaintiff. Wm. H. Niles and H. B. Mayo, for defendant.

**RUGG, J.** This is an action of tort to recover for injuries sustained by the plain-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tiff from a fall on premises of the defendant under these circumstances: For the purpose of trading she visited the store of one Bauer, who was a tenant of the defendant, in a four-story block; the first story was occupied by two stores, between which was an entrance to the upper stories. The street in front of the block was at a considerable grade, Bauer's store being opposite the lower portion of the street. The front of the building was on the street line, but all the entrances were set back, that of Bauer's store about 10 feet, and that to the upper stories about 9 feet. The space between the street line (that is, between the line of the sidewalk adjacent to the building) and the entrances was paved by the defendant with alternate squares of black and white tiling. The space or passageway to Bauer's entrance was substantially level with the sidewalk, and in it stood, just inside the street line, a column about 1 foot square supporting the building. The passageway to the entrance to the upper stories was raised above the sidewalk and tiling leading to Bauer's store from  $2\frac{1}{2}$  to  $3\frac{1}{4}$  inches, and the line of separation between these two levels of tiling continued the diagonal line made by Bauer's show window to the sidewalk line. The plaintiff stumbled over this riser between the two levels of tiling as she was coming out of the store on a sunny afternoon.

Without discussing the plaintiff's due care or whether she had any greater right than Bauer, the tenant, would have had under similar circumstances, the ruling of the superior court for the defendant should be supported on the ground that there was no evidence of negligence on the part of the defendant. He owned a lot of land on a slight hillside, and it abutted upon a street which descended the hill. He had a right to improve his real estate in any reasonable way. He chose to maintain upon it a block with two stores separated by an entrance to upper stories. The problem which confronted him in doing this was so to arrange the means of access to these three entrances as to adapt them to the varying grade of the adjacent sidewalk. This could have been done in any one of several different ways. But it obviously must have been done in some way. So long as the present physical configuration of this commonwealth continues to exist, substantially the same difficulties will confront those who undertake to erect structures for use of the public. Methods may change, and facilities of access may grow better, but the situation of buildings abutting upon hilly streets will abide. Persons entering this building were charged with knowledge that they were not entering from a perfectly level sidewalk, and that generally the floors of buildings are not of precisely the same elevation as the sidewalk,

even where it is level. Customers entering or leaving stores cannot be oblivious of these almost universally prevailing conditions. Owners of buildings have a right to proceed in their constructions in view of this common observation on the part of the public and assume in the actions of those, who may frequent their buildings, the exercise of ordinary circumspection as to their footing. Steps of greater or less height are the usual, although not the only, means of overcoming such differences in level as existed in this case between the street and the entrance. People cannot expect upon land obviously in private ownership next a street, the same condition that they might anticipate in a public sidewalk. In arranging an approach to the store wider at the street line and converging toward the door and the approach to the upper floors at a conveniently higher level with a low step in ordinary form between, the defendant violated no duty which he owed to the plaintiff. *Ware v. Evangelical Baptist Benevolent & Missionary Society of Boston*, 181 Mass. 285, 63 N. E. 885; *Lorenzo v. Wirth*, 170 Mass. 596, 49 N. E. 1010, 40 L. R. A. 347.

Exceptions overruled.

(200 Mass. 331)

#### HILLIARD v. FELS ICE CO.

(Supreme Judicial Court of Massachusetts.  
Essex. Jan. 4, 1909.)

**TAXATION (§ 290\*)—PROPERTY SUBJECT TO TAXATION—STATUTES—"HIRE OR OCCUPY A MANUFACTORY, STORE, OR SHOP."**

A foreign corporation carried on a retail ice business in a town where it had its office and transacted all its business. It sold only such ice as it cut and stored. It owned several ice-houses on the shores of a pond in another town, where it had a steam engine used for cutting and storing ice there. It transacted no business in the latter town, except what was essential for the cutting and storing of ice and the delivery under orders from its office. *Held*, that the corporation did not "hire or occupy a manufactory, store, or shop" in the latter town, within Rev. Laws 1902, c. 12, § 23, cl. 1, providing for the taxation of personal property in the municipality in which the owner hires or occupies manufactories, etc.; but the steam engine, boiler, and ice stored in the latter town were taxable under St. 1903, p. 448, c. 437, § 71, providing that every foreign corporation shall be subject to taxation on its machinery and merchandise by the municipality in which such property is situated.

[*Ed. Note.*—For other cases, see *Taxation*, Dec. Dig. § 290.\*]

Appeal from Superior Court, Essex County.

Suit by Henry Hilliard against the Fels Ice Company. There was a decree for complainant, and defendant appeals. *Affirmed*.

B. Marvin Fernald, for appellant. Robert F. Metcalf, for appellee.

MORTON, J. This is a petition brought by the collector of taxes for the town of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Georgetown under St. 1902, p. 269, c. 349, to restrain the defendant, a foreign corporation organized under the laws of Maine, from doing business in this commonwealth, until a tax, alleged to have been duly and lawfully assessed upon it by the assessors of Georgetown, shall have been paid. The case was heard upon agreed facts and a decree was entered in favor of the complainant restraining the defendant from doing business in this commonwealth "until the tax mentioned in the complainant's petition with all incidental costs and charges including the costs of this suit shall have been paid." The defendant appealed from this decree.

The defendant carries on the retail ice business in Malden, where it has its only office, keeps its books, employs an office force, keeps its wagons and horses, has its stables and transacts all its business. One of the sources of its ice supply is at Georgetown, where it owns several ice houses on the shores of Pentucket Pond, a great pond in which it stores ice cut on that pond. The ice so cut is transported to Malden and there used by the defendant in its retail business. It sells only such ice as it cuts and stores itself. It has a steam engine and boiler at its icehouses at Georgetown, which are only used for cutting and storing ice in said houses, and has no other personal property in Georgetown except the ice harvested and stored in said icehouses for its use in Malden. It transacts no business at Georgetown except what is essential to the cutting, storing and delivery of the ice pursuant to orders from the Malden office. It is agreed that the ice is merchandise and constitutes the defendant's stock in trade. In 1907 the town of Georgetown assessed the tax in question upon the steam engine, boiler and the ice stored in the icehouses and the only question is whether the tax so assessed was a valid tax.

St. 1903, p. 448, c. 437, § 71, provides that " \* \* \* every foreign corporation which is subject to the provisions of this act shall be subject to taxation upon all real estate, machinery and merchandise owned by it and situated in this commonwealth by the city or town in which such property is situated. The taxes authorized by the provisions of this section shall be assessed, collected and paid in accordance with the provisions of chapters 12 and 13 of the Revised Laws."

It is not contended that the defendant corporation was not subject to the provisions of St. 1903, p. 418, c. 437, and it is plain that it had machinery and merchandise in the town of Georgetown when the tax in question was assessed. The defendant did not hire or occupy a manufactory, store or shop in Georgetown, and therefore did not come within Rev. Laws, c. 12, § 23, cl. 1, and was not taxable there under that clause for the

engine, boiler and ice. *Hittinger v. Westford*, 135 Mass. 259; *Hittinger v. Boston*, 139 Mass. 17, 29 N. E. 214; *Coffin v. Artesian Water Co.*, 193 Mass. 274, 79 N. E. 282. And the defendant contends that inasmuch as the taxes authorized by section 71, supra, are to be "assessed, collected and paid in accordance with the provisions of chapters 12 and 13 of the Revised Laws," it follows that this tax was not lawfully assessed. But the reference to those chapters is for the purpose of providing generally how the tax that is authorized shall be assessed and collected. Except for such a reference the Legislature would have been obliged to provide at length for the assessment and collection of the tax. And to give the provision any other construction would nullify the requirement that the real estate, machinery and merchandise belonging to a foreign corporation and situated in this commonwealth shall be taxed to it in the city or town where it is situated. It is manifest, we think, that it was the intention of the Legislature that machinery and merchandise belonging to foreign corporations should be subject like real estate belonging to them to local taxation in the city or town where it was situated and that the laws relating to the assessment and collection of taxes on property so situated should apply in these as in other cases. This construction of the statute rendered it unnecessary to refer in it by way of repeal or otherwise to the clause relied on by the defendant. It plainly would be inapplicable.

Decree affirmed.

(200 Mass. 327)

**LIZOTTE v. DLOSKA et al.**

(Supreme Judicial Court of Massachusetts.

Bristol. Jan. 4, 1909.)

**1. CRIMINAL LAW (§ 302\*)—NOLLE PROSEQUI —DISTRICT ATTORNEY'S POWER.**

A district attorney had absolute power to enter a nolle prosequi, without the approval or intervention of the court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 689; Dec. Dig. § 302.\*]

**2. CRIMINAL LAW (§ 302\*)—NOLLE PROSEQUI —FINALITY.**

The entry of a nolle prosequi is final as to the particular case.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 697; Dec. Dig. § 302.\*]

**3. CRIMINAL LAW (§ 636\*)—NOLLE PROSEQUI —ESSENTIALS.**

A nolle prosequi does not require the presence or consent of accused.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 636.\*]

**4. ATTORNEY AND CLIENT (§ 127\*) — SETTLEMENT OF ACCOUNTS—ACTION NOT PREMATURE.**

Where an attorney was paid a sum to cover expenses and fees in a criminal case under an agreement that the remainder should be returned, the clients were entitled to settlement on the district attorney agreeing to enter a nolle prosequi at a subsequent term.

[Ed. Note.—For other cases, see *Attorney and Client*, Dec. Dig. § 127.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Exceptions from Superior Court, Bristol County.

Action of review by Max L. Lizotte against Leonora Dloska and others. Certain rulings being refused, plaintiff brings exceptions. Exceptions overruled.

Alvin G. Weeks, for plaintiff. Frank A. Pease, for respondents.

**RUGG, J.** This is a writ of review. It was referred in the superior court to an auditor, with the stipulation that his finding of facts should be final. At the hearing upon his report the fundamental question raised was whether the original action was prematurely brought. The action was instituted on April 27, 1906. The plaintiff in review, an attorney at law, in January, 1906, was given by the defendants in review \$600 "to be used," as stated by him in his contemporaneous receipt, "in obtaining bail and paying all expenses and fines and for services in getting bail and to defend John Farra and Joseph Goyeski against cases in superior court, balance to be returned to" the defendants in review. He immediately procured the bail and paid attendant expenses, including an allowance to one of the bondsmen. In February following, Farra pleaded guilty to a complaint for assault and was fined, the plaintiff in review paying the fine. At the same time, and before any trial was begun, all the other cases were disposed of by agreement with the district attorney that they should be "nol. pros'd" at the June sitting following. The district attorney had the absolute power to enter a nolle prosequi upon his official responsibility, without the approval or intervention of the court. He alone is answerable for the exercise of his discretion in this respect. It is presumed that he will act under such a heavy sense of obligation for enforcement of the law and sensitive consciousness of important public duty that no wrongful act will be committed. *Commonwealth v. Wheeler*, 2 Mass. 172; *Commonwealth v. Tuck*, 20 Pick. 356. The entry of a nolle prosequi is final so far as the particular case is concerned. It does not require the presence nor the consent of the defendant. Therefore the agreement of the prosecuting officer, that the indictments or complaints should not be further prosecuted and that an entry upon the records of the court should be made to that effect at an early sitting, was tantamount to the completion of the service which the plaintiff contracted to render in defending Farra and Goyeski in the criminal proceedings pending against them. It is not to be assumed that the word of a prosecuting officer will be broken respecting the disposition of cases, in instances where the whole matter lies in his own hand. It is significant of the view which Lizotte took of the situation, that, after the district attorney had said he would not further prosecute the cases, he

collected \$200, which had been deposited with one of the bondsmen, at the same time paying him for his services as such and giving a receipt, which stated that the cases had been disposed of and there was no longer liability as surety. It is not necessary to discuss whether the statement that the surety was relieved from further liability was technically accurate. It was practically so treated by all parties, including the district attorney in his capacity as responsible representative of the obligee on the bond. The cases had been disposed of so far as the plaintiff was concerned. In his account for services and disbursements the plaintiff in error made no charge after February, 1906.

Under these circumstances the finding of the auditor that at the time of the bringing of the original action "the purposes for which the money had been placed in the hands of Lizotte had been accomplished and the suit was not prematurely brought" was fairly supported by the facts reported. The rulings requested in the superior court were properly refused.

Exceptions overruled.

(200 Mass. 429)

#### FRISCH v. WELLS.

(Supreme Judicial Court of Massachusetts.  
Essex. Jan. 4, 1906.)

#### 1. SALES (§ 479\*)—CONDITIONAL SALE—REMEDIES OF SELLER—FAILURE TO PAY INSTALLMENTS.

Where, under a contract of sale, title was not to pass until the price had been fully paid and a bill of sale given, and, after having paid a part of the price by installments, the buyer failed to make other payments, he breached the contract, and the seller could either treat it as an agreement for goods sold and delivered, and sue at once for the price, or in tort for conversion, or in replevin for their specific recovery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1420; Dec. Dig. § 479.\*]

#### 2. SALES (§ 479\*)—CONDITIONAL SALES—INCONSISTENT REMEDIES—NECESSITY FOR ELECTION.

On breach of a contract of conditional sale, the remedy of the seller by action for the price rests upon the theory that after breach, at the election of the seller, the title passed to the buyer, who received and retained the property, and the remedy for conversion upon the assumption that as the condition had not been performed the title remained in the seller, and as the remedies, though alternative, are inconsistent, the seller must elect which he will pursue.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1419; Dec. Dig. § 479.\*]

#### 3. ELECTION OF REMEDIES (§ 9\*)—ACTS CONSTITUTING ELECTION—COMMENCEMENT OF SUIT TO ENFORCE COEXISTING INCONSISTENT REMEDY.

It is not the judgment which may be obtained, but the commencement of an action to enforce a coexisting inconsistent remedy in a court having jurisdiction, which makes an election of remedies binding; and hence where, upon breach of a contract of conditional sale, a seller began suit for the balance due, thus electing to consider the title to have passed to the buyer, and had the buyer arrested and his body

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

held, but did not prosecute the suit, and the debtor was discharged, the seller was precluded from subsequently suing in replevin.

[Ed. Note.—For other cases, see Election of Remedies, Dec. Dig. § 9.\*]

#### 4. REPLEVIN (§ 69\*) — PLEADING — GENERAL DENIAL—ISSUES.

In replevin, a general denial puts in issue, not only plaintiff's right to possession, but his title to the property.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 273; Dec. Dig. § 69.\*]

#### 5. SALES (§ 479\*) — CONDITIONAL SALES — WAIVER OF TITLE BY SUEING FOR BALANCE DUE.

The seller's election, on breach of a contract of conditional sale, to sue for the balance due on the contract, upon the theory that title had passed to the buyer, operated as a waiver of his title to the goods, so as to bar a subsequent action for replevin.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1419; Dec. Dig. § 479.\*]

Report from Superior Court, Essex County; Jabez Fox, Judge.

Replevin by Max Frisch against Frank E. Wells. On report from the superior court. Judgment for defendant.

F. E. Shaw, for plaintiff. James H. Sisk, William E. Sisk, and Richard L. Sisk, for defendant.

**BRALEY, J.** Under the contract, title to the replevied chattels was not to pass to the vendee, until the purchase price had been fully paid, and a bill of sale given. But after having paid a part by installments, his failure to make other payments was a breach, which entitled the vendor, who had not broken the contract, either to treat it as an agreement for goods sold and delivered, and to sue at once for the price, or in tort for conversion, or in replevin for their specific recovery. *Bailey v. Hervey*, 135 Mass. 172; *Brown v. Magorty*, 156 Mass. 209, 30 N. E. 1021; *White v. Solomon*, 164 Mass. 516, 518, 42 N. E. 104, 30 L. R. A. 537; *Smith v. Aldrich*, 180 Mass. 367, 369, 62 N. E. 381. If the first remedy was used, it rested upon the theory that after breach, at the election of the plaintiff, the title passed to the vendee, who received and retained the property. But if the second remedy was resorted to, the remedial right rested upon the assumption that, as the bill of sale had not been given, the title still remained in the plaintiff. *Brown v. Magorty*, 156 Mass. 209, 211, 30 N. E. 1021. See *Cooper v. Cooper*, 147 Mass. 370, 373, 17 N. E. 892, 9 Am. St. Rep. 721. These remedial rights, although alternative, were therefore inconsistent, and, while the plaintiff had his choice of either, he could not resort to them all. *Snow v. Alley*, 156 Mass. 193, 195, 30 N. E. 691. Nor is the case of *Miller v. Hyde*, 161 Mass. 472, 37 N. E. 760, 25 L. R. A. 42, 42 Am. St. Rep. 424, on which the plaintiff relies, in conflict. A majority of the court there held that, without satisfaction, a judgment for the plaintiff, in

an action of tort for conversion, did not vest in the defendant title to the chattels, and, as the remedies were consistent, replevin for the horse could be maintained against his vendee. It must be presumed, from the record, that with knowledge of his legal rights, and being in possession of the facts, the plaintiff chose to bring suit for the balance due, and to arrest and hold the body of the debtor, until he was discharged upon taking the oath prescribed by Rev. Laws, c. 168, § 40. The plaintiff failed to enter the writ. It is not, however, the judgment which may be obtained, but the commencement of a suit to enforce a coexisting inconsistent remedy in a court having jurisdiction, which constitutes the decisive act, and makes the election binding. *Butler v. Hildreth*, 5 Mete. 49; *Connihan v. Thompson*, 111 Mass. 272; *Bailey v. Hervey*, 135 Mass. 172. The answer was a general denial, which put in issue, not only the plaintiff's right to possession, but his title to the property. *D'Arcy v. Steuer*, 179 Mass. 40, 41, 60 N. E. 405. Having once made an irrevocable election the title was relinquished or waived, and the present action is absolutely barred. *Bailey v. Hervey*, 135 Mass. 172; *Whitney v. Abbott*, 191 Mass. 59, 77 N. E. 524.

The rulings at the trial were correct, and by the terms of the report judgment is to be entered for the defendant with damages in the sum of one dollar, and for a return of the goods. *McNeal v. Leonard*, 3 Allen, 263. So ordered.

(300 Mass. 337)

#### LANEN v. HAVERHILL, G. & D. ST. RY. CO.

SAME v. BOSTON & N. ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Essex. Jan. 4, 1909.)

#### MASTER AND SERVANT (§ 234\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF DANGER.

Plaintiff, a street railroad motorman, was injured by a derailment of his car, claimed to have been caused by a defective rail joint. Plaintiff at the time was running at usual speed, in violation of a rule requiring motormen to slow up at that point, though he had known for more than a month that there was a sunken joint there which was liable to cause derailment. Held, that plaintiff was negligent, precluding a recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 684-693, 706-709; Dec. Dig. § 234.\*]

Report from Superior Court, Essex County; Edgar J. Sherman, Judge.

Actions by Stephen A. Lanen against the Haverhill, Georgetown & Danvers Street Railway Company and against the Boston & Northern Street Railway Company. Verdict for defendant in each case, and the case was reported to the Supreme Judicial Court. Judgment on verdicts.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Peters & Cole, for plaintiff. J. P. Sweeney and L. S. Cox, for defendants.

**KNOWLTON, C. J.** The plaintiff was a motorman running a car, owned by the defendant in the first case, over a track owned and to be kept in repair by the defendant in the second case. The car which he was running left the track just before it reached a bridge, covered with plank, over the Boston & Maine Railroad in Bradford in the city of Haverhill, which is immediately southerly of the bridge over the Merrimac river between Bradford and Haverhill. The planking on the bridge over the Boston & Maine tracks was 30 feet long. The space between that planking and the bridge over the Merrimac river was covered with stone paving, and its length was about 20 feet. The rails in the stone pavement of the street southerly of the railroad bridge were the ordinary girder rails, and those through the planking of the bridge were T rails. The junction of the easterly T rail with the girder rail was about 5 feet southerly of the planking of the bridge over the railroad, and the junction of the westerly T rail with the girder rail was about 20 feet southerly of the planking. At the joint of these easterly rails a small piece was broken off from the flange at the base of the girder rail on the inner side, but, as this was not what kept the wheels on the track, there is nothing to show that it was a cause of the accident. At the junction of these two rails of different kinds there was a loose or low joint which is supposed to have been the cause of the cars leaving the track, but there was testimony that there was more than one such joint within a short distance, and it was not certain upon the evidence which of the joints caused the accident. The evidence tended to show that it was one of the two above mentioned.

The plaintiff testified that he had been a motorman running cars for the first defendant over this track all the time but about four months for between five and six years; that he passed over these tracks many times every day; that he had often noticed the joints between these two kinds of rails at that point, and that he noticed that there was a low joint in the block paving over the abutment; at one time he said it was what might be called a sunken joint, very slightly sunken, "not more than an inch—less than an inch;" afterward he said it might be 2 inches, he added, "Well, I should say it was two inches, anyway." He said he had seen this sunken joint at least a month before the accident, but had made no report of it to anybody; that he knew it was the duty of the motorman to pass over such joints slowly and with care, for the reason that there is always danger of going off the rail; that he knew before the accident that a sunken joint of 2 inches might send a car off the

track; that he could not remember anything that happened that day after he left the turnout, before the accident, and that he did not know at what rate of speed he was going just before, nor at what rate he was going when the car left the track. The turnout was about 450 feet southerly of the bridge. The grade of the street running southerly from the Haverhill bridge fell about  $5\frac{1}{10}$  feet in 161 feet, and then began to rise until, at the turnout, it was nearly level with the bridge. There was other testimony tending to show the danger of running rapidly over such a sunken joint. He also testified that there was a rule of the road that a motorman should slow up after leaving the turnout, and go on the Haverhill bridge at a slow rate of speed. Several witnesses testified as to the rate at which the car was going at the time of the accident, and no one said that it was slowed up after leaving the turnout, but all agreed that it was going at the usual rate.

Upon the uncontradicted testimony we are of opinion that there was no evidence that the plaintiff was in the exercise of due care. He was not only running in violation of the rule of the road in failing to slow up at this point as he was about to pass over the bridge, but he was doing this when he had known for more than a month, from his experience in passing over this place, that there was a sunken joint at that point, which was liable to cause a car to leave the track and run against the bridge, as this car did. The jury would not have been warranted in finding that the plaintiff, with such knowledge as he had, was in the exercise of reasonable care, when, in violation of the defendant's rule, he ran his car at its usual rate of speed over this sunken joint, in close proximity to the bridge.

Judgment on the verdicts.

(200 Mass. 414)

# UNION TRUST CO. v. HASSELTINE.

(Supreme Judicial Court of Massachusetts.

Suffolk. Jan. 5, 1909.)

## 1. PLEDGES (§ 53\*) — FORECLOSURE UNDER POWER OF SALE—RIGHT OF PLEDGEE.

The pledgee of a mortgage has a right to foreclose it, even though the contract of pledge only authorizes the pledgee to sell the mortgage.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 129; Dec. Dig. § 53.\*]

## 2. PLEDGES (§ 53\*)—PLEDGE OF NOTE—COLLECTION BY PLEDGEE.

The pledgee of a note may collect it when it becomes due.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 129; Dec. Dig. § 53.\*]

## 3. CORPORATIONS (§ 123\*)—TRANSFER OF SHARES — DIVIDENDS — COLLECTION BY PLEDGEE.

The dividend on corporate stock may be collected by a pledgee of the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 569; Dec. Dig. § 123.\* Pledges, Cent. Dig. § 129.]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

#### 4. PLEDGES (§ 53\*) — FORECLOSURE — SALE — RIGHTS OF PURCHASER.

A pledgee of a mortgage under a contract giving him full power to sell the mortgage "at any brokers' board or any public or private sale," and to be the purchaser at such sale, may purchase at a foreclosure sale under a power in the mortgage; but he takes such title as trustee for the pledgor, and holds it subject to redemption by payment of the debt for which it was pledged, although under a contract of pledge expressly authorizing him, not only to foreclose the mortgage, but to purchase at the foreclosure sale, he would have the right to purchase for himself at a foreclosure sale.

[Ed. Note.—For other cases, see Pledges, Dec. Dig. § 53.\*]

Exceptions from Superior Court, Suffolk County; John C. Crosby, Judge.

Action by the Union Trust Company against John Hasseltine. Verdict for plaintiff, and defendant takes exceptions. Exceptions sustained.

Willard Howland and Clarence A. Warren, for plaintiff. Clarence F. Eldredge, for defendant.

KNOWLTON, C. J. The defendant pledged to the plaintiff three mortgages, as collateral security for the payment of his promissory note. The contract of pledge gave the plaintiff "full power and authority to sell and assign and deliver the whole of said property or any part thereof, or any substitute therefor, or any addition thereto, at any brokers' board or any public or private sale, at the option of said trust company or its president or treasurer, or its or their or either of their assigns, and with the right to be the purchasers themselves at such broker's board or public or private sale, on the nonperformance, of this promise, \* \* \* without advertisement or notice," etc. The questions before us arise on the action of the plaintiff upon one of these mortgages. This mortgage the plaintiff foreclosed, by a sale under a power in the mortgage, for a breach of the condition thereof. It is agreed that this sale was made in good faith, and in accordance with the terms of the power. The plaintiff, through a third person, became the purchaser at the sale, and took from him a transfer of the property, which we assume was done under the authority of the power. The defendant was sued in this action for a balance due upon his debt to the plaintiff, and he offered to prove that the plaintiff acted in bad faith in disposing of the property acquired under the foreclosure, and sold it for much less than it was worth. He claimed an allowance upon the note for its value.

The first question is whether the plaintiff could make a valid foreclosure of the mortgage under the power of sale contained therein. It was an assignee of the mortgage and was within the terms of the power given by the mortgagor. As the holder of the mort-

gage title it had the right to foreclose, unless restrained by the terms of its contract with the defendant as pledgor. The contract was silent on this point. The broad power to sell the pledged property did not in itself give a right to foreclose the mortgage. But the pledgee of property has the control of it for the time being, and he represents not only his own interest, but that of the pledgor, in taking any proper action for the preservation of it and the collection and care of its proceeds. If the pledged property is a promissory note or other evidence of debt, he may collect it when it becomes due. If it is stock in a corporation he may collect the dividends. If it is a mortgage upon land and regularly assigned to him, he may foreclose the mortgage for a breach of the condition, if he deems such action best for the interests of himself and the pledgor. 22 Am. & Eng. Enc. of Law (2d Ed.) 895, 896, and cases cited. The right of a pledgee to foreclose a mortgage is recognized in this commonwealth, although most of the cases show a foreclosure by an entry and possession, rather than by sale. *Brown v. Tyler*, 8 Gray, 135, 69 Am. Dec. 239; *Stevens v. Dedham Institution for Savings*, 129 Mass. 547-549; *Montague v. Boston & Albany Railroad Company*, 124 Mass. 242-245. The language in the case of *Lord v. Hartford*, 175 Mass. 320, 56 N. E. 609, in which it was held that a pledgee "is precluded from buying the property pledged at a foreclosure sale, on the ground that his duty to the pledgor is inconsistent with his interest as a purchaser," was used of a purchase in reference to the right acquired under it as against the pledgor. He cannot take the title by virtue of the purchase at the auction sale and hold it absolutely, as against the pledgor. If he buys, he takes the title as a trustee for the pledgor, and holds it subject to redemption by him on the payment of the debt for which it was pledged. It was not intended to intimate that his right to foreclose, under the power, by virtue of his title as holder of the mortgage, does not enable him to buy it at the auction sale to prevent the sacrifice of the property, if the power in the mortgage gives such a right. If he does this, as was held of a similar foreclosure by possession in each of the cases above cited, he holds as a trustee for the pledgor, as well as for his own security. It was decided otherwise upon the facts in *Jennings v. Wyzanski*, 188 Mass. 285-289, 74 N. E. 347, because, by the terms of the pledge, he was expressly authorized, not only to foreclose the mortgage but to purchase at the foreclosure sale. This as between the pledgor and pledgee, was held to give the pledgee a right to buy for himself at the sale.

It follows that the plaintiff, after the foreclosure, held the real estate in trust for

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the defendant, and it had no right to sell it without regard to his interests. The terms of the contract of pledge gave it no right to make such a sale as that which the defendant offered to prove. The third instruction requested should have been given

Exceptions sustained.

(200 Mass. 409)

WELSH v. MILTON WATER CO. (two cases).

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 5, 1909.)

1. APPEAL AND ERROR (§ 977\*)—REVIEW—DISCRETION OF COURT—NEW TRIAL—STATUTORY PROVISIONS.

While the court, in granting a new trial after verdict, must confine itself to the grounds stated in a written motion therefor, under Rev. Laws 1902, c. 173, § 112, providing that the court may, before judgment, set aside a verdict in a civil action and order a new trial for any cause for which a new trial may be granted upon motion, stating the reasons relied on, whether a new trial shall be granted lies in the judicial discretion of the court, which is not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860, 3862; Dec. Dig. § 977.\*]

2. NEW TRIAL (§ 163\*)—SUFFICIENCY OF ORDER.

It is the order setting aside a verdict, based on grounds stated in a motion for a new trial, which vacates the verdict, and not the reasons of decision, whether stated orally or reduced to writing; and where the motion alleged that the verdict was against the weight of evidence, and in the memorandum the order was distinctly put upon that ground, it was sufficient.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 330; Dec. Dig. § 163.\*]

3. NEW TRIAL (§ 163\*)—SUFFICIENCY OF ORDER.

An order which set aside a verdict on the ground, alleged in a motion for a new trial, that the verdict was against the weight of evidence, was not objectionable as going beyond the scope of the ground alleged, because it also set aside certain findings of the jury, since, when the general verdict fell, the findings fell with it, irrespective of the order setting them aside.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 330; Dec. Dig. § 163.\*]

Exceptions from Superior Court, Suffolk County; Daniel W. Bond, Judge.

Actions by Louisa E. Welsh and by James Welsh against the Milton Water Company. There were verdicts for plaintiffs, which were set aside, and plaintiffs excepted to the order. Exceptions overruled.

James E. Cotter and Joseph P. Fagan, for plaintiffs. Felix Rackemann and Ralph W. Dunbar, for defendant.

BRALEY, J. It is provided by Rev. Laws, c. 173, § 112, that "the court may at any time before judgment set aside the verdict in a civil action, and order a new trial for any cause for which a new trial may by law be granted, but a verdict shall not be set

aside, except upon a motion in writing by a party to the case, stating the reasons relied upon for its support. \* \* \* But while the decision of the court must be confined to the reasons stated, whether a new trial shall be granted is wholly discretionary, and to the exercise of his judicial discretion by the trial judge no exception lies to this court. Pierson v. Boston Elevated Railway Co., 191 Mass. 223, 230, 77 N. E. 769; Reeve v. Dennett, 137 Mass. 315, 318; Shanahan v. Boston & Northern Street Railway Co., 193 Mass. 412, 79 N. E. 751, and cases cited.

The defendant's motion, among other reasons, alleged that the verdict was against the evidence, and the weight of the evidence, and in the memorandum the order was distinctly put upon this ground. It is the order setting the verdict aside, based upon the grounds stated in the motion, which vacates the verdict, not the reasons of decision, whether stated orally or reduced to writing and filed in the case. Boyd, Pet'r, 199 Mass. 262, 85 N. E. 464. The plaintiffs' however, while recognizing this, strongly urge that the scope of the order went further, because certain specific findings made in their favor by the jury, on questions submitted to them involving important issues, are also specifically set aside. But the contention is not well founded, for if no such reference had been made or order entered, when the general verdict in their support fell, and the whole case had been reopened for a new trial, these findings fell with it. Hawks v. Truesdell, 99 Mass. 557; Monies v. Lynn, 119 Mass. 278; Hart v. Brerley, 189 Mass. 598, 604, 76 N. E. 286; McCrum v. Corby, 15 Kan. 112, 117.

Exceptions overruled.

(300 Mass. 393)

DAVIDSON v. STEWART et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 5, 1909.)

1. MECHANICS' LIENS (§ 182\*)—EFFECT—EXTENT OF LAND AFFECTED.

Where labor and materials were expended on a building under a contract, a lien was acquired on the whole lot, though it was subsequently divided.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 310; Dec. Dig. § 182.\*]

2. MORTGAGES (§ 151\*)—PRIORITY—MECHANICS' LIENS.

A mechanic's lien for labor and materials expended on a building was subject to a prior mortgage thereon.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 307-329; Dec. Dig. § 151; Mechanics' Liens, Cent. Dig. §§ 358-370.]

3. MECHANICS' LIENS (§ 190\*)—PROPERTY AFFECTED.

Though a mechanic's lien was subject to a prior mortgage on the land, upon the release of a part of the land from the mortgage, the lien was left in full force on such part.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 190.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**4. MECHANICS' LIENS (§ 73\*)—RIGHT TO LIEN—PAYMENT BY NOTE.**

That the contract under which labor and materials were furnished provided for payment in part by notes did not deprive the contractor of his right to a mechanic's lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 97, 98; Dec. Dig. § 73.\*]

**5. PAYMENT (§ 17\*)—NOTE OF DEBTOR—NON-PAYMENT OF NOTE.**

Where three notes were given to a contractor for work and labor performed, which were entered on his books, but one of them was not paid, and was taken up by the contractor, who returned it to the owner and changed the entry on his books to show two notes paid, the unpaid note returned was not accepted by him in absolute payment.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 70-77; Dec. Dig. § 17.\*]

Exceptions from Superior Court, Suffolk County; John A. Alken, Judge.

Mechanic's lien proceedings by John S. Davidson against Joseph I. Stewart and others. Findings establishing the lien, and petitioner excepts. Exceptions overruled.

During the progress of work under a building contract, the owner gave the contractor three notes, which he entered on his books; but one of them was not paid, and the contractor took it up and surrendered it to the owner, and changed the entry on his books to show only two notes received.

John E. Crowley, for petitioner. Wm. R. Bigelow, for respondents.

**KNOWLTON, C. J.** This is a petition to enforce a mechanic's lien for labor and materials upon a lot of land and five houses thereon, in the erection of which houses the labor and materials were furnished. When the contract was made there was a duly recorded mortgage on the land. Afterwards, while the work was going on, the lot was divided into four smaller lots. At a later date three of the lots were released from the mortgage, and still later the mortgage on the other lot was foreclosed by a sale, the proceeds of which were no more than enough to satisfy the mortgage. The respondents contend that the lien cannot be enforced against the three remaining lots, because of the releases and the foreclosure.

By virtue of the contract and the work done under it a lien was acquired upon the whole lot, which was divided subsequently. But this land was subject to the rights of the mortgagee. The petition is to enforce the lien upon the whole large lot, which includes the four smaller lots. Except as against the title held under the mortgage, the lien is established. The release of three of the lots from the mortgage leaves the lien with full effect upon them, while the foreclosure of the mortgage on the other lot leaves nothing remaining in that upon which the lien can continue in force. The judge rightly refused the ruling requested and es-

tablished the lien. It can be enforced and given effect only upon so much of the original lot as has not been taken out from under the lien by the foreclosure of the mortgage.

The provisions of the contract in relation to payment in part by notes did not deprive the petitioner of his right to a lien. Payment has not been made, except of the amount credited. The judge decided rightly that the note afterwards returned was not accepted as an absolute payment.

Exceptions overruled.

(300 Mass. 357)

**HARRIGAN v. DODGE.**

(Supreme Judicial Court of Massachusetts.  
Essex. Jan. 5, 1909.)

**1. SPECIFIC PERFORMANCE (§ 114\*)—BILL—ALLEGATION OF OWNERSHIP.**

In an action to compel the specific performance of a contract to transfer real estate, the bill is not demurrable for failure to allege that defendant was the owner of the property, as inability to perform the contract is a matter of defense.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 369; Dec. Dig. § 114.\*]

**2. FRAUDS, STATUTE OF (§ 110\*)—SUFFICIENCY OF WRITING—DESCRIPTION OF LANDS.**

A receipt for money paid "on account of sale of the three houses belonging to the Frances Dodge estate in Danvers," signed by the agents of defendant, and another receipt signed by defendant for money received on account "of sale of the three houses and land that rightfully belongs thereto, in Danvers, belonging to the Dodge estate," are sufficient memoranda under the statute of frauds, if the three houses and the land was the only real estate owned by the Frances Dodge estate in Danvers; but, if it appear that such estate owned more than three houses in Danvers, then the description contained is not sufficient to satisfy the statute.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 225-236; Dec. Dig. § 110.\*]

**3. FRAUDS, STATUTE OF (§ 158\*)—EVIDENCE TO AID MEMORANDUM.**

Where a memorandum of sale described the property as "the three houses belonging to the Frances Dodge estate in Danvers," evidence to show whether that estate owned more than three houses in that place is admissible for the purpose of interpreting and applying the memorandum.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 875; Dec. Dig. § 158.\*]

**4. SPECIFIC PERFORMANCE (§ 114\*)—PLEADING—CONTRACT—REAL PROPERTY—STATUTE OF FRAUDS.**

A bill for the specific performance of a contract to convey real property set out a memorandum of the sale, describing the property as "the three houses belonging to the Frances Dodge estate in Danvers," and another memorandum describing the property as "the three houses and land that rightfully belongs thereto, in Danvers, belonging to the Dodge estate." *Held*, that the bill must set out in substance that the three houses referred to in the memoranda were the only ones owned by defendant in the town, as otherwise it would be demurrable.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 361; Dec. Dig. § 114.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Superior Court, Essex County; John C. Crosby, Judge.

Action by William Harrigan against Eben Dodge. From a decree sustaining a demurrer to the bill, and dismissing it, plaintiff appeals. Affirmed.

Daniel N. Crowley, for appellant. F. L. Evans and J. F. Quinn, for appellee.

RUGG, J. This is a bill in equity brought to compel the defendant to convey a certain tract of land in Danvers. It alleges that the plaintiff entered into a contract with the defendant, through his agents, Allen & Tebbets, to buy certain land described at length in the bill, and that a memorandum thereof in writing was signed as follows: "Received from one William Harrigan one hundred dollars on account of sale of the three houses belonging to the Frances Dodge estate in Danvers. \$100. Allen & Tebbets"—and another memorandum of the tenor following: "Received of A. G. Allen twenty-five dollars (\$25.00) on acct. of sale of the three houses and land that rightfully belongs thereto, in Danvers, belonging to the Dodge estate. Eben Dodge, Agent." There are further sufficient averments as to the precise price to be paid and the plaintiff's readiness to pay and refusal of defendant to deliver a deed. The defendant demurs on the grounds, first, that the bill sets forth no sufficient memorandum signed by him to satisfy the statute of frauds; and, second, that the bill does not allege that the defendant is the owner of the premises.

The second ground of demurrer may be briefly disposed of, for the reason that such an allegation is unnecessary. The defendant may have made a contract, by which he became liable to this suit, without having been the owner of the real estate. It is matter of defense to the prayer for specific performance, if he is unable to perform his contract on account of lack of ownership, and not a fatal defect apparent upon the statement of the plaintiff's claim.

The first ground of demurrer raises chiefly a question of pleading. The descriptions contained in the two memoranda may or may not turn out to be sufficient to point to any particular houses. Standing alone, without further allegations, they are equivocal. The purpose of the statute of frauds in this regard requires the memorandum to contain a description of the land sufficient for purposes of identification, when read in the light of all the circumstances of ownership of the property by the vendor. These memoranda might be sufficient if three houses and the land within their several curtelages was the only real estate owned by the Frances Dodge estate in Danvers. If, however, it should appear that the Dodge estate owned more than three houses in Danvers, then the description contained in the two

writings is not enough to satisfy the statute of frauds. *Whelen v. Sullivan*, 102 Mass. 102, 204; *Clark v. Chamberlin*, 112 Mass. 19; *Doherty v. Hill*, 144 Mass. 467, 11 N. E. 581. All these attendant circumstances may be shown outside the writing and by parol for the purpose of interpreting and applying the memorandum. *Mead v. Parker*, 115 Mass. 418, 15 Am. Rep. 110. The question presented here is one of pleading, and not what might be sufficient after verdict in view of identifying evidence. The writings themselves being not certain on their face, and being open to the possibility of becoming wholly indefinite, it is necessary for the plaintiff to allege facts sufficient to state a case clearly, which calls for specific performance, by setting out in substance that the three houses referred to in the writings were the only ones owned by the defendant in the town. Having failed to do this, the demurrer was properly sustained. The case is governed by *Miller v. Burt*, 196 Mass. 396, 82 N. E. 39. It is plainly distinguishable from *Slater v. Smith*, 117 Mass. 98, relied upon by the plaintiff in that the memorandum under discussion in the latter case by definite and clear physical and financial earmarks identified the houses. The decree sustaining the demurrer and dismissing the bill must be affirmed.

So ordered.

(300 Mass. 400)

#### LYNCH v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 5, 1909.)

#### 1. APPEAL AND ERROR (§ 927\*)—REVIEW OF DIRECTED VERDICT.

On exceptions to a directed verdict for defendant at the close of plaintiff's evidence, the evidence must be taken as true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3748; Dec. Dig. § 927.\*]

#### 2. MASTER AND SERVANT (§ 214\*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

One employed as a sealer of freight cars was injured while sealing a car on a track, in consequence of a switch engine without warning running in on an adjacent track, striking the ladder on which he was standing. He possessed ordinary powers of observation and knew that if his fellow servants failed to give warning of approaching engines he would be exposed to dangers. The railroad company had no rule requiring the giving of warnings, but it was the practice for employees working about the cars and tracks in the house to look out for their own safety. *Held*, that the employé, by continuing the employment, took the chance of any injury which might follow on his failure to take ordinary precaution to guard himself against the danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 565; Dec. Dig. § 214.\*]

Exceptions from Superior Court, Suffolk County; William Schofield, Judge.

Action by Annie T. Lynch, administratrix, against the Boston & Maine Railroad. There

was a verdict for defendant, and plaintiff brings exceptions. Overruled.

Henry O. Long and Frank W. Campbell, for plaintiff. Archibald R. Tisdale, for defendant.

**BRALEY, J.** This is an action of tort at common law, to recover damages for the conscious suffering of the plaintiff's intestate from injuries alleged to have been caused by the defendant's negligence, and from which he shortly after died. In the superior court, at the close of the evidence for the plaintiff, upon the request of the defendant, a verdict was ordered in its favor, and the case is here on her exceptions. The evidence, which must be taken as true, showed that at the time of the accident the decedent was employed as a sealer of freight cars in the "car freight house." This house was a long covered building with a way or street on one side for the use of teams, and an entrance at the westerly end through which two tracks entered from the adjoining yard at a grade which brought the floor of the cars level with the platform of the house, where the freight was received and delivered. The track nearest the platform was known as "the house or first track," and terminated within the building, while the other referred to as the "back track" was connected with the other tracks in the yard, and ran through to the dock. In handling freight the merchandise was loaded either from the platform directly into the cars on the first track, or when necessary into cars on the back track, by means of bridges placed between the car doorways, and as required. The cars were moved into position by switching engines, each in charge of a "switching crew of six men," but they ran irregularly, as the time of their entrance was determined by the assistant yardmaster. After being loaded, the doors of each car had a seal put on, and then the train was taken out, and empty cars run in taking their places. In sealing the doors next to the back track the sealer used a ladder, which rested in the space between the tracks, the width of which does not appear, but is described as being so narrow that "there was just space enough to go by between the two tracks," or as stated by one witness, "You couldn't put the ladder against the car on the front track, without having the foot in such relation to the train on the other track that, if there was any motion of the train on that track, it would be liable to knock down the ladder." There was evidence that the house was somewhat dark, being lighted in the daytime only by the doorways on the street side and the open ends, and that by reason of the curvature of the tracks the decedent, from the position where he was at work, could not see approaching cars until they arrived at the westerly entrance. Before running cars or engines over the back track, it had been

customary for either the brakeman or the "yardman" to warn him of their approach. In the uncontradicted answer of the president of the defendant to the interrogatories propounded by the plaintiff, which she introduced in evidence, it was stated that there was no rule of the railroad requiring a warning to be given, and "that the practice was for employes working about the cars or tracks in the car house to look out for their own safety as being the most appropriate means to avoid danger, considering the variety or character of the work. \* \* \*"

It also was undisputed that, for some two years before he was injured, he had been employed by the defendant, either to truck freight, or as a sealer, and was familiar with the arrangement of the tracks, the making up of trains, and the movements of cars, and of switching engines, in and through the freight house. From his declarations, which were put in evidence, it could have been found that, while standing on a ladder resting on the space between the tracks engaged in sealing the door of a car, on the first track, a switching engine without any warning having been given, and whose entrance and approach he did not observe, ran in on the back track, and by striking the ladder caused him to fall to the ground, over which he was dragged for some distance, receiving the injuries for which damages are sought.

We are of opinion that under these conditions the plaintiff cannot recover.

There is no evidence of any defect in the ways or instrumentalities used, and in the general management of its road the defendant had the right to construct and equip its freight house, and to conduct its business in the manner described.

It is not contended that the decedent was not possessed of ordinary powers of observation sufficient to enable him, in the light of his experience, to understand and fully appreciate the dangers incidental to the environment in which he was employed. The peculiar perils to which he was exposed in sealing cars on the first track, whether arising from insufficient light, or the passing of cars or engines, were not only obvious, but must have been known to him, and he also knew, or ought to have known, that if his fellow servants negligently failed to give warning of an approaching car or engine, he was exposed to great danger as they passed by the probability of their coming into contact with the ladder on which he must stand while at work. By continuing in his employment under such circumstances he must be held to have taken the chance of any injury which might follow, if he failed to take ordinary precaution to guard himself against the danger which caused the accident. *Goldthwait v. Haverhill & Groveland Street Railway Co.*, 160 Mass. 554, 36 N. E. 486; *Meehan v. Holyoke Street Railway Co.*, 186 Mass. 511, 72 N. E. 61; *Duffy v. New York*,

New Haven & Hartford Railroad Co. 19<sup>th</sup> Mass. 28, 77 N. E. 1081; *Regan v. Lombard*, 192 Mass. 319, 78 N. E. 476; *Pembroke v. Cambridge Electric Light Co.*, 197 Mass. 477, 84 N. E. 331.

Exceptions overruled.

(301 Mass. 10)

# MINOT et al. v. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 7, 1909.)

## 1. EMINENT DOMAIN (§ 221\*)—PROCEEDINGS TO ASSESS COMPENSATION—ASSESSMENT BY JURY—VERDICT.

In proceedings under St. 1897, p. 396, c. 426, to recover damages for the taking of an easement for sewerage purposes in land, the assessment of damages is within the exclusive province of the jury, and cannot be made in part by the jury and in part by the court.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 560; Dec. Dig. § 221.\*]

## 2. TRIAL (§ 340\*)—VERDICT—AMENDMENT.

A verdict which is defective in form may be amended by the court, after discharge of the jury, so as to make it conform to the real intent of the jury; but the court cannot, under the guise of amending the verdict, invade the exclusive province of the jury, or substitute its verdict for theirs.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 796; Dec. Dig. § 340.\*]

## 3. EMINENT DOMAIN (§ 223\*)—PROCEEDINGS TO ASSESS COMPENSATION—ASSESSMENT BY JURY—VERDICT.

Where the jury, in proceedings under St. 1897, p. 396, c. 426, to recover damages for the taking of an easement for sewerage purposes in land, have rendered a verdict without being required by the charge to pass on the question of interest as an element of damage, an amendment of the verdict by the court after the discharge of the jury, which increases the award by adding interest from the time of the taking, invades the exclusive province of the jury to assess the damages, and is not permissible, under the common law, or under Rev. Laws 1902, c. 173, § 48, relating to amendments.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 573; Dec. Dig. § 223.\*]

Exceptions from Superior Court, Suffolk County; Robert R. Bishop, Judge.

Petition by Lawrence Minot and others, trustees, against the City of Boston, for damages on account of the taking of an easement in petitioners' property. To the granting of an order directing an amendment of the verdict, defendant excepted. Exceptions sustained.

H. M. Davis, for petitioners. Arthur L. Spring, for defendant.

**HAMMOND, J.** This was a petition for damages on account of the taking of an easement for sewerage purposes in a certain strip of land of the petitioners, under St. 1897, p. 396, c. 426. The taking was made and completed by record on October 12, 1901, and this fact distinctly appeared at the trial. There was a trial by jury and a verdict for the petitioners was rendered on February 17,

1908. The evidence introduced at the trial all related to the value of the land and its adaption for valuable uses at the time of the taking. In the charge to the jury nothing was said either "in relation to the matter of interest upon whatever amount of damages the jury should find," or "as to the date as of which the petitioners were to recover their damages." In one part of the charge the jury were told that the measure of damages was "the diminution, if any, in the fair market value of the land owned by the petitioners," and afterwards, that it was "the fair value of the land taken upon the whole evidence." There was evidence upon which the jury might properly have found that the diminution in the fair market value of the land—or that the fair value of the land taken—was equal to the amount of their verdict.

No exceptions to the charge were taken by either party, and nothing further is shown by the evidence or record regarding interest. The court heard no evidence after the verdict was rendered. The petitioners did not file any motion for a new trial, nor any bill of exceptions, but on March 5, 1908, they filed a motion for allowance of interest upon the amount of the verdict from the time of the taking. This motion was argued on April 2, and on April 4, 1908, the justice who had presided at the jury trial made the following order: "It appearing to the court that the verdict of the jury in the above entitled case was for the damages sustained by the plaintiffs as of the date of the taking, completed by public record October 12, 1901, and did not include any interest upon such damages since said date of taking, the clerk is hereby ordered, in entering up judgment upon said verdict, to reckon and include therein interest upon the verdict from the said date of taking."

The case is before us upon the appeal of the respondent to this order; and the sole question is whether the court had the power to make the order.

It is to be borne in mind that the whole question of the amount of damages was before the jury. They were the tribunal to determine it, and the only tribunal, and hence it was not only in their power, but it was their duty to fix the amount due. Their verdict, therefore, so long as it stands, is the only authoritative announcement of that amount. And that is so, whether or not every element of damage in the way of interest or otherwise was placed before the jury, or whether the instructions to them were right or wrong, complete or defective. The parties have tried the case as they saw fit, and they made no objection to the charge nor asked for further instructions.

It is to be further noted that this is the verdict upon which, so long as it stands, judgment is to be entered. No authority is given

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to add to this verdict a further sum. The assessment of the amount due is not to be made in part by the jury and in part by the court, but wholly by the jury. As an assessment made by the court, therefore, it cannot stand. The only plausible ground upon which the order can stand is not that it is an addition to the assessment made by the jury, but that it may be regarded as an amendment to the verdict, or, in other words, that the verdict actually rendered shall not stand as given but shall be so amended as to stand as the court thinks it ought to have been given.

There is no doubt of the power of the court to amend a verdict after the discharge of the jury, and even after the end of the term at which the case was tried; and, in considering the nature of the amendment to be made, reference may be had to the notes of the judge who presided at the trial, or to any other satisfactory evidence as to the issues actually tried and the actual state of the material evidence. *Clarke v. Lamb*, 6 Pick. 512; *Id.*, 8 Pick. 415, 19 Am. Dec. 332, and cases cited. Thus a general verdict upon a declaration containing several counts, all for the same cause of action, one of which is fatally defective, may be amended at a subsequent term by an examination of the minutes of the judge, and judgment may be entered only on the good counts. *Barnard v. Whiting*, 7 Mass. 358; *Porter v. Rummery*, 10 Mass. 64; *Smith v. Cleveland*, 6 Metc. 332. See, also, rule 40 of the Superior Court. And generally where the verdict is defective in form it may be put in proper shape. As stated by Lord, J., in *Ashton v. Touhey*, 131 Mass. 26, 29: "If the verdict as affirmed and recorded does not state with technical accuracy the finding [of the jury] upon the real issues tried, and the court can see how it should be corrected, it will reject what is surplusage, or in some proper mode make it conform to the real issues tried." And the same rule applies in criminal cases. *Commonwealth v. Stebbins*, 8 Gray, 492; *Commonwealth v. Lang*, 10 Gray, 11. Whether the case be civil or criminal, the verdict which is defective only in form may be worked "into form" so that "it may serve."

But there is one important limitation to this rule, and that limitation is that the amendment in all cases must be such as to make the verdict conform to the real intent of the jury. "The judge cannot, under the guise of amending the verdict, invade the exclusive province of the jury or substitute his verdict for theirs." *Acton v. Dooley*, 16 Mo. App. 441, 449. After the amendment the verdict must be not merely what the judge thinks it ought to have been, but what the jury intended it to be. Their actual intent, and not his notion of what they ought to have intended, is the thing to be expressed and worked out by the amendment.

This is not a case like *Martin v. Silliman*, 53 N. Y. 615, and other similar cases, where the jury by their verdict have stated that in-

terest is to be added to the sum found by them. See, also, *Jackson v. Brockton*, 182 Mass. 26, 64 N. E. 418, 94 Am. St. Rep. 635. The amendment in the present cases increases the verdict rendered by the jury more than one-third. It is a change in substance and not in form. The jury were not instructed as to the time with reference to which the damages were to be assessed. It cannot be known whether the jury would have arrived at the amount named in the verdict if they had supposed that it would be largely increased by the court. A verdict is the product of the minds of 12 men, and, to a certain extent, especially in a case like the present, frequently represents a result which no individual member of the panel would have reached in the first instance if free to follow his own judgment. It is a conclusion to which he can consistently assent, although if left entirely to himself he would perhaps have preferred a different result. It is by no means certain that if the jury had known that the sum which they were to find due was to be increased more than one-third they would have found the amount they did.

But whether that be so or not, the amount of damages to be awarded, interest and all, was by the law in the hands of the jury under the instructions of the court, and in law their verdict represented their judgment on the whole question; and until reversed their judgment was that of the law. The amendment was not made for the purpose of correcting an error in expression of the conclusion to which the jury had come, so that the verdict as amended should say what the jury intended and supposed they had said. On the contrary it is an amendment which is based upon the theory that the jury never passed upon the question involved, and there is no pretense that the verdict as amended expresses any idea which the jury had, much less anything they intended to express. Such an amendment is not permissible under the common law. Nor can the provisions of Rev. Laws 1902, c. 173, § 43, be held to authorize such an amendment. The statute cannot be held to authorize the court under the guise of an amendment to usurp a function exclusively within the province of the jury.

For other cases bearing upon the subject, see in this state *Sullivan v. Holker*, 15 Mass. 374, *Coffin v. Jones*, 11 Pick. 45, *Dryden v. Dryden*, 9 Pick. 546, and *Morris v. Callanan*, 105 Mass. 129, and in other states *Parker v. Lake Shore & Michigan Southern Railway*, 93 Mich. 607, 53 N. W. 834, *Hallum v. Dickinson*, 47 Ark. 120, 14 S. W. 477, *Flore v. Ladd*, 29 Or. 528, 46 Pac. 144, *Dyer v. Coombs*, 65 Mo. App. 148, and *Orlich v. Williamsburg Ins. Co.*, 45 Minn. 444, 48 N. W. 198. In *Longworth v. Cincinnati*, 48 Ohio St. 637, 29 N. E. 274, it was held that an act of the court like the one before us, although an irregularity, was nevertheless not prejudicial to the defendant and it was upheld. See, also, *Barber Asphalt Paving Co. v. New*

York Post Graduate Medical School & Hospital (Sup.) 62 N. Y. Supp. 392. But these last two cases seem to be contrary to the general weight of authority.

Exceptions sustained.

(201 Mass. 15)

**COBB et al. v. CITY OF BOSTON.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 8, 1909.)

Exceptions from Superior Court, Suffolk County; Robert R. Bishop, Judge.

Petition by John C. Cobb and others, trustees, against the City of Boston, for damages on account of the taking of an easement in petitioners' property. To the granting on an order directing an amendment of the verdict, defendant excepted. Exceptions sustained.

H. M. Davis, for petitioners. Arthur L. Spring, for defendant.

**HAMMOND, J.** This case raises precisely the same question as *Minot v. Boston*, 86 N. E. 783, and for reasons stated in that case these exceptions are sustained.

(200 Mass. 514)

**MILES v. JANVRIN.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 6, 1909.)

**1. LANDLORD AND TENANT (§ 150\*)—DUTY OF LANDLORD TO REPAIR.**

As a general rule, a tenant takes the premises as he finds them, with no duty of the landlord to repair them or provide for their safety during the term; but if a landlord retains in his possession and control approaches, halls, or passages, to be used in common by different tenants, or by himself and tenants, the law implies a duty on his part to keep them in a safe condition, except as to obvious risks from the mode of construction, or other permanent conditions, of which the tenant takes the risk, because impliedly there is to be no change in those particulars.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 536; Dec. Dig. § 150.\*]

**2. LANDLORD AND TENANT (§ 152\*)—DUTY OF LANDLORD TO REPAIR—ASSUMPTION OF DUTY BY DEALINGS WITH TENANT.**

A landlord and tenant by their dealings with each other may enter into a relation in respect of parts of the premises let, whereby the landlord assumes the duty of keeping them safe, and the control which the landlord retains in such case does not take those parts of the premises out of the tenant's possession, but is only such as is necessary for inspection and for keeping them safe.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 538; Dec. Dig. § 152.\*]

**3. LANDLORD AND TENANT (§ 164\*)—AGREEMENT TO REPAIR—LIABILITY FOR FAILURE—DAMAGES.**

An agreement of a landlord to make general repairs during the term is a simple contract to do certain work, and for a breach he is liable only for damages directly resulting therefrom, which would ordinarily be only the cost of the repairs, the tenant not being relieved from the duty of looking out for himself and of refraining from using the premises if their use would be perilous because of the landlord's failure to repair; while an agreement to keep the premises safe and in good repair during the term refers to the condition of the premises as to safe-

ty as well as in other particulars, the tenant having the right to assume that the premises would be kept safe for his use, and damages would be recoverable for an injury resulting from a failure to keep them safe.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 630, 631; Dec. Dig. § 164.\*]

**4. FRAUDS, STATUTE OF (§ 58\*)—INTERESTS IN LAND—ORAL AGREEMENT.**

An oral agreement for the letting of premises is a contract for the sale of an interest in land, and not binding under the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 90; Dec. Dig. § 58.\*]

**5. SUNDAY (§ 11\*)—VALIDITY OF CONTRACTS—NEGOTIATION ON SUNDAY.**

A contract for the letting of premises made on Sunday is illegal, as violative of the statute for the observance of the Lord's Day.

[Ed. Note.—For other cases, see *Sunday*, Cent. Dig. § 32; Dec. Dig. § 11.\*]

**6. SUNDAY (§ 15\*)—SUNDAY CONTRACTS—RATIFICATION—SUBSEQUENT ADOPTION.**

A contract for the letting of premises made on Sunday, being illegal, cannot be ratified so as to be in effect from the beginning; but it may be subsequently adopted by the parties without formality.

[Ed. Note.—For other cases, see *Sunday*, Cent. Dig. § 46; Dec. Dig. § 15.\*]

**7. SUNDAY (§ 15\*)—SUNDAY CONTRACTS—SUBSEQUENT ADOPTION.**

In an action against a landlord for injuries to a tenant's wife, where it appeared that when the tenant took possession the tenant's wife stated to the landlord's agent that nothing had been done to the posts or steps yet, and he replied that he would have his son come and look after them, the conversation by its terms referring to a former conversation and being not fully intelligible without knowledge of it, evidence that previously the landlord had agreed to keep the steps in repair during the tenancy was admissible to explain the conversation, though the former talk took place on Sunday.

[Ed. Note.—For other cases, see *Sunday*, Cent. Dig. § 46; Dec. Dig. § 15.\*]

**8. SUNDAY (§ 24\*)—SUNDAY CONTRACTS—ADDITIONS—EVIDENCE.**

Evidence held sufficient to go to the jury on the question whether, when parties entered into the relation of landlord and tenant on a weekday, they adopted a provision in a previous contract between them, which was illegal because made on Sunday, that the landlord would keep certain steps in a safe condition.

[Ed. Note.—For other cases, see *Sunday*, Cent. Dig. § 58; Dec. Dig. § 24.\*]

**9. FRAUDS, STATUTE OF (§ 139\*)—LEASES—ADOPTION OF LEASE VOID UNDER STATUTE.**

Where a person took possession of premises under an oral agreement not binding under the statute of frauds, and was accepted as a tenant, the contract arising from the tenancy so created was not affected by the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 338; Dec. Dig. § 139.\*]

Exceptions from Superior Court, Suffolk County; John C. Crosby, Judge.

Personal injury action by Harriet M. Miles against Samuel P. Janvrin. There was a directed verdict for defendant, and plaintiff excepts. Exceptions sustained.

See, also, 82 N. E. 708, 13 L. R. A. (N. S.) §78.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

James A. McGeough, for plaintiff. Johnson W. Ramsey and Samuel R. Cutler, for defendant.

KNOWLTON, C. J. There was evidence in this case which would warrant the jury in finding that the plaintiff was in the exercise of due care and that the defendant was negligent, if the relation of the parties in regard to the steps was such that the defendant owed the plaintiff a duty to look after their condition and provide for their safety during the term of occupation of the plaintiff's husband as a tenant. The steps were a part of the premises let. As a general rule a tenant takes the premises as he finds them, with no duty on the part of the landlord to repair them, or provide for their safety during the term. But if a landlord retains in his possession and control approaches, halls or passages, to be used in common by different tenants, or by himself and tenants, the law implies from these relations a duty on his part to keep them in a safe condition, except as to obvious risks from the mode of construction or other permanent conditions, of which the tenant takes the risk because impliedly there is to be no change in these particulars. In the former decision of this case it was held that a landlord and tenant may enter into relations in regard to a part of the premises let, such that the landlord assumes the duty of looking after their condition, and providing for their safety, for the protection of the tenant. *Miles v. Janvrin*, 196 Mass. 431, 434, 435, 439, 82 N. E. 708, 18 L. R. A. (N. S.) 878. We believe this to be in accordance with the law as it is generally understood elsewhere. For a recent application of it in New York, see *May v. Ennis*, 78 App. Div. 552, 79 N. Y. Supp. 896. In such a case the question is not whether an important part of the landlord's undertaking is in form a promise to make repairs, but whether, as a result of the dealings of the parties with each other, they come into relations whereby the landlord undertakes and assumes the duty of looking after the condition of the premises in reference to safety, and of doing what is necessary for that purpose, so that the tenant properly may trust him for the performance of this duty. The control of the premises that the landlord retains in such cases is not a control that takes them out of the possession of the tenant, as the owner of the estate at will or for years, but only control so far as is necessary for making proper inspection and keeping them in a safe condition. The tenant could maintain trespass *quare clausum* against a stranger coming upon the premises, as well under such an arrangement as if the landlord made no repairs.

The difference between an agreement like that in *Tuttle v. Gilbert Manufacturing Company*, 145 Mass. 169, 18 N. E. 465, or that of a landlord who agrees only to make general repairs during the term, and an agreement

of a landlord who promises to take care of the property and keep it in a safe condition and in good repair during the term, is that the former is a simple contract to do certain work, and nothing more. If the landlord fails to do the work, it leaves him liable only for such damages as are the direct result of his breach of contract. This ordinarily would be only the cost of making the repairs. The tenant in such a case is not relieved of the duty of looking out for himself as to the safety of the premises, and refraining from using them, if the use would be perilous by reason of the failure of the landlord to do the work. The latter is a contract which has reference directly to the condition of the premises as to safety, as well as in other particulars. The tenant may rely upon the undertaking in that particular, and assume that the premises will be kept safe for his use. Payment of damages for a personal injury resulting from a breach of such a contract would be directly in the contemplation of the parties in making the contract.

Apart from the question how far the rights of the parties are affected by the fact that an important part of their conversation was on a Sunday, there was evidence from which the jury might find that the defendant undertook to look after the condition of the steps, and keep them safe, so that the plaintiff's husband and his family might use them confidently, without the duty of examining them to see that the wood was sound and strong.

We come now to that part of the defense which is founded on the Sunday law. The principal conversation in regard to the letting of the premises occurred on the Lord's Day. It appeared in evidence that the defendant's husband, who was in charge of the property for the defendant said: "You won't have anything to do with those steps. Never mind about it. I will take care of them myself. I will have them looked over and put in good repair, and keep them so while you stay there." Other evidence upon the same subject was that he said: "You won't have to bother with them steps. I will keep them in my own care. I will look after that myself. I have a man for that purpose that lives on the same street, and I will have him overhaul them steps and fix them—put them in good repair, and keep them so as long as you live there." It appeared that the plaintiff's husband moved into the house the following week.

The agreement between the parties, made at that time, was not binding, for two reasons. In the first place it was a contract for the sale of an interest in land, and was within the statute of frauds. Secondly, it was illegal because it was in violation of the statute for the observance of the Lord's Day. As an illegal contract it could not be ratified, so as to be in effect from the beginning; but it could be adopted subsequently without for-

mality. See *Stebbins v. Peck*, 8 Gray, 553, as explained in *Day v. McAllister*, 15 Gray, 434. The plaintiff's husband and the plaintiff first came into the relation of contracting parties when the husband entered upon the tenancy, under the authority which had been given him on the Sunday previously, and the defendant accepted him as a tenant. What were the relations of the parties in reference to the premises? There was evidence that, the next day after the plaintiff went into the house to stay, the defendant's husband came there, and she said to him, "I see they haven't done anything to the posts or steps yet," and that he replied, "I am going right up to my son now and tell him about them and have him come down and look right after them." She also testified that afterwards, when she saw the defendant's son George at one time, she said to him, "I see you haven't done anything to those steps yet," and he said, "Well, I will when I get around to them." It appeared that soon after the accident the defendant put in new steps. Her husband testified that he told his son to "be particular to keep them (the steps) safe so that no accident should occur." The conversation between the plaintiff and the defendant's husband, after she went to the house to live, by its very terms referred to a former conversation. It is not fully intelligible without knowledge of what the former conversation was. The fact that their previous talk was on a Sunday does not make it incompetent for the purpose of explaining the later conversation and showing its meaning. *Dickinson v. Richmond*, 97 Mass. 45. We are of opinion that, from all this evidence, the jury might find that, in connection with entering into the relation of landlord and tenant on a week day, the parties adopted the contract which they previously had attempted to make in regard to the tenancy, but which was of no effect because it was made on the Lord's Day. *Day v. McAllister*, 15 Gray, 434; *Stebbins v. Peck*, 8 Gray, 553. Upon the contract arising from the creation of the tenancy there was no question as to the statute of frauds. This evidence tends to show an understanding on the part of both parties that the defendant was to keep the steps in a safe condition.

Exceptions sustained.

(300 Mass. 333)

**CUNNINGHAM v. CONNECTICUT FIRE INS. CO.**

(Supreme Judicial Court of Massachusetts.  
Essex. Jan. 4, 1909.)

**1. STIPULATIONS (§ 14\*)—AGREED STATEMENT OF FACTS—INFERENCES OF FACT.**

Where a case is tried on an agreed statement of facts, without any agreement that the court may draw inferences of fact, plaintiff can only recover in case the facts agreed show all

the elements legally required to establish plaintiff's claim.

[Ed. Note.—For other cases, see *Stipulations*, Dec. Dig. § 14.\*]

**2. APPEAL AND ERROR (§ 1010\*) — AGREED STATEMENT OF FACTS—INFERENCES OF FACT.**

Where a case is tried on an agreed statement of facts, and the right is reserved to the court to draw whatever inferences of fact seem reasonable, the inquiry on appeal is limited to whether there is any evidence warranting the court's finding, being analogous to the question arising on exceptions to a verdict or a finding of the court on all the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1010.\*]

**3. INSURANCE (§ 131\*) — PAROL CONTRACT — VALIDITY.**

A binding contract of insurance may be made by parol.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 204-209; Dec. Dig. § 131.\*]

**4. INSURANCE (§ 136\*) — FIRE POLICY — CONTRACT.**

A bankrupt applied to the agent of several insurance companies, including defendant, for a \$3,000 insurance on certain identified property. Nothing was said as to the companies in which the insurance was to be written, the amount, premiums, or term; nor was any binding slip issued. There was no further communication between the bankrupt and any one representing defendant insurance company until after the property sought to be insured was injured by fire. The agent wrote policies, all bearing the date of the application, in defendant and other companies, dividing the risk between stock and furniture. None of these policies were delivered, nor their contents communicated to the bankrupt, and the agent thereafter canceled \$2,000 of the insurance, and procured policies to that amount in other companies, which he did not represent. These policies, though written, were never delivered, and the bankrupt knew nothing concerning them until after the fire. *Held*, that there was no binding contract of insurance between the insurance company and defendant.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 219, 220; Dec. Dig. § 136.\*]

**5. INSURANCE (§ 131\*)—ORAL CONTRACT.**

An alleged oral contract of insurance was not enforceable, where the parties only contemplated the existence of a contract on a delivery of the policies and payment of the premiums.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 204; Dec. Dig. § 131.\*]

Appeal from Superior Court, Essex County.

Action by William H. Cunningham, as trustee in bankruptcy of Solomon Yaffee, against the Connecticut Fire Insurance Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Francis V. McCarthy and Roy F. Bergengren, for appellant. F. W. Brown and Lindsey K. Foster, for appellee.

RUGG, J. This case comes before us upon appeal from a judgment in favor of the defendant entered upon agreed facts, with no reservation of right to the trial or appellate court to draw inferences of fact. The issue thus presented is whether upon these facts the plaintiff, as matter of law, is entitled to judgment. Unless among the facts agreed

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

are found all the elements which the law requires to establish his claim, the plaintiff must fail. *Old Colony Railroad v. Wilder*, 137 Mass. 536; *Mayhew v. Durfee*, 138 Mass. 584; *Collins v. Waltham*, 151 Mass. 196, 24 N. E. 827; *Schwarz v. Boston*, 151 Mass. 226, 24 N. E. 41; *Gallagher v. Hathaway Manuf. Co.*, 169 Mass. 573, 43 N. E. 844; *Courtemanche v. Blackstone Valley Street Railway*, 170 Mass. 50, 48 N. E. 937, 64 Am. St. Rep. 275; *Olds v. City Trust, Safe Deposit & Surety Co. of Philadelphia*, 185 Mass. 500, 70 N. E. 1022, 102 Am. St. Rep. 856; *Putnam v. Glidden*, 159 Mass. 47, 34 N. E. 81, 38 Am. St. Rep. 394; *Jaquith v. Winnissimmet National Bank*, 182 Mass. 53, 64 N. E. 723; *Boston v. Brooks*, 187 Mass. 286, 73 N. E. 206; *Morse v. Fraternal Accident Association*, 190 Mass. 417, 77 N. E. 491, 112 Am. St. Rep. 837; *Koppel v. Mass. Brick Co.*, 192 Mass. 223, 78 N. E. 128; *Coffin v. Artesian Water Co.*, 193 Mass. 274, 79 N. E. 262. The question presented is radically different from that which would arise upon a record where on facts stated the court is permitted to draw whatever inferences of fact seem reasonable. Then the inquiry is whether there is any evidence warranting the finding. Such a question is analogous to, if not like, that arising upon exceptions to a verdict of a jury or finding of a court upon all the evidence. Then not only all the supporting facts but also all rational inferences from them may be invoked to support the conclusion reached by the trial tribunal. Such a decision would not be disturbed unless unwarranted by all the evidence, including both the specific facts and the deductions legitimately to be drawn from them. *Commonwealth v. Gordon*, 159 Mass. 8, 33 N. E. 709; *Davis v. Harrington*, 160 Mass. 278, 35 N. E. 771; *McKim v. Glover*, 161 Mass. 418, 37 N. E. 448; *Wright v. Lowell*, 166 Mass. 298, 44 N. E. 249; *Johnson v. Mutual Life Ins. Co.*, 180 Mass. 407, 62 N. E. 733, 63 L. R. A. 833.

The only contention pressed by the plaintiff is that one Yaffee, of whose estate he is trustee in bankruptcy, made with the defendant, through its authorized agent, a binding parol contract of insurance. The authority of the agent is not in dispute; nor can it be argued that there may not be a valid contract of insurance resting only in parol. The only question is whether the agreed facts prove the making of such a contract. These facts are that on December 15, 1906, Yaffee applied to one Knight, who was agent for several other insurance companies besides the defendant, and requested the issuance to him of policies of insurance on certain identified property to the amount of \$3,000. Nothing was said as to the companies by which the policies should be written, as to the amount to be assumed by each company, as to the premium, nor as to the term of the policies. The policies were to be in Massachusetts standard form, and were to be written by Knight, and Yaffee was to receive them at

some later date. There was no further communication between Yaffee and anyone representing the defendant, until after the property sought to be insured was injured by fire. Knight wrote policies all bearing date December 15, 1906, in four different companies, aggregating the sum total applied for, but dividing the risk upon the property to be insured between stock and furniture. None of these policies were delivered to Yaffee, nor were their contents communicated to him. Between the 15th and 25th days of December, Knight decided that he ought not to issue policies for the entire amount in companies, which he represented, and he requested another insurance agent to issue policies to the amount of \$2,000 on the property. These policies, although written, were never delivered, and Yaffee knew nothing about them until after the fire. These facts show that the relations between Yaffee and Knight rested in negotiation, and had not reached the finality of a contract. Without a word of instruction, request or intimation from Yaffee, Knight determined the companies (subsequently changing them) in which the insurance should be placed, and the time for which the policies should run, and a division of the risk between stock and fixtures. None of these essential elements of the contract of insurance were either fixed in advance or subsequently agreed to between the parties. In any one of these respects Yaffee could have objected to the policies as drafted by Knight and declined to receive or pay for them. If he had so decided, no liability would have attached to him, nor could he have been made responsible for the premium until he had agreed to these stipulations of the contracts. The proposals, which Knight arranged upon these points, were not submitted to nor accepted by Yaffee until after the fire, when by its acts the defendant declined to go further with the insurance contracts. There was no understanding expressed or fairly implied under these circumstances that the property of Yaffee should be immediately protected from the time of the interview. The conversation is described in the facts as being an application for policies, indefinite in the important particulars heretofore enumerated, which Yaffee was to receive at a time in the future. This indicates the early stage of discussion, and not a consummated or final agreement. Therefore the cases, of which *Sanford v. Orient Company*, 174 Mass. 416, 54 N. E. 883, 75 Am. St. Rep. 358, is an example, are not applicable. There is here no binding slip, as in *Lipman v. Niagara Fire Ins. Co.*, 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719, nor any course of dealing from which a mutuality of understanding can be implied, as in *Eames v. Home Ins. Co.*, 94 U. S. 621-629, 24 L. Ed. 298, and *Baker v. Commercial Union Insurance Co.*, 162 Mass. 358, 38 N. E. 1124. The record is bare of any facts from which can be gathered a meeting of minds of Yaffee and Knight as to

some of the essential elements of an oral contract of insurance. *Cleveland Oil Co. v. Norwich Union Fire Ins. Co.*, 34 Or. 228, 55 Pac. 435.

Moreover, the facts are susceptible of the construction that the parties never intended any oral contract of insurance, and that they only contemplated a contract springing into existence upon the delivery of the policies and the payment of the premiums. In this aspect of the agreed facts, *Wainer v. Milford Fire Ins. Co.*, 153 Mass. 335-339, 26 N. E. 877, 11 L. R. A. 508, and *Myers v. Liverpool & London & Globe Ins. Co.*, 121 Mass. 338, are decisive in favor of the defendant. It follows that the plaintiff has failed to sustain his case.

Judgment for the defendant affirmed.

(200 Mass. 519)

### POWERS v. STURTEVANT.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 6, 1909.)

#### 1. APPEAL AND ERROR (§ 830\*)—REHEARING—APPLICATION.

An application for rehearing, after a case has been determined by the full Supreme Judicial Court, cannot be made as a matter of right, but is received as suggestion merely in the interest of justice; and is not entered on the records of the court unless the justices in their discretion determine so to do.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 830.\*]

#### 2. APPEAL AND ERROR (§ 1219\*)—REHEARING—APPLICATION—EFFECT.

If the justices of the Supreme Judicial Court, after receiving an application for rehearing, do not advise a rescript or otherwise suggest a postponement of action by the trial court, an application to a single justice to postpone entry of judgment to afford an opportunity for rehearing is a matter of discretion, and the refusal of the application is not ground for bill of exceptions.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1219.\*]

Appeal from Superior Court, Suffolk County.

Action by Clark Powers against Malcolm E. Sturtevant. From an order directing that judgment be entered for plaintiff, defendant appeals. Affirmed.

David T. Montague and Wade Keyes, for appellant. Whipple, Sears & Ogden and Edwin M. Brooks, for appellee.

KNOWLTON, C. J. This is an appeal by the defendant from an order of the superior court that judgment be entered for the plaintiff. The appeal is founded upon the fact that an application for a rehearing, on account of a supposed error in law in the decision of the case by the full court, had been sent to the Chief Justice, and the receipt of it had been acknowledged, with a statement that it would be considered by the justices at their next meeting for consultation. The application was sent in July, and the

next meeting of the justices was to be on the first Tuesday of September.

The defendant seemingly misapprehends the standing of a case after a final decision of it by the full court upon questions of law. On this subject Chief Justice Gray said, in the opinion in *Winchester v. Winchester*, 121 Mass. 127-130:

"The practice of that court [the English Court of Chancery] affords no rule to govern a court of last appeal, whose judgments have the strongest presumptions in their favor, and cannot be freely reconsidered without unreasonably protracting litigation and disregarding the claims of other suitors to the attention of the court.

"After final judgment in the House of Lords or in the Judicial Committee of the Privy Council, no rehearing is allowed, unless for the purpose of correcting mistakes in the form of the decree. \* \* \* In the Supreme Court of the United States no rehearing of a case once decided is granted, nor even an argument permitted upon the question whether a rehearing should be had, unless the court, upon inspection of the petition for a rehearing, sees fit so to order, \* \* \* and this court, for some years past, has conformed to that practice as essential to the discharge of its increasing business."

He supports his statements as to the practice in England and in the Supreme Court of the United States by numerous citations. A similar practice prevails generally in the courts of last resort in the states of this country, although there are two or three, and possibly more, in which applications for a rehearing of questions of law are entertained and arguments heard upon them. The application in *Winchester v. Winchester*, ubi supra, was on the ground that a decree had been entered erroneously as by consent of the parties, when in fact there was no consent. The court received the application without hearing argument upon it, and announced a decision refusing a rehearing. In cases of applications for a rehearing on the ground of a supposed error of the full court, it has been the practice, for many years, not to treat them as having any standing as a part of the legal procedure in the case. They are not recognized by our statutes. They cannot be made as a matter of right, and they are not entered upon the records of the court unless the justices, in their discretion, think they ought to be.

Of course there is a possibility of error in a decision by the most learned and painstaking court in the world. The justices of the Supreme Court of the United States, and of other distinguished tribunals, are often nearly evenly divided in opinion upon a difficult question of law. But when a decision is made, after a court's best efforts to reach a correct conclusion, it ought not to be open to revision merely because it seems to the de-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

feated party to be wrong. On the other hand, if by any accident, oversight or inadvertence a wrong conclusion should be reached in any case, the judges who made the decision presumably would be more desirous than any one else to correct the error. Accordingly, in such a case they would welcome a suggestion in the interest of justice, from anybody, at any time while they have power to revise the decision. The practice of the court in reference to such suggestions from a party is stated in *Wall v. Old Colony Trust Company*, 177 Mass. 275-278, 58 N. E. 1015, 1016, as follows: "Such an application has no standing under our laws as a recognized part of our procedure, but is received only as friendly information to the justices of an oversight or manifest error, which, in the opinion of the justices, should call for correction or reargument. Argument is not heard upon such an application, nor should the application itself contain any argument, but it should suggest the error relied on." If such a suggestion indicates an error the court, of its own motion, will do anything in its power to accomplish justice and protect the rights of the parties. But happily there is seldom occasion to do anything of this kind, and it would be likely to work injustice rather than justice, to permit a party, by presenting such an application, to postpone as of right the entry of final judgment, after a case has been through all the earlier stages of litigation, and has been finally decided with due deliberation by the court of last resort. If the justices, after receiving such an application, do not recall the rescript, or otherwise suggest a postponement of action by the lower court, the action of that court should be governed by the rule stated in *Shannon v. Shannon*, 10 Allen, 249, in these words: "The application to the court, holden by a single judge, to postpone entering judgment for the purpose of affording the party an opportunity for a reargument upon a case already decided by the full court, was a matter within the discretion of the judge, and his ruling refusing such application does not furnish any ground for a bill of exceptions." On the face of the record the case was ripe for judgment, and there was no error of law in making the order.

Judgment affirmed.

(200 Mass. 419)

**HOUDLETTE et al. v. DEWEY.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 5, 1909.)

**1. SALES (§ 79\*)—CONTRACT—CONSTRUCTION—DELIVERY.**

Plaintiffs engaged to import structural beams and deliver them to a structural company, whose works were at Everett. The contract, however, required payment on delivery to the structural company at Boston. *Held*, that plaintiffs were only required to deliver at Boston, and that, when the beams were landed on

the wharf and the structural company notified, plaintiffs' contract was performed.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 214; Dec. Dig. § 79.\*]

**2. SALES (§ 75\*) — CONSTRUCTION — FREIGHT EXPENSE—RECOVERY.**

Where plaintiffs contracted to import and deliver beams to a structural company at Boston for defendant, and their correspondence showed that defendant understood that plaintiffs would transport the beams from the delivery point on the Boston wharf to the structural company's plant at defendant's expense, and plaintiffs did so, they were entitled to recover from defendant the cost of such transportation.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 75.\*]

Exceptions from Superior Court, Suffolk County; L. B. Holmes and Francis A. Gaskill, Judges.

Action by Fred A. Houdlette and others against William C. Dewey. Judgment for plaintiffs, and defendant brings exceptions. Overruled.

This action was brought to recover a balance due for a quantity of steel beams, for labor of cutting the same, and expenses of transportation from Boston to East Everett, Mass.

Plaintiff's claim was based on the written proposition and acceptance set up in the declaration made by letter, with the acceptance indorsed thereon, as follows:

"Boston, July 29, 1902.

"Mr. Wm. C. Dewey, New York, N. Y.—Dear Sir: We propose to furnish and deliver to the New England Structural Company, Boston, a schedule of steel beams as per their sheets, Nos. 1 to 11, inclusive, and the small schedule for New York, amounting to about 275 tons, for the sum of \$2.05 base, including duty and wharfage in Boston or New York for beams up to and including 15"; larger sizes usual extras, \$2.50 per ton.

"Terms: Cash by sight draft against invoice and delivery to New England Structural Company at Boston and on dock in New York, you to advance \$3,000 in cash (as an evidence of good faith) the same to be applied against the payment of our last delivery of beams.

"Delivery: Shipment of the entire schedule from Europe to be made within four to six weeks from this date. It is understood that this contract is accepted and the sale made subject to delays brought about by strikes, fires or causes beyond our control.

"Yours very truly,

"Fred A. Houdlette & Sons.

"Accepted July 31, 1902.

"Wm. C. Dewey."

It appeared in evidence that after about two-thirds of the beams called for by the contract had arrived at Boston the plaintiffs sent the following telegram to the defendant:

"Boston, Mass., Sept. 17, 1902.

"W. C. Dewey, 5 East 14th St., New York. Contract calls for delivery dock Boston who

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

attends to delivery Structural Companies works. They can't receipt until that is done, draft must be paid upon presentation.

"F. A. Houdlette & Son."

To this the defendant replied by telegraph on the same day as follows:

"New York, Sept. 17, 1902.

"To F. A. Houdlette & Son, 139 Milk Street, Boston. Read contract July twenty-ninth you must deliver to Structural Co. will not accept draft until that is done.

"Wm. C. Dewey, 5 E. 14th St."

On the same day the defendant wrote the plaintiffs, inclosing a copy of the above telegram from himself to the plaintiffs as follows:

"Your telegram received and I have replied as per inclosed copy. It is needless to say that I am surprised that you could send the telegram you did. I depended on my memory when I wrote you the 15th inst., but it was perfectly clear to me as I allowed you the extra 5c. just for that purpose and your contract calls for delivery to New England Structural Co. and cash by sight draft against invoice and delivery to New England Structural Co. That matter was thrashed out thoroughly in Boston and I was not in a position to attend to the detail of receiving beams provided they should be delivered to the New England Co. and it was especially agreed that their receipt should be attached to draft."

The following testimony of defendant appears in the record with reference to this letter:

"Q. What are you referring to in the letter of September 17, 1902, from defendant to plaintiffs? How did you know they were charging you extra for transportation, of which you complained?

"A. That referred to the cutting, your honor. The five cents extra was for cutting to lengths as called for in the schedule, and that is what I referred to as the five cents, and, as I say, the delivery was to be to the works of the New England Company.

"Q. You say that you were complaining then of the charge for the extra cutting?

"A. No; I was complaining in that letter of the charge for freight, or his refusal, rather, to deliver the goods to the mill of the New England Structural Company. He wanted to have a delivery of the order constitute a delivery of the goods, and I refused to accept a delivery order as a delivery of the goods."

Also, under date of September 17th, defendant wrote plaintiffs as follows:

"Springfield, September 17th.

"F. A. Houdlette & Son—Gentlemen: I found it necessary to come here and will be here during the day. To-morrow, Thursday, if you wish to telephone me I will be at my home at 10 a. m., or I will be at the office of P. P. Kellogg, the United States Envelope Company, at 11 a. m. You should telephone your bank here to hold draft until you send receipt of New England Structural Company

and have delivered as per contract of July 29th. You know that I have no facility for receiving or arranging for delivery, and it was never intended that I should be bothered with it.

"Yours, W. C. Dewey."

On September 18th plaintiffs telegraphed defendant as follows:

"Boston, Sept. 18, 1902.

"W. C. Dewey, 69 Maple St., City. We will deliver beams Structural Co. Everett. Please pay draft to-day. J. A. Houdlette & Son."

On the same day plaintiffs sent the defendant the following letter:

"Boston, Sept. 18, 1902.

"Mr. W. C. Dewey, 69 Maple St., Springfield, Mass.—Dear Sir: Since talking with you on the telephone this morning we have wired you as follows which we now confirm: 'We will deliver beams Structural Co. Everett. Please pay draft to-day.' We also had our bank, the Beacon Trust Co., wire to the Springfield Safe Deposit & Trust Co. to hold draft made on you over another day. We trust, however, that you have taken this up to-day. We will proceed as soon as possible to deliver this material to the N. E. Structural Co. at Everett.

"Referring to the steel columns for your new building, we have a cable from our foreign representative stating that he would quote us a price on these in a few days.

"Yours very truly,

"F. A. Houdlette & Son.

"Dict. by M. R. H."

During the month of October following the balance of the beams called for by the contract having arrived the following correspondence was had between the parties:

"New York, Oct. 13, 1902.

"F. A. Houdlette & Sons, 139 Milk Street—Gentlemen: We have yours of Oct. 11th, and shall decline to accept the draft, so you may as well notify the bank to recall it. I told you when I was in Boston the conditions under which I would accept the draft, and inasmuch as you have the \$3,000, everything is to your advantage, and I will not pay out any more money until I receive the following:

"Duplicate invoice, giving detail of beams with weights, showing a credit for overcharge for last bill, and a delivery from the New England Structural Co. There is no use in your trying to do business with me in the way that you have, and I shall insist upon my rights as specified in the contract.

"Your prompt compliance will save trouble and possibly expense for you, and under the circumstances you cannot possibly be taking any risk, so I shall insist upon the above, and will not accept the draft until everything has been complied with, as stated above.

"Yours truly,

Wm. C. Dewey."

"Boston, Oct. 15, 1902.

"Wm. C. Dewey, Esq., 5 East 14th St., New York—Dear Sir: Your letter of the

18th inst. received, contents noted. We have consulted with Mr. Keyes on the subject and he states:

"The position which Mr. Dewey assumes is so entirely different from what I would think a business man experienced in the building trade would take that I do not understand it. A contract was made with him for delivery at Boston of certain beams at a base price of 2.05c. You (F. A. H. & Son) have kindly for Dewey, but very foolishly for yourselves, paid on the previous shipments the transportation charges from Boston to Everett at a cost of 5c. per cwt.

"Let us hereafter follow and 'stick' to the conditions of the contract which explicitly states a base price. Base price in the steel business, as we all understand, is the first charge for ordering sizes of material, in beams for sizes under 18". Any additional work on them of whatever nature is charged extra, and as a consequence we have been charged for cutting to exact lengths on the Dewey order, which charge has been objected to by him. We certainly do not want to absorb 8 3/4c. per cwt. in addition to the 5c. already and the expense of the bond (\$30.00) or else you will be receiving perhaps a cent a pound when Mr. Dewey finishes his demands. You have given away too much already and I ask that the terms of the contract be carried out on our part and if Mr. Dewey refuses to do his part, the fault, responsibility and expense will be his, not ours. If, as I understand, he has refused already and will not recede, dispose of the material by sale at as early a date as possible to save charges."

"What will we do in the matter? Will you pay or will we dispose of the material elsewhere?"

"Yours very truly,

"F. A. Houdlette & Son."

"Boston, Oct. 17, 1902.

"Mr. Wm. C. Dewey, New York—Dear Sir: Your letter of yesterday received and contents noted. In reply would state that if foolishness and childishness has been exhibited it has not been on our part. If we had gone by the strict letter of the contract on delivery you would be paying \$1.00 per ton extra for delivery to Everett.

"We have decided now to stick to the contract. Your threats are out of place. Unless we hear from you to-morrow agreeing to pay our bill as its stands we will dispose of the material. We will wait for your immediate telegraphic reply to this letter before acting.

"Yours very truly,

"F. A. Houdlette & Son.

"Dict. by M. R. H."

The following telegram was in evidence:  
"October 21st.

"Will deliver beams to Structural Company, Everett, and charge you transportation, this being additional to the contract.

"F. A. Houdlette & Son."

The court found that the rights under the contract were not varied by the payment of the first draft by defendant and the letter and telegrams of plaintiffs promising to deliver at Everett; both parties having acted under mutual mistake of facts and that no variation of the original contract was made, and the minds of the parties not having met on any variation.

Joseph Cavanagh, for plaintiffs. Whipple, Sears & Ogden and Edwin M. Brooks, for defendant.

BRALEY, J. The declaration as amended contained two counts, the first declaring for the balance of an account due under the contract, the second on an account annexed in which the balance was itemized. At the trial, the other items having been either admitted or not seriously contested, the controversy seems finally to have been narrowed to the charge for transportation, and the exception to the refusal to rule that under the contract the plaintiffs could not recover therefor, presents the only question to be decided. The plaintiffs' letter to the defendant, with his acceptance, constituted the contract, and in view of the findings of the judge, which were supported by the evidence, that it had not been varied by their subsequent telegrams, letters, and interviews, their respective rights rest upon its construction. It may be gathered from the exceptions, which are extremely meager of any clear description of the parties, or their situation, at the time, that the defendant, who was an architect residing in another state, intended to use the steel beams, after they had been properly fitted, in the erection of a building either owned by him or being built under his supervision. The plaintiffs engaged to import the beams, and deliver them to the New-England Structural Company, by whom, under a separate contract with him, they were to be wrought into the desired shape. But in fact their works were at Everett, and as the company refused to accept delivery of the beams at the wharf, the plaintiffs, having paid for transportation to the works for all the shipments, demanded reimbursement. The defendant's agreement with the company does not appear, nor is it important, for upon recurrence to the contract, the plaintiffs became bound to deliver only "at Boston," the place designated by the buyer, and when the beams were landed on the wharf, and the company notified, they had performed their contract, and the title then passed to him. *Chickering v. Fowler*, 4 Pick. 372; *Lucas v. Nichols*, 5 Gray, 300; *Nichols v. Morse*, 100 Mass. 523; *Peck v. Waters*, 104 Mass. 845; *Wyoming National Bank v. Dayton*, 102 U. S. 59, 26 L. Ed. 77; *Smith v. Chance*, 2 B. & A. 753, 755. In payment of the shipments as they arrived, and upon making delivery, sight drafts were to be drawn upon the defendant against the invoices. But as the company would not re-

ceipt, unless the beams had been actually received, after about two-thirds had arrived, and were on the wharf, the plaintiffs telegraphed the defendant of the refusal, and asked for instructions. If this telegram, his letter in reply, and the telegram and letter sent to him the following day, to which no answer was received, are read in connection with his oral testimony in reply to questions put by the court, there was evidence which warranted the judge in finding that the defendant understood the plaintiffs were to transport the beams to the mill of the company for his benefit, and at his expense. The plaintiffs, therefore, having made the necessary outlay, were properly found entitled to recover the amount upon the account annexed. *Massachusetts Mutual Life Ins. Co. v. Green*, 185 Mass. 306, 70 N. E. 202; *Foote v. Cotting*, 185 Mass. 55, 62, 63, 80 N. E. 600, 15 L. R. A. (N. S.) 693.

Exceptions overruled.

(300 Mass. 412)

# **EASTMAN v. BOSTON ELEVATED RY. CO.**

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 5, 1909.)

## **1. WITNESSES (§ 267\*)—CROSS-EXAMINATION—DISCRETION.**

The injury for which recovery was sought being of an arm, exclusion of cross-examination of plaintiff as to any miscarriage from 11 to 20 years before the accident is in the discretion of the court; any connection between that and the accident being too attenuated and remote for consideration.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 923; Dec. Dig. § 267.\*]

## **2. WITNESSES (§ 831½\*) — IMPEACHMENT — SCOPE OF INQUIRY.**

In the introduction of evidence affecting generally the credibility of a witness, the inquiry is limited to her reputation for truth and veracity; so the impeaching witness cannot also be asked if he would believe her under oath.

[Ed. Note.—For other cases, see *Witnesses*, Dec. Dig. § 831½.\*]

Exceptions from Superior Court, Suffolk County; Frederick Lawton, Judge.

Action by Jeannette F. Eastman against the Boston Elevated Railway Company. Verdict for plaintiff. Defendant excepted. Exceptions overruled.

Chas. A. McDonough, for plaintiff. Forrest F. Collier, for defendant.

**MORTON, J.** The injury for which the plaintiff sought to recover was to her arm. In the course of her cross-examination by the defendant it appeared that the plaintiff was married 9 years; that her husband was dead and that she had been a widow 11 years. It also appeared that menstruation came on immediately after the accident, about a week "ahead of time." Thereupon she was asked this question: "Have you ever had any miscarriages since you were married? \* \* \*

I mean during your marriage." The question was excluded and the defendant excepted. It is enough to say that its exclusion was plainly within the discretion of the presiding justice as to the extent to which the cross-examination should be permitted to go. It was possible of course that there might be a connection between the injured arm and premature menstruation and miscarriages which occurred from 11 to 20 years before the accident. But, if there was, it was too attenuated and remote for consideration.

The defendant was allowed to ask a witness called by it if he knew what the reputation of the plaintiff for truth and veracity was, and upon his answering that he did to ask him what it was, and the witness replied that it was bad. Thereupon the defendant asked the witness, "Would you believe her under oath?" On the plaintiff's objection the question was excluded and the defendant excepted.

Whatever may be the rule in England and in some other jurisdictions in this country, we regard it as settled in this commonwealth that, in the introduction of evidence affecting generally the credibility of a witness, the inquiry is limited to his reputation for truth and veracity. *Wetherbee v. Norris*, 103 Mass. 565; *Com. v. Lawler*, 12 Allen, 585; *Quinsigamond Bank v. Hobbs*, 11 Gray, 250, 257; *Com. v. Moore*, 3 Pick. 194, 196. This rule, it is said in 30 Am. & Eng. Ency. of Law (2d Ed.) 1075, "is well supported by authority as well as reason," and a large number of cases is cited. See, also, *Teese v. Huntington*, 23 How. 2, 16 L. Ed. 479, and *Greenleaf on Ev.* § 461.

Exceptions overruled.

(300 Mass. 527)

# **CARROLL v. BOSTON ELEVATED RY. CO.**

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 6, 1909.)

## **1. DISCOVERY (§ 40\*)—STATUTORY PROVISIONS — INTERROGATORIES — SUBJECT-MATTER OF EXAMINATION.**

Under Rev. Laws 1902, c. 173, § 63, providing that a person interrogated before trial shall not be obliged to answer a question disclosing the manner in which he proposes to prove his case, a defendant in a personal injury action is not compelled to disclose in advance its theory of the accident, or to state the facts derived from investigation on which it will rely to establish its defense.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. § 53; Dec. Dig. § 40.\*]

## **2. APPEAL AND ERROR (§ 970\*)—DISCRETION OF LOWER COURT—EXCLUSION OF EVIDENCE — REVIEW.**

It is within the discretion of the presiding judge to exclude the testimony of a medical expert on the ground that the witness lacks sufficient medical experience; and such discretion will not be disturbed, unless wrongfully exercised.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3849; Dec. Dig. § 970.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

### 3. APPEAL AND ERROR (§ 1056\*) — HARMLESS ERROR — ERRONEOUS EXCLUSION OF EVIDENCE.

The error, if any, in excluding evidence bearing only on the measure of damages in a personal injury action, was not prejudicial, where the jury found that there was no liability.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4190; Dec. Dig. § 1056.\*]

### 4. WITNESSES (§ 374\*) — BIAS OF WITNESS — COMPETENCY OF EVIDENCE—DISCRETION OF COURT.

A witness having testified that she had only the friendliest feelings toward plaintiff, plaintiff's attorney, to show bias, offered a letter written by witness containing unpleasant gossip in relation to doings of plaintiff's son and daughters, but only inferentially referring to plaintiff herself. *Held*, that the exclusion of the letter was discretionary with the trial court.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 374.\*]

### 5. EVIDENCE (§ 553\*) — OPINION EVIDENCE — HYPOTHETICAL QUESTION.

A hypothetical question may rest either on assumed facts already in evidence or on assumed facts which may be put in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2371; Dec. Dig. § 553.\*]

### 6. APPEAL AND ERROR (§ 971\*) — DISCRETION OF LOWER COURT—RECEPTION OF EVIDENCE—REVIEW.

In determining the scope, fullness, and distinctness of hypothetical questions, much must be left to the discretion of the presiding judge, and his discretion will not be overridden, unless it very clearly appears to have been wrongfully exercised.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 971.\*]

### 7. EVIDENCE (§ 554\*) — HYPOTHETICAL QUESTIONS—ANSWERS—SUFFICIENCY.

A hypothetical question, asked an expert as to the causes for the derailment of a car, was predicated on the assumption that the car track and the switch were apparently in good condition before and after the accident, which facts were established by testimony. There was no objection or exception to the question, and the answer assumed the facts stated in the question, and the witness then proceeded to give his opinion and demonstrate the correctness thereof by giving reasons therefor. *Held*, that the testimony of the expert was not open to the objection that it assumed the existence of facts not in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2375; Dec. Dig. § 554.\*]

### 8. TRIAL (§ 260\*) — INSTRUCTIONS — REFUSAL TO GIVE INSTRUCTION COVERED BY THE CHARGE GIVEN.

It is not error to refuse requested instructions substantially embodied in instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

### 9. TRIAL (§ 244\*) — INSTRUCTIONS—SINGLING OUT PORTION OF EVIDENCE.

An instruction in a personal injury action that the jury are not bound to believe the evidence of the defense, or to accept the explanation of the accident offered by defendant, unless they are satisfied that it is true and that the accident was not due to the negligence of defendant, is properly refused, because it singles out a portion of the evidence for comment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 578, 579; Dec. Dig. § 244.\*]

### 10. TRIAL (§ 260\*) — INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS COVERED BY CHARGE GIVEN.

Where the court in a personal injury action charged that the credibility of the witnesses and the weight of the evidence as to any adequate explanation offered by defendant were for the jury, the refusal to charge that the jury were not bound to believe defendant's explanation of the accident, unless they were satisfied that it was true, was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

### 11. CARRIERS (§ 317\*) — INJURIES TO PASSENGERS—EVIDENCE—ADMISSIBILITY.

The fact that a car jumped a switch on being replaced after its derailment at the switch, injuring a passenger, is inadmissible as evidence of an admission by the carrier that the passenger had been injured through its negligence.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 317.\*]

### 12. CARRIERS (§ 321\*) — CARRIAGE OF PASSENGERS—CARE REQUIRED—INSTRUCTIONS.

An instruction, in an action for injuries to a passenger by the derailment of the car, that the carrier was bound to use the highest degree of care for the safety of its passengers consistent with the practical operation of the road, and that if the jury found that the accident would not have resulted, had greater care been taken to examine the switch at the place of the derailment of the car, the passenger was entitled to recover, was erroneous, because it subjected the carrier to a greater liability than the law imposes.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1327; Dec. Dig. § 321.\*]

### 13. EVIDENCE (§ 94\*) — "PRIMA FACIE EVIDENCE."

"Prima facie evidence," in legal intendment, means evidence which, if un rebutted or unexplained, is sufficient to maintain the proposition and warrant the conclusion to support which it has been introduced; but a prima facie case, when made out, does not, either necessarily or usually, change the burden of proof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 117; Dec. Dig. § 94.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5549, 5550; vol. 8, p. 7762.]

### 14. EVIDENCE (§ 94\*) — "BURDEN OF PROOF."

In the sense of the burden of the evidence, the "burden of proof" may change from one side to the other as the trial proceeds; but in the sense of maintaining the issue involved in the action, it constantly remains on the party alleging the fact which constitutes the issue, and when all the evidence has been introduced the jury must determine whether it has been maintained.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 117; Dec. Dig. § 94.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 904-907; vol. 8, p. 7593.]

### 15. CARRIERS (§ 316\*) — INJURIES TO PASSENGERS—BURDEN OF PROOF.

Where, in an action for injuries to a passenger by the derailment of the car, the carrier gave evidence from which the jury could find that it had used due care in the construction, equipment, and maintenance of the railway, the burden of proof was not shifted, but remained on plaintiff to establish the carrier's negligence on all the evidence, of which the presumption of negligence on proof of the derailment and injury formed only a part.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1288; Dec. Dig. § 316.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Exceptions from Superior Court, Suffolk County; Robert O. Harris, Judge.

Action by Agnes Carroll against the Boston Elevated Railway Company. There was a verdict for defendant, and plaintiff brings exceptions. Overruled.

The following were the instructions requested by plaintiff:

"(1) Upon all the evidence the jury should find for the plaintiff.

"(2) Upon all the evidence the jury should find that the plaintiff was a passenger upon the defendant's railway at the time of the accident.

"(3) Upon all the evidence the jury should find that the plaintiff was in the exercise of due care at the time of the accident.

"(4) Upon all the evidence the jury should find the defendant's negligence was the cause of the accident.

"(5) The undertaking of the defendant as a carrier of passengers is that it will use reasonable care according to the nature of its contract; and, as that involves the safety of the lives and limbs of passengers, the law requires the highest degree of care which is consistent with the nature of the undertaking.

"(6) While the burden of proof of the defendant's negligence is upon the plaintiff in this case, the proof of the occurrence of the accident in this case and of the exercise of due care on the part of the plaintiff is *prima facie* proof of the defendant's negligence.

"(7) A railway and its cars are so constructed and adjusted to each other with the purpose that, when there is no defect in either, the cars shall remain on the track. The fact that a car runs off the track or jumps a switch is evidence of defect or negligence somewhere; and, when the track and cars are under the exclusive control of the defendant, it is evidence sufficient to charge it, in the absence of an explanation which satisfies the jury, that the accident was not due to negligence in some respect on the part of the defendant.

"(8) The plaintiff is not bound to show the particulars of the defendant's negligence, or to point out the particular act or omission which caused the accident. It is enough if she shows facts from which negligence may be inferred.

"(9) No one but the defendant was in control of the car or switch and from the circumstances of the accident it would not be reasonable to infer that it was due to the careless or willful act of any third person, or to any cause except the failure of the switch to perform the function for which it was designed and which was made of it by the defendant.

"(10) The jury are not bound to believe the evidence of the defense or to accept the explanation of the accident offered by it, unless they are satisfied that it is true and that

the accident was not in fact due to the negligence of the defendant in any particular.

"(11) The defendant was bound to use the highest degree of care for the safety of its passengers consistent with the practical operation of the railway; and if the jury find that the accident would not have resulted, had greater care been taken to examine the condition of the switch and the position of the tongue and key of the same, the plaintiff is entitled to recover.

"(12) The fact that the car again jumped the switch upon being replaced after the accident is evidence of a defect in the car or switch."

The judge gave the instructions prayed for in the second, third, fifth, eighth, and ninth prayers as requested, or in substance, and refused to give the instructions contained in the first, fourth, sixth, tenth, eleventh, and twelfth prayers, and gave the instructions contained in the seventh prayer, but modified.

The following is the letter referred to in the opinion:

"So. Boston, July 26, 1900.

"Dear Jim: Well I thought I would write you a few lines and let you know what is going on in this part of the town. Well the first go off Mr. J. Carroll was arrested & his Mother had to pay a fine of \$3.00 & \$2.00 to bail him out & may be there isn't war over that much money. They are all going it blind to have him put away but the old Lady sides in with him. Everett is after giving him another wheel, but she does not let him work any more & Mrs. McDermott is ripping it into her for fair, and also old lady Drake, so yesterday she was out Grove Hall way looking for rooms but didn't get any as yet, but is going again today. The girls came back from Portland with swelled heads. They were made acquainted with 35 fellows & they didn't know which they would take. There are two of them calling here now but they are both ashamed of the Street so Ma must move right away as the Street is not fit for some Dr. & Dentist that they would like to ask & laying all jokes aside I wonder how their front room will suit their swelled friends. The other night Bill sat on the steps & Katie & Joe did so much blowing that Bill couldn't stand it so he went across to Johnie Kramer. They were saying that they never went to bed till two & three oc'l in the morning that they stayed out on the yacht till that time, so Bill says he doesn't think much of either of them but this Street has two much noise for them they want to go where it is quiet. Don't say a word Jim Mahan calls here again to see Katie, & last night she had a date with Keenan & expected Willie at the same time. Joe is going with a fellow named Patterson, but he looks like a good hot sport. But they both want to catch the Dentist as they said on the steps the other night they wanted to

pull his leg, they are both making up their minds to go to Portland for Labor Day, & I guess that is all eight of them intend to do with any fellow but some day they will both get taking in the same as their Mother did. Well the Kramers go away Monday to be gone for a month & Bill Eddle & I are going out to Roslindale for a week in Aug. Bill is still working. Sat. night he was with Bachelder down to his house drinking Italian wine & may be he wasn't sick, Sunday, and I more than give him the laugh. Well I guess I will close hoping you are taking good care of yourself. & are well as this letter leaves us all at the present time. Mrs. O'B.

"Jim be sure & burn this letter after you read it as I wouldn't want Flossie or Nellie to read it after you came home & you heedn't mind answering it as I only thought I would let you know what was going on unless you want to. Nell."

Wendell P. Murray, for plaintiff. Ralph A. Stewart and Henry J. Hart, for defendant.

**BRALEY, J.** If the record is supplemented by the admissions found in the brief of defendant's counsel, the refusal of the president to answer the eleventh interrogatory affords no ground of appeal. The defendant was not compelled under Rev. Laws, c. 173, § 63, to disclose in advance its theory of the accident, or to state the facts derived from investigation, upon which it relied to establish its defense. *Gunn v. New York, New Haven & Hartford Railroad Co.*, 171 Mass. 417, 50 N. E. 1081; *Robbins v. Brockton Street Railway Co.*, 180 Mass. 51, 61 N. E. 265; *Spinney v. Boston Elevated Railway Co.*, 188 Mass. 30, 73 N. E. 1021. Nor was there any error at the trial in the rulings upon the admission and exclusion of evidence.

It was within the discretion of the presiding judge, which does not appear to have been wrongly exercised, to exclude the testimony of the plaintiff's medical expert, upon the ground that in his opinion the witness lacked sufficient medical experience. *Muskeget Island Club v. Nantucket*, 185 Mass. 303, 70 N. E. 61; *Lakeside Mfg. Co. v. Worcester*, 186 Mass. 552, 72 N. E. 81. Moreover as his evidence, if admitted, bore only on the measure of damages, the jury having found there was no liability, the plaintiff was not prejudiced. The exclusion of the letter also was discretionary, as it contained only by remote inference, if at all, any possible allusion to the plaintiff. *Jennings v. Rooney*, 183 Mass. 577, 67 N. E. 665; *Robinson v. Old Colony Street Railway Co.*, 189 Mass. 594, 76 N. E. 190. The defendant, without objection or exception, having put a hypothetical question to an expert called by it to give his opinion as to the causes by which the car might have been derailed, the plaintiff asked that his answer be excluded, because it assumed the existence of facts not in evidence, and which the

jury could not fairly find to have been true. To a refusal to exclude this answer the plaintiff excepted. *Williams v. Clarke*, 182 Mass. 316, 65 N. E. 419. A hypothetical question rests upon either assumed facts already in evidence, or assumed facts which may be put in evidence. In determining the scope, fullness and distinctness of the questions, much must be left to the discretion of the presiding judge, which ought not to be overridden, unless it very clearly appears to have been wrongly exercised. *Chalmers v. Whitmore Mfg. Co.*, 164 Mass. 532, 533, 42 N. E. 98; *Anderson v. Albertstamm*, 176 Mass. 87, 57 N. E. 215; *Com. v. Johnson*, 188 Mass. 382, 384, 385, 396, 74 N. E. 989. By the testimony of other witnesses the defendant had laid a proper foundation upon which to rest the assumption of facts in the question asked. The witness assumed in his answer, as the question itself was predicated upon such assumption, that the car track, and the switch, were apparently in good condition as well after as before the accident, and then proceeded to give his opinion that, if these conditions were found to have existed at the time, the tongue of the switch might have been moved a little when the forward trucks passed over, and, if this occurred, the rear trucks as they followed might be caught causing the car partially to leave the track. In further demonstrating how this might happen, his statements that, if dirt had worked into the switch, the tongue might have been pushed out from the rail on which the car was traveling, causing it to run off the track, or if the switch tongue had become slightly worn, it would be a little low, causing the tread of the wheel to lift from the rail as it passed over, may be regarded either as additional reasons for his opinion, derived from experience, or as other possible consistent explanations, falling within the scope of the inquiry.

We pass to the rulings requested by the plaintiff, and to the instructions under which the case went to the jury. In all there were 12 requests. Of these, the second, third, fifth, eighth and ninth were given substantially in the language requested, while the seventh, subject to the plaintiff's exception, was given in a modified form. The tenth was properly refused, as the court was not called upon to single out a portion of the evidence for comment. Besides, the jury must clearly have understood from the instructions, which if not in terms certainly in substance, embodied the request, that the credibility of the witnesses, and the weight of the evidence as to any adequate explanation offered by the defendant, were all for their determination. The twelfth could not properly be given, as the derailment after the accident was inadmissible as evidence of an admission by the defendant that the plaintiff had been previously injured through its negligence. *Shinners v. Proprietors of Locks and Canals*, 154 Mass. 168, 28 N. E.

10, 12 L. R. A. 554, 26 Am. St. Rep. 228. By the first part of the eleventh request, the plaintiff directed the attention of the court to the degree of care required of a common carrier of passengers, and the instructions were in conformity therewith. The second part could not properly be given, as it subjected the defendant to a greater liability than the law imposes. *Millmore v. Boston Elevated Railway Co.*, 194 Mass. 323, 80 N. E. 445, 11 L. R. A. (N. S.) 140, 120 Am. St. Rep. 558; *Marshall v. Boston & Worcester Street Railway Co.*, 195 Mass. 284, 287, 81 N. E. 195.

But the plaintiff's principal complaint arises from the refusal to give the sixth and seventh requests, without modification. In the case of *Ware v. Gay*, 11 Pick. 106, 112, where a stagecoach, in which the plaintiff was a passenger, overturned and broke his leg, it was said: "The wheel came off upon a plain and good level road without coming in contact with any other object. The evidence made a *prima facie* case for the plaintiff. We are of the opinion, that the law would imply negligence from these facts. It would result from them, that the coach was not properly fitted, and provided. Then the burden of proof would change, and it would be for the defendants to rebut the legal inference." This form of statement of the law both as to the presumption of negligence on the part of the carrier, where the injury to the passenger is of such a nature, that the accident according to common experience would not have happened if there had not been a defect in the road, or the equipment by which it is operated, and the burden of proof after a *prima facie* case has been made out, is found, in very many of the cases where the subject has been considered. *Fairchild v. California Stage Co.*, 18 Cal. 599; *Osgood v. Los Angeles Traction Co.*, 137 Cal. 280, 70 Pac. 169, 92 Am. St. Rep. 171; *Derwort v. Loomer*, 21 Conn. 245; *Younge v. Kinney*, 28 Ga. 111; *New York, Chicago & St. Louis Railroad Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. 809; *Pittsburgh, Cincinnati & St. Louis Railroad Co. v. Williams*, 74 Ind. 462; *Southern Kansas Railroad Co. v. Walsh*, 45 Kan. 653, 659, 26 Pac. 45; *Louisville & Portland Railroad Co. v. Smith*, 2 Duv. (Ky.) 556; *Baltimore & Ohio Railroad Co. v. Worthington*, 21 Md. 275, 83 Am. Dec. 578; *Stevens v. Railroad Co.*, 66 Me. 74, 77; *Stoody v. Detroit, Grand Rapids & Western Railroad Co.*, 124 Mich. 420, 83 N. W. 26; *McLean v. Burbank*, 11 Minn. 277 (Gil. 189); *Sawyer v. Hannibal & St. Joseph Railroad Co.*, 37 Mo. 240, 90 Am. Dec. 382; *Curtis v. Rochester & Syracuse Railroad Co.*, 18 N. Y. 534, 75 Am. Dec. 258; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Iron Railway Co. v. Mowery*, 36 Ohio St. 418, 422, 38 Am. Rep. 597; *Sullivan v. Philadelphia & Reading Railroad Co.*, 30 Pa. 234, 72 Am. Dec. 698; *Boss v. Providence & Worcester Railroad Co.*, 15 R. I. 149, 154, 1 Atl. 9; *Zempt v. Wilmington &*

*Charleston Railroad Co.*, 9 Rich. Law (S. C.) 84, 64 Am. Dec. 763; *Baltimore & Ohio Railroad Co. v. Wrightman*, 29 Grat. (Va.) 431, 26 Am. Rep. 384; *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115; *New Jersey Railroad & Transportation Co. v. Pollard*, 89 U. S. 341, 22 L. Ed. 877; *Gleason v. Virginia Midland Railway Co.*, 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458; *Skinner v. London, Brighton & South Coast Railroad Co.*, 5 Exch. 787; *Dawson v. Manchester, Sheffield & Lincolnshire Railway Co.*, 7 H. & N. 1037; *Carpue v. London & Brighton Railway Co.*, 5 Q. B. 747; *Kearney v. London, Brighton & South Coast Railroad Co.*, L. R. 6 Q. B. 759, 762, 763. In some of our more recent decisions the presumption standing alone is stated to be sufficient to support an inference of negligence, unless the defendant, by going forward with the evidence, offers what the jury may find to be an adequate or satisfactory explanation. *Le Barron v. East Boston Ferry Co.*, 11 Allen, 312, 316, 817, 87 Am. Dec. 717; *Feital v. Middlesex Railroad Co.*, 109 Mass. 398, 12 Am. Rep. 720; *Joy v. Winnsimmet Co.*, 114 Mass. 63; *White v. Boston & Albany Railroad Co.*, 144 Mass. 404, 11 N. E. 552; *Griffin v. Boston & Albany Railroad Co.*, 148 Mass. 143, 146, 147, 19 N. E. 166, 1 L. R. A. 698, 12 Am. St. Rep. 528; *Cassady v. Old Colony Street Railway Co.*, 184 Mass. 156, 162, 68 N. E. 10, 63 L. R. A. 285; *Heblethwaite v. Old Colony Street Railway Co.*, 192 Mass. 295, 78 N. E. 477; *Egan v. Old Colony Street Railway Co.*, 195 Mass. 159, 80 N. E. 696; *Minihan v. Boston Elevated Railway Co.*, 197 Mass. 367, 83 N. E. 871. But, whichever form of expression may be chosen, *prima facie* evidence in legal intentment means evidence which if un rebutted or unexplained is sufficient to maintain the proposition, and "warrant the conclusion to support which it has been introduced." *Emmons v. Westfield Bank*, 97 Mass. 230, 243; *Crane v. Morris*, 6 Pet. 598, 611, 8 L. Ed. 514. A *prima facie* case, when made out, does not, however, either necessarily or usually change the burden of proof. It stands only until the contrary is shown. *Com. v. Kimball*, 24 Pick. 359, 365, 35 Am. Dec. 326; *Wilder v. Cowles*, 100 Mass. 487. The distinction between the burden of proof and the weight or preponderance of the evidence is sometimes overlooked. In the sense of the burden of the evidence, the burden of proof may change from one side to the other as the trial proceeds; but in the sense of maintaining the issue involved in the action, it constantly remains on the party alleging the fact which constitutes the issue, and, when all the evidence has been introduced, the jury must say whether it has been maintained. *Central Bridge Co. v. Butler*, 2 Gray, 180, 132. It is in this sense that the phrase has been employed, or impliedly understood, in the class of cases in our Reports to which the case at bar belongs. The defendant, in the explanation which it offer-

ed, was not called upon to account satisfactorily for the accident, although oftentimes when this has been done the presumption of the carrier's carelessness disappears, but only to show or explain that it had not been guilty of negligence. After it had introduced evidence from which the jury could find that it had used due care in the construction, equipment and maintenance of the railway, the burden of proof had not been shifted, but still remained upon the plaintiff to establish its negligence, upon all the evidence, of which the presumption or inference of negligence upon proof of the derailment, and injury, formed only a part.

The requests, therefore, except so far as given, were properly refused, and the instructions, which fully and accurately recognized this distinction, were correct in law.

Exceptions overruled.

(200 Mass. 400)

**CUTTER et al. v. CITY OF BOSTON.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 5, 1909.)

**1. MUNICIPAL CORPORATIONS (§ 394\*)—CLOSING PRIVATE WAY BY RAISING STREET—RIGHT OF DAMAGES.**

Persons owning land having access to public streets only over private ways, through which they have rights of passage appurtenant to their land, are entitled to damages for the closing of such a private way by the raising of the highway into which it leads by an abutment at the junction point; the damage being special and peculiar, the public having no rights in the private ways.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 942; Dec. Dig. § 394.\*]

**2. EVIDENCE (§ 474\*)—OPINIONS—QUALIFICATION OF WITNESS.**

One may be found qualified to testify to the damaging effects on land, having access to public streets only by private ways, of the closing of such a private way by the raising of a street at the junction point; such person, in addition to a long experience as auditor in such class of cases and as a former judge, being the owner and manager of property adjoining that in question, and having been familiar with the neighborhood for years, although not professing to have much knowledge of the market price of real estate there, he being asked only the general effect of the change on the estate, and the percentage of value taken away thereby.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2217; Dec. Dig. § 474.\*]

Exceptions from Superior Court, Suffolk County; Francis A. Gaskill, Judge.

Petition by Frederick R. Cutter and others against the city of Boston. Verdict for petitioners. Respondent brings exceptions. Exceptions overruled.

Chas. F. Jenney and Sumner Robinson, for petitioners. Philip Nichols, for respondent.

**KNOWLTON, O. J.** This was a petition to recover damages, under the provisions of St. 1890, p. 464, c. 428, § 5, for injury to the

land of the petitioners by the abolition of the grade crossing of the Boston & Maine Railroad at Cambridge street, in that part of Boston which was formerly Charlestown. The petitioners' premises were situated at the corner of Crafts and Roland streets, which were private ways through which the petitioners had had rights of passage appurtenant to their land. Crafts street led directly to Cambridge street, which was the nearest highway, and Roland street ran parallel to Cambridge street, and was connected with it by another private way called Crescent street in which the petitioners also had rights of passage. Crafts street and Crescent street entered Cambridge street at grade. By the abolition of the grade crossing Cambridge street was carried over the tracks of the railroad, and its grade at the intersection of Crafts street was raised about seven feet. The decree provided "that the northerly end of Crafts street be closed to all travel." Crafts street was left at its former grade, terminating at the bottom of a stone wall seven feet high, forming the abutment of Cambridge street. The petitioners' premises had no access to any public street except over some of these private ways, and, after access with teams to Cambridge street by way of Crafts street was cut off, the only access of this kind to that street was by a circuitous route which was comparatively inconvenient for the occupants of the property. The respondent contended that there was no liability, either on the part of the city or the railroad, for the damage to the petitioners' estate from cutting off access through Crafts street to Cambridge street.

The question thus raised is answered favorably to the petitioners by the decisions in *Munn v. Boston*, 183 Mass. 421, 67 N. E. 312, and *Webster v. Lowell*, 142 Mass. 324, 8 N. E. 54. See, also, *Sheehan v. Fall River*, 187 Mass. 359-361, 73 N. E. 544. The petitioners were the owners of an interest in the land in Crafts street where it abutted upon Cambridge street. Apart from their right as owners of an easement in the premises abutting on Cambridge street, they were entitled to damages to their real estate at the corner of Crafts street and Roland street, with its appurtenances, by reason of the effect of the change of grade upon the value of that property for use.

The principal contention of the respondent's counsel is that, because damages are not allowed for the discontinuance of a public way to persons who have other access to the public streets, and whose estates do not abut on the part of the way discontinued, no damage should be allowed to persons whose property is damaged by the obstruction or taking of a private way. See *Smith v. Boston*, 7 Cush. 254; *Davis v. Hampshire County Commissioners*, 153 Mass. 218, 26 N. E. 848, 11 L. R. A. 750; *Hammond v. Worces-*

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ter County Commissioners, 154 Mass. 509, 28 N. E. 902; Hyde v. Fall River, 189 Mass. 439, 75 N. E. 953, 2 L. R. A. (N. S.) 269. But the reason why damages are not allowed in this last class of cases is that they are general, and not special and peculiar; in other words, they do not differ in kind from those suffered by the public generally, although they may be much greater in degree. The reasons for the distinction are stated fully in the cases just cited. But in the present case the damages are special and peculiar. The public have no rights in these private ways, and they suffer no damages from the obstruction of Crafts street at its junction with Cambridge street. See *Munn v. Boston*, *ubi supra*, and *Putnam v. Boston & Providence Railroad Company*, 182 Mass. 351, 65 N. E. 790.

The presiding justice properly might find that Judge Wardwell was qualified to testify as an expert as to the damaging effects of the change upon the petitioners' property. In addition to a long experience as auditor in this class of cases, and as a former judge of the superior court, he was the owner of the legal title and the manager of an estate joining the petitioners' property, and had been familiar with the neighborhood for many years, although he did not profess to have much knowledge of the market price of real estate there. He was not asked to state the damage in money, but only the general effect of the change upon the estate, and the percentage of value taken away. *Whitman v. Boston & Maine Railroad*, 7 Allen, 313, 319, 329; *Brainard v. Boston & New York Central Railroad Company*, 12 Gray, 407, 409, 411; *Swan v. Middlesex*, 101 Mass. 173-177; *Dwight v. County Commissioners*, 11 Cush. 201.

Exceptions overruled.

(200 Mass. 437)

**MacKEOWN v. LACEY.**

(Supreme Judicial Court of Massachusetts.  
Essex. Jan. 5, 1909.)

**1. BILLS AND NOTES (§ 443\*)—INDORSEMENT OF NONNEGOTIABLE NOTE—DELIVERY.**

The indorsement and delivery of a non-negotiable note by the payee thereof operates as an assignment of the note to the indorsee, who, under Rev. Laws 1902, c. 173, § 4, may sue thereon in his own name.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 1380; Dec. Dig. § 443.\*]

**2. HUSBAND AND WIFE (§ 38\*) — NOTES EXECUTED BEFORE MARRIAGE—VALIDITY.**

A note given by a man for money loaned to him by a woman prior to their marriage is not extinguished or rendered void by their subsequent marriage, though husband and wife are incompetent to contract with each other.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 223; Dec. Dig. § 38.\*]

Exceptions from Superior Court, Essex County; Daniel W. Bond, Judge.

Action by Sarah A. MacKeown against Fred Lacey, executor. There was a verdict for plaintiff, and defendant excepts. Overruled.

Rowell & Clay, for plaintiff. J. P. Sweeney and L. S. Cox, for defendant.

**MORTON, J.** The instruments declared on were promissory notes, though not negotiable, and were given by the defendant's testator to the payee for money lent by her to him before their marriage. Interest was paid on them by him to within a few days of the marriage. After the marriage the notes remained in the possession of the payee, but no interest was paid or demanded. After the testator's death the notes were indorsed by the payee to the plaintiff and were duly delivered by her to the plaintiff and thereupon this action was brought. No money or other consideration was paid for the transfer of the notes and the plaintiff was cognizant of the facts in regard to them. The defendant asked the court to rule that the plaintiff was not entitled to recover. The court refused so to rule and found for the plaintiff for the full amount claimed. The case is here on exceptions by the defendant to the refusal to rule as requested and to the finding in favor of the plaintiff.

The indorsements operated as assignments of the notes to the plaintiff (*Hill v. Lewis*, 1 Salk. 132; 2 Ames' Cases on Bills and Notes, 100, note 1), and under St. 1897, p. 378, c. 402 (Rev. Laws, c. 173, § 4), which was in force at the time of the transfer and of the bringing of the action, the assignee could sue in her own name. The notes were valid in their inception and whatever may have been the law formerly it must now be regarded as settled in this commonwealth that the subsequent marriage of the maker and payee did not extinguish them or render them void. *Butler v. Ives*, 139 Mass. 202, 29 N. E. 654; *Spooner v. Spooner*, 155 Mass. 52, 28 N. E. 1121. *Chapman v. Kellogg*, 102 Mass. 246, and *Abbott v. Winchester*, 105 Mass. 115, were disapproved if not overruled in *Butler v. Ives*, *supra*. It is still the law that husband and wife are incompetent to contract with each other. *Caldwell v. Nash*, 190 Mass. 507, 77 N. E. 515. But at the time when these notes were made the parties were not husband and wife and that rule does not, therefore, apply.

Exceptions overruled.

(201 Mass. 7)

**TOGNAZZI v. MILFORD & U. ST. RY. CO.**

(Supreme Judicial Court of Massachusetts,  
Worcester. Jan. 9, 1909.)

**1. STREET RAILROADS (§ 117\*)—COLLISIONS—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.**

One driving a covered wagon leaned over and looked for an approaching car before cross-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing a street car track. He saw no car, and after crossing the track he drove parallel therewith for about 300 feet, when, without looking for cars, he turned and crossed the track. A car struck his wagon and injured him. There was nothing to show that he listened for any car or bell. *Held*, that he was guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.\*]

## 2. STREET RAILROADS (§ 99\*)—COLLISIONS—CONTRIBUTORY NEGLIGENCE.

A traveler on a street on which street cars are operated may properly trust something to the expectation that if a car approaches the motorman will exercise reasonable care and will not run into his vehicle; but he is not justified in relying altogether on such expectation, and is bound to take proper measure for his own safety.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 209-216; Dec. Dig. § 99.\*]

Exceptions from Superior Court, Worcester County; Henry A. King, Judge.

Action by Antonio Tognazzi against the Milford & Uxbridge Street Railway Company. There was a verdict for defendant, and plaintiff excepts. Overruled.

John B. Ratigan and John E. Swift, for plaintiff. Charles C. Milton, Shelley D. Vincent, and Wendell Williams, for defendant.

**MORTON, J.** We assume in favor of the plaintiff, without deciding, that the evidence warranted a finding that the motorman was negligent; but we think that the ruling that the plaintiff was not in the exercise of due care was correct.

The plaintiff testified that as he went from North street into East Main street, across the railroad track he stooped over or leaned out of his wagon and looked both sides to see if a car was coming, but did not see any. He did this, as he testified, because he felt that it was necessary for his safety that he should do so. After he had crossed the track into East Main street he drove along nearly parallel to the track, at first in about the center of the street or ten feet from the track and the last part of the way about two or three feet from the track. His wagon was a covered one with no windows in the sides or back and he could only look ahead within such range of vision as was afforded from where he sat by the opening in the front of the wagon. He could not see anything at the side unless he stooped over or leaned over and looked out. He drove along until he got opposite the driveway that led into his premises, when he turned sharp at right angles and crossed the track to go into the driveway. The car struck the hind wheel of his wagon before he got across the track and threw him out, causing the injuries complained of. From North street to the driveway was 300 feet, and, after looking as he crossed the track at North street, the plaintiff did nothing as

he drove along East Main street to see if a car was coming, or as he turned to go into his driveway, or as he drove across the track. He testified that he did not hear any gong or bell or car. But there is no evidence that he listened. To say that he did not hear is as consistent with his not listening as with his listening and not hearing. The uncontroverted evidence shows that when he turned to cross the track and go into the driveway the car was about 160 feet away. If he had exercised ordinary precaution and leaned out of the wagon and looked he would have seen it. No doubt he could properly trust something to the expectation that if a car did come along the motorman would exercise reasonable care, and would not run into his wagon. He was not justified, however, in relying altogether upon such expectation, but was bound himself to take proper measures for his safety. Instead of doing that he turned squarely across the track in front of a rapidly approaching car which was within a short distance without taking the slightest precaution to see if a car was approaching. He did not rely upon the fact, if it was a fact, that a car was not due, for he testified that he did not know how often nor exactly when the cars passed. He was not justified in relying solely upon the look or glance which he gave when he crossed from North street into East Main street 300 feet away and his conduct must be condemned as careless. In *Williamson v. Old Colony St. Ry.*, 191 Mass. 144, 77 N. E. 655, 5 L. R. A. (N. S.) 1081; relied on by the plaintiff, there was evidence that as the plaintiff drove along he "was listening to see what he could hear," and in *Jedrey v. Boston & Nor. St. Ry. Co.*, 198 Mass. 232, 84 N. E. 316, also relied on by the plaintiff, there was evidence tending to show that before the plaintiff crossed the track he "looked back to see if it was perfectly safe to go over" perhaps "200 or 300 feet." That the plaintiff recognized the danger is shown by the precautions which he took for his safety at the North street crossing, but so far as appears he took no precautions to avoid a collision as he turned to cross the track into his own premises. For a case closely resembling this, although the distance which the plaintiff drove before turning to cross the track was greater, see *Seele v. Boston El. Ry. Co.*, 187 Mass. 248, 72 N. E. 971. See, also, *Birch v. Athol St. Ry. Co.*, 198 Mass. 257, 84 N. E. 310; *Beirne v. Lawrence & Methuen St. Ry.*, 196 Mass. 173, 83 N. E. 859; *Fitzgerald v. Boston El. Ry. Co.*, 194 Mass. 242, 80 N. E. 224; *Saltman v. Boston El. Ry. Co.*, 187 Mass. 243, 72 N. E. 950; *Donovan v. Lynn & Boston St. Ry. Co.*, 185 Mass. 583, 70 N. E. 1029. In the opinion of a majority of the court the exceptions must be overruled.

Exceptions overruled.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(194 N. Y. 1)

**HALBERSTADT v. NEW YORK LIFE INS. CO.**

(Court of Appeals of New York. Jan. 5, 1909.)

**1. MALICIOUS PROSECUTION (§ 8\*) — COMMENCEMENT—WARRANTY.**

Since the substantial injury for which damages may be recovered in an action for malicious prosecution is that inflicted on the feelings, reputation, and character by a false accusation as well as that caused by arrest and imprisonment, a prosecution sufficient to satisfy the law relating to malicious prosecution may be commenced by the issuance of a warrant charging the person accused with a criminal offense, though such warrant is never executed.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 8; Dec. Dig. § 8.\*]

**2. MALICIOUS PROSECUTION (§ 35\*) — CRIMINAL PROCEEDING—TERMINATION.**

Where a criminal proceeding has terminated in favor of accused by judicial action involving the merits or propriety of the proceeding or by dismissal or discontinuance based on some act chargeable to the complainant, a foundation is laid for an action of malicious prosecution; but, if the proceeding is terminated without regard to the merits as by agreement of the parties or by procurement of accused as a matter of favor, or as the result of some act, trick, or device preventing action by the court, a suit for malicious prosecution will not lie.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 71-77; Dec. Dig. § 85.\*]

**3. MALICIOUS PROSECUTION (§ 35\*)—CRIMINAL PROCEEDING—TERMINATION—CAUSE.**

Where a criminal prosecution was dismissed because defendant escaped from the country, and eluded the jurisdiction of the court before he was arrested, and continued his escape until prosecution was barred by lapse of time, the dismissal was not such a termination of the prosecution in favor of accused as would entitle him to sue for malicious prosecution.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 71-77; Dec. Dig. § 85.\*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by Siegmund E. Halberstadt against the New York Life Insurance Company. From an order of the Appellate Division (125 App. Div. 890, 110 N. Y. Supp. 188), reversing an interlocutory judgment of the Supreme Court sustaining plaintiff's demurrer to the second and third defenses of the answer and overruling the demurrer, plaintiff appeals by permission on certified questions. Affirmed.

The questions certified are:

First. Whether the matter set up as a second, further, and separate, defense in the paragraphs numbered 3 and 4 in the answer, is insufficient in law upon the face thereof to constitute a defense to the complaint.

Second. Whether the matter set up as a third, further, and separate defense in the paragraphs numbered 3, 4, and 5 in said answer is insufficient in law upon the face thereof to constitute a defense to the complaint.

The action is brought to recover damages for an alleged malicious prosecution claimed

to have been instituted by the respondent against the appellant in Mexico. It is in the complaint, amongst other things, alleged that the respondent through its agent in the criminal court of the city of Mexico charged the appellant with the crime of embezzlement, "and thereupon and in and by virtue of said charge and the institution of said criminal proceedings a warrant was issued by said court for the arrest of the plaintiff (in this action)," and that thereafter "the said criminal proceedings for the punishment of said plaintiff were dismissed and extinguished and the said prosecution was thereby wholly determined \* \* \* in favor of the plaintiff." The respondent, by its second defense, which is challenged here for insufficiency, alleged in substance that, before the warrant referred to in the complaint could be served upon the appellant and before he could be apprehended, "he left the Republic of Mexico, and thereafter continuously remained absent, \* \* \* and by such absence avoided being arrested under such warrant, or being tried, \* \* \* but remained absent from said Republic of Mexico for a sufficient period of time to enable him to procure the dismissal of said proceedings under the law of Mexico on account solely of the lapse of time," and, conversely, that said criminal proceedings "were not dismissed on account of a determination of the case in favor of the plaintiff on the trial thereof on the merits, nor was it dismissed for failure to prosecute said case except as above set forth, nor was it dismissed on account of any withdrawal of the complaint." The third defense, also challenged, repeats the foregoing allegations, and alleges that "the departure of the plaintiff \* \* \* was for the purpose of avoiding arrest, and by so absconding the said plaintiff did avoid arrest," and in substance that he did so for the purpose and with the result of procuring a dismissal of the criminal proceeding in accordance with the laws of Mexico on account of the lapse of time alone, and "by reason of the premises said plaintiff could not be brought to trial and was never tried in said court to answer to said charge."

Samuel H. Guggenheimer, for appellant.  
James H. McIntosh, for respondent.

HISCOCK, J. (after stating the facts as above). This appeal involves interesting questions in an action for malicious prosecution raised by demurrer to certain affirmative defenses which have been pleaded.

The respondent's first reply to the appellant's attack upon its answer is of the tu quoque nature; it insisting that the complaint is as deficient in the statement of a good cause of action as the answer is alleged to be in the statement of a good defense. This contention is based upon the fact that

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the complaint does not allege any act subsequent or in addition to the mere issuance of a warrant in the criminal proceeding complained of, does not allege that the warrant was ever executed in any way whatever, or that the appellant was ever actually brought into said proceedings either by force of process or voluntary appearance. Therefore the question is presented whether the mere application for and issuance to a proper officer for execution of a warrant on a criminal charge may institute and constitute such a prosecution as may be made the basis of a subsequent civil action by the party claimed to have been injured. In considering this question, we must keep in mind that the facts alleged in the complaint and in the light of which it is to be determined do not show, as the answer does, that the defendant in those proceedings was beyond the jurisdiction of the court. This question does not seem to have been settled by any decision which we regard as controlling on us.

The respondent cites the following authorities deciding it in the negative: *Newfield v. Copperman*, 15 Abb. Prac. (N. S.) 360; *Lawyer v. Loomis*, 3 Thomp. & C. 393; *Cooper v. Armour*, 42 Fed. 215, 8 L. R. A. 47; *Heyward v. Cuthbert*, 4 McCord (S. C.) 354; *O'Driscoll v. McBurney*, 2 Nott & McC. (S. C.) 55; *Bartlett v. Christliff*, 69 Md. 219, 14 Atl. 518; *Gregory v. Derby*, 8 Car. & P. 749; *Paul v. Fargo*, 84 App. Div. 9, 82 N. Y. Supp. 369. The case last cited was concerned with an alleged malicious prosecution by means of civil process, and what was there said must be interpreted with reference to that fact, and thus interpreted it is not applicable here. Of the other cases, only two, *Heyward v. Cuthbert* and *Cooper v. Armour*, considered the question here involved with sufficient thoroughness to require brief comment. An examination will show that the decision in each of them rested in whole or in part on a principle not, as I believe, adopted in this state. In the former it was said that "the foundation of this sort of action is the wrong done to the plaintiff by the direct detention or imprisonment of his person." As I think we shall see hereafter, that is not a correct statement of the law in this state. In the other case it was stated: "The only injury sustained by the person accused, when he is not taken into custody, and no process has been issued against him, is to his reputation, and for such an injury the action of libel or slander is the appropriate remedy, and would seem to be the only remedy." I think that this doctrine, which, if correct, would provide an adequate remedy outside of an action for malicious prosecution for an injured party in a case where no warrant had been executed, also is opposed to the weight of authority both in this state and elsewhere hereafter to be referred to.

The authorities holding to the contrary on the question above stated, and that the execution of the warrant is not necessary to

lay the foundation for an action of malicious prosecution, are 2 Addison on Torts (4th Eng. Ed.) p. 478; *Newell on Malicious Prosecution*, § 30; *Stephens on Malicious Prosecution* (Am. Ed.) § 8; *Stapp v. Partlow*, Dud. (Ga.) 176; *Clarke v. Postan*, 6 Car. & P. 423; *Feazle v. Simpson*, 1 Scam. (Ill.) 30; *Britton v. Granger*, 13 Ohio Cir. Ct. R. 281, 291; *Holmes v. Johnson*, 44 N. O. 44; *Coffey v. Myers*, 84 Ind. 105. And to the like effect in the absence of special statutory provisions is *Swift v. Witchard*, 103 Ga. 193, 29 S. E. 762.

Thus it is apparent, as before stated, that there is no controlling decision on this question, and we are remitted to a search for some general considerations which may be decisive. It seems to me that these may be found, and that they favor the view that a prosecution may be regarded as having been instituted, even though a warrant has not been executed.

The first one of these considerations is found in the rule applied in civil actions and proceedings to an analogous situation. There it has many times been held that the mere issue of various forms of civil process for service or other execution is sufficient independent of statute to effect the commencement of case or proceeding. *Carpenter v. Butterfield*, 3 Johns. Cas. 146; *Cheetham v. Lewis*, 3 Johns. 42; *Bronson v. Earl*, 17 Johns. 68; *Ross v. Luther*, 4 Cow. 158, 15 Am. Dec. 341; *Mills v. Corbett*, 8 How. Prac. 500; *Hancock v. Ritchie*, 11 Ind. 48, 52; *Howell v. Shepard*, 48 Mich. 472, 12 N. W. 661; *Webster v. Sharp*, 116 N. C. 466, 471, 21 S. E. 912. I see no reason why a similar rule should not be applied to criminal proceedings, at least for the purposes of such an action as this.

Then there is another reason resting on justice which seems to me to lead us to adopt this conclusion. In opposition to what was said in the South Carolina case already referred to, the sole foundation for an action of malicious prosecution is not "the wrong to the plaintiff by the direct detention or imprisonment of his person." In an action for false imprisonment that would be so. But in an action of the present type the substantial injury for which damages are recovered and which serves as a basis for the action may be that inflicted upon the feelings, reputation and character by a false accusation as well as that caused by arrest and imprisonment. This element "indeed is in many cases the gravamen of the action." *Sheldon v. Carpenter*, 4 N. Y. 579, 580, 55 Am. Dec. 301; *Woods v. Fennel*, 13 Bush (Ky.) 628; *Townsend on Slander*, § 420; *Wheeler v. Hanson*, 161 Mass. 370, 37 N. E. 382, 42 Am. St. Rep. 408; *Gundermann v. Buschner*, 73 Ill. App. 180; *Lawrence v. Hagerman*, 56 Ill. 68, 8 Am. Rep. 674; *Davis v. Seeley*, 91 Iowa, 583, 60 N. W. 183, 51 Am. St. Rep. 356. But, no matter how false and damaging the charge may be in a criminal proceeding upon which a warrant may be issued, damages for the injury caused thereby cannot under any ordi-

nary circumstances be recovered in an action for libel or slander. *Howard v. Thompson*, 21 Wend. 319, 324, 34 Am. Dec. 238; *Woods v. Wiman*, 47 Hun, 362, 364; *Sheldon v. Carpenter*, supra; *Dale v. Harris*, 109 Mass. 193; *Gabriel v. McMullin*, 127 Iowa, 427, 103 N. W. 355; *Hamilton v. Eno*, 81 N. Y. 116; *Newell on Malicious Prosecution*, § 10. Therefore it follows that a person who has most grievously injured another by falsely making a serious criminal accusation against him whereon a warrant has been actually issued may escape all liability by procuring the warrant at that point to be withheld unless an action for malicious prosecution will lie. It seems to me that under such circumstances we should hold that such action will lie, if for no other reason than to satisfy that principle of law which demands an adequate remedy for every legal wrong.

Deciding, therefore, that the appellant's complaint does state a cause of action, we are brought to the direct consideration of the respondent's answer. I do not think that there is such substantial difference between the two defenses which are questioned as calls for any separate treatment of them. Liberally construed, as the pleader is entitled to have them in the face of a demurrer, each one amounts to this: That the appellant fled from Mexico before the warrant could be served on him for the purpose of avoiding service, and remained out of the country and beyond the jurisdiction of the court for such a length of time that the criminal proceeding was finally dismissed, presumably because prosecution was not and could not be carried on. The question is whether a dismissal or discontinuance of a criminal proceeding under such circumstances is that kind of a termination which will support an action for malicious prosecution. If it is, the answers are bad; otherwise, not. While it is elementary that a criminal proceeding must be terminated before an action for malicious prosecution can be begun, there has been much discussion of the nature of this necessary termination. The best idea of what is essential may be gathered by reference to some pertinent authorities.

In *Wilkinson v. Howell*, 22 E. C. I. R. 368, 1 M. & M. N. P. 495, it appeared that the court in the criminal proceeding complained of had ordered a *stet processus* with the consent of the parties. It was said by Lord Tenterden "that the termination (of the criminal proceeding) must be such as to furnish *prima facie* evidence that the action was without foundation," and that the termination in question did not furnish any such evidence. In *McCormick v. Sisson*, 7 Cow. 715, 717, criminal proceedings were suspended because the parties declared that they had settled all matters of difficulty between them. The court held that there was no proper termination of the proceeding, saying: "It is essential that the plaintiff prove he has been acquitted. The discharge must be in conse-

quence of the acquittal. The action cannot be sustained unless the proceedings are at an end by reason of an acquittal." In *Gallagher v. Stoddard*, 47 Hun, 101, it appeared that the plaintiff, after being arrested, paid the officer having him in custody some money, which was receipted for by the defendant and the officer, and he was thereupon discharged. It was held that this was not enough. In *Atwood v. Belrne*, 73 Hun, 547, 26 N. Y. Supp. 149, it appeared that there had been cross-criminal proceedings, and it was arranged that the respective complainants should be absent on the days to which the proceedings were adjourned and each complaint thus fell for want of prosecution. It was held that this was not a sufficient termination to support a subsequent action for malicious prosecution. In *Jones v. Foster*, 43 App. Div. 33, 35, 59 N. Y. Supp. 738, it was said that the theory on which such an action as this is sustainable "is that the proceeding out of which the action arose has terminated successfully to the defendant, exonerating him from the charge made." In *Leyenberger v. Paul*, 40 Ill. App. 516, it was established that there had been an adjournment of the criminal proceedings to a certain day, and that the attorney for the defendant in that proceeding in violation of his agreement went before the magistrate and procured the dismissal of the charge for want of prosecution. It was held that this was not sufficient, the court saying: "But a *nolle prosequi* by consent, or by way of compromise, or where such exemption from further prosecution has been demanded as a right, or sought for as a favor, is not enough. \* \* \* The principle of the cases is that the discharge or acquittal must be by judicial action under such circumstances as that the party accused has not avoided or prevented judicial investigation." And it has been held in many different jurisdictions under varying circumstances that the entry of a *nolle prosequi* by the prosecuting officer or the termination of a criminal proceeding by the procurement of the party prosecuted or by his consent or by way of compromise is not such a termination of a prosecution as will enable the party thereby discharged to maintain an action for malicious prosecution. *Langford v. B. & A. R. R. Co.*, 144 Mass. 431, 11 N. E. 697; *Russell v. Morgan*, 24 R. I. 134, 52 Atl. 809; *Craig v. Ginn*, 3 Pennewill (Del.) 117, 48 Atl. 192, 53 L. R. A. 715, 94 Am. St. Rep. 77; *Welch v. Cheek*, 115 N. C. 310, 20 S. E. 460; *Marcus v. Bernstein*, 117 N. C. 81, 23 S. E. 38; *Holliday v. Holliday*, 123 Cal. 26, 55 Pac. 703; *Rosenberg v. Hart*, 133 Ill. App. 262; *Marbourg v. Smith*, 11 Kan. 554.

From all of these authorities added to others which are more familiar I think two rules fairly may be deduced. The first one is that, where a criminal proceeding has been terminated in favor of the accused by judicial action of the proper court or official in any way involving the merits or propriety

of the proceeding or by a dismissal or discontinuance based on some act chargeable to the complainant as his consent or his withdrawal or abandonment of his prosecution, a foundation in this respect has been laid for an action of malicious prosecution. The other and reverse rule is that, where the proceeding has been terminated without regard to its merits or propriety by agreement or settlement of the parties, or solely by the procurement of the accused as a matter of favor or as the result of some act, trick, or device preventing action and consideration by the court, there is no such termination as may be availed of for the purpose of such an action. The underlying distinction which leads to these different rules is apparent. In one case the termination of the proceeding is of such a character as establishes or fairly implies lack of a reasonable ground for his prosecution. In the other case no such implication reasonably follows. *Townsend on Slander*, § 423. When we apply these rules to the defenses which have been pleaded, it is evident that they sufficiently allege a termination of the Mexican proceeding which is not of a character to sustain this action, and ought not to be. That proceeding came to a dismissal and end, not because of any judicial action in favor of the accused for lack of merits or because of a withdrawal or abandonment of it by the prosecuting party, but simply because the defendant therein succeeded in escaping from the country and eluding the jurisdiction of the court and thereby preventing a prosecution. He by his flight, as in other cases the accused had done by agreement, settlement, or trick, prevented a consideration of the merits, and he ought not now to be allowed to claim that there were no merits. In some of the cases refusing to allow the maintenance of such an action as this by a party who had procured a discontinuance of criminal proceedings by settlement, it has been said that the reason for such rule is that such settlement was so far a recognition of the propriety of the proceeding that a party making it is subsequently estopped from questioning them. It may be that the conduct of the present appellant in fleeing from Mexico was discreet or even justifiable by virtue of facts which do not appear to us. At the present time, however, it does not to my mind carry any such presumption of innocence in connection with the termination of the proceedings in that country as impliedly condemns them for having been instituted maliciously and without ground.

In opposition to these views, it is insisted by appellant that there is a line of cases which treats the discharge of the defendant in the criminal proceeding as a mere technical condition precedent to the action for malicious prosecution and sustain his theory that the dismissal of the proceeding against him was sufficient for the purposes of this action, specific reference being made to the

cases of *Clark v. Cleveland*, 6 Hill, 344; *Moulton v. Beecher*, 8 Hun, 100; *Fay v. O'Neill*, 36 N. Y. 11; *Coffey v. Myers*, 84 Ind. 105, and *Robbins v. Robbins*, 133 N. Y. 597, 30 N. E. 977. A brief review of these cases seems proper. In the first one the person arrested was released from custody on void bail proceedings. He appeared in accordance with the terms of the latter at a Court of General Sessions, but the complainant did not appear, and no subsequent steps were taken under the warrant. While some general observations were made with reference to the necessary ending of a criminal prosecution, I discover nothing opposed to the principles already stated, and it was held in that case that there had not been a sufficient ending of the prosecution to sustain an action for malicious prosecution. In the *Moulton* Case it appeared that the criminal charge complained of had been terminated in plaintiff's favor by the entry of a nolle prosequi on motion of the district attorney "after consulting with defendant and in compliance with his request." This was clearly a sufficient termination. *Fay v. O'Neill* simply holds that the abandonment of a criminal charge and a discontinuance of the prosecution is equivalent to a discharge from the accusation so as to support an action for malicious prosecution. The *Indiana* Case is thought to be especially applicable because there the accused had fled from the jurisdiction of the criminal court, and the complaint showing this fact was challenged by demurrer, and still held good. The complaint in that case, however, stated a very different termination of the proceeding from that outlined in the present answer; it being expressly alleged that the criminal charge was false; that the defendant fled because of a conspiracy formed which would prevent him from establishing his innocence; and that the proceeding was dismissed because the originators thereof "became satisfied that they could not maintain the prosecution."

It is, however, the *Robbins* Case upon which the appellant most relies. In that case it appeared that the accused had been discharged in the criminal proceeding after a hearing by a police justice, and the only question was whether she was discharged because there was no sufficient evidence against her or whether she was erroneously discharged as a matter of sympathy upon her promise of good behavior. This question was one of fact for the jury, which presumably resolved it in favor of the plaintiff. But, even if the justice under the circumstances was actuated by erroneous or improper motives in discharging her, it nevertheless beyond any question was a sufficient termination of the proceeding under all of the authorities bearing on that subject, and on either theory the basis was laid for an action of malicious prosecution. Under these circumstances, the learned judge

who wrote the opinion made use of some expressions which interpreted by themselves are quite broad and general and are quite confidently quoted by this appellant. He said, among other things: "It cannot in reason make any difference how the criminal prosecution is terminated, provided it is terminated. \* \* \* The circumstances under which she (the plaintiff in that case) is discharged may furnish competent evidence upon the issue of probable cause and malice, and on the question of damages. \* \* \* The termination of the criminal proceeding is a mere technical matter in no way concerning the merits of the action, and is a mere condition precedent to its maintenance." Page 600 of 133 N. Y., page 978 of 30 N. E. In my opinion these remarks should not be construed as meaning, and were not intended to mean, what the appellant claims. For instance, it is not possible that it was intended to disregard the entire current of authority that a termination of criminal proceedings by agreement or settlement is not such an one as will support an action for malicious prosecution, and yet literally the language employed would include that case. We must construe the language used by Judge Earl in the light of the events he was considering, and these were the discharge of an accused by a magistrate acting judicially, even though erroneously, after a hearing. This was what the judge had in mind when, after discussing the effect of a conviction, he mentioned the other termination resulting "favorably to the accused or without his conviction," as sufficient. And, when he said "It cannot in reason make any difference how the criminal prosecution is terminated provided it is terminated," he immediately referred as illustrating his meaning to the case then in hand, where the accused had been duly discharged by the justice, although, as claimed, erroneously. Termination as the result of judicial consideration and decision was what he was talking about and this was the kind he contemplated when with his concluding words he said: "Therefore any termination such as we have above mentioned, as a general rule furnishes the condition precedent." Page 600 of 133 N. Y., page 978 of 30 N. E.

Therefore I think that these cases do not either singly or collectively sustain the burden which appellant has sought to impose especially upon them of furnishing an authority for the reversal of the order appealed from, and for all the reasons stated the latter should be affirmed, with costs, and the questions certified to us answered in the negative.

VANN, J. I concur in the result because there was merely an attempt to prosecute with no actual prosecution. The Mexican court did not acquire jurisdiction of the per-

son of the plaintiff for he was not arrested, nor was process or notice of any kind served upon him. He was not brought into court and the prosecution could not end because it was never begun. He could not be a party defendant until he was notified or voluntarily appeared. He was threatened with prosecution, but neither his person nor his property was touched. There can be no prosecution unless knowledge thereof is brought home to the alleged defendant in some way. If there had been a prosecution commenced, the crime could not have outlawed during the defendant's absence, as is admitted of record. While in civil actions, in order to arrest the statute of limitations, "an attempt to commence an action, in a court of record, is equivalent to the commencement thereof," still the attempt goes for naught unless followed by service, actual or constructive, within 60 days. Code Civ. Proc. § 399. The rule was similar at common law. Although, in order to prevent injustice, an action was deemed to be commenced by the delivery of process for service, it was never treated as effectual for any purpose unless actual service was subsequently made. The authorities cited in the prevailing opinion illustrate this proposition.

In the absence of controlling authority, which it is conceded does not exist, I favor restricting rather than enlarging the scope of the action. This accords with the general position of the court upon the subject.

GRAY, HAIGHT, and OHASE, JJ., concur with HISCOCK, J. CULLEN, C. J., and WILLARD BARTLETT, J., concur with VANN, J.

Order affirmed.

(194 N. Y. 37)

ROBINSON v. CONSOLIDATED GAS CO.  
OF NEW YORK.

(Court of Appeals of New York. Jan. 5, 1909.)

1. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—QUESTION FOR JURY.

In an action for the death of an employé by the falling of a scaffold on which he and another were working, where there is evidence that the nature of the work in trying to uncouple a large pipe placed considerable strain on the scaffold, it was error to take from the jury the question whether there was negligence on the part of any person in the service of defendant intrusted with the duty of seeing that the ways, works, and machinery used were in proper condition.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.\*]

2. MASTER AND SERVANT (§ 286\*)—PRESUMPTIONS AS TO NEGLIGENCE.

In an action for the death of an employé by the falling of a scaffold on which he was working, where there is evidence that the nature of the work in trying to uncouple a large pipe placed considerable strain on the scaffold.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the case is not one for the application of the maxim, "*Res ipsa loquitur*."

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 881; Dec. Dig. § 265.\*]

3. NEGLIGENCE (§ 121\*)—"RES IPSA LOQUITUR."

The "*res*" in the maxim, "*Res ipsa loquitur*," is not simply an accident resulting in injury, but the accident and the surrounding circumstances, and the doctrine does not permit a recovery without some proof of negligence, but, if the occurrence was such that it could not have happened without negligence according to the ordinary experience of mankind, the doctrine is applied, though the precise omission or act of negligence is not specified.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 218; Dec. Dig. § 121.\*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6136-6139; vol. 8, p. 7787.]

Appeal from Supreme Court, Appellate Division, First Department.

Action by Anne Robinson, administratrix, against the Consolidated Gas Company of New York. From a judgment of the Appellate Division (125 App. Div. 914, 109 N. Y. Supp. 1144), affirming a judgment for plaintiff, defendant appeals. Reversed.

For decision on motion to set aside verdict for plaintiff, see 57 Misc. Rep. 155, 103 N. Y. S. Supp. 1088.

Theron G. Strong, for appellant. Edward F. Brown, for respondent.

VANN, J. On the 29th of April, 1905, the plaintiff's intestate, a plumber in the permanent employment of the defendant, was so injured through the fall of a scaffold that he died in a short time. This action was brought under the Code of Civil Procedure and the employer's liability act to recover the pecuniary damages sustained by his next of kin.

The accident occurred in a coal vault beneath the sidewalk of No. 1 Broadway, in the city of New York. The structure upon which the decedent was working when the accident happened was used by the defendant in its business, although it does not appear by whom it was erected, or to whom it belonged. In the pleadings by the witnesses and by counsel in their arguments it was called and treated as a scaffold. About a year before the occurrence in question, it was used by the defendant, but, after that, its history does not appear, except that it remained in the same position in the vault until after the lapse of a year it was again used by the defendant. It was about 9 or 10 feet from the floor, and had no support underneath. One end was suspended by two ropes, and the other rested on a wooden brace placed horizontally between two piers to relieve the lateral strain and thus to strengthen the building. The brace was not designed to sustain a vertical strain, and it was kept in place simply by wedges driven at either end. There was no other fastening. Owing to

work on the subway in the street in front, the vault was open and the brace and the wedges were exposed to the variations in moisture and temperature pertaining to the climate for an entire year. The decedent, by the direction of the assistant foreman of the defendant in charge of its work, went upon the scaffold with another man to uncouple a large pipe overhead, but, owing to rust or some other cause, it was difficult to unscrew it. One man had a wrench and the other a pair of chain tongs, and both exerted all their strength and put all the strain they could on the pipe and scaffold. By pushing upward, as the survivor testified, with all their "might and main," they subjected the scaffold on which they were sitting to a severe vertical strain, when the brace gave way, the scaffold fell, and the decedent was thrown to the floor with such violence as to cause his death. Upon the trial the jury found for the plaintiff, and the judgment entered on the verdict was affirmed by the Appellate Division; one of the justices dissenting. The defendant appealed to this court, and through its counsel insisted that the judgment should be reversed on account of an error in the charge.

The trial judge in instructing the jury laid down the usual elementary propositions relating to negligence, contributory negligence, and assumption of risks. He charged further as follows: "Precisely how or why that scaffold fell is not told by any witness. There is no witness, as I recollect the testimony, who gives you any express facts to show why that scaffold fell, and therefore I instruct you under the maxim '*Res ipsa loquitur*,' which means that things speak for themselves, that the scaffold must have fallen because there was something the matter with it." The defendant excepted and asked the court "to leave to the jury the question as to whether there was negligence of any person in the service of the employer intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition, as a question of fact." After making this request, the counsel for the defendant added: "Your honor charged practically in the language of the statute that the negligence must be that of a superintendent or a person charged with superintendence, and I except to that statement, and ask you to leave it to the jury as a question of fact whether there was any such negligence." The court declined and gave the defendant an exception. In his dissenting opinion, no other being written, Mr. Justice Ingraham said: "I think it was error to refuse to charge the defendant's ninth request. The evidence is uncontradicted that the deceased and his associate placed considerable strain upon this scaffold in trying to unscrew a pipe, and that while thus straining the scaffold fell. There was no evidence but that

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the scaffold would have been perfectly safe if used in an ordinary way."

We also are of opinion that the exceptions raised reversible error, because the doctrine of *res ipsa loquitur* was improperly applied. The "res" of that maxim, which is sometimes misused, is not simply an accident resulting in injury, but the accident and the surrounding circumstances, necessarily shown by proving how the accident occurred; or, in other words, the occurrence as it appears by proof of the accident. The doctrine does not permit a recovery without some proof of negligence, but it regulates the degree of proof required under certain circumstances. If proof of the occurrence shows that the accident was such as could not have happened without negligence according to the ordinary experience of mankind, the doctrine is applied even if the precise omission or act of negligence is not specified, and even when it does not appear whether the accident was owing to some act done or to some act not done. It is applied when the inference of negligence is required by the nature of the occurrence. Thus the apparent cause of the accident may be want of care in constructing or maintaining or operating a machine, and, if the occurrence indicates that the accident could not have happened without negligence in one or more of these respects, it speaks for itself and establishes a *prima facie* case for the jury to consider, even if it does not appear specifically whether or in what respect the machinery was negligently constructed, maintained or operated. Under such circumstances, precision in the proof is not required, as the occurrence raises a presumption of negligence, based on common experience, although no specific defect, act, or omission appears. The occurrence points to negligence as the cause of the accident, because in the nature of things there could have been no such occurrence without negligence. If the res, or the entire occurrence as proved, could not have happened without negligence of some kind, negligence is presumed without showing what kind, and the burden of explanation is thrown on the defendant. If, however, proof of the occurrence shows that the accident might have happened from some cause other than the negligence of the defendant, the presumption does not arise and the doctrine cannot properly be applied. Under such circumstances, it is for the jury to find whether the accident was owing to negligence on the part of the defendant, or to some cause for which the defendant was not responsible. The principles upon which the doctrine rests and the circumstances under which it should be applied were so clearly pointed out by Judge Cullen in *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630, the leading case upon the subject, that further discussion thereof is unnecessary.

In the case before us, the occurrence did not speak for itself, nor permit negligence as the only inference, for the fall of the scaffold may not have been caused by the weight of the men upon it, but by their weight only when augmented in its effect by excessive pressure applied by all the strength they could exert when pushing upward, although indirectly, against a stationary object. One of them, as it was shown, had unusual and the other, as it is presumed, had average strength, and the strain of the pressure may have much exceeded the strain of the weight. The jury, if permitted, might have found that this caused the accident. It was an explanation for them to consider, tending to show why the scaffold fell; but, under the charge that it "must have fallen because there was something the matter with it," no consideration thereof was possible, and the defendant was deprived of its chief defense.

For this error, we think that the judgment appealed from should be reversed and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

Judgment reversed, etc.

(194 N. Y. 529)

GUNDERSON v. ROEBLING CONST. CO.  
(Court of Appeals of New York. Jan. 5, 1909.)  
MASTER AND SERVANT (§ 281\*)—DEATH OF  
SERVANT—CONTRIBUTORY NEGLIGENCE.

In an action for death of a workman, held that decedent was negligent, precluding a recovery.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 281.\*]

Hiscock, J., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Rosa Gunderson, as administratrix of the estate of her deceased husband, against the Roebling Construction Company, impleaded with Post & McCord. A motion to dismiss was granted as to Post & McCord, and from a judgment of the Appellate Division (124 App. Div. 914, 108 N. Y. Supp. 1134), affirming a judgment on a verdict for plaintiff for \$12,000, against the Roebling Construction Company, and from an order denying its motion for a new trial, it appeals. Reversed, and new trial granted.

J. Arthur Hilton, for appellant. Thomas J. O'Neill, for respondent.

EDWARD T. BARTLETT, J. This action was brought to recover damages for the death of plaintiff's husband, who was killed on the 26th of September, 1906, while working on a structure, in the course of erection, known as the "Edison Building," a power

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

house, at Thirty-Ninth street and First avenue, in the city of New York, borough of Manhattan. This action was originally commenced against the Roebing Construction Company and Post & McCord, who were the contractors engaged in erecting the steel structure, and the Roebing Construction Company contracted for the concrete work. When the plaintiff first rested, a motion was made to dismiss the complaint as to both defendants. It was denied as to the Roebing Construction Company and granted as to Post & McCord.

The Roebing Construction Company maintained an electric elevator or hoist for the purpose of carrying its concrete and material from the basement to the upper floors. The hoist ran from the cellar to the top of the building between "guides," which kept it in position. There were also "grooved cleats" that ran upon the guides and connected with the hoist. The cement was carried in wheelbarrows, which were placed on the hoist and delivered at the various floors. The scene and nature of the accident are necessarily described in a general way, for the reason that at the trial a model of the building was admitted in evidence, and to which reference was made as to locations, letters, and figures that were quite clear, doubtless, to the witnesses and jury, but not as readily comprehended by an appellate court. There was submitted, on the argument in this court, a blue print containing letters and figures which differed somewhat from those used in the model. The steel structure of this building was not completed at the time of the accident, and the general condition may be thus described: Steel upright columns extended from the ground to the roof of the building, and there was opposite each column an iron slanting girder running, as it appears by the blue print, from the third floor, at an angle of 45 degrees, to near the top of each column. There were also three eyebeams running at right angles with the girders, apparently to bind and strengthen the same. The third floor was laid, and on each side of it were four columns equipped with girders and eyebeams as stated. On the east side of the building, on which was operated the electric hoist, there were four columns, marked "A," "B," "C," and "D," and their respective girders were marked "I," "J," "K," and "L." There were also three eyebeams running at right angles with the girders, marked respectively "1," "2," and "3." The electric hoist was placed between columns B and C. On the day of the accident, near the top of column B, a workman had been discharged in the middle of the day, and the deceased was ordered to take his place. The point at which the deceased was directed to begin work was from 30 to 40 feet above the third floor. At the time this order was given to the deceased, he was standing on the third

floor with Lohman, the foreman, and a witness named Perine, all of whom were in the employ of Post & McCord, and had no connection with the Roebing Construction Company, or its concrete work.

It clearly appears that the deceased might have walked along the floor from the point where he was standing, at the time the order to take the place of the man discharged was given, and ascended girder J, connected with column B, and reached his destination without having approached the immediate vicinity where the electric hoist was operated. The deceased, instead of availing himself of the floor already laid, ascended girder K, connected with column C, and on arriving at the eyebeam 3, which ran within an inch and a half of the guide of the hoist, sought thereby to reach girder J, connected with column B. It was proved that a person standing on this eyebeam when the hoist was descending could not lay hold of the guide in which it ran for support without danger of crushing his hand, and if not thus supported, the wind from the hoist might knock him off, as it descended at a high rate of speed. An eyewitness of the accident testified that he saw the deceased ascending the girder and start out upon the eyebeam. He thus describes the situation: "In order to walk on that beam he had to steady himself. As he balanced on the edge there, he would have to balance himself and reach for something." It seems that this eyebeam did not present a flat surface on which to walk, but was at an angle of 45 degrees, like the girder in which it was inserted. This witness continued: "That portion of that eyebeam he was walking on was the edge of the angle. That edge was within five or six inches of the elevator, not the inside edge—the top edge he was walking on, fully five or six inches. One edge of the flange of this eyebeam was within an inch or so—two inches of this track or guide." This witness went on to state that about the time deceased was opposite the guide the hoist suddenly descended at great speed from the floor above, and he was struck by the projecting arm of a wheelbarrow somewhere between his breast and knees, the blow causing him to pitch forward and plunge down into the hoist, receiving fatal injuries. It thus appears that this unfortunate intestate selected a route that was not a safe one to reach his destination, but exceedingly dangerous. This eyebeam was some 20 feet above the third floor, and presented a difficult footing for even a skilled ironworker, to say nothing of the dangerous proximity of the hoist. It was also proved that there were other safe routes which the deceased might have selected in addition to the one already pointed out. It was further proved that Lohman, the foreman, did not instruct the deceased to take any particular route to the point where he was to continue the work of the

man discharged. It also appears that deceased was receiving the full wages of a skilled ironworker.

It was ably argued by plaintiff's counsel that the Roebling Construction Company should be held liable in damages by reason of the improper manner in which the wheelbarrows were placed upon the hoist which resulted in the death of the intestate. We are, however, of the opinion that this question cannot be considered, as the evidence clearly establishes that the intestate was guilty of contributory negligence, and that the judgment must be reversed.

The judgment against the Roebling Construction Company is reversed, and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, VANN, WERNER, and WILLARD BARTLETT, JJ., concur. HISCOCK, J., dissents.

Judgment reversed, etc.

(194 N. Y. 88)

IANNE v. UNITED STATES GYPSUM CO.  
(Court of Appeals of New York. Jan. 5, 1909.)

MASTER AND SERVANT (§ 264\*)—INJURIES TO SERVANT—MINES—PLEADING—VARIANCE.

Where, in an action for death of a mine employé through the falling of a portion of the roof, no charge of mismanagement of the mine was made in the complaint, testimony of an ex-superintendent that the mine was properly managed in the firing of the blasts under his superintendency, and that the management afterwards in the firing of blasts was more dangerous and liable to loosen the overhanging rocks, was incompetent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 866; Dec. Dig. § 264.\*]

Edward T. Bartlett and Haight, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Frank Ianne, as administrator, etc., of Ansllo Ianne, deceased, against the United States Gypsum Company. From a judgment of the Appellate Division (126 App. Div. 244, 110 N. Y. Supp. 496), affirming a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

H. E. Itourke, for appellant. Eugene M. Bartlett, for respondent.

PER CURIAM. The defendant was engaged in mining gypsum at Oakfield, Genesee county, and for that purpose had sunk a shaft perpendicularly, 50 feet in depth, from the bottom of which it had tunneled to different parts of the mine, following as nearly as could be the veins of the gypsum. The rock from which the gypsum was quarried was about four feet in thickness, and this rock was dislodged by means of explosives, and, when so dislodged, it was loaded into cars which were pushed by the men at work

in the mines upon a track laid therein to a mule track, where it was hauled to the shaft and hoisted to the surface. Over the gypsum rock there was a stratum of rock about two feet in thickness, which was called by a witness "ash rock," and over that was a limestone formation. There was evidence tending to show that the ash rock when exposed to the air was liable to deteriorate and fall unless supported by props; that a room of 50 or 60 feet in dimensions had been excavated and had remained for nearly a month unpropped. On the 23d of October, 1906, the decedent was in the employ of the defendant, engaged in loading and pushing the car to the place where it could be drawn by the mule to the shaft, and on the return of the car it had been loaded with props for the purpose of supporting the ash rock over the gypsum rock which had been excavated. While the decedent and another employé were pushing the car loaded with props into the part of the mine where they were to be used, the ash rock fell upon the decedent, causing his death.

The complaint charges negligence on the part of the defendant in failing to warn or notify the decedent of the danger attending his labor in the mine through its neglect to properly timber or support the roof of the mine, its neglect to provide safe and proper places in which to perform his work, through its neglect to properly inspect the mine after blasting, and through its neglect to post rules for the guidance of employes, under the provisions of chapter 415 of the Laws of 1897, and through the neglect and failure of the defendant to employ a competent superintendent and overseer and competent fellow servants to work with the decedent. It will be observed that there was no allegation of improper operation of the mine in other respects. Upon the trial, a witness by the name of Watts was sworn on behalf of the plaintiff, and gave evidence to the effect that he had been superintendent of the mine for some years up to the month of June before the accident, and then he was permitted to testify, under objections and exceptions of the defendant, that in blasting the rock he used black powder; that the manager of the mine had requested him to set off two or more blasts at one time, which he had refused to do, for the reason that it would increase the danger of the work; that the purpose of such request on the part of the management was to save time and expense. Other evidence was given to the effect that, after witness had ceased to be superintendent of the mine, dynamite was substituted in the place of powder; that a number of holes were drilled which were filled with dynamite, and then fired either by fuses or electricity; and that several such blasts had been fired in the vicinity of the accident shortly before its occurrence, and that there had been no inspec-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion of the mine thereafter before the accident.

The tendency of the evidence given by witness Watts was that the mine was properly managed in the firing of the blasts under his superintendency, and that the management afterwards in the firing of blasts was more dangerous and liable to loosen the overhanging rocks. In view of the fact that no charge of mismanagement of the mine was made in the complaint, we think this evidence was incompetent and should have been excluded by the court; that its effect may have been to prejudice the jurors against the officers of the defendant in their endeavor to save time and money in the firing of numerous blasts at about the same time. It is true that this branch of the case was not submitted to the jury in the charge made by the trial judge, but the jurors were not instructed to disregard it. We consequently entertain the view that the error is such as to call for a reversal of the judgment.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

CULLEN, C. J., and VANN, WERNER, HISCOCK, and CHASE, JJ., concur. EDWARD T. BARTLETT and HAIGHT, JJ., dissent.

Judgment reversed, etc.

(194 N. Y. 83)

#### PEOPLE v. JONES.

(Court of Appeals of New York. Jan. 5, 1909.)

##### 1. HOMICIDE (§ 253\*)—MURDER—EVIDENCE.

In a prosecution for homicide, evidence held to sustain a conviction of murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 253.\*]

##### 2. HOMICIDE (§ 237\*)—INSANITY—EVIDENCE.

In a prosecution for homicide, evidence held to sustain a finding that accused was not insane.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 237.\*]

Appeal from Supreme Court, Trial Term, Nassau County.

William Jones was convicted of murder in the first degree, and he appeals. Affirmed.

H. Willard Griffiths, for appellant. Franklin A. Coles, for the People.

HISCOCK, J. The defendant has been charged with and convicted of the crime of murder in the first degree because, as alleged, he shot one Bunn on Sunday, September 1, 1907, in the town of Hempstead.

We are asked to reverse the judgment upon the usual grounds of insufficiency of evidence and errors of the trial judge in the conduct of the trial. The first contention that the evidence was insufficient relates to the people's case not only upon the general

issue of deliberate and premeditated killing, but also upon the special issue of the defendant's responsibility raised by the plea of insanity. While the appeal involves a consideration in detail of the weight and sufficiency of evidence, we were not for some reason aided by any oral argument of counsel for the defendant. We doubt not, however, that our personal examination of the record, aided in some degree by the printed brief, has defined all of the questions available to the defendant upon this appeal and suggested all of the arguments to be made thereon in his behalf. Assuming for the present that he was responsible for his acts, we entertain no doubt that the testimony very conclusively proved that he was guilty of the crime of which he has been convicted.

Witnesses who seem to have been reputable, and with the exception of a brother of the deceased, who gave cumulative evidence upon minor points, entirely disinterested, by their uncontradicted testimony fully established, amongst others, the following facts: The defendant, who was a colored man, and the deceased, who apparently also was a colored man, for some time had been acquainted and fellow employes in a livery stable in the village of Hempstead. During the forenoon of the day of the alleged murder the two men became involved in an altercation. In the afternoon the defendant purchased a revolver and cartridges, and subsequently, on being asked who had struck him, replied, "Bunn," and then, showing a revolver said, "I will fix him." Later although not on duty on that day, he went to the livery stable where he and the deceased were employed, and subsequently another person in the stable, hearing a pistol shot, looked out and saw the defendant with a revolver in his hand pointed toward the feet of Bunn, who was standing some little distance away and facing him. When this person asked, "Jones, what are you doing?" the latter replied, "I dare you to come here too." This witness then fled, and, as he was fleeing, heard a second pistol shot from the direction where the men were, and, when he returned in 15 or 20 minutes, found Bunn lying on the ground either then dead or shortly thereafter dying as the result of a pistol shot received in the breast. The defendant forthwith fled, and that evening was seen getting off a car at Queens. At first, when questioned by a police officer who apparently was on the lookout for him under a police alarm, he denied his identity and former whereabouts, giving a fictitious name and a false account of his movements. Subsequently, however, he admitted to this officer his identity and that he had shot the deceased, claiming first as the reason therefor some grudge and afterwards giving the explanation of a fight. He also admitted the ownership and identity of the revolver

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and cartridges which he had left in the toilet room of a hotel at Queens. The defendant again to this same witness on the following day repeated the claim of a grudge as the explanation of his killing the deceased, and he also admitted to other witnesses that he had shot the deceased, the admission in one case being coupled with the claim that he had to defend himself as the latter had a razor; there being, however, no other evidence of the possession by the deceased of any such weapon. In addition to the general trend of the evidence as bearing upon that subject, it specifically appeared that the defendant within a few hours both before and after the alleged murder seemed to be entirely normal and self-possessed.

The statement of the undisputed facts thus testified to by the witnesses for the prosecution carries with it its own argument. In our judgment the jury were entirely justified in believing the evidence which was presented to them in behalf of the people on this branch of the case, and, thus believing it and barring the special defense of insanity, they not only were warranted in reaching the conclusion which they did as to the guilt of the defendant, but practically were prohibited from taking any other rational view. The motive of revenge was present in the defendant's mind. He deliberately prepared to satisfy this motive by purchasing a revolver and cartridges, and he expressly indicated his purpose to satisfy it by his statement of an intent to "fix" the deceased; his attitude as described by the witness Jackson in facing the deceased with a revolver in his hand and the interval which occurred between the first shot, which was apparently harmless, and the second shot, which was fatal; his flight and his subsequent confessions and acts establish that he deliberately and remorselessly carried out his purpose.

But it was pleaded on the trial and is now urged that the defendant was insane, and, therefore not to be charged with legal responsibility for these acts which in the ordinary person would import the highest degree of criminal intent, and on the trial his counsel endeavored to elicit some evidence in support of this plea. His efforts were very unsuccessful. In view of his lack of success in securing the admission of evidence, we have studied all the more carefully, not only the evidence which was admitted, but also that which was stricken out, and even the suggestions of counsel about what he thought he might be allowed to prove, for the purpose of determining, not only whether this defense was established, but also whether there seemed to be any reasonable possibility of its being established on another trial. This study of the record, however, fails to disclose any such evidence or probability of evidence as requires a reversal of the judgment on this question. The most important testimony on behalf of the defendant was given by a sister, and her evidence, as well

as that of other witnesses from whom the counsel succeeded in eliciting any testimony, was to the effect that the defendant on various occasions, entirely or mostly occurring some time before the homicide, made apparently unprovoked assaults on members of his family and others, and that on such occasions especially his appearance was excited and abnormal, frequent reference being made in his sister's testimony to his "glary and stary eyes." A physician gave an account of an examination made of the defendant at the time of the trial, but aside from the witness' conclusion that the defendant was suffering from loss of memory, a symptom which even if present was manifestly a thing of easy simulation, there is scarcely anything in his history of the examination calculated even to attract attention in a consideration of the present question. Lastly, two experts on hypothetical questions embracing facts testified to by the sister and other lay witnesses expressed a rather inconclusive opinion that the defendant was or might be insane. In answer to this testimony was that of three experts sworn in behalf of the people, who testified that the evidence in behalf of the defendant in their opinion did not justify the conclusion that he was insane even at the time of the occurrences detailed, and that, even if he was then insane, it would not at all follow that such insanity continued to the time of the homicide. But more important than this testimony in our judgment was the evidence of various witnesses detailing the conduct and movements of the defendant on the day of and shortly before and after the homicide. Some of these spoke especially and directly in respect to his self-possessed and normal appearance, while others simply repeated his conversations and described his acts, but, whichever they did, all of them made it entirely clear that there was no lack of comprehension on defendant's part of the scope and nature and effect of the purpose which he formed and so effectually executed.

When we consider all of this testimony in its entirety, we conclude that the jury was amply justified in determining that the defendant was not insane. The evidence fairly indicated as might be expected that he was of rather a low order of intellect, and some of it, if believed, indicated in the absence of some hidden explanation that he had a violent and uncontrollable temper and disposition. But it falls far short of establishing that his mind was so deficient or so perverted that he could not distinguish and appreciate the character of the acts which he was performing at the time of the homicide, and we should be entirely unjustified in deciding that any such error has been committed in the disposition of this branch of the case as to require a new trial.

We have examined all the exceptions taken to the rulings of the court. The charge of the trial judge was a very full and care-

ful exposition of the principles of law governing the jury in their deliberations. He commented on the evidence so far as seems us to have been necessary in view of the very plain and comparatively brief character of the testimony, and we think that neither in his charge nor in his rulings on evidence was any substantial error committed which prejudiced the rights of the accused. The judgment, therefore, must be affirmed.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, VANN, WERNER and CHASE, JJ., concur.

Judgment of conviction affirmed.

(194 N. Y. 64)

**PELOW v. OIL WELL SUPPLY CO.**

(Court of Appeals of New York. Jan. 5, 1909.)

**1. MASTER AND SERVANT (§ 101\*)—DUTY OF MASTER—SAFE TOOLS AND APPLIANCES.**

It is the duty of a master to furnish his servants with safe tools and appliances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 171, 178; Dec. Dig. § 101.\*]

**2. MASTER AND SERVANT (§ 153\*)—DUTY OF MASTER — SAFE TOOLS AND APPLIANCES — WARNING AND INSTRUCTING SERVANT.**

It was the special duty of a master when directing a servant about 16 years old to work with large prosser pins, which become dangerous through use, to properly instruct him so that he might care for himself, or else to publish rules for the instruction of all servants engaged in such work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 815; Dec. Dig. § 153.\*]

**3. MASTER AND SERVANT (§ 218\*)—ASSUMPTION OF RISK.**

An inexperienced servant 16 years old, who was struck in the eye by a chip from a burred prosser pin which he was driving, did not assume the risk of injury where he did not know that a burred pin was dangerous or of its tendency to throw off chips when struck by a hammer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 603; Dec. Dig. § 218.\*]

**4. MASTER AND SERVANT (§ 230\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.**

An inexperienced servant 16 years old, who was injured by a chip from a burred prosser pin which he was driving, was not guilty of contributory negligence, where he neither knew where he could get other pins or that by using the ones furnished he might be injured.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 694; Dec. Dig. § 230.\*]

**5. MASTER AND SERVANT (§ 93\*)—DUTY OF MASTER—DELEGATION OF DUTY.**

The duty of a master to furnish safe tools and appliances, and to properly warn and instruct servants of dangers incident to the work, cannot be delegated except at the master's risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 142; Dec. Dig. § 93.\*]

Gray, J., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Albert J. Pelow, an infant, by

his guardian ad litem, against the Oil Well Supply Company. From a judgment of the Appellate Division (125 App. Div. 903, 109 N. Y. Supp. 1140), affirming a judgment for plaintiff, defendant appeals. Affirmed.

Elisha B. Powell, for appellant. James R. O'Gorman, for respondent.

VANN, J. On the 25th of January, 1905, the plaintiff, then a lad of about 16 years, while at work for the defendant in its boiler manufactory in the city of Oswego, met with an accident which resulted in the loss of his left eye. The factory, 400 feet long by 200 wide, was divided into several departments, with a foreman in charge of each. The plaintiff had been employed by the defendant for about three weeks, and during this period had worked exclusively upon automobile boilers, which are quite small, being only about two feet long and a foot and a half in diameter, with copper tubes half an inch in thickness. On the day in question he was sent by the assistant superintendent in charge of the work upon which he was then engaged to help one McKinsty on a stationary boiler in another department of the factory. This boiler was of large size, being 16 or 18 feet long and 4 or 5 feet in diameter, with iron tubes 3 inches thick. The work assigned to him in this new place was what is called "prossering," which is described as inserting an appliance called an expander in the end of the tube when it is in position in the boiler, placing a prosser pin about three inches thick in the expander and striking the pin with a sledge hammer, weighing about seven pounds, three times, and, after turning the pin around half way, three times more. The pin is then loosened by a light blow on the side, pulled out and inserted with the expander in the next tube, when the process is repeated. The plaintiff was directed by the assistant superintendent to "go and work with Rob McKinsty on the stationary boiler and prosser flues," but he said nothing else to him. The plaintiff asked no questions, but did as he was told.

There were but four prosser pins in that department of the factory, and they were all "burred," that is, by repeated blows of the sledge the ends had become widened out and a collar of ragged iron had formed around the edges. A pin in that condition is apt to throw off small chips of iron from the collar when struck by a heavy sledge in the ordinary work of prossering. The plaintiff was set at this work without knowledge of the danger, although he had casually observed the process of prossering with large pins "a couple of times before," but he had never used them himself. He had no instructions as to how to do the work, or how to take care of himself, and no rules upon the subject were made, at least until after he was injured. When a prosser pin is "burred," it should be

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

taken to an emery wheel and the "burrs" ground off, or to a blacksmith shop and repaired. The plaintiff, however, knew nothing about this. The prosser pins used on the auto boilers where he had been working are very small, and the hammer is of corresponding size. The sledge furnished to the plaintiff was chipped off at the end, and one piece of considerable size had been broken off so as to leave the face of the hammer only about one inch in diameter with irregular edges. The assistant superintendent knew about this condition of affairs and complaint had been made to him about the burred prosser pins, which were shown to him, but he made no reply except on one occasion when he said it was all right.

The plaintiff on the day in question used the pin and hammer furnished by the assistant superintendent, who was in general charge of the work to which he was assigned. He worked at the foot and McKInstry at the head of the boiler, which, 16 or 18 feet long and 4 or 5 feet high, was between them. No one stood by the plaintiff to observe his work, or to tell him how to do it. After prossering 10 tubes, he was engaged upon the eleventh, when striking the pin a blow with the sledge in the usual way a small piece of steel chipped off from the burr, struck him in the eye, and injured it so that ultimately it had to be removed. The piece of steel was found in the eyeball after it was taken out. The operating surgeon testified that "it had gone into the front of the eye, traversed the diameter of the eye, and gone to the back side." The plaintiff had been at work but fifteen minutes on the new kind of employment when the accident happened. The object of this action, which is in the common-law form, was to recover damages for the injuries sustained by the plaintiff on the occasion in question, and the facts are presumed to have been found by the jury as thus stated, for they are supported by some evidence, although there was a sharp conflict in the statements of the witnesses called by the parties. The jury found for the plaintiff, the Appellate Division affirmed the judgment entered on the verdict, one of the justices dissenting, and the defendant appealed to this court.

It is the general duty of a master to furnish his servants with safe tools and appliances, and it was the special duty of the defendant when directing a boy to work with large prosser pins, which become dangerous through use, to give him proper instructions so that he could take care of himself, or else to make and publish rules for the instruction of all employes engaged in such work. Although evidence was given in behalf of the defendant to the contrary, the jury might have found that there were but four prosser pins in the department to which the plaintiff was suddenly transferred, and that all of them were burred and in a dangerous condition. There were other prosser pins in

other departments of the factory, and evidence was given tending to show that the assistant superintendent had prosser pins with other implements locked up in a cupboard in his office and that he ordinarily furnished them upon requisition being made therefor, but the plaintiff did not know about this, and he used the tools and appliances that were given him. He did not select the prosser pin or the hammer, and did not know there was a place where hammers and pins were kept. He did not know that a burred prosser pin is dangerous or of its tendency to throw off chips when struck by the hammer. He did not assume a risk of which he knew nothing, and he was not guilty of negligence as a matter of law for using burred prosser pins, when he neither knew where he could get others or that by using these he might be injured.

The main position of the defendant is that there was no evidence of negligence on its part, and that the only negligence shown was that of the plaintiff and his co-servants. The duty of furnishing safe tools and appliances to his employes belongs to the master, and the defendant did not meet that obligation. The duty of warning and instructing a new employe, assigned to work of more or less danger, belongs to the master, and the defendant did not discharge it. When the assistant superintendent set the plaintiff at the new work which he knew was dangerous to some extent, he should not only have seen that he had safe tools and appliances, but should also have given him proper warning and instructions, so that he could protect himself. This duty rested upon the master, as such, at the inception of the new work by the plaintiff, and, it could not be delegated except at the defendant's risk. *Simone v. Kirk*, 173 N. Y. 7, 14, 65 N. E. 739. The implements in fact furnished were defective, as the jury could find, and the plaintiff was not told where he could get safe ones. He did not know that they were unsafe, for he had neither experience nor warning to guide him. He had the right to assume that his employer had discharged its duty toward him and that he could safely use the tools he was told to use. Even if the risk would have been obvious to a competent and experienced mechanic, we cannot hold as matter of law that it was obvious to an inexperienced boy put at a new kind of work with unsafe tools and without warning or instruction. The duty and the acts of both parties should be viewed in the light of the plaintiff's age and inexperience, and, when thus viewed, I think the evidence warranted the jury in finding the defendant guilty of negligence, and the plaintiff not guilty of contributory negligence.

The judgment should be affirmed, with costs.

OULLEN, C. J., and EDWARD T. BARTLETT, WERNER, WILLARD BARTLETT,

and HISCOCK, JJ., concur. GRAY, J., dissents.

Judgment affirmed.

(194 N. Y. 32)

**ROONEY v. BROGAN CONST. CO.**

(Court of Appeals of New York. Jan. 5, 1909.)

**1. MASTER AND SERVANT (§ 295\*) — INJURIES TO SERVANT—INSTRUCTION—ASSUMPTION OF RISK—KNOWLEDGE OF DANGER.**

In an action for the death of a servant killed by falling through an unguarded shaft in a building where he worked, an instruction that if he knew the hole was there and was unguarded, and knew the condition of the floor around the hole, he assumed the risk, was improperly qualified by stating that he must have appreciated the dangers incident to the condition in order to assume the risk, as knowledge implied appreciation of the danger incident to falling in the hole, and the qualification permitted the jury to speculate whether, knowing the danger, he did in fact appreciate it.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 295.\*]

**2. WORDS AND PHRASES — "APPRECIATE THE DANGER."**

To "appreciate the danger" incident to a condition of things signifies that the danger is recognized, and that possible accidental consequences are justly estimated.

**3. APPEAL AND ERROR (§ 179\*) — PRESENTATION BELOW—SUFFICIENCY—INSTRUCTIONS—REQUESTS—QUESTIONS RAISED.**

Whether Labor Law (Laws 1897, p. 468, c. 415) § 20, as amended by Laws 1899, p. 351, c. 192, requiring contractors or owners to cause elevator shafts in buildings being constructed to be guarded, requires the original contractors to guard such a shaft, was not sufficiently raised in an action against the principal contractor for an employee's death by falling through an elevator shaft by a requested instruction that, if defendant sublet all contracts for the building, it would not be bound to guard the shaft, as it omitted the element whether the subcontractors had exclusive control of the building, and hence the question will not be determined on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 179.\*]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Margaret Rooney, as administratrix, against the Brogan Construction Company. From a judgment of the Appellate Division (121 App. Div. 919, 106 N. Y. Supp. 1143), unanimously affirming a judgment for plaintiff, defendant appealed by permission. Reversed, and new trial ordered.

I. R. Oeland, for appellant. Gilbert D. Lamb, for respondent.

GRAY, J. The plaintiff brought this action for the recovery of the damages sustained by her through the death of her husband, which, as she alleges, was caused by the negligence of the defendant in a failure to comply with the requirements of the labor law of the state that shafts, or openings, in the floors of a building, in the course of construction, shall be inclosed. The defendant

was engaged in constructing a building of some 10 stories in height upon its property through the instrumentality of various contractors. In the course of the work a hoisting machine or elevator was installed in an opening in the floors, which extended from the basement to the upper floor of the building, for the use of any of the contractors who might arrange therefor with the hoisting company. The deceased was in the employment of one of the contractors, and for a few days before the occurrence of the accident, which resulted in his death, had been engaged in keeping up fires in stoves, placed upon the different floors for the purpose of preventing the fresh plaster from freezing. On the evening in question he came to the ninth floor, in company with another workman, and, while in the act of carrying a stove from one side of the floor to the other, was observed to trip and to fall through the unguarded opening, near which he was passing. He fell to the cellar, and was killed. The flooring of the ninth floor at the time was not finished and the spaces between the joists, or beams had been filled in with ashes, or cinders, of a dark color. The only light was furnished by two gasoline torches which the deceased and his companion were carrying. The duty of the deceased to keep up the fires in the stoves upon the several floors of the building necessarily required him to know the conditions of each floor. The case was submitted to the jury upon the questions of the defendant's negligence and of that of the deceased, and the plaintiff recovered a verdict. The judgment has been unanimously affirmed by the Appellate Division; but leave was given by that court to the defendant to appeal to this court.

There are but two questions for our consideration, and they relate to the correctness of rulings upon requests by the defendant for further instructions to the jurors upon the conclusion of the charge. The court was asked to charge the jury "that if they find that he [the deceased] knew the hole was there, and that he knew it was unguarded and knew the condition of the flooring around the hole, and exercised all ordinary care to have known it, then if he knew those facts, as matter of law they must find he assumed the risk, and cannot recover." The court ruled: "I charge that with the qualification, however, that he must have appreciated all the dangers incident to that condition, and if they find that he did know those facts and appreciated all the dangers incident to these facts, then as matter of law he assumed the risk." To this modification of the instruction requested exception was taken. In obedience to the instruction as given, the jurors, in addition to finding that there was a knowledge of the facts stated, had to find, further, that the deceased must have appreciated the danger of such a situation. This

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was imposing a greater burden of proof upon the defendant than the court should sanction, and for the error in the ruling we should order a new trial. Precisely why it was necessary to show that the deceased, when knowing the dangerous conditions under which his work had to be performed, must also have appreciated the danger incident thereto (which is, only, to say, possible from such an occurrence), is difficult to understand. To appreciate the danger incident to a condition of things signifies that the danger is recognized, and that possible accidental consequences are justly estimated. But knowledge of the unguarded opening and of the condition of the flooring about it necessarily involved recognition of the fact that tripping near and falling into the opening might be attended by results of a more or less fatal nature. It is not shown that the deceased was lacking in the possession of his senses, and that in a sane mind appreciation of danger can exist, as a sentiment, apart from knowledge of the facts which exhibit danger, I am unable to comprehend. If the deceased knew of the opening and of the imperfect flooring, he must have appreciated the risk of a misstep when passing too close to the former. As the case was left by the ruling of the trial court, the jurors were permitted to wander into a mental speculation as to how far the burden of proof thus cast upon the defendant had been borne, with the probable consequences that the doubt upon the subject were better resolved in favor of the plaintiff.

The defendant also requested the trial court to charge that if the jury "find and believe from the evidence that the Brogan Construction Company sublet all contracts for this building that then there would be no obligation on the part of the Brogan Construction Company to erect any barriers around it [the opening in the floor]." This request was refused, and an exception was taken by the defendant. The defendant by this request intended to raise the question whether the duty rested upon it, under the circumstances, to cause the openings to be inclosed. Section 20 of the labor law (Laws 1897, p. 468, c. 415), as amended by Laws 1899, p. 351, c. 192, provides that, "if elevating machines or hoisting apparatus are used within a building in the course of construction, \* \* \* the contractors or owners shall cause the shafts or openings in each floor to be enclosed or fenced in on all sides by a barrier at least eight feet in height." The argument is made by the appellant that, under the facts of the case, the statutory duty devolved upon the contractors, to whom the work of construction had been sublet, and that it was not the legislative intent to require the owner to erect the barriers, unless he had exclusive charge and control of the building. Whether, from the language used, the Legislature intended that the duty of such protection

should rest upon both owners and contractors, irrespective of the question of the control of the building, in my opinion is open to grave doubt. If the question were actually presented by this case, I should hesitate to hold that proposition. It would seem the more reasonable construction of the statute to hold that the statutory duty was imposed only upon the person who had the possession and control of the building, and that the duty was jointly imposed only where both owner and contractor could exercise control. The use of the disjunctive particle "or" suggests a possible alternative. If the work was being performed by an independent contractor whose contract gave him the exclusive control of the building until completed, I should doubt whether the owner was intended to be held responsible for a compliance with the requirements of the labor law. But I do not think that the request presented the question, and therefore we should not determine it. The request does not embody in its terms the fact of an exclusive control by the contractors and the evidence leaves it in considerable doubt whether the defendant, as the owner, ever did part with its control and supervision of the building. Indeed, it is open to the inference that such was not the case.

For the reason given, I advise that the judgment appealed from should be reversed, and that a new trial should be ordered of the issues in the action, with costs to abide the event.

CULLEN, C. J., and EDWARD T. BARTLETT, VANN, WERNER, and HISCOCK, JJ., concur. WILLARD BARTLETT, J., not sitting.

Judgment reversed, etc.

(194 N. Y. 42)

ARNOLD v. NATIONAL STARCH CO.  
(Court of Appeals of New York. Jan. 5, 1909.)

1. MASTER AND SERVANT (§ 115\*)—LIABILITY FOR INJURIES TO SERVANT—PLACES FOR WORK—ERECTION OF FIRE ESCAPES.

Laws 1897, p. 481, c. 415, § 82, requiring fire escapes deemed necessary by the factory inspector to be provided outside of every factory three or more stories high, and describing the form, location, and construction thereof, is mandatory, and requires the factory owner to seek from the factory inspector such directions in addition to those prescribed by the statute as may be necessary, and does not permit him to delay until the factory inspector of his own motion orders him to build fire escapes.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 206; Dec. Dig. § 115.\*]

2. MASTER AND SERVANT (§ 285\*)—INJURIES TO SERVANT—ACTIONS—QUESTIONS FOR JURY—CAUSE OF INJURY.

Evidence, in an action to recover for injuries resulting from the master's failure to provide fire escapes, held sufficient to go to the jury on the question whether defendant's failure to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

erect fire escapes was the cause of plaintiff's injuries.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 285.\*]

**3. MASTER AND SERVANT (§ 288\*)—INJURIES TO SERVANT—ACTIONS—QUESTIONS FOR JURY—ASSUMPTION OF RISK.**

Whether a servant, 14½ years of age, assumed the risk from the absence of fire escapes in the factory in which she was employed, was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068–1088; Dec. Dig. § 288.\*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Anna Arnold against the National Starch Company. The complaint was dismissed, and plaintiff appeals. The judgment was affirmed (125 App. Div. 905, 109 N. Y. Supp. 1123), and plaintiff appeals. Reversed.

The action was brought to recover damages caused by burns received by appellant while she was at work in respondent's factory, and which injuries it is claimed resulted from the latter's failure to remove starch dust and other inflammable waste from the room wherein she was working, and to place outside fire escapes upon its building.

On the evidence presented the jury would have been entitled to find, amongst other facts, the following ones: Respondent's factory consisted of three stories and a basement. Appellant was at work with 15 or 20 other girls upon the top floor. An explosion occurred, and a fire originated from some unexplained cause on the story below and rapidly spread to the floor where she was at work. It first appeared near where she was sitting and very rapidly spread over the whole or a large part of said floor. The appellant immediately sought to escape. The only means provided for such escape were a stairway and scuttle leading to the roof and a series of inside inclosed wooden stairways leading from floor to floor to the ground. There were no outside fire escapes. Appellant, who at that time was 14 years and 6 months old, attempted to escape by the stairway leading downward, but the door leading to it was surrounded by other girls, and she was unable to open it. She then went to various windows, but there was no way to escape from them except by jumping a long distance to the ground, and she finally returned to the stairway, and after a while, the door being opened, she with the other girls escaped. Some considerable time elapsed before such escape. While the appellant was at one of the windows, seeking escape, as she says: "The fire was right next to me; all around me; all the while there were big clouds of fire that came around up in there." After she returned from the windows to the stairway, she was told that she was on fire, and the

fire was put out, and this was the first time that she knew she had been burned. Her injuries were quite severe. There was a large accumulation of starch and starch dust in the room where appellant was, the same not having been cleaned up for some considerable time, and this was very inflammable.

Udelle Bartlett, for appellant. Elisha B. Powell, for respondent.

HISCOCK, J. (after stating the facts as above). The important question in this case relates to the obligation of the respondent to place outside fire escapes upon its factory and to its liability for appellant's injuries as a result of its failure to place such fire escapes. It is urged in behalf of respondent, as I understand it, that section 82, c. 415, p. 481, Laws 1897 (Labor Law), with reference to fire escapes, was not mandatory, but only required a factory owner to build them after directed so to do by a factory inspector. I am unable to agree with this contention. Said statute provides: "Such fire escapes as may be deemed necessary by the factory inspector shall be provided on the outside of every factory in this state consisting of three or more stories in height." Said section then describes with much particularity the form, location, and method of construction of the fire escapes so to be provided. Considering the object of this statute, the great saving of life oftentimes resulting from its observance, and on the other hand the terrible catastrophes frequently resulting from the absence of suitable fire escapes, and also considering the details with which it describes a proper construction, I should not be inclined, even in the absence of authority, to adopt respondent's view that the salutary precautions provided by the statute may be neglected until some factory inspector has made an order in addition to the statute. If passing on the question as a new one, I should deem it our duty to construe the enactment as requiring a factory owner to construct fire escapes and as imposing upon him the duty to seek from the factory inspector such directions in addition to those prescribed by the statute as might be necessary, rather than that he should be allowed to delay all action until a factory inspector had sought him out and made an order in the premises. But I do not regard that question as fairly open. The principles here involved have been covered by other decisions and conclusions reached thereon adverse to the respondent's contention. In *McLaughlin v. Armfield*, 58 Hun, 376, 12 N. Y. Supp. 164, the court had before it for construction section 16, tit. 14, c. 583, p. 1028, Laws 1888, which directed that certain buildings "shall be provided with such fire escapes and doors as shall be direct-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed and approved by the commissioner." It was held that the statute imposed upon the owner the mandatory duty of bringing the subject before the commissioner and of obtaining his direction in the premises, and where an accident occurred because of the absence of such fire escapes from a building, the owner could not avoid responsibility by alleging that the statute did not declare absolutely that fire escapes should be erected by him. In *Willy v. Mulledy*, 78 N. Y. 310, 314, 34 Am. Rep. 536, there was involved the interpretation of section 36, tit. 13, c. 863, p. 1353, Laws 1873, which, in addition to other things, enacted that certain houses "should be provided with such fire escapes and doors as shall be directed and approved by the commissioners" (of the department of fires and buildings). It was held that this requirement was mandatory, and that the owner must provide the fire escapes, seeking out the commissioners for instructions, rather than awaiting the preliminary action of such commissioners. The court said: "Under this statute the defendant was bound to provide this house with a fire escape. He was not permitted to wait until he should be directed to provide one by the commissioners. He was bound to do it in such way as they should direct and approve, and it was for him to procure their direction and approval." See, also, *McRickard v. Flint*, 114 N. Y. 222, 21 N. E. 153. In my judgment the statute placed before us for interpretation is much stronger in favor of the appellant's contention than were the statutes involved in the cases cited, for here the statute itself describes, with much particularity, the substantial features of the escapes which the respondent was required to construct, leaving it to procure from the proper official preliminary directions only in respect to what at most could be minor details.

But, passing this point, it is further urged in behalf of respondent that its failure to comply with the statute, even if mandatory, may not be made the basis of a recovery for any damages sustained by appellant on the occasion in question, because it was not established that the injuries resulted from such failure. This argument rests on two propositions; the first one being that other sufficient means of escape were provided, and the second one that appellant's clothes and hair took fire immediately when the conflagration reached the room where she was, and that therefore her damages accrued before she could possibly have reached the fire escape if provided. The evidence, in my judgment, permitted the jury to find against this argument and both of the propositions involved in it. It clearly permitted the jury to say that the system of stairways leading to the ground became blocked and useless for a considerable time, and certainly it cannot be said as a matter of law that the stairway leading to the roof, even if appellant knew of it, was a safe or efficient means of escape

from a fire which was rapidly burning and spreading on the floor below. And on the other proposition, while the evidence may not establish with mathematical accuracy just when the fire reached appellant's clothes and person with reference to its first appearance on the floor, or with reference to her final escape therefrom many minutes afterwards, still, as I read it, it permitted the jury to find that as the result of an accumulation of inflammable dust and material the fire spread very rapidly throughout the floor, that appellant came in contact with it and was set on fire some time after it first appeared, and that if there had been statutory and convenient fire escapes from the windows she might have escaped thereby before becoming on fire, and, conversely, that the failure to comply with the statute resulted in her detention in the burning room for many unnecessary minutes, and that such detention and inability to escape caused and contributed to her injuries. Even if it should be found that the fire reached appellant when it first appeared on the floor, but that by reason of respondent's default she was confined in the room for an unnecessary period, and that by reason of such unnecessary detention under the circumstances she was prevented from extinguishing or procuring to be extinguished the flames on her person, and her injuries thereby increased, I think that the appellant would be liable for such additional injuries if ascertainable. The connection between respondent's legal default and appellant's injuries is better and more clearly established than it was in the *Willy Case*, above cited, and wherein it was held that the plaintiff had established a sufficient connection between the two.

Lastly, it is urged that the appellant knew of the absence of fire escapes, and therefore as a matter of law assumed whatever risk resulted therefrom. It is a sufficient answer to this contention to say that she absolutely denies knowledge of the absence of such safeguards. Moreover, it should not be decided as a matter of law that the appellant, in view of her age, appreciated and assumed all the risks and dangers resulting from the failure to place fire escapes, even if it should be found that she knew of their absence. *Schwandner v. Birge*, 33 Hun, 186; *Gorman v. McArdle*, 67 Hun, 484, 22 N. Y. Supp. 479.

These views lead to the conclusion that the appellant furnished evidence upon which she was entitled to go to the jury, and that it was error to dismiss her complaint.

The judgment appealed from should be reversed, and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, VANN, WERNER, and WILLARD BARTLETT, JJ., concur.

Judgment reversed, etc.

(194 N. Y. 99)

**PEOPLE ex rel. DEISTER v. WINTER-MUTE.**

(Court of Appeals of New York. Jan. 5, 1909.)

**1. ELECTIONS (§ 235\*)—CANVASS AS EVIDENCE OF TITLE TO OFFICE.**

An official canvass is only prima facie evidence of title to office.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 203½; Dec. Dig. § 235.\*]

**2. ELECTIONS (§ 222\*)—CONSTITUTIONAL PROVISION—EFFECT.**

The amendment by Const. 1895, of the provision of Const. 1821, art. 2, § 4, and Const. 1846, art. 2, § 5, requiring elections to be by ballot, by adding "or by such other method as may be prescribed by law, provided that secrecy in voting be preserved," was not designed to create any additional safeguards for the secrecy of the ballot, but solely to authorize substitution of voting machines.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 222.\*]

**3. ELECTIONS (§ 293\*)—CONTESTS—TESTIMONY OF VOTERS—ADMISSIBILITY.**

Testimony of voters as to how they voted on an issue as to who was elected is not inadmissible as violating the secrecy of the ballot.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 291; Dec. Dig. § 293.\*]

**4. ELECTIONS (§ 216\*)—VOTES WHEN CAST.**

A vote by ballot is complete when the voter deposits his legally prepared ballot in the ballot box.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 216.\*]

**5. ELECTIONS (§ 222\*)—VOTING MACHINES—VOTE WHEN COMPLETE.**

A vote where a voting machine is used is complete when the voter complies with the prescribed regulations for its use so as to indicate his choice for any particular office, regardless of any failure of the machine to work properly.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 222.\*]

**6. ELECTIONS (§ 272\*)—CONTESTS—DIFFICULTY IN DETERMINING QUESTION—EFFECT.**

Difficulty in determining in an election contest who received the greater number of votes is no valid objection to entry upon the inquiry.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 272.\*]

**7. ELECTIONS (§ 24\*)—RIGHT OF ELECTOR.**

The right of an elector to vote is secured by the Constitution, and any method of holding an election which deprives electors, free from fault or misfortune, of the right to cast their ballots and have effect given thereto, is unconstitutional.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 16-18; Dec. Dig. § 24.\*]

**8. ELECTIONS (§ 222\*)—VOTING MACHINES—USE NOT IMPROPER.**

The use of voting machines does not necessarily infringe an elector's constitutional rights.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 222.\*]

**9. ELECTIONS (§ 203\*)—CONTESTS—EVIDENCE—DEFECTIVE VOTING MACHINES.**

In an election contest, evidence of a defective working of a voting machine was competent, where the result recorded contradicted witnesses who testified that they voted for relator; but tests of the machine were improper to show any average of loss by relator over defendant, and to predicate thereon that relator must have re-

ceived a particular number of votes more than the machine credited him.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 293.\*]

**10. ELECTIONS (§ 295\*)—CONTESTS—TESTIMONY—CREDIBILITY.**

On an issue as to who received the larger number of votes for an office, testimony showing that more people voted for relator than a voting machine showed was not conclusive, and, if the machine proved on examination to be working accurately, the jury could discredit the testimony.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 295.\*]

**11. ELECTIONS (§ 292\*)—CONTESTS—DEFECTIVE VOTING MACHINES.**

In an election contest based on the failure of a voting machine to record votes cast, the record should be taken as the starting point of inquiry, and such record can be varied only by competent legal proof that voters did vote for either candidate to a number in excess of those registered by the machine.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 292.\*]

**12. CONSTITUTIONAL LAW (§ 46\*)—DETERMINATION OF CONSTITUTIONALITY OF STATUTE—MODE.**

The question whether use of voting machines is constitutional should be determined in a direct proceeding by mandamus to compel rejection of the machines and use of ballots, and not in an election contest based on a defective working of a machine.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 45; Dec. Dig. § 46.\*]

Gray, Chase, and Edward T. Bartlett, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by the People of the State of New York, on the relation of John H. Deister, against Thomas J. Wintermute. From a judgment of the Appellate Division, Third Department (127 App. Div. 933, 111 N. Y. Supp. 1135), affirming a judgment at Trial Term, both parties appeal. Reversed, and new trial granted.

William S. Jackson, Atty. Gen., for the People. Michael Danaher, for relator. Richard A. Thurston, for defendant.

CULLEN, C. J. The action was brought to determine the title of the defendant to the office of county treasurer of Chemung county. At the general election held in 1906, the relator and the defendant were candidates for that office, the term of the then incumbent of which expired on the 31st day of December ensuing. The defendant was the incumbent. The official canvassers awarded the office to the defendant by a plurality of two votes. The relator claimed the canvass was erroneous and that in truth he had received a plurality. On the trial of the action the following facts appeared: In the county of Chemung there were 45 election districts, 28 of which were in the city of Elmira. In that city were used at the general election of 1906 the United States Standard voting machines. Paper ballots were

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

used in all the other districts outside of the city of Elmira with the exception of 4. The controversy in the case has been caused by the failure of the machines to properly register the votes of the electors. The failure of the machines to operate correctly arose from the following circumstances: In the machines the candidates of the various parties are put in columns, one after the other, for the respective offices to be filled at the election. Candidates for the same office, of different parties, are placed in their respective party columns, but opposite each other on the same horizontal line. Opportunity is given to vote a "split" ticket by the use of a lever or knobs, and a device is employed which prevents the voter from voting for more than one candidate for the same office. Where, however, there are two or more vacancies in the same office to be filled, the elector may wish to vote for candidates who are on the same horizontal line. To enable him to do so, and also to prevent him from voting twice for the same candidate, instead of once for each of two candidates, another piece of mechanism is employed, which is called an "indorsement bar." These bars are not part of the ordinary mechanism of the machine, but are used only in cases where there are two or more vacancies in the same office to be filled. There were two vacancies in the office of judge of the Supreme Court in the judicial district which includes the county of Chemung. In three of the Elmira districts the inspectors or other election officials, through ignorance, failed to properly adjust or fasten the indorsement bars, the result of which was to affect the accurate working of the machine, not only with reference to the votes for the two offices named, but throughout the whole ticket, so that it does not seem to have properly recorded or registered the votes of the candidates for any office. The failure was one of omission rather than of commission; that is to say, the machine did not record votes that were not cast, but it failed to record votes that were cast, and from a test of the operation of the machine made at the trial the failure to properly adjust the indorsement bars seems to have affected the Democratic column, in which the relator's name was, much more seriously than the Republican column, in which was the name of the defendant. This defect in the operation of the machine was fully explained at the trial, but the details it is unnecessary to relate. In the First district of the Fourth ward the vote for the relator, as shown by the machine, was 27. On the trial the relator proved, by the testimony of 51 electors of that district, that they had voted for him at the election of 1906. Further testimony was given as to the failure of the machines to properly record the votes in two other districts. Testimony was also given on behalf of the defendant. At the conclusion of the evidence the relator asked that the question of who received the greater

number of votes, he or the defendant, should be submitted to the jury for determination as a question of fact. The defendant asked that a verdict be directed in his favor that he was duly elected to the office. The trial court denied each request and held that on account of the failure of the voting machines to work there was no valid election for the office of county treasurer, but that the defendant was entitled to hold the office by virtue of his prior incumbency until his successor should be duly elected, and directed the jury to find a verdict to that effect. From the judgment entered on that verdict both parties appealed to the Appellate Division, where the judgment below was affirmed.

That an official canvass is only prima facie evidence of title to office, and not conclusive, may be said to be almost elementary law in this state (*People ex rel. Van Voast v. Van Slyck*, 4 Cow. 297; *People ex rel. Yates v. Ferguson*, 8 Cow. 102; *People ex rel. Benton v. Vail*, 20 Wend. 12; *People ex rel. Eastman v. Seaman*, 5 Denio, 409; *People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 451; *People ex rel. Smith v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242; *People ex rel. Stapleton v. Bell*, 119 N. Y. 175, 187, 23 N. E. 533), but in what manner and to what extent such canvass can be impeached presents the question argued before us. The first question, and that most elaborately argued by the learned counsel for the defendant, is as to the admissibility of the testimony of the electors to show how they voted at an election. He contends that to allow such testimony is to violate the secrecy of the ballot, and insists that the question is still an open one in this state. The claim that the question is an open one is clearly untenable. It has long since been settled in this state by authority. The first Constitution of the state (1777) directed the Legislature, as soon as might be possible after the termination of the Revolutionary War, to pass an act for holding all elections by ballot. Section 6. The Constitution of 1821 required all elections to be by ballot except for town officers. Article 2, § 4. The provision of that Constitution was re-enacted in the Constitution of 1846 (article 2, § 5), and again in that of 1895, in which last, however, there is added, "or by such other method as may be prescribed by law, provided that secrecy in voting be preserved." That the object of this addition in the last Constitution was not to create any greater safeguards for the secrecy of the ballot than had hitherto prevailed, but solely to enable the substitution of voting machines, if found practicable, is too clear for discussion. Therefore the older decisions of our courts have lost none of their authority by reason of any change in the Constitution. *People ex rel. Yates v. Ferguson*, 8 Cow. 102, was quo warranto to try title to the office of clerk of Montgomery county. The relator's name was Henry F. Yates, and he was at times called Frey Yates. The canvassers refused the relator

votes cast for H. F. or Frey Yates. On the trial of the action the circuit judge excluded the testimony of voters to the effect that in voting for H. F. Yates or for Frey Yates they intended to vote for the relator. A verdict was rendered for the defendant, on which judgment was entered. That judgment was reversed by the Supreme Court, which held that the witnesses should have been allowed to testify. In that case no point seems to have been raised that the testimony would violate the secrecy of the ballot. Again, in *People v. Cook*, 8 N. Y. 68, 59 Am. Dec. 451, testimony was admitted to prove that by votes for Benjamin C. Welch, Jr., or Benjamin Welch, the electors intended to vote for Benjamin Welch, Jr. Again, the point that such evidence violated the secrecy of the ballot does not seem to have been raised. But in *People ex rel. Smith v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242, despite a vigorous opinion by Chief Judge Denio, which forcibly urged everything that could be said in support of that objection, the objection was overruled and the testimony held competent. It was sought to reargue the question in *People ex rel. Judson v. Thatcher*, 55 N. Y. 525, 14 Am. Rep. 312, but the court adhered to the doctrine of the *Pease Case*; Judge Andrews saying: "The right to examine voters in an action in the nature of a quo warranto is in affirmance and vindication of the essential principle of the elective system that the will of the majority of the qualified electors shall determine the right to an elective office." Page 535 of 55 N. Y. (14 Am. Rep. 312). It is true in the *Thatcher Case* this declaration was obiter, for the disposition of the case proceeded on another ground. Since the *Thatcher Case*, 35 years ago, the doctrine of the *Pease Case* has never been questioned. It has been accepted as the settled law of the state, not only in quo warranto proceedings, but in criminal prosecutions against election officers, and such officers have been convicted and punished on the strength of such testimony. Nor can the *Pease Case* be distinguished from the case at bar. True, in that case it was sought to show that persons who had voted for a certain candidate were not qualified electors, while here it is sought to show that the vote of the elector was not counted; but the purpose for which the testimony was offered has no bearing on the question of its admissibility, since the only ground for excluding it is that it infringes on the secrecy of the ballot, an objection equally applicable to every purpose for which the testimony might be offered. We must therefore decline to treat the question as still open.

We are now brought to the consideration of the effect of this testimony if credited. If the voting had been by ballot, there is no doubt that under the authorities cited the jury could have found that the relator was entitled to the votes of those witnesses, and, if they were sufficient in number, to the of-

fice for which he was a candidate. It is contended, however, that a different rule is applicable to voting by a machine, and so the learned Appellate Division held on a previous appeal in this action (122 App. Div. 849, 352, 106 N. Y. Supp. 1076), where that court said: "In permitting the use of voting machines the statute has, in effect, provided that any elector who desires to vote for a candidate must register his choice by making a change in a counter, capable of being read by the inspectors, and which, by the understanding of all, expresses a vote for the candidate whose name is connected with the counter. It has made the question whether or not an elector has voted to depend upon a movement or change of the counter numbers. This is apparent from the character of the duty imposed upon the inspectors in canvassing the vote. They are only required to read, record, and return 'the result as shown by the counter numbers.' They are not called upon to determine whether the voting machine did or did not work correctly, or to correct any error if one were made. The change or movement of the counter is the only means provided for expressing, carrying out, or determining the choice of the voter, and, as the very purpose of voting is to have it counted, it cannot be doubted that if a voter has not indicated his choice so that it can be determined, without intrinsic evidence of his intention, he has not voted, and it is a matter of no consequence whether the failure to express a preference is due to the condition of a ballot, the voluntary act of the voter, or to the defects in the mechanism or the operation of a voting machine." The learned court therefore concluded that the evidence would not establish that the relator had received the votes of these witnesses; but, nevertheless, it held it was competent as showing that the electors were deprived of the right to vote in sufficient number to render the election illegal or ineffective.

In this reasoning we do not concur. The pith of it is that by the substitution of machines for paper ballots the act of voting and that of registering or canvassing the vote cast has been so blended as to constitute a single indivisible thing, and that if a vote is not registered it is in law not cast. Until the use of voting machines, it never was questioned that the acts of voting and of canvassing the vote were entirely separate. When the voter deposited his ballot legally prepared in the box, the exercise of his right was complete. As shown by the cases cited, the question was what candidate had received the greater number of votes so cast by the electors; the canvass or return of the vote being only prima facie evidence. That canvass might be false, or ballots might have been lost or destroyed during the canvass so as to make an accurate canvass impossible. Doubtless, any of these things placed serious obstacles in the way of ascertaining what vote had actually been cast. Nevertheless

if, in despite of these obstacles, a candidate could show by the testimony of electors that a majority had actually cast their votes in his favor, such evidence, if credited by the jury, entitled him to an award of the office. When the elector in the use of a voting machine complies with the prescribed regulations for its use so as to indicate his choice for any particular office, the vote, so far as he is concerned, is complete. The registry by the machine is simply a substitute for the canvass of written votes. That it failed to work properly cannot destroy the effect of the act of the elector in the exercise of his constitutional right. If the machines at the close of the polls, but before it could be opened, were destroyed by accident or design, this should not render the election nugatory. Doubtless it would make the ascertainment of the vote cast a work of great difficulty, but the difficulty of the inquiry would be no valid objection to entering upon it.

A similar argument was addressed to the court in the Pease Case, where it was urged that to permit a party to show that a greater number of illegal votes had been cast for his adversary than the canvassed majority gave him would be attended with great inconvenience and might last a number of years. In response the court said: "It is the first time I have ever heard it urged that a party who had a conceded right should not have a remedy to enforce it, because a large consumption of time would take place before his right could be established. If a party has a legal title to an office, it surely can be no legal reason for denying him the opportunity to establish it that such process will require the examination of a large number of witnesses and consume much time in the proceeding. Rights of parties cannot be determined on such a basis." Page 61 of 27 N. Y. (84 Am. Dec. 242). If the use of voting machines were attended or may be attended with the result attributed to it by the Appellate Division, I should very much doubt whether such use was constitutional, despite the amendment in 1895. The right of the elector to vote is conferred by the Constitution, and whenever he exercises that right in conformity with the methods prescribed by law he is entitled to see that his vote is given full force and effect in the determination of what persons have been elected to office. True, he may be unable to exercise that right either by negligence on his own part or by personal misfortune, but any method of holding an election which would deprive the electors, free from fault or personal misfortune, of the right of casting their ballots and having effect given to the votes so cast, would plainly be unconstitutional. *People ex rel. Bradley v. Shaw*, 133 N. Y. 493, 31 N. E. 512, 16 L. R. A. 606; *People ex rel. Goring v. President, etc., Wappingers Falls*, 144 N. Y. 616, 39 N. E. 641. When the constitutional convention authorized the employment of methods of voting

otherwise than by a ballot, it never contemplated or sanctioned a method which would impair the rights which the voter had enjoyed under the previous Constitutions. As already said, we think that the use of voting machines does not necessarily impair those rights. It may make it more difficult to ascertain the true vote cast where the machine works defectively than in cases where the paper ballots are used and the ballots are preserved. It is to be borne in mind, however, that until a few years ago the paper ballots were always destroyed immediately after the canvass, and it would not seem more difficult to establish the vote of an election district cast by a machine than when the ballots were destroyed immediately after the canvass. We are of opinion therefore that, if the testimony of these witnesses was credited by the jury, their acts at the polling place were not mere attempts to vote, but complete votes for the candidates of their choice.

The case of *People ex rel. Nichols v. Board of County Canvassers of Onondaga*, 129 N. Y. 396, 29 N. E. 327, 14 L. R. A. 624, is plainly distinguishable from the one before us. There the official ballots furnished at certain election districts were improperly indorsed. It was held by a divided court that the votes should not have been counted; but, as pointed out by Judge O'Brien in the prevailing opinion, the mistake of the public officers in indorsing the ballots did not defeat the right of the elector to vote because, under the statute, he could still prepare and tender a proper ballot. Had the statute not reserved this right to the elector, the case would have been very different, for, though the Legislature's power to regulate the method of voting is plenary, the method must be such as will enable an elector being without fault or personal misfortune to exercise his constitutional right. So it has been held that the fact that an impostor has been suffered to vote under an elector's name cannot deprive the elector of the right to vote when he presents himself at the polls. *People ex rel. Borgla v. Doe*, 109 App. Div. 670, 96 N. Y. Supp. 389.

At the trial the practical operation of a voting machine showed on several tests that it worked more to the detriment of the relator than to that of the defendant for some reason which the experts explained. The evidence of the defective working of the machine was competent because the machine contradicted the statements of the witnesses for the relator that all of them had voted for him. Of course, the testimony of these witnesses was not conclusive, and, if the machine proved on examination to be working properly and accurately, the jury might very possibly and probably have discredited the witnesses as against the record shown by the voting machine. When the machine was shown to work improperly, its record as a contradiction of the witnesses was very

much diminished; but these tests or experiments before the jury were not competent for the purpose of showing any average of loss by the relator over that suffered by the defendant and to predicate thereon that the relator must have received so many more votes than the machine credited him with. This would be pure conjecture, in which the jury should not be permitted to indulge. There is no pretense that the machine recorded votes not cast, but it failed to record votes cast. Therefore the record as returned by the machine should be taken as the starting point of the inquiry, and such record can be varied only by competent, legal proof that voters did vote for either candidate to a number in excess of those registered by the machine.

The learned counsel for the defendant also contends that the use of the voting machine is unconstitutional, in that it does not secure secrecy in voting, and therefore the returns from those districts where machines were used should be thrown out, and the election awarded on the canvass of the other districts. This would give the defendant a large majority. The evidence in the case tends to establish that when an elector votes a "split" ticket persons very close to the machine may at time hear a noise or "click" caused by the movements of the lever which is necessarily employed when the elector goes out of the straight party column. There is no pretense that any indication is given as to what candidate the elector has voted for, but simply that he has not voted a straight party ticket. The circumstances by which even this information can be gathered seem exceptional. Assuming, however, that the objections to the use of the machine, as violating the constitutional requirement, are substantial, that question should be determined in a direct proceeding by mandamus or otherwise to compel the rejection of the machines and the use of the paper ballot, in which the subject can be fully investigated and the question fairly determined. It would be an extreme case that would justify the courts in disfranchising a large body of electors by holding that their votes cast in the method prescribed by statute were null and void.

It follows that the case should have been submitted to the jury, and that the judgment below should be reversed, and new trial granted; costs to abide the event.

GRAY, J. (dissenting). I dissent from the decision advised by the chief judge, and, while I vote for the reversal of the judgment, it is upon the ground that the return of the board of canvassers in question was conclusive under the present election law. According to that return, the defendant was elected county treasurer of Chemung county by the greatest number of votes cast. There is no charge, nor pretense, of any fraud, or of fraudulent practices, by which that result

was effected. The claim is, in substance, that at the close of the voting, the voting machines in 3 out of the 28 election districts of the city of Elmira, as to some candidates, had shown peculiar variations in the registration of votes, and that, in subsequent tests, they appeared to work defectively in registering and in counting votes cast. It was conceded that they had not been tampered with; but because the subsequent tests, ordered by the court and made upon the trial, showed that they failed, at times, to register votes, which were attempted to be cast by operating the mechanical levers, or appliances, the relator claims the right to supplement their supposed defectiveness in operation by the testimony of witnesses as to how they did vote in those particular election districts. The testimony of a large number of witnesses was received to show that they had voted for the relator, and, if competent to invalidate the official return, the evidence showed that more votes had been attempted to be cast for him than the counting dials of the machines had registered. That the evidence of witnesses as to how they voted at an election is admissible, upon the trial of an action to determine the right to the office of the person receiving a certificate of election, has been frequently held, and the rule as it has been applied in the cases is not questioned. If the witness does not object to being compelled to testify as to how he cast his ballot, the objection is not available to any one else; but, while such a rule has its proper application in cases where the inquiry is into the qualifications of the electors to cast a vote, or where fraud has been practiced and is shown to have affected the result, as in the cases of *People ex rel. Smith v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242, and of *People ex rel. Judson v. Thacher*, 55 N. Y. 525, 14 Am. Rep. 312, I think it is hardly applicable to a case like this. If the result of an election, held wholly, or in part, by the use of voting machines, as declared by the official return, is to be questioned, and a new result attempted to be reached by the reception and counting of votes of electors in court, upon a trial, upon the sole ground that, in certain election districts, machines in use appeared, upon subsequent tests, to operate defectively, then we have a serious innovation upon our elective system and one calculated to produce most unsatisfactory consequences. The amendment of our state Constitution in 1894 permitted elections to be by ballot "or by such other method as may be prescribed by law, provided that secrecy in voting be preserved." Article 2, § 5. In 1901 (*Laws 1901*, p. 1308, c. 530) the Legislature amended the election law of 1896 (*Laws 1896*, p. 893, c. 909), and authorized the adoption, "for use at elections any kind of voting machine approved by the state board of voting machine commissioners, or the use of which has been specifically authorized by law; and thereupon such voting machine may be used at any or all

elections held in such city \* \* \* for voting, registering and counting votes cast at such elections." Section 163. Sections 160, 161, and 162 provide for a board of voting machine commissioners, for their examination of voting machines, for the adoption thereof upon a report that they can safely be used by voters at elections, and for the requirements, which such machines must meet, in a construction permitting of a person's voting straight or "split" tickets, or in blank columns, and which prohibits, through a lock, or locks, any movement of the mechanism after the polls are closed. Section 162 prescribes that the machine "must permit voting in absolute secrecy." The municipal authorities followed the law, and there is neither question of the legality of the election held in the municipal election districts through the use of voting machines, nor question of the absolute integrity of action of the election officers, through whom the results passed and were certified.

We have therefore a case of the lawful adoption by the community of voting machines for the use of voters, where an approved mechanism is availed of to secure honesty, secrecy, and exactness in the casting, counting, and return of votes cast. It must be clear that, in the use of these machines, certain effects are understood and certain results intended, namely: That, from their construction, a vote is not registered, unless the counting dials are moved; that whether the elector has voted depends upon that fact; inasmuch as the law requires, only, of the inspectors in canvassing, that they shall return "the results as shown by the counter numbers" (section 178); and that, if an elector has attempted to vote, and, for any reason, his vote is not registered by the counting dial within the machine, he has not, in fact voted. It must be borne in mind that we are dealing with a new system of voting, authorized by law, in which security against the frauds, or frailties, of mankind is aimed at, and which seems to be nearly reached, as a fact. If they are to be considered as objectionable devices in the holding of elections, that consideration is for the Legislature and not for the courts to act upon. I most seriously doubt the correctness of the statement that, under the novel method of voting authorized by the Constitution and the law, greater secrecy is not aimed at. I think it to be quite apparent that the Legislature must have intended to secure the more absolute secrecy of action in voting, which the mechanical device offered. As the question presents itself to my mind, in holding that the official return of the canvassers should be accepted as conclusive, we simply follow the legislative intent. They are to take what they find recorded and counted upon the counting dials, when opened at the close of the polls. What the electors, who have entered the machine inclosure, have voted, is a question to be determined by the

results shown upon the dial plates. That votes of electors were not counted upon them may, it is true, have been due to machine defects; but, equally, it is true that it may have been due to the elector's mistake, or ignorance, or to his voluntary act. It does not follow that the electors, who testified upon the trial, had attempted to vote for the relator. Influences, or motives, may have determined them to abstain from voting for him, to which they allowed effect in the secrecy of the closet. At any rate, to require them, upon a complaint of the defective working of the machine, to testify what they intended to do, when the question is what they did, seems a dangerous precedent in cases free from fraud, or fraudulent practices. It seems to me to be equally immaterial whether the failure of a voter to have his vote registered be due to a defective machine, or to a defective ballot. Under the system of voting by ballot, it may happen that the votes, which electors have attempted to cast, may not be counted, not because of any fraud, but by reason of their own mistakes, or of some defect in the ballots prepared for the election districts. In such a case, they are deprived of their share in the election, but for that there is no remedy. Upon the exercise of the elective franchise are imposed many conditions, which must be met before the elector's vote can be cast or counted. Sacred as is the right of the citizen to vote, it is, under our system, not untrammelled.

In *People ex rel. Nichols v. Board of County Canvassers of Onondaga*, 129 N. Y. 395, 29 N. E. 327, 14 L. R. A. 624, the wrong indorsement of the Republican ballots in certain election districts resulted in their rejection, because they were marked, or defective, ballots, and failed to meet the requirement for the secrecy of the elector's vote under the provisions of the ballot reform act. It was said in the opinion, if the law required the exclusion of the ballots, "that although it may deprive a portion of the citizens of the county of their right to be heard in the election of a clerk at one election, it is better that they should suffer this temporary privation than that the courts should habituate themselves to disregard or ignore the plain law of the land in order to provide for hard cases." Page 412 of 129 N. Y., and page 334 of 29 N. E. (14 L. R. A. 624). So in this case, where the method substituted for human agencies in the preparation, reception, and counting of ballots was a mechanical instrument, contrived and adapted for those purposes, and the command of the statute is that the inspectors return the "result as shown by the counter numbers," the courts should give effect to the law, and, there having been no fraud, should hold the return conclusive. They should not, because in instances, for some reason, as attributable to the elector's act, as to the defective working of the mechanism, disregard the official return and,

on testimony of intentions, reverse the result. The elector, when asked as a witness to state, in open court, how he had intended, or attempted, to vote, may be influenced, then, by a desire to represent his personal, or political, convictions as to the relator's candidacy, quite differently than they were felt in the retirement of the voting booth. There is room for the admission of an elector's testimony with respect to how he voted or attempted to vote, at an election, in the investigation of his qualifications as an elector, or of any practices complained of on the part of the election officers; but that it should be admissible to change the result without any such facts of complaint, I do not believe. To say that the right to an elective office ought to depend upon the number of votes cast by the qualified electors may be true, but that does not meet the question in this case. That question is who, according to the arrangements, which the Constitution and the laws have provided for determining that question, received the greatest number of votes, and was therefore elected to the office? The Legislature has not left it an open question to be settled in the courts, at the instance of a defeated candidate, not complaining of any fraud, but only of the result. It has prescribed a method for determining the result, which, if availed of, minimizes the uncertainty of elections and mechanically declares a result.

In my opinion, the result as declared should be conclusive. I therefore vote for the reversal of the judgment appealed from, and I advise that a judgment in favor of the defendant be entered upon the case as made at the trial, upon the ground that the defendant was legally elected as county treasurer for the county of Chemung, for the term of three years, commencing on January 1, 1907.

HAIGHT, VANN, and WILLARD BARTLETT, JJ., concur with CULLEN, C. J. EDWARD T. BARTLETT and CHASE, JJ., concur with GRAY, J.

Judgment reversed, etc.

(194 N. Y. 19)

FIFTH AVE. COACH CO. v. CITY OF NEW YORK.

(Court of Appeals of New York. Jan. 5, 1909.)

1. MUNICIPAL CORPORATIONS (§ 631\*)—ORDINANCES—CONSTRUCTION—"WAGON"—"VEHICLE."

Greater New York Charter (Laws 1901, p. 1, c. 466), provides that the word "vehicle" shall include wagons, cabs, carriages, omnibuses, motors, etc. The city adopted an ordinance providing that no advertising wagons shall be allowed in the streets of a borough, but nothing contained therein shall prevent the putting of business notices on ordinary business wagons so long as such wagons are engaged in the usual

business of the owner. *Held*, that vehicles on four wheels, propelled by motors, designed primarily for the carriage of passengers, operated by a corporation maintaining a stage route, are "wagons" within the ordinance—a "wagon" being a wheeled carriage; a vehicle on four wheels.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 631.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7284-7286, 7373, 7374, 7831.]

2. MUNICIPAL CORPORATIONS (§ 631\*)—ORDINANCES—USE OF STREETS—CONSTRUCTION.

An ordinance, providing that no advertising wagons shall be allowed in the streets, but nothing shall prevent the putting of business notices on ordinary business wagons so long as such wagons are engaged in the usual business of the owner and not used merely for advertising, does not refer exclusively to wagons wholly used for the display of advertisements; but such notices are prohibited on wagons used mainly for advertising, and general advertising for hire is prohibited whether carried on wagons wholly used for advertising or in connection with the ordinary business in which the wagons are engaged.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 631.\*]

3. MUNICIPAL CORPORATIONS (§ 680\*)—CONTROL OF STREETS.

A city owning in fee the streets thereof may grant their use for public purposes not inconsistent with nor prejudicial to the public easement for street purposes, and it may refrain from granting rights therein that are not for street purposes.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1459-1466; Dec. Dig. § 680.\*]

4. MUNICIPAL CORPORATIONS (§ 63\*)—ORDINANCES—VALIDITY—PRESUMPTIONS.

An ordinance adopted by the aldermen of a city authorized by the charter to make such ordinances as they may deem necessary for the good government of the city is presumptively valid, and, the necessity and advisability of the ordinance being for the legislative power to determine, unless an ordinance is arbitrary and unreasonable it must be upheld.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 155, 1373, 1379; Dec. Dig. § 63.\*]

5. CONSTITUTIONAL LAW (§ 47\*)—STATUTES—VALIDITY.

The validity of a statute is not alone to be determined by what has been done in any particular instance, but what may be done under it.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 47.\*]

6. MUNICIPAL CORPORATIONS (§ 602\*)—ORDINANCES—VALIDITY.

Under Greater New York Charter (Laws 1901, pp. 23, 23, c. 466), §§ 43, 44, 50, as amended by Laws 1905, pp. 1536, 1540, c. 629, §§ 4, 5, 9, authorizing the aldermen to make ordinances as they may deem proper for the good government of the city and to regulate the use of the streets for signs and the exhibition of advertisements, and in reference to the running of trucks, etc., an ordinance providing that no advertising wagons shall be allowed in the streets of a borough except business notices on ordinary wagons engaged in the usual business of the owner not merely for advertising, is valid when applied to vehicles used by a corporation for the transportation of passengers and carrying on the exterior advertising matter pursuant to a contract therefor, where such vehicles used congested streets owned in fee by the city, and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

when the corporation had no franchise to maintain such advertisements.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 602.\*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Fifth Avenue Coach Company against the City of New York. From a judgment of the Appellate Division (126 App. Div. 857, 110 N. Y. Supp. 1087), affirming a judgment of the Special Term (58 Misc. Rep. 401, 111 N. Y. Supp. 759), dismissing the complaint, plaintiff appeals. Affirmed.

William H. Page, for appellant. Francis K. Pendleton, Corp. Counsel (Theodore Connolly, of counsel), for respondent.

CHASE, J. The plaintiff owns and runs on the route hereinafter described, in the city of New York, a large number of stages. On the 11th day of May, 1907, it entered into an agreement with the Railway Advertising Company by which it granted and leased to said company "the exclusive right and privilege of maintaining advertising signs upon the exterior of each and every coach or omnibus now (then) operated or run, or which may hereafter (thereafter) be operated or run, upon the regular route of said coach company, extending from Eighty-Ninth street in the city of New York down Fifth avenue across and to the south side of Washington Park and return and upon any additional route or extension of its route which shall be operated by it" during the term of said lease. The agreement is to continue until December 31, 1913. It provides that: "If at any time any order or judgment of a court having jurisdiction in the premises shall be entered, or any act of the Legislature of the state of New York shall be passed, or any ordinance or resolution of the city of New York or of any branch of the city government shall be adopted which forbids the use of the exterior of said vehicles for advertising purposes or which imposes any tax or license fee upon said vehicles by reason of such exterior advertising in addition to the tax or license fee now paid for the same, which additional tax or license fee the advertising company shall refuse to pay, the coach company shall, in any such event, have the right to terminate this agreement upon thirty days written notice to the advertising company." Since the making of said agreement, the plaintiff has operated its said stages for the transportation of passengers at a uniform fare of 10 cents for each person, and it has maintained on the exterior of said stages advertisements provided by said advertising company. The advertisements consist of painted scenes and letters which are extravagant and gaudy in appearance. They are fully described in the record, and a detailed statement of some of such advertisements may also be found in the opinion of the court

at Special Term, rendered on the trial of this action which is reported in 58 Misc. Rep. 401, 111 N. Y. Supp. 759. It was found by the trial court as follows: "The defendant through its various officials and officers has interfered with and threatens to continue to so interfere with and to prevent the use of signs on the exterior space upon the stages operated by the plaintiff herein for the display of advertising matter and to cause the removal of said advertising matter." This action is brought by the plaintiff to permanently enjoin and restrain the defendant from interfering in any way with the advertising signs or matter permitted, placed, or used by the plaintiff, or under its direction, on the exterior of said stages.

The plaintiff was incorporated on the 23d day of July, 1896, "To take and possess the property and franchises of a domestic stock corporation (Fifth Avenue Transportation Company, Limited) sold as hereinafter (in the certificate of incorporation) stated." The property thus sold and subsequently transferred to the plaintiff, so far as it relates to a franchise, is as follows: "The right to run and drive, or cause to be run and driven, a line of stages or carriages for the transportation of passengers for hire from Eighty-Ninth street in the city of New York down Fifth avenue across Washington Park and along South Fifth avenue to the Bleecker street elevated station, and return. Together with all the rights granted to Fifth Avenue Transportation Company limited or acquired under or by chapter 536 [page 765] of the Laws of 1886 and all the rights granted to or acquired by said Fifth Avenue Transportation Company limited under or by chapter 182 [page 212] of the Laws of 1889." The Fifth Avenue Transportation Company, Limited, was organized October 28, 1885. It went into the hands of a receiver in 1895, and the plaintiff corporation was organized for the purposes stated, and to it was transferred on November 3, 1897, the property and franchises for the holding, maintenance, and operation of which it was organized.

Chapter 536, p. 765, Laws 1886, authorized the Fifth Avenue Transportation Company, Limited, and its assigns, "On payment of the license fees as hereinafter (in said statute) provided, to run and drive, or cause to be run and driven, and without further authority from said city, a line of stages, or carriages, for the transportation of passengers for hire, from Eighty-Ninth street in the city of New York down Fifth avenue, across Washington Park, and along South Fifth avenue to the Bleecker street elevated station and return." Other provisions were included in the act relating to the consent of property owners on the avenues and streets whereon the stages were to be run, the payment of a license fee, and the rate of fare. Chapter 182, p. 212, Laws 1889, authorizes said Fifth Avenue Transportation Company, Limited, with

the consent of the commissioners of the sinking fund, and on such terms as they may prescribe, "To run, drive, or cause to be run and driven, and without further authority from said city, a line of stages or carriages for the transportation of passengers and parcels for hire" upon the streets therein named including the streets mentioned in the act of 1886. Chapter 657, p. 1437, Laws 1900, authorizes a corporation operating a lawfully established stage route as therein provided and upon the authority and consent therein provided to extend its route and to operate the route so extended with stages and omnibuses propelled by electricity or any other motive power. The plaintiff has since materially extended its route, and it is now operating its stages by motor power pursuant to the franchises obtained as stated and defined in said acts of the Legislature. The stages were drawn by horses prior to 1907. Such franchise does not expressly include the right to use the public streets mentioned therein for advertising purposes or to carry or maintain exterior advertisements on its stages, and the carrying of such advertisements is not a necessary or essential incident to its express franchise rights. Such exterior advertising is in no way related to the carrying of passengers for hire. The defendant has provided by ordinance as follows: "No advertising trucks, vans or wagons shall be allowed in the streets of the borough of Manhattan under a penalty of \$10 for each offense. Nothing herein contained shall prevent the putting of business notices upon ordinary business wagons, so long as such wagons are engaged in the usual business or work of the owner and not used merely or mainly for advertising."

A "wagon" is defined to be a wheeled carriage; a vehicle on four wheels. The defendant's charter provides that the word "vehicle," "shall be deemed to include wagons, trucks, carts, cabs, carriages, stages, omnibuses, motors, automobiles, locomobiles, locomotives, bicycles, tricycles, sleighs or other conveyances for persons or property." The plaintiff's stages are also called indiscriminately carriages, coaches, and omnibuses. They are vehicles on four wheels designed primarily for the carriage of passengers, and they are wagons within the meaning of the ordinance. The fact that they are now propelled by motors, instead of being drawn by horses, has not changed their character as wagons or removed them from the prohibition of the ordinance. The second sentence of the ordinance is a part of the same paragraph, and the two sentences read together show the intention of the legislative body. It bears evidence in itself that it was not intended to refer exclusively to wagons wholly used for the display of advertisements. Business notices upon ordinary business wagons are not prohibited so long as such wagons are engaged in the usual business or regular work of the owner, but even such notices are prohibited on wagons used merely or mainly

for advertising. General advertising for hire is by the ordinance prohibited, whether carried on wagons wholly used for advertising or in connection with the ordinary or usual business in which the wagons are engaged. The second sentence of the ordinance was wholly unnecessary, unless the negative in the first sentence was intended to prohibit general advertising on wagons even if they are not wholly devoted to that use.

Power to make ordinances is given by the defendant's charter to the board of aldermen. It is therein provided as follows: "The board of aldermen shall have power to make \* \* \* all ordinances \* \* \* not contrary to the laws of the state, or the United States, as they may deem necessary to carry into effect the powers conferred upon the city of New York by this act, or by any other law of the state, or by grant; and such as they may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, peace and prosperity of said city, and its inhabitants. \* \* \*" Section 43 of said charter, as amended by chapter 629, p. 1536, Laws 1905. " \* \* \* The board of aldermen in addition to all enumerated powers may exercise all of the powers vested in the city of New York by this act, or otherwise, by proper ordinances \* \* \* not inconsistent with the provisions of this act, or with the Constitution or laws of the United States or of this state \* \* \* may from time to time ordain and pass all such ordinances \* \* \* applicable throughout the whole of said city or applicable only to specified portions thereof, as to the said board of aldermen may seem meet for the good rule and government of the city, and to carry out the purposes and provisions of this act or of other laws relating to the said city. \* \* \*" Section 44 of the charter as so amended. "Subject to the Constitution and laws of the state, the board of aldermen shall have power to regulate the use of streets and sidewalks by foot passengers, animals or vehicles; \* \* \* to regulate the use of the streets for signs \* \* \* and other purposes; to regulate the exhibition of advertisements \* \* \* and to make all such regulations in reference to the running of stages, omnibuses, trucks and cars as may be necessary for the convenient use and the accommodation of the streets. \* \* \*" Section 50 of charter as so amended.

That the defendant owns in fee the streets and avenues over which the plaintiff runs its stages is not disputed. Such streets are held in trust for public uses. In *Osborne v. Auburn Telephone Company*, 189 N. Y. 393, 397, 82 N. E. 428, this court say: "Cities which own the fee in the streets may contract, lease, or grant their use for public or municipal purposes not inconsistent with nor prejudicial to the public easement or use for street purposes. In such cases, the fee having been transferred to the municipality, it can grant rights in the streets other than for street purposes which do not impair the public ease-

ment." The converse of such statement is true, and a city which owns the fee of its streets can refrain from granting rights therein that are not for street purposes.

This case is not one like *N. Y. Mail & Newspaper Transportation Co. v. Shea*, 30 App. Div. 266, 51 N. Y. Supp. 563, to prevent the consummation of a contract made in behalf of a city, nor of *Interborough Rapid Transit Co. v. City of New York*, 47 Misc. Rep. 221, 95 N. Y. Supp. 886, and other similar cases construing a lease made by the city. In this case the plaintiff without express authority to maintain advertisements on the exterior of its stages seeks to enjoin the defendant from interfering with such advertisements notwithstanding its express prohibitive ordinance. It was stated, in *N. Y. Mail & Newspaper Transportation Co. v. Shea*, supra, by Judge Cullen, then sitting in the Appellate Division, that a contract made by the late trustees of the New York and Brooklyn Bridge with a corporation by which they authorized it to lay and operate a pneumatic tube on said bridge could be wholly abrogated by said trustees, and that the corporation would have to submit. Said bridge and its approaches are owned in fee, and the judge there said, referring to the contract, that it and all similar contracts "must be construed as made subject to what we may term the governmental or legislative power of the bridge authorities over its public use." Page 270 of 47 Misc. Rep., page 566 of 51 N. Y. Supp. Conducting a private business and using private easements in public streets, even where expressly authorized by the municipality, are frequently condemned. *Hatfield v. Straus*, 189 N. Y. 208, 82 N. E. 172; *State ex rel. Belt v. St. Louis*, 161 Mo. 371, 61 S. W. 658; *People ex rel. Healy v. Clean Street Company*, 225 Ill. 470, 80 N. E. 298, 9 L. R. A. (N. S.) 456, 116 Am. St. Rep. 156.

In further considering the authority of defendant to enact said ordinance the language of the charter may be repeated in so far as it says that the board of aldermen may make such ordinances "as they may deem necessary and proper for the good government \* \* \* of said city and its inhabitants," and also, "as to the said board of aldermen may seem meet for the good will and government of the city." The board of aldermen are thus the judges as to what ordinances they will pass to carry out and preserve the interests of the municipality, and, unless an ordinance passed by them is wholly arbitrary and unreasonable, it should be upheld. The necessity and advisability of the ordinance is for the legislative power to determine. The presumption is in favor of the ordinance. The validity of a statute is not alone to be determined by what has been done in any particular instance, but by what may be done under it. *City of Rochester v. West*, 164 N. Y. 510, 58 N. E. 673, 53 L. R. A. 548, 79 Am. St. Rep. 659.

The plaintiff is engaged in the transporta-

tion of passengers, and at the same time in running advertising wagons. The exterior advertisements carried by it are not seen by its passengers, but they are such that they can be seen in the streets of the city and in Central Park when the view is not obstructed for a distance of one-half mile. Fifth avenue is an important and much-used street. At certain times of the day slow-moving trucks are barred therefrom on account of the congestion in such street. The plaintiff's contract with the advertising company allows the advertisements on its stages to become the conspicuous part of their exterior, and the business of advertising for the purpose of revenue is of such value to the plaintiff that the gross income therefrom exceeds six per cent. upon its entire capital stock. The contract with the advertising company includes "each and every coach or omnibus now operated or run, or which may hereafter be operated or run" by it, and the compensation is dependent upon the number so operated and run. The number has continually increased. Such advertising for hire clearly tends to increase the number of plaintiff's stages in such important and much-used street, and constitutes a substantial reason, not only for the continuance of the present number of stages therein, but also for the further increase of the number thereof. Every procession, parade, or show upon vehicles passing through a public street tends to congestion therein, and to some extent interferes with those engaged in business or having their homes thereon. It appears that the right to display garish advertisements in conspicuous places has become a source of large revenue. If the plaintiff can cover the whole or a large part of the exterior of its stages with advertisements for hire, delivery wagons engaged by the owners in their usual business or regular work can rightfully be covered with similar advertisements. Cars and vehicles of many descriptions, although not engaged exclusively in advertising, and thus not incumbering the street exclusively for advertising purposes, may be used for a similar purpose. The extent and detail of such advertisements, when left wholly within the control of those contracting therefor, would make such stages, wagons, or cars a parade or show for the display of advertisements which would clearly tend to produce congestion upon the streets upon which they were driven or propelled. The exaggerated and gaudy display of advertisements by the plaintiff is for the express purpose of attracting and claiming the attention of the people upon the streets through which the stages are propelled.

In *Commonwealth v. McCafferty*, 145 Mass. 384, 14 N. E. 451, the court, referring to an ordinance which provided, "No person shall place or carry or cause to be placed or carried on any sidewalk any showboard, placard or sign for the purpose of there displaying the same," say: "The purpose of the ordinance in question is to prevent the placing of show-

boards and signs upon the sidewalks so as to obstruct them, and also to prevent the carrying of placards and signs for the purpose of displaying them of which the tendency and effect might be to collect crowds and thus to interfere with the use of the sidewalks by the public and lead to disorder. We cannot say that such a provision applicable to the crowded streets of a populous city is unreasonable."

The board of aldermen were not wholly arbitrary and unreasonable in passing the ordinance that we have quoted. This action is brought by the plaintiff in equity to enjoin the city from interfering with the maintenance of such exterior advertisements on its stages. It has failed to show that the maintenance of such exterior advertisements is within its express franchise rights, or that such ordinance prohibiting their maintenance on its stages is not a proper exercise of the authority vested in the city to regulate the business conducted in the streets thereof, and the trial court was therefore right in dismissing the plaintiff's complaint.

The judgment appealed from should be affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, and WILLARD BARTLETT, JJ., concur. GRAY, J., concurs in result.

Judgment affirmed.

(194 N. Y. 70)

BERGMANN v. LORD et al.

(Court of Appeals of New York. Jan. 5, 1909.)

1. WILLS (§ 634\*)—CONSTRUCTION—REMAINDERS—TIME OF VESTING.

Where a testator bequeathed a sum in trust to invest and pay the income to his wife for life, and on her death the corpus to go to his surviving children, the remainder vested on testator's death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488, 1491, 1494-1500; Dec. Dig. § 634.\*]

2. TRUSTS (§ 148\*)—DISPOSAL OF INTEREST—TRANSFER BY BENEFICIARY.

Under Personal Property Law (Laws 1897, p. 508, c. 417) § 3, as amended by Laws 1903, p. 239, c. 87, providing that the right of a beneficiary to enforce a trust and to receive the income of personalty and apply it to the use of any person cannot be transferred, but the interest of the beneficiary of any other trust in personalty may be transferred, where money was bequeathed in trust to be invested and pay the income to the testator's wife, she could not transfer her interest in the trust property.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 148.\*]

3. REMAINDERS (§ 14\*)—TRANSFER.

Where money was bequeathed in trust to pay the income to testator's wife, and upon her death the corpus to go to testator's surviving children, so that the children took a vested remainder on testator's death, the children's vested interest was transferable in the same manner as an expectant reversionary remainder in realty, and Personal Property Law (Laws 1897, p. 508, c. 417) § 3, as amended by Laws 1903, p.

239, c. 87, prohibiting the transfer of the right of a beneficiary to receive the income of personal property held in trust, would not prevent the transfer of the children's interest.

[Ed. Note.—For other cases, see Remainders, Dec. Dig. § 14.\*]

4. TRUSTS (§ 151\*)—CREDITORS OF CESTUI QUE TRUST—RIGHTS WHICH MAY BE SUBJECTED.

While property held in trust to receive the rents and income and apply it to the beneficiary's support cannot be reached by the beneficiary's creditors, a vested interest in a fund held in trust for another, if transferable, can be so reached.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 195, 195½, 197; Dec. Dig. § 151.\*]

5. REMAINDERS (§ 13\*)—RIGHTS OF CREDITORS.

Code Civ. Proc. c. 15, tit. 4, art. 1, § 1871, provides that, when execution against a judgment debtor's property is returned unsatisfied, the judgment creditors may maintain an action to discover any property belonging to him. Section 1879 provides that the preceding section shall not authorize the seizure of any property held in trust for a judgment debtor where the trust was created by another. Property was bequeathed in trust to pay the income to testator's wife for life, the corpus to go to his children on her death, so that the children had a vested remainder on testator's death. *Held*, that section 1879 did not prevent creditors from reaching the vested remainder interest.

[Ed. Note.—For other cases, see Remainders, Dec. Dig. § 13.\*]

6. REMAINDERS (§ 12\*)—VESTED REMAINDERS—LEGAL TITLE.

Where money was bequeathed in trust to pay the income to another for life, with vested remainder to testator's children, the trustee had the legal title to the trust fund; but the children or their representatives had the legal title to the remainder interests.

[Ed. Note.—For other cases, see Remainders, Dec. Dig. § 12.\*]

7. LIMITATION OF ACTIONS (§ 60\*)—ACCRUAL OF CAUSE OF ACTION—ACTION ON JUDGMENT.

The time for commencing a judgment creditor's action is not prescribed by Code Civ. Proc. c. 4, tits. 1, 2, but section 388 provides that an action, the limitation of which is not prescribed in those titles, must be commenced within 10 years after the cause of action accrues. Section 1871 authorizes a judgment creditor to maintain an action to compel the discovery of any property, etc., when execution against him has been returned wholly or partly unsatisfied. Section 413 provides that, when not otherwise provided, the period of limitation must be computed from the time the right of action accrues to the time the claim for relief is actually interposed. *Held*, that where a judgment was rendered October 27, 1894, and execution returned unsatisfied on December 3, 1894, an action to reach the judgment creditor's property, brought November 21, 1904, was not barred by limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 60.\*]

8. EXECUTORS AND ADMINISTRATORS (§ 525\*)—ACTION AGAINST FOREIGN EXECUTOR—EQUITY JURISDICTION.

While, as a general rule, an action will not lie against a foreign executor, where it is necessary to prevent a failure of justice, equity will take jurisdiction of such an action, at least so far as the relief relates to property within the court's jurisdiction.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2344, 2345; Dec. Dig. § 525.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**9. EXECUTORS AND ADMINISTRATORS (§ 261\*)—  
PAYMENT OF CLAIMS—ORDER OF PAYMENT.**

Under Code Civ. Proc. § 2719, requiring executors to pay decedent's debts in the order named, and giving judgments priority over unliquidated payments, a judgment creditor is entitled to payment before general creditors.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 957; Dec. Dig. § 261.\*]

**10. EXECUTORS AND ADMINISTRATORS (§ 525\*)—  
—ACTION AGAINST FOREIGN EXECUTOR—EN-  
FORCEMENT OF DOMESTIC JUDGMENT.**

Property was devised in trust to pay the income to testator's wife, with remainder over to his children, and judgment was rendered against one of them in this state, and execution returned unsatisfied, and thereafter the debtor died in New Jersey, bequeathing his interest in the trust fund to his wife and appointing her his executrix. The original trustees died, and the fund now remains in the control of the courts of this state. *Held*, that the executrix's interest as executrix being nominal, and she being within the jurisdiction of the courts of this state, such courts will assume jurisdiction of an action against the executrix to subject the debtor's remainder interest to the payment of such judgment.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2344, 2345; Dec. Dig. § 525.\*]

**11. CREDITORS' SUIT (§ 51\*)—JUDGMENT.**

Under Code Civ. Proc. § 1873, requiring the final judgment in a judgment creditor's action to provide for the satisfaction of the sum due plaintiff out of the property of the judgment debtor, discovered in the action, the form and detail of the decree is in the discretion of the trial court.

[Ed. Note.—For other cases, see *Creditors' Suit*, Dec. Dig. § 51.\*]

Appeal from Supreme Court, Appellate Division, First Department.

Suit by George A. Bergmann against Franklin B. Lord and another, as substituted trustees under the will of George Cabot Ward, deceased, and others. From an order of the Appellate Division (122 App. Div. 921, 107 N. Y. Supp. 1121), affirming a judgment for plaintiff at Special Term, defendant Leavitt, individually and as executrix, and defendant Low, appeal. Affirmed.

Merle I. St. John, for appellants. John M. Harrington, for respondent.

**CHASE, J.** This is a judgment creditor's action. Article 1, tit. 4, c. 15, of the Code of Civil Procedure, relating to a judgment creditor's action, provides: "When an execution against the property of a judgment debtor, issued out of a court of record, \* \* \* has been returned wholly or partly unsatisfied, the judgment creditor may maintain an action against the judgment debtor, and any other person, to compel the discovery of anything in action, or other property belonging to the judgment debtor, and of any money, thing in action, or other property due to him, or held in trust for him; to prevent the transfer thereof, or the payment or delivery thereof, to him, or to any other person; and to procure satisfaction of the plaintiff's de-

mand. \* \* \* Section 1871. "This article does not apply to a case, \* \* \* nor does it authorize the discovery or seizure of, or other interference with, \* \* \* any money, thing in action, or other property, held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor. \* \* \* Section 1879.

Among the facts found by the trial court are: That George Cabot Ward died a resident of the state of New York May 4, 1887, leaving a will which was duly admitted to probate, in which, among other things, he provided: "Out of my own individual estate, real or personal, exclusive of that held in trust for me as aforesaid, I give and bequeath to the said George De Forest Lord and Daniel Lord as trustees the sum of fifty thousand dollars, or so much thereof as my said estate shall suffice to pay, in trust to invest and reinvest the same as hereinafter authorized and to collect and apply the net rents, issues and income thereof to the use of my wife (if she shall survive me) for and during her natural life and upon and after her death I give and bequeath the capital of said fund unto such of my children as shall survive me and to the issue of any who shall die before me, leaving issue me surviving." That said George Cabot Ward left him surviving a widow, who is still living, and two children, the defendant Marian Low and Samuel G. Ward, Jr. The trustees named in the will duly qualified and entered upon the discharge of their duties as such trustees, but both have since died, and the defendants Lord and Van Duzer were duly substituted as trustees under said will. The trustees named in said will had set apart to them certain securities of the value of \$50,000, and there is now in the hands of said Van Duzer, the surviving substituted trustee, the principal fund of \$50,000, together with certain accretions, amounting in the aggregate at the time of the judgment herein to \$83,359.03. On the 27th day of October, 1894, the plaintiff duly recovered in this state a judgment against said Samuel G. Ward, Jr., for \$4,355.06, which judgment was duly entered and docketed in the office of the clerk of the city and county of New York on that day. On the same day execution was issued thereon as provided by section 1872 of the Code of Civil Procedure, which was on the 3d day of December, 1894, returned wholly unsatisfied. On the 16th day of November, 1900, said Samuel G. Ward, Jr., died a resident of the state of New Jersey, leaving a will which was duly admitted to probate in the orphans' court of Essex county in said state, and in and by said will he gave to his wife, Frances L. B. Ward, now Frances L. B. Leavitt, all of his property, real and personal, and she was named therein as an executrix and has since duly qualified as the sole ex-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ecutrix under said will. All of the defendants are residents of the state of New York, and said principal fund is held by said substituted trustee in this state. The plaintiff is the only judgment creditor of the said Samuel G. Ward, Jr., and the only creditor residing in this state. The defendant Leavitt moved from New Jersey to the state of New York soon after the death of her late husband. Before the commencement of this action the plaintiff demanded of her that she make application for and have issued by a Surrogate's Court of this state ancillary letters testamentary on the will of her late husband, but she has failed, neglected, and refused to have such ancillary letters issued. This action was commenced November 21, 1904, and the plaintiff seeks to have the interest of said Ward in the fund so held in trust for the benefit of the mother of said Ward sold to satisfy his said judgment. The appellant insists that the plaintiff cannot maintain this action: (1) Because of the provisions of said section 1879 of the Code of Civil Procedure, and (2) because the action was not commenced within 10 years after the docketing of said judgment.

The gift to the children of the testator, George Cabot Ward, who survived him, vested immediately on his death, subject to the same being held in trust for the use of his wife during her natural life. The language of the will, viz., "Upon and after her (the wife's) death I give and bequeath the capital of said fund unto such of my children as may survive me," so far as it relates to the time when the legacy is to be received in possession by the surviving children, is not of the substance of the gift, and does not prevent the remainder vesting absolutely and immediately. *Smith v. Edwards*, 88 N. Y. 92; *Stringer v. Young*, 191 N. Y. 157, 83 N. E. 690. The interest of Samuel G. Ward, Jr., in the fund so held in trust for his mother, was and is at all times transferable by assignment or otherwise. *Stringer v. Young*, supra.

It is provided by Personal Property Law, § 3 (chapter 417, p. 508, Laws 1897, as amended by chapter 87, p. 239, Laws 1903), that "The right of the beneficiary to enforce the performance of a trust to receive the income of personal property, and to apply it to the use of any person, cannot be transferred by assignment or otherwise. But the right and interest of the beneficiary of any other trust in personal property may be transferred." The widow of George Cabot Ward is the beneficiary of the trust to receive the income thereof, and she cannot transfer her interest therein by assignment or otherwise; but such prohibition does not extend to the persons vested with the fund subject to the performance of the trust to receive the income and apply it to the use of the widow. The remainder so vested in the children of George Cabot Ward is like an expectant reversionary estate or remainder in real property,

which is by express provision of statute descendible, devisable, and alienable in the same manner as an estate in possession. Real Property Law (Laws 1896, p. 567, c. 547) § 49. It was said, in substance, by the chancellor in *Lawrence v. Bayard*, 7 Paige, 70, that nobody ever doubted that a remainder which was vested in interest could be transferred both at law and in equity. *Ham v. Van Orden*, 84 N. Y. 257.

Where a person has a vested interest in a fund held in trust for another, and he can transfer the same by assignment or otherwise, it can be reached by his creditors. The only property held in trust for a debtor which cannot be reached by a creditor's bill against it is that which is held in trust to receive the rents, profits, and income thereof, and to apply such rents or income to the support of the cestui que trust; that is, an interest in trust property which the cestui que trust has no power to alienate by any sale or assignment executed by him. *Degraw v. Clason*, 11 Paige, 136. The court in the *Degraw Case* say: "Neither law nor sound policy will allow an absolute or unconditional right to property to be vested in a person, which he may use and dispose of as he pleases, by anticipation or otherwise, but in relation to which property he may set his creditors at defiance." *Palmer v. Hallock*, 94 App. Div. 485, 88 N. Y. Supp. 17; *Hallet v. Thompson*, 5 Paige, 583.

Section 1879 of the Code of Civil Procedure, from which we have quoted, was not intended to prevent an action under said article to reach a vested remainder interest in a trust fund, but to prevent the interest of a person for whose benefit the property is held in trust to be so taken. *Graff v. Bonnett*, 31 N. Y. 9, 88 Am. Dec. 236; *Tolles v. Wood*, 16 Abb. N. C. 1, note 20. Unless the intention of the Legislature is shown by clear and certain language, it would be a strange conclusion if we should decide that the Legislature intended to withhold from a judgment creditor property vested in such debtor simply because the legal title to the fund in trust is in a trustee for the benefit of some other person for life, and the time when the debtor can obtain the remainder in possession is postponed. The appellant urges that the legal title to the principal fund vests in the trustee, and that the persons entitled to the fund subject to the trust cannot obtain the same except by an action for an accounting after the death of the person for whose benefit it is held. The legal title to the trust fund is of little importance in determining this controversy. There is a distinction between the legal title to the securities in which the trust fund is invested and the legal title to a vested interest in the remainder. The trustee may have the legal title to the securities in which the trust fund is invested, while at the same time the defendant Leavitt individually and as executrix has the legal and equitable title to one-half of the vested remain-

der. The Code of Civil Procedure does not prohibit the maintenance of a creditor's action to reach a vested remainder in a fund held in trust to receive the income and apply it to the use of a person other than the debtor.

The time for the commencement of a judgment creditor's action not being specially prescribed in titles 1 and 2 of chapter 4 of the Code of Civil Procedure, it is included in the general limitation contained in section 388 of the Code, as follows: "An action, the limitation of which is not specially prescribed in this or the last title, must be commenced within ten years after the cause of action accrues." The cause of action accrues, by the express terms of said section 1871, when "an execution against the property of a judgment debtor, issued out of a court of record, \* \* \* has been returned wholly or partly unsatisfied." See, also, section 415. At the time the action was commenced it was not barred by the statute of limitations. *Crapo v. City of Syracuse*, 183 N. Y. 395, 76 N. E. 465. The respondent also contends that the running of the time in which he could have brought the action was suspended for at least some period by reason of the absence of Samuel G. Ward, Jr., from the state and also by reason of his death.

In addition to the facts already stated herein, it was found by the trial court that the defendant Leavitt claims that she is the absolute owner of all property left by the judgment debtor including one-half of the remainder in said \$50,000 legacy and of all accretions thereon, and that after qualifying as executrix in the state of New Jersey she removed to this state and remained continuously without the jurisdiction of the courts of that state, and that she has not rendered an account as executrix. It is a general rule that an action will not lie against a foreign executor, but there are exceptions to the rule. *Slatter v. Carroll*, 2 Sand. Ch. 573; *Lyon v. Park*, 111 N. Y. 350, 18 N. E. 863; *Montgomery v. Boyd*, 78 App. Div. 64, 79 N. Y. Supp. 879. In actions in equity, where it is necessary to prevent a failure of justice, jurisdiction will be assumed at least so far as the relief to be secured relates to property in the jurisdiction of the court. In this case all of the defendants are out of the jurisdiction of the courts of New Jersey.

The plaintiff is the only judgment creditor of the deceased debtor. So far as appears there are no other creditors; but, even if there are creditors, plaintiff's judgment is entitled under our statute (Code Civ. Proc. § 2719) to a preference in payment over general creditors. The original trustees appointed by the will of George Cabot Ward are dead, and the fund held in trust is in the control of our Supreme Court. The defendant Leavitt individually is the sole equitable owner of the interest therein which was vested in her late husband.

The plaintiff exhausted his legal remedy, and his judgment remained wholly unpaid and unsecured. He brought this action nearly 10 years after the execution on his judgment had been returned wholly unsatisfied. Even now the appellants insist that the plaintiff has lost his right to obtain satisfaction of his judgment from said vested remainder by reason of his delay in bringing the action. The court has jurisdiction of the subject-matter and of the person of all the defendants. The interest of the defendant Leavitt as executrix is apparently nominal. The circumstances are exceptional and justified the court at Special Term in assuming jurisdiction of the action for the benefit of the plaintiff, a domestic creditor, and in directing the satisfaction of the sum due the plaintiff out of the property of the deceased judgment debtor in this state. The courts of this state are not wholly without power to protect a resident creditor under such circumstances.

It also appears by the findings of the trial court that an agreement was entered into by and between the trustees, the defendant Low, and the judgment debtor in his lifetime, by which particular investments were set apart for the trust fund, and by reason of such investments and the subsequent reinvesting thereof the amount held in trust as the principal fund has largely increased. No personal claim is made in this action against the defendant Low, and her presence as a defendant will settle possible questions relating to the rights of the individual owners of the undivided vested remainder and aid the sale of the interest of the deceased judgment debtor.

Section 1873 of the Code provides "The final judgment in the action must direct and provide for the satisfaction of the sum due to the plaintiff, out of any money, thing in action, or other personal property, belonging to, or due to the judgment debtor, or held in trust for him, which is discovered in the action; whether the same might or might not have been originally taken by virtue of an execution." The form and detail of the judgment directing and providing for the satisfaction of the plaintiff's judgment was in the discretion of the court at Special Term.

The judgment should be affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, and HISCOCK, JJ., concur.

Judgment affirmed.

(194 N. Y. 79)

TOUSEY v. HASTINGS.

(Court of Appeals of New York. Jan. 5, 1909.)

1. TRIAL (§ 142\*)—QUESTION OF FACT—UNCONTROVERTED EVIDENCE.

There may be a question of fact, when all the witnesses are worthy of belief, and no wit-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ness contradicts another, since diverse inferences may be drawn from the narrative of a truthful witness; and, when the narrative is of oral admissions made some time before, and, though the precise words are important, there is no circumstance to impress them particularly on the memory, it is seldom that a question of fact is not presented as to whether the essential fact is fully proved.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. § 142.\*]

2. EVIDENCE (§ 265\*)—ADMISSIONS—WEIGHT. Aside from the danger of fabrication, verbal admissions are unreliable, since they are frequently misunderstood, imperfectly remembered, or inadvertently made.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1029-1060; Dec. Dig. § 265.\*]

3. SPECIFIC PERFORMANCE (§ 121\*) — CONTRACTS FOR TESTAMENTARY DISPOSITION — CERTAINTY—EVIDENCE.

An oral agreement to make, in effect, a testamentary disposition will not be specifically enforced, unless established by clear, credible, and satisfactory evidence.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387-395; Dec. Dig. § 121.\*]

4. SPECIFIC PERFORMANCE (§ 123\*)—PROCEEDINGS—EVIDENCE—QUESTION OF FACT.

In a suit for specific performance of an alleged oral agreement to make, in effect, a testamentary disposition of property, evidence held to prove, without dispute, facts which require the exercise of reason and judgment to determine whether the agreement was made as alleged, and hence to raise a question of fact in the case.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 398; Dec. Dig. § 123.\*]

5. APPEAL AND ERROR (§ 1004\*) — REVIEW — DECISIONS OF INTERMEDIATE COURTS—QUESTIONS OF FACT.

Questions of fact must be settled in the Supreme Court; the Court of Appeals having no power to pass thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4322; Dec. Dig. § 1004.\*]

6. APPEAL AND ERROR (§ 1143\*)—DISPOSITION OF CAUSE—AFFIRMANCE—JUDGMENT ABSOLUTE ON STIPULATIONS.

Where plaintiff obtained a judgment which was reversed on the law and facts by the Appellate Division, and a new trial granted, and plaintiff appealed to the Court of Appeals, stipulating that, in case of affirmance, judgment absolute should go against him, the Court of Appeals, on finding against him, will not dismiss the appeal, but will render judgment absolute on the stipulation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4449; Dec. Dig. § 1143.\*]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Sinclair Tousey against George Gordon Hastings, as executor of Rosalie Tousey Hastings. From an order of the Appellate Division (127 App. Div. 94, 111 N. Y. Supp. 344), reversing on the law and facts a judgment for plaintiff, plaintiff appeals. Affirmed and rendered.

James M. Hunt, for appellant. Morgan J. O'Brien and Theron Davis, for respondent.

VANN, J. This case adds another to the long list in which appeals to the Court of

Appeals were ineffectual because the Appellate Division reversed the judgment of the Trial Term both on the facts and the law. We have frequently held, but it does not seem to be well understood, that there may be a question of fact when all the witnesses are worthy of belief and no witness contradicts another. Diverse inferences may be drawn from the narrative of a truthful witness; and when the narration is of oral admissions, made some time before, and, although the precise words are important, there is no circumstance to impress them particularly on the memory, it is seldom that a question of fact is not presented as to whether the essential fact is fully proved. Aside from the danger of fabrication, verbal admissions are regarded as unreliable evidence, because experience shows that they are frequently misunderstood, imperfectly remembered, and inadvertently made.

The alleged contract in this action was of a class, posthumous in effect, and regarded with anxiety by the courts, that can be established only by clear, credible, and satisfactory evidence. *Hamlin v. Stevens*, 177 N. Y. 39, 69 N. E. 118. As found by the trial court, it was a verbal contract made by the defendant's testatrix to "make such provision that upon her death" property, said to be worth nearly \$500,000, "owned by her should belong to, and become the property of, the plaintiff." There was no writing of any kind to support the contract. No witness was called who was present when it is alleged to have been made, and the only evidence to establish it was given by two witnesses, doubtless disinterested, who testified to admissions made by the decedent, in casual conversations with them, more than two years before. She made two wills afterward, and in each ignored the plaintiff's claim, yet it is conceded that she was a woman of high character. At her funeral, and before he knew the contents of her will, the plaintiff began to negotiate with her executor for the purchase of the very property that he now claims by virtue of said contract. He did not disclose his claim to the executor until this action was commenced. The most vital evidence of the most important witness for the plaintiff was given by him under circumstances which made it look like an afterthought. The conversations in which the admissions are alleged to have been made were desultory in character, and consistent with an agreement, or with the declaration, of an intent to do something without promising to do it. There was nothing to particularly impress them upon the memory of the witnesses, and there were inconsistencies which, although not grave, bore on the accuracy of their recollection. They did not profess to give the words used by the decedent; and, as was well said by the Appellate Division, "How much is inference,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and how much recollection, neither we nor the witnesses can tell." The opportunity for misunderstanding and misrecollection what the decedent said is quite apparent from the evidence; and, as the highest federal court once declared, "Courts of justice lend a very unwilling ear to statements of what dead men had said." *Lea v. Polk Co. Copper Co.*, 21 How. 493, 504, 16 L. Ed. 203. These circumstances, and others which are set forth much more fully by the Appellate Division, make it obvious, as we think, that there was a question of fact whether the contract was made as alleged or not. "When facts proved without dispute require the exercise of reason and judgment, so that one reasonable mind may infer that a controlling fact exists, and another that it does not exist, there is a question of fact." *Hirsch v. Jones*, 191 N. Y. 195, 198, 83 N. E. 786; *Matter of Totten*, 179 N. Y. 112, 116, 71 N. E. 748, 70 L. R. A. 711.

Upon the argument before us the learned counsel for the plaintiff was informed by the chief judge that, if there was a question of fact in the case, absolute judgment would doubtless be rendered against the appellant upon his stipulation. Still he preferred to run that risk rather than encounter the danger of an adverse finding of fact against him upon a new trial. No doubt the situation which confronts counsel upon a reversal of the Special Term on the facts is embarrassing, because the court upon a new trial is too apt to follow the view of the Appellate Division, instead of deciding the questions of fact wholly on its own judgment, as is its duty, still an appeal to this court is hazardous, if not fatal, as we cannot deal with the facts, which must be settled in the Supreme Court.

While we could dismiss the appeal and allow the plaintiff to have another trial, in view of the circumstances and the recent announcement of our intention to restrain such appeals "by the most repressive form of judgment within our power," we feel compelled to affirm the order appealed from, and to render judgment absolute against the appellant, with costs in all courts. *Van Slyck v. Woodruff*, 192 N. Y. 547, 84 N. E. 724.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur.

Order affirmed, etc.

(194 N. Y. 15)

#### GASTEL v. CITY OF NEW YORK.

(Court of Appeals of New York. Jan. 5, 1909.)

#### 1. MUNICIPAL CORPORATIONS (§ 768\*) — DEFECTS IN SIDEWALKS—CONDITION OF SIDEWALK—INEQUALITIES IN SURFACE.

A person cannot recover for injuries due to tripping on an inequality in the sidewalk, caus-

ed by a difference in level of two portions of the sidewalk, where the difference at the curb is but  $\frac{3}{4}$  of an inch, and this difference is gradually increased to about  $1\frac{1}{4}$  inches on the inner side of the walk, which was 19 feet wide, where the person injured was familiar with the locality and it was reasonably lighted, although there was evidence tending to show that others had tripped and fallen at the same place.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1624, 1625; Dec. Dig. § 768.\*]

#### 2. EVIDENCE (§ 5\*) — JUDICIAL NOTICE — DEFECTS IN SIDEWALKS.

The court will take judicial notice that sidewalks, crosswalks, curbs, or pavements contain many slight irregularities.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 4; Dec. Dig. § 5.\*]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Charles Gastel against the city of New York. A motion for nonsuit was granted, and plaintiff's exceptions were sustained, and a new trial granted (126 App. Div. 936, 110 N. Y. Supp. 1129), and defendant appeals. Reversed, and judgment entered on the order of the Trial Term dismissing plaintiff's complaint.

This action was brought to recover damages for the alleged negligence of the defendant in maintaining a defective sidewalk on Prospect Park West near the intersection of Sixteenth street, whereby plaintiff was tripped and injured by falling on the walk. The evidence tends to establish that plaintiff did trip and fall at the point in question. It also establishes that for a considerable time prior to the date of the accident there had been a difference in level of the adjacent portions of the sidewalk maintained by the defendant at the point in question. This difference in level was about  $\frac{3}{4}$  of an inch at the curb, and gradually increased to about  $1\frac{1}{4}$  inches on the inner side of the walk, which was 19 feet wide. The difference seems to have been occasioned by the construction of a new walk which met the old walk at this point and on a slightly different grade. The plaintiff was quite familiar with the locality, and it was reasonably lighted at the time of the accident. He seems to have been walking inside of the center line of the walk, but not at the inner edge where the difference in level was the greatest. There was evidence that others had tripped and fallen at the same point and by reason of this difference in the level of the two sidewalks.

Francis K. Pendleton, Corp. Counsel (James D. Bell, of counsel), for appellant. Robert Stewart, for respondent.

HISCOCK, J. (after stating the facts as above). The determination of this action would be controlled beyond debate by our decision in *Butler v. Village of Oxford*, 186 N. Y. 444, 79 N. E. 712, except for one feature which is claimed to distinguish it from

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that case. In the Village of Oxford Case there was no evidence of prior accidents at the point where the plaintiff stumbled and fell, whereas in this case there is evidence that other people had been tripped by the alleged obstruction. It is true that some of this testimony is so extravagant as to create a strong and immediate distrust of its truthfulness and accuracy, but, of course, this question of veracity would be for the jury, and, if the evidence is sufficient on its face to differentiate this case from the other and take it to the jury, the decision of the learned Appellate Division must be affirmed. We do not think, however, that it is thus sufficient.

When an alleged defect or obstruction is of such a character that it possibly may be made the basis of an action for negligence and the question is debatable which way the decision shall go, evidence of prior accidents very well may be received and utilized for the purpose of showing that tested by actual experience it has proved dangerous and naturally calculated to cause accidents. This evidence of prior accidents cannot, however, be sufficient of itself to sustain a charge of negligence and to lay the foundation for damages because of the maintenance of some particular construction of pavements, sidewalks, or buildings. There must be evidence of such a fundamental condition of the thing under scrutiny as will at least permit the inference that the party complained of has failed to discharge the duties reasonably and fairly imposed on him by law. If the full description of the alleged defect in a municipal case shows that it was of such a trivial character that it was not naturally dangerous, and must almost inevitably occur in the many street miles of a city unless a grievously burdensome degree of care and expense is to be exacted, a recovery will not be allowed even though witnesses do testify to prior accidents. The familiar rule of *damnum absque injuria* will be applied, and travelers' mishaps will be charged to their own carelessness or to unavoidable mischance rather than to the treasury of the city. We think that such is the present case. We have had a description of the sidewalk complained of. The difference in level is small, averaging for the entire width of the walk about one inch. There was no space under the upper edge in which the foot might catch, and the walk was not broken or otherwise out of repair. We think we may take judicial notice of the fact which ordinary observation discloses that there is scarcely a rod in the streets of any city in which there may not be discovered some little unevenness or irregularity in sidewalks, crosswalks, curbs, or pavements. As the result of various causes, climatic and otherwise, they are constantly occurring and recurring. Ordinarily they cause no difficulties, and it would require a vast expenditure of money to remove them all. The recent tendency of the law as evi-

denced by legislative enactment has been in the direction of making less rather than more stringent the rules of municipal liability in such cases, and, directing our considerations to the precise facts here presented, we think that we should be disregarding those principles of liability which are justified by reason and public policy if we should permit a recovery.

The order of the Appellate Division should be reversed, plaintiff's exceptions overruled, and judgment entered on the order of the Trial Term dismissing plaintiff's complaint, with costs to appellant in all the courts.

CULLEN, C. J., and GRAY, HAIGHT, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

Order reversed, etc.

(173 Ind. 383)

INDIANAPOLIS & W. RY. CO. v. BRANSON et al. (No. 21,161.)<sup>1</sup>

(Supreme Court of Indiana. Jan. 5, 1909.)

1. EMINENT DOMAIN (§ 109\*)—RAILROADS—DAMAGES.

Under Act 1905 (Acts 1905, p. 62, c. 48), § 6, authorizing recovery of the value of land condemned for railroad purposes, and for the damages to the remainder of the tract, damages which may arise in the future from the happening of some possible, but uncertain, event cannot be considered, e. g., the danger to which the owner and his family may be exposed in crossing tracks, since it cannot be assumed that the company will negligently injure him or his family, and since, if the road is improperly constructed, or is negligently operated, he has ample remedy notwithstanding the award.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 294, 295; Dec. Dig. § 109.\*]

2. EMINENT DOMAIN (§ 122\*)—NECESSITY OF FULL COMPENSATION.

In a condemnation proceeding, damages—all legitimate damages resulting from the taking—should be included in the award, since the award bars recovery by the owner for any damage which should and could have been legally included therein.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 325; Dec. Dig. § 122.\*]

3. EMINENT DOMAIN (§ 103\*)—ELECTRIC RAILROADS—DAMAGES—FENCES.

Under Acts 1903, p. 428, c. 227 (Burns' Ann. St. 1903, § 5707 et seq.), requiring electric railroad companies to fence their rights of way within one year after their lines are placed in operation, making them liable for damages caused by their failure to fence as required, and authorizing landowners to fence at the company's expense where it fails to do so, in a proceeding to condemn an electric railway right of way no award can be made for the cost of fencing along the right of way; it being presumed that the company will obey the law.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 274-277; Dec. Dig. § 103.\*]

Appeal from Circuit Court, Hendricks County; T. J. Cofer, Special Judge.

Condemnation proceeding by the Indianapolis & Western Railway Company against Rebecca Branson and others. From a judg-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup> Rehearing denied, 88 N. E. 594.

ment for defendant Branson, and from an order denying a new trial, plaintiff appeals. Reversed and new trial ordered.

Otis E. Gulley, W. H. Latta, and L. H. Obereich, for appellant. Geo. W. Brill and Geo. C. Harvey, for appellee.

JORDAN, J. Appellant is an incorporated electric interurban railway company, seeking to condemn and appropriate a right of way for its railroad through Hendricks county, Ind. In fact this cause arises out of the same condemnation proceedings involved in the appeal of the Indianapolis & Western Railway Company v. Charles B. Hill et al. (No. 21,160, decided at this term) 86 N. E. 414. Appraisers were appointed to assess the damages resulting to the defendant Rebecca Branson (appellee herein). These appraisers made their report therein, assessing her damages for the appropriation of real estate at \$500. She filed exceptions to this award, and the issue in respect to damages as raised and tendered by her exceptions was submitted to a jury for trial at the January term, 1907, of the Hendricks circuit court. After hearing all of the evidence in the case and the instructions of the court, the jury returned a verdict in her favor, assessing damages for the lands appropriated by appellant company for its right of way in the sum of \$925. Thereupon appellant unsuccessfully moved for a new trial, assigning in its motion various reasons therefor. The court rendered judgment in favor of the defendant for the amount of damages assessed by the jury. Appellant appeals, and assigns as error the overruling of its motion for a new trial. Counsel for appellee interpose virtually the same objections and criticisms, in respect to appellant's brief and the record in this appeal, as they presented and urged in the case of Indianapolis & Western Railway Company v. Hill, supra. For the reasons stated or given in the decision in the latter case, these objections are overruled. The court on its own motion gave 10 instructions to the jury. Appellant's counsel at the proper time tendered to the court, with a request to give the same to the jury, five instructions. The court refused each of these instructions, to which ruling appellant excepted.

The evidence in the case establishes, among others, the following facts: On the south side of appellee's farm, which embraces 77 acres, and out of which lands appellant's right of way is appropriated, there is a public highway running east and west. Between this highway and the south line of her farm is located the right of way of the Vandalla Railroad Company, over which said company has for many years propelled by steam both passenger and freight cars. The dwelling house of appellee, wherein she and her husband and the members of her family reside, is about 200 feet north of the line of appellant's railroad. The strip of land appropriated is 60 feet wide and runs east and west ad-

jacent to and parallel with the Vandalla railroad. Appellee and the members of her family, in order to reach the highway on the south side of her farm, are compelled to cross appellant's right of way and also the Vandalla railroad. There is a private crossing over the latter road, which she maintains and uses for the purpose of crossing over the latter road.

Evidence, over the objections of appellant, appears to have been given at the trial by appellee to show how far distant from the above-mentioned crossing trains and cars could be seen approaching, not only over appellant's road, but also over the road of the Vandalla Railroad Company, and how close a car or train would be to a person before it could be seen by such person. It was also shown that appellee and the members of her family used this crossing many times during each day. Manifestly this evidence was given for no other purpose than to show the danger to which appellee and the members of her family would be exposed by an approaching car or cars while crossing over the track of appellant's road in going to and from the public highway. By instruction No. 2 appellant requested the court to advise the jury to the effect that, in assessing damages, if any, to the residue of defendant's land, it would not be warranted in anticipating and taking into consideration any danger attendant upon ingress or egress to and from said land arising out of any negligence on the part of either appellant company or the defendant or any members of defendant's family. The court refused so to instruct. No instructions given by the court referred to or advised the jury upon this proposition. In view of the evidence given on behalf of appellee we are of the opinion that the court erred in its refusal to so advise the jury. It is provided by clause 3, § 6, Act 1905 (Acts 1905, p. 62, c. 48), which deals with the assessment of damages: "Third. The damages to the residue of the land of such owner or owners to be caused by taking out the part sought to be appropriated." The provision of section 6 of the statute is that it is not only the value of the land sought to be appropriated which is to be determined, but also the damages to the remainder of the particular tract of land caused by the part thereof appropriated, or in other words, the material inquiry is in regard to the actual depreciation of the market value of the land not taken caused by the carving out thereof of the portion actually appropriated. In determining the question of the depreciation of the market value of the residue of the land, the jury must be confined to the consideration of proper evidence. It will not be permitted to anticipate damages of any character which will not certainly, but only possibly, result in the future from the appropriation of the railroad. It is well affirmed by the authorities that damages which may in the future arise from the happening of some possible, but uncertain, event cannot

be considered. These are too remote, speculative, and uncertain, and may be said to rest upon mere conjecture. Such uncertain or speculative matters are not proper to go to the jury as evidence relative to the depreciation of the market value of the remaining lands. Neither do they afford a proper basis for a witness to take into consideration in forming his opinion upon such depreciation. To this class of speculative, uncertain, and remote damages may be assigned the peril or danger to which the owner of the remaining land and the members of his family may be subjected or exposed in crossing the track, or tracks, of the railroad located upon the right of way condemned. Such peril or danger is said to rest upon, or be due to, the negligence of the company in the future operation of its cars or trains over the right of way in controversy. It cannot be assumed that the railroad company will, in the future operation of its road and the cars thereover, be guilty of such negligence as will result in personal injury to the owner of the land or to any member of his family. The principles or rules which sustain the above propositions are well settled. *Chicago, etc., R. Co. v. Hunter*, 128 Ind. 213, 27 N. E. 477; *Indianapolis, etc., Tr. Co. v. Larrabee*, 169 Ind. 237, 80 N. E. 413, 10 L. R. A. (N. S.) 1008, and authorities there cited; *Indianapolis, etc., R. Co. v. Hill* (No. 21,160, at this term), 88 N. E. 414; *Conness v. Indiana, etc., R. Co.*, 193 Ill. 464, 62 N. E. 221; *Chicago Elec., etc., Co. v. Mawman*, 206 Ill. 182, 69 N. E. 66; *Illinois, etc., R. Co. v. Freeman*, 210 Ill. 270, 71 N. E. 444; *Chicago, etc., R. Co. v. Nolln*, 221 Ill. 367, 77 N. E. 435; *Neilson et ux. v. Chicago, etc., R. Co.*, 58 Wis. 518, 17 N. W. 310, and authorities there cited; *Lyon v. G. B. & M. R. Co.*, 42 Wis. 538; *Montana R. Co. v. Fresser*, 29 Mont. 210, 74 Pac. 407; 2 *Elliott on Railroads* (2d Ed.) §§ 991, 991a, 991b; 2 *Lewis on Eminent Domain*, § 482. In *Neilson et ux. v. Chicago, etc., R. Co.*, supra, the court, upon this question, said: "Witnesses may testify to depreciation, and be permitted to state the grounds of their opinion, as in *Snyder's Case*, but evidence of remote and conjectural cause of depreciation should not be submitted to the jury as a basis for their assessment of damages." The general presumption is that the railroad will be constructed and operated in a proper manner, and upon this presumption the actual effects upon the remaining lands should control the assessment of damages. In case the road is improperly constructed by the railroad company, or is in the future negligently operated, to the injury of the landowner, then under such circumstances the law affords him an ample remedy for the recovery of damages resulting from such injury, notwithstanding the award made in the original condemnation proceedings. It is true, as the authorities affirm, that damages are assessed "once for all," and all legitimate damages resulting from the appropriation of the land should be

included in the original award or assessment; for such assessment is conclusively presumed to embrace damages for every injury which could have been legally included in the appraisal made by the appraisers or the assessment made by the jury, and it will operate to bar a recovery of the landowner for any damages which should, and could, have been legally included therein. *Chicago, etc., R. Co. v. Hunter*, supra; *Lyon v. G. B. & M. Co.* supra; 2 *Elliott on Railroads* (2d Ed.) § 104; *White v. Chicago, etc., R. Co.*, 122 Ind. 317, 23 N. E. 782, 7 L. R. A. 257, and authorities there cited; 4 *Sutherland on Damages*, § 3072. It follows that the court erred in not charging the jury as requested by appellant in instruction No. 2.

Appellant by instruction No. 3 asked the court to charge the jury, in effect, that the law of this state casts upon the railroad company the duty of constructing and maintaining a good and substantial fence along the line between its right of way and the defendant's land; that the jury should not take into consideration in assessing the defendant's damages "the cost of a permanent fence along the north line of the right of way of plaintiff's railway." There is evidence in the case to which this instruction was applicable. By the statute of 1903 (Acts 1903, p. 426, c. 227; see, also, sections 5707, 5708, et seq., *Burns' Ann. St. 1908*) it is provided that "any corporation, lessee, etc., owning, controlling or operating, etc., any interurban railroad, traction line, or suburban railway, within the state of Indiana, using electricity for a motive power, etc., shall within one year from the taking effect of this act, as to those already constructed and as to those hereafter constructed within one year from the date of the completion of any part of such line and putting the same in operation, erect, build, construct and thereafter maintain fences on both sides throughout the entire length of such road completed, \* \* \* sufficient and suitable to turn and prevent cattle, horses, mules, sheep, hogs or other stock from getting on such road, except at crossings," etc. It is further provided that "when such fences and cattle guards are not made as herein provided, or when such fence or cattle guards are not kept in repair, such railroad corporation or person operating the same shall be liable for all damages which may be done by the agents, employes, servants or cars of such corporation, or persons operating the same, to any such cattle, horses, sheep, hogs or other stock thereon." By section 5708, supra, in case such corporation neglects or refuses to construct such fence, barriers or cattle guards as provided, etc., the landowner is given the right to construct the same and recover of the corporation or person operating the road a reasonable compensation therefor. Section 6 of the act (Acts 1903, p. 429, c. 227; section 5712, *Burns' Ann. St. 1908*) provides that "when

such railroad is fenced on one or both sides at the point where such way is constructed, such abutting landowner shall erect and maintain substantial gates in the line of such fence or fences across such way and keep the same securely fenced and closed when not in use by himself or his employes." In view of the provisions of the statute, the cost of building permanent fences along the sides of appellant's railroad would not constitute an element of damages to be considered by the jury in making the assessment. In fact this is the prevailing rule in states wherein the railroad company is by statute required to fence its road or right of way. It will be presumed that the railroad company, within the time provided, will comply with the requirements of the law. Therefore, under the circumstances in this case, the jury should have been advised by the court that the cost of building fences along the sides of appellant's railroad, after the expiration of the time allowed by the statute, should not be taken into consideration by them, or included in the award or assessment of damages. 2 Elliott on Railroads (2d Ed.) § 996; Chicago, etc., R. Co. v. Baker, 102 Mo. 553, 15 S. W. 64; St. Joseph, etc., R. Co. v. Shambaugh, 106 Mo. 557, 17 S. W. 581; Winona, etc., R. Co. v. Waldron, 11 Minn. 515 (Gil. 392) 83 Am. Dec. 100; Jones v. Chicago, etc., R. Co., 68 Ill. 380; 4 Sutherland (2d Ed.) § 1072; 2 Lewis on Eminent Domain, § 498; Mills on Eminent Domain, § 212.

For the error of the court in refusing to charge, as requested by appellant in its instructions numbered 2 and 3, the judgment is reversed and a new trial ordered.

HADLEY, J., not participating.

(171 Ind. 513)

POTTER MFG. CO. v. A. B. MEYER & CO.  
et al. (No. 21,385.)

(Supreme Court of Indiana. Jan. 7, 1909.)

1. MECHANICS' LIENS (§ 1\*)—RIGHT TO—NATURE.

The right to a mechanic's lien for labor or materials, etc., furnished for structures, is purely statutory.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 1.\*]

2. MECHANICS' LIENS (§ 5\*)—STATUTORY PROVISIONS—CONSTRUCTION.

Where claimant of a mechanic's lien brings himself within Burns' Ann. St. 1908, § 8295, authorizing such liens, the statute will be liberally construed in his favor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 5; Dec. Dig. § 5.\*]

3. MECHANICS' LIENS (§ 47\*)—RIGHT TO—USE OF MACHINERY.

Burns' Ann. St. 1908, § 8295, giving a mechanic's lien for labor performed on a structure, gives a lien for the value of labor performed in operating a trench machine, including the work done by the machine, but a mere

leasing of a machine cannot be regarded as performance of labor within the statute.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 50; Dec. Dig. § 47.\*]

4. MECHANICS' LIENS (§ 47\*)—RIGHT TO—MATERIALS.

Under Burns' Ann. St. 1908, § 8295, giving a lien for material furnished for a structure, the materialman must ordinarily show that his materials were furnished for and were actually used in the erection, etc., of the structure.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 50; Dec. Dig. § 47.\*]

5. MECHANICS' LIENS (§ 47\*)—RIGHT TO—USE OF MACHINERY.

The machinery for which a mechanic's lien is given under Burns' Ann. St. 1908, § 8295, giving a lien for machinery furnished for a structure, must be so attached to the realty as to become a part and enhance the value thereof, and must be fairly contemplated by the contract between the owner and the contractor, the title passing to the owner, and hence the statute gives no lien for the mere use of a trench machine or other tools, or of a private railroad switch track, in performing work.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 50; Dec. Dig. § 47.\*]

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by the Potter Manufacturing Company as cross-complainant against A. B. Meyer & Co. and others. There was judgment for defendants, and cross-complainant appealed to the Appellate Court. Transferred from the Appellate Court under clause 2, § 1394, Burns' Ann. St. 1908. Affirmed.

See, also, 85 N. E. 725, 1048.

John S. Berryhill, for appellant. McCarty & Rassman and Charles Martindale, for appellees.

MONTGOMERY, J. This action was brought to foreclose a mechanic's lien upon the property of the Indianapolis Light & Heat Company, a corporation which had been formed by consolidation of the Marion County Hot Water Heating Company and the Indianapolis Light & Power Company. Appellant filed a cross-complaint in the action, alleging that the Marion County Hot Water Heating Company had contracted with J. J. Smith & Co. for the construction of a certain sewer and drain, and, for the purpose of executing said contract, J. J. Smith and J. J. Smith & Co. purchased and leased of appellant certain material and machinery, and hired appellant to perform certain labor, to be used in the construction of said sewer and drain, as shown by bills of particulars filed; that said materials and machinery were used, and said labor was performed by appellant, on the erection and construction of said sewer and drain. It was further averred that J. J. Smith & Co. failed financially and became insolvent, that notice of an intention to hold a lien was duly filed, and that appellant's claim was still unpaid. The cross-complaint was answered by a general denial. A trial resulted

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in a finding and judgment against appellant.

Appellant's motion for a new trial, on the ground that the decision of the court was contrary to law, was overruled, and this ruling is assigned as error. It appears from the evidence that J. J. Smith & Co. agreed to construct this sewer and drain, and "to furnish all necessary tools and materials and employ the necessary labor to properly and promptly execute the said work." A part of the claim for which appellant seeks to enforce a lien is the rental price of one "Potter trench machine" for 2 months and 23 days at the agreed rate of \$150 per month. This machine was described in the contract as follows: "Said trench machine to consist of 272 feet of steel trestle, one engine car, one tall block, one double tub carriage, 12 3/4 yard buckets, 700 feet of 25-pound Tee rail, fish plates and bolts, 1,200 feet of 1/2 inch best crucible steel wire cable, 19 wires to the strand, sheaves, axles, shafts, bolts, wrenches, oil cans, and all necessary parts for running machine." Smith & Co. were carefully to take down and return the machine to appellant's yard when through with its use. The residue of the account against Smith & Co., amounting to \$276.75, for which a lien is asserted, was for a telegram, braces, brace screws, and washers, sheeting puller, brick buckets, stringer hooks, sharpening picks, blacksmith work, and the use of a private switch in unloading cars. This part of appellant's claim, aside from the charge for a telegram and the use of its private track, was for the purchase price of and for repairs to tools and implements used in the construction of the work, and upon the completion thereof carried away as the personal property of the contractor.

The concrete question for decision may be concisely stated in the language of appellee's counsel as follows:

"(1) Are tools sold or leased to a contractor or repairs on tools and machinery used by a contractor in the erection of a structure, and which are at the conclusion of the contract carried away by the contractor as his personal property, or returned to the bailor, and in no way incorporated into the structure, the subject of a mechanic's lien?

"(2) Is a charge for the privilege of using a railroad switch from which to unload materials to be transported to a structure, the subject of a mechanic's lien?"

Section 1 of the statute upon which the alleged lien is founded reads as follows: "That contractors, subcontractors, mechanics, journeymen, laborers and all persons performing labor or furnishing material or machinery for the erection, altering, repairing, or removing any house, mill, manufactory, or other building, bridge, reservoir, system of waterworks or other structure, or for constructing, altering or repairing or removing of any sidewalk, walk, stile, well, drain, sewer or cistern, may have a lien separately or

jointly upon the house, mill, manufactory or other building, bridge, reservoir, system of waterworks or other structure, sidewalk, walk, stile, well, drain, sewer or cistern which may have been erected, altered, repaired, or removed, or for which they may have furnished material or machinery of any description, and on the interest of the owner of the lot or parcel of land on which it stands or with which it is connected to the extent of the value of any labor done, material furnished or either; and all claims for wages for mechanics and laborers employed in or about any shop, mill, wareroom, store-room, manufactory or structure, bridge, reservoir, system of waterworks or other structure, sidewalk, walk, stile, well, drain, sewer or cistern, shall be a first lien upon all machinery, tools, stock of materials, work finished or unfinished located in or about such shop, mill, wareroom, storeroom, manufactory or other building; bridge, reservoir, system of waterworks or other structure, sidewalk, walk, stile, well, drain, sewer, or cistern or used in the business thereof; and should the person, firm, or corporation be in falling circumstances the above mentioned claim shall be preferred debts, whether claim or notice of lien has been filed or not." Section 8295, Burns' Ann. St. 1908. This statute provides that a mechanic's lien may be acquired by persons (1) who perform labor; or (2) who furnish material or machinery for the erection, altering, repairing, or removal of certain enumerated structures. The right to such lien is purely statutory, and in no respect founded on the common law. A claimant to such a lien must in the first instance bring himself clearly within the terms of the statute; but, when his right has been established, the law will be liberally interpreted toward accomplishing the purposes of its enactment. A lien is authorized in favor of a laborer to the extent of the value of the work done by him. This trench machine owned by appellant did not work automatically, but was operated only by men in the employ and under direction of the lessee of the machine, J. J. Smith & Co. There could be no question that the contractor, J. J. Smith & Co., might have acquired a lien to the extent of the value of the work done by them, including that done by this labor-saving machine. Appellant, however, did not perform, or in any manner engage to perform, any labor upon the structure to be erected. Its claim is not for the value of work actually done, but compensation at an agreed price for a specified time as the rental value of the machine without regard to whether it was idle or in use upon this work. But, waiving any technical questions as to the theory of the cross-complaint, and assuming that, if the evidence so warranted, appellant might recover thereon to the extent of the value of work done by it, we are clearly of opinion that appellant is not shown

to have performed any work, and as the mere lessor of this machine, cannot be regarded as one performing labor within the meaning of the statute under consideration.

In the case of *Lohman v. Peterson et al.*, 87 Wis. 227, 58 N. W. 407, the plaintiff sought to enforce a mechanic's lien for the hire of an ox used in hauling railroad ties under a statute authorizing such lien for labor or services in cutting and hauling lumber, railroad ties, etc. The court held that the statute was designed to secure the pay of those who performed manual labor upon such articles, including that done by their servants and teams, but that the plaintiff performed no such labor; that he performed no work by his ox, since it was hired to, and used by, another, and in contemplation of the act became the property of the bailee, who had a right to a lien upon the same ties for services including the use of his team. The same court in the case of *McAuliffe v. Jorgenson et al.*, 107 Wis. 132, 82 N. W. 706, said: "Plaintiff's right to a lien is based upon the fact that he hired his well-boring machine to Jorgenson, who had the contract to bore the well. Laws giving liens to mechanics are equitable in their character, and are to be liberally construed to advance their objects. Yet they are purely statutory, and cannot be extended by construction to cases not fairly and reasonably within their purview. \* \* \* Whatever right he [plaintiff] has, if any, arises from the use of his machine. When he hired it to Jorgenson, to all intents and purposes it became the latter's machine, the same as if he had purchased it outright. The plaintiff did no manual labor, either by himself or his servants, toward the construction of the well. The machine was used by Jorgenson as though it was his own. For its use in connection with his own laborers, he would have been entitled to a lien, not for the use of the machine alone, but because with his labors in the use and operation of the machine the well was drilled. \* \* \* The machine thus used is 'the plant of the contractor,' and can in no sense be said to be materials furnished or used in the drilling of the well. \* \* \* To permit this lien to stand and be enforced would be stretching the lien law beyond any reasonable limit." In the case of *Allen v. Elwert*, 29 Or. 428, 443, 44 Pac. 823, 826, 48 Pac. 54, the court said: "But we do not think the claimants are entitled to a lien for the use of their tools or appliances, or for hauling or transporting the same to and from the building, for the reason that they are in no sense either materials furnished to be used in the construction, alteration, or repair of a building or labor performed thereon, and are therefore not within either the letter or spirit of the statute." See, also, *Evans v. Lower*, 67 N. J. Eq. 232, 58 Atl. 294.

The answer to the remaining inquiry,

whether appellant may be fairly regarded as one furnishing materials or machinery for the construction of the sewer or drain, is foreshadowed by the quotations above given. It is well settled, both in this state and elsewhere, that a materialman claiming a lien must ordinarily show that his materials were furnished for and were actually used in the erection, alteration, or repair of the building against which the lien is asserted. *Crawford v. Crockett*, 55 Ind. 220; *Hill v. Sloan*, 59 Ind. 181; *Lawton v. Case*, 73 Ind. 60; *Neeley v. Searight*, 118 Ind. 316, 15 N. E. 598; *Jones v. Hall*, 9 Ind. App. 458, 35 N. E. 923, 37 N. E. 25; *Leeper v. Myers*, 10 Ind. App. 314, 37 N. E. 1070; *Clark et al. v. Huey et al.*, 12 Ind. App. 224, 40 N. E. 152; *Barnett v. Stevens*, 16 Ind. App. 420, 43 N. E. 661, 45 N. E. 485. The provisions of the statute respecting the furnishing of machinery are not substantially different from those with regard to building materials. The machinery furnished must be so attached to the realty as to become a part thereof, and be regarded as a fixture, to make it the basis of a mechanic's lien. 27 Cyc. 38. Appellant's trench machine was rented by the contractor merely as a tool or labor-saving device for temporary use in the performance of his contract, and was not intended to, and did not, become in any sense a part of the structure. The machinery for which the statute authorizes a lien is such as may fairly be contemplated or required by the terms of the contract between the owner of the premises or structure to be erected and the contractor, and the title to which when furnished will pass to the owner of such property, become a part thereof, and to some extent enhance its value. *Cincinnati, etc., R. R. v. Shera*, 36 Ind. App. 315, 73 N. E. 293; *Basshor v. Baltimore, etc., R. Co.*, 65 Md. 99, 3 Atl. 285; *May & Thomas Hdw. Co. v. McConnell*, 102 Ala. 577, 14 South. 768; *Meek v. Parker*, 63 Ark. 367, 38 S. W. 900, 58 Am. St. Rep. 119; *Oppenheimer v. Morrell*, 118 Pa. 189, 12 Atl. 507; *Stimson Mill Co. v. Los Angeles, etc., Co.*, 141 Cal. 30, 74 Pac. 357.

In the case of *Oppenheimer v. Morrell*, supra, the court said that when a materialman "knows the material is to be used merely for the purpose of erecting temporary scaffolding to facilitate the work of the contractor, and it is in fact so used, he has no right to a lien, notwithstanding he may have furnished it on the credit of the building. Such a claim is no more within the purview of the statute than would be one for pickhandles furnished to facilitate the work of excavating the foundation for the building." In the case of *Stimson Mill Co. v. Los Angeles, etc., Co.*, supra, the Supreme Court of California held that the materials for which the lien is claimed must be used, not merely in the process of construction, but in the structure, and said further: "The

temporary structure was put in merely for the purpose of supporting the track until the steel necessary for its permanent support could be obtained. This was done by the contractors on their own account. \* \* \*

The temporary structure was therefore not a part of the bridge either as contracted for or as actually completed; but it remained the property of the contractors who were entitled to remove it. Hence neither the contractors nor the plaintiff as furnisher of the materials for it became entitled to a lien." The furnishing and repair of other tools and appliances mentioned in appellant's bill of particulars, and used merely to facilitate the work, fall within the principle above announced, and afford no basis for a mechanic's lien.

It is still more plain that the charge for the use of appellant's private railroad switch in unloading cars is not within the statute under consideration. It follows that the decision of the trial court was in accord with the law, and the appellant's application for a new trial rightly denied.

The judgment is affirmed.

(171 Ind. 521)

NEW YORK, C. & ST. L. R. CO. v. RHODES et al. (No. 20,994.)

(Supreme Court of Indiana. Jan. 7, 1909.)

**1. EMINENT DOMAIN (§ 103\*) — ESTABLISHMENT OF HIGHWAY ACROSS RAILROAD TRACKS—ELEMENTS OF COMPENSATION.**

In a proceeding to establish a highway across railroad tracks, the railroad company cannot recover the cost of wing fences and cattle guards and of planking the proposed highway, as such expenses would be incurred by it in complying either with the requirements of Burns' Ann. St. 1901, § 5153, cl. 5 (Burns' Ann. St. 1903, § 5195, cl. 5), relative to highway crossings, or of laws passed in the exercise of the police power of the state.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 275; Dec. Dig. § 103.\*]

**2. RAILROADS (§ 96\*)—HIGHWAY CROSSINGS—DUTY TO KEEP IN SAFE CONDITION.**

Under Burns' Ann. St. 1901, § 5153, cl. 5 (Burns' Ann. St. 1903, § 5195, cl. 5), requiring railroad companies to put and keep in safe condition all highway crossings, a railroad company acquires its right of way subject to the right of the state to extend highways and streets across the same, and to the condition that it must put and keep all crossings, regardless whether the highway was established before or after the railroad was built, in such condition as not unnecessarily to impair the usefulness of the highway, and to afford security for life and property without reference to whether the company owns the right of way in fee, or merely an easement therein.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 287; Dec. Dig. § 96.\*]

**3. RAILROADS (§ 95\*) — HIGHWAY CROSSINGS—DUTY TO RESTORE AND KEEP IN REPAIR.**

Burns' Ann. St. 1901, § 5153, cl. 5 (Burns' Ann. St. 1903, § 5195, cl. 5), requiring railroad companies to put and keep in safe condition all highway crossings, does not depend for its validity upon the police power of the state, but

is valid because the state has the power to provide the conditions upon which railroad companies acquire their right of way, and such conditions are binding whether the right of way be acquired by deed, condemnation, or otherwise.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 274-283; Dec. Dig. § 95.\*]

**4. RAILROADS (§ 96\*)—HIGHWAY CROSSINGS—CONSTITUTIONALITY OF REQUIREMENTS PERTAINING TO HIGHWAY CROSSINGS.**

Laws requiring railroad companies to construct, maintain, and keep in safe repair highway crossings by the erection and maintenance of gates and men to operate the same, planking the crossing, construction of cattle guards, employment of gatemen or flagmen, or otherwise, are passed in the exercise of the police power and are constitutional, though enacted after the railroad is built.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 96.\*]

**5. EMINENT DOMAIN (§ 108\*) — ESTABLISHMENT OF HIGHWAY ACROSS RAILROAD TRACKS—COMPENSATION.**

Where a highway crosses the right of way of a railroad company at a point at which it has only a main track and two switch tracks, no question can justly arise as to the impairment of the company's franchise by such taking so as to entitle it to damages, for under such circumstances both the use as a highway and as a railway can stand, and do not interfere with each other.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 292; Dec. Dig. § 108.\*]

**6. EMINENT DOMAIN (§ 239\*) — ESTABLISHMENT OF HIGHWAY ACROSS RAILROAD TRACKS—COMPENSATION—QUESTIONS FOR JURY.**

Whether the establishment of a highway across the right of way of a railroad company would interfere with the operation of its railroad was a question of fact for the jury.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 239.\*]

**7. APPEAL AND ERROR (§ 1171\*)—REVERSAL—FAILURE TO ASSESS NOMINAL DAMAGES.**

Failure to assess nominal damages affords no ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4553; Dec. Dig. § 1171.\*]

**8. EMINENT DOMAIN (§ 239\*) — ESTABLISHMENT OF HIGHWAY ACROSS RAILROAD TRACKS—INSTRUCTIONS.**

Requested instructions in a proceeding to establish a highway across the right of way of a railroad company were properly refused where so general and indefinite as to authorize the assessment of damages to which the company was not entitled.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 239.\*]

**9. EMINENT DOMAIN (§ 128\*) — ESTABLISHMENT OF HIGHWAY ACROSS RAILROAD TRACKS—MEASURE OF DAMAGES.**

As the establishment of a highway across the right of way of a railroad company does not deprive it of its use of the right of way, a different rule for ascertaining compensation must be applied than that which obtains in the condemnation of land of others, and the company is not entitled, as are such owners, to the value of the real estate taken and the injury to that not taken because of the location of the highway.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 851; Dec. Dig. § 128.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**10. TRIAL (§ 191\*)—INSTRUCTIONS—INVASION OF PROVINCE OF JURY.**

Requested instructions in a proceeding to establish a highway across the right of way of a railroad company that the company was entitled to compensation for the value of the land taken and the diminution in value of that not taken because of the location of the highway are objectionable because invading the province of the jury in assuming that the value of the company's land would be diminished by the location of the highway.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 191.\*]

Appeal from Circuit Court, Allen County; Edward O'Rourke, Judge.

Petition by Elmer E. Rhodes and others for the location and opening of a public highway across the right of way of the New York, Chicago & St. Louis Railroad Company. From the judgment of the board of commissioners establishing the highway, the railroad company appealed to the circuit court, where the case was tried de novo and a judgment rendered establishing the highway, and denying the railroad company's claim for damages, and the railroad company appeals. Affirmed.

Walter Olds and Chas. M. Niezer, for appellant. Aiken & Underwood, for appellees.

**MONKS, J.** Appellees filed a petition for the location and opening of a public highway across the right of way of appellant and the lands of other persons. Viewers were appointed, who reported in favor of the opening of said highway. Appellant filed a remonstrance against the public utility of said highway and for damages. Reviewers were appointed who reported in favor of the public utility of the proposed highway and against appellant's claim for damages. From the judgment of the board of commissioners establishing said highway, appellant appealed to the court below, where the proceeding was tried de novo, and a verdict returned in favor of the establishment of the highway and against appellant's claim for damages. Over appellant's motion for a new trial, judgment was rendered upon the verdict in favor of the appellees.

The only error assigned is that the court erred in overruling appellant's motion for a new trial. It appears from the evidence that appellant's right of way at the place where the same is crossed by the proposed highway is 100 feet wide, and that the proposed highway is to be 40 feet wide, and that at said place appellant has three tracks, a main track, and two switch tracks, one of which is called a "passing" track; the passing track being 2,990 feet long and the switch track 2,770 feet long.

During the progress of the trial appellant offered to prove, by a competent witness, in answer to a question propounded to him as an element of damages, the cost of constructing wing fences and cattle guards and of

planking the proposed highway across appellant's tracks, to which appellees objected, which objection was sustained by the court. Said items of expense excluded by the court belong to that class of expenses which a railroad company incurs in complying either with the requirements of section 5153, Burns' Ann. St. 1901, (section 5195, Burns' Ann. St. 1908), or of laws passed in the exercise of the police power, and for which, therefore, they are not entitled to recover or be allowed compensation. *Lake Erie, etc., R. Co. v. Shelley*, 163 Ind. 38, 40-47, 71 N. E. 151, and authorities cited. It follows that the court did not err in excluding said evidence nor in refusing to give instructions which authorized the recovery of such damages.

Appellant complains of instruction No. 3 given to the jury, on the ground that "it is to the effect that appellant is not entitled to just compensation for its land taken for a public highway, and therefore is in violation of section 21, art. 1, of the Constitution of this state, and the fourteenth amendment to the Constitution of the United States." Said instruction reads as follows: "(3) I instruct you that a railroad acquires its right of way subject to the right of the state to extend public highways and streets across the same, and subject to the condition that it must place, keep, and maintain all highway crossings, regardless of whether the highway was established before or after the railroad was constructed, and in such condition as not unnecessarily to impair the usefulness of the highway, and in such manner as to afford security for life and property. I therefore instruct you that should you find by a preponderance of the evidence in this case that the proposed highway will necessitate the crossing of the right of way at right angles of the New York, Chicago & St. Louis Railroad Company, and will not interfere with the operation of said railroad, said company cannot recover damages in this case, and your verdict on that issue, so far as said railroad company is concerned, may be for the petitioners." Under the statutes of this state, it is the duty of all railroad companies to construct and keep in safe condition all highway crossings; and this duty is the same whether the highway was established before or after the railroad was built. Clause 5, § 5153, Burns' Ann. St. 1901; section 5195, Burns' Ann. St. 1908; *Evansville, etc., R. Co. v. State*, 149 Ind. 276, 278, 49 N. E. 2, and cases cited; *Chicago, etc., R. Co. v. State*, 158 Ind. 189, 191-198, 63 N. E. 224, and authorities cited; *Chicago, etc., R. Co. v. City of Noblesville*, 159 Ind. 237, 240, and 241, 64 N. E. 860, and authorities cited. It is clear from our statute and the cases cited that a railroad company acquires its right of way subject to the right of the state to extend public highways and streets across the same, and subject to the condition that it must

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

place, keep, and maintain all highway crossings, regardless of whether the highway was established before or after the road was built, in such condition as not unnecessarily to impair the usefulness of the highway, and "so as not to interfere with the free use" thereof, and "in such a manner as to afford security for life and property," without reference to whether the railroad company owns the right of way in fee or merely an easement therein. *Chicago R. Co. v. City of Chicago*, 149 Ill. 457, 460, 461, 37 N. E. 78; *Elliott's Roads and Streets* (2d Ed.) § 222, p. 236. Having accepted the privileges and franchises from the state and acquired its right of way subject to such right under said statute on the part of the state, it is not entitled to any compensation for the interruption and inconvenience, if any, nor for increased expense nor increased risk, if any, nor for the expense and inconvenience of the railroad company in complying with the requirements of said statutes at highway crossings. *Boston, etc., R. Co. v. County Commissioners*, 79 Me. 386, 10 Atl. 113; *Portland, etc., R. Co. v. Inhabitants of Deering*, 78 Me. 67, 2 Atl. 670, 57 Am. Rep. 784, 787; *City of Grafton v. St. Paul, etc., R. Co.*, 16 N. D. 313, 113 N. W. 598, 601, 602; *Lake Shore, etc., R. Co. v. City of Chicago*, 148 Ill. 509, 518-520, 37 N. E. 88; *Lake Erie R. Co. v. Shelley*, 163 Ind. 37, 71 N. E. 151, and cases cited. Said subdivision 5, § 5195, *Burns' Ann. St.* 1908 (section 5153, *Burns' Ann. St.* 1901; section 3903, *Rev. St.* 1881), does not depend for its validity upon the police power of the state, but is valid because the state has the power to provide the conditions upon which railroads acquire their right of way in the state, and such conditions are binding whether the right of way be acquired by deed, condemnation, or otherwise. Moreover, the laws requiring railroad companies to construct, maintain, and keep in safe condition all the highway crossings by the erection and maintenance of gates and men to operate the same, planking the crossing, construction of cattle guards, employment of gatemen or flagmen, etc., or otherwise, are passed in the exercise of the police power, and are constitutional although enacted after the railroad was built. 3 *Elliott on Railroads*, § 1102; *Lake Erie R. Co. v. Shelley*, 163 Ind. 37, 71 N. E. 151, and cases cited; *Portland, etc., R. Co. v. Inhabitants of Deering*, 78 Me. 61, 2 Atl. 670, 57 Am. Rep. 784; *Chicago, etc., R. v. City of Chicago*, 140 Ill. 309, 29 N. E. 1109, and cases cited; *Ill. Central R. Co. v. Willenborg*, 117 Ill. 203, 7 N. E. 698, 57 Am. Rep. 862; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979.

It is evident, as we have already held, that in proceedings to establish a public highway across a railroad track the railroad company is not entitled to any damages for the cost and expense of complying with the requirements of section 5195 (5153), *supra*, or of the laws passed in the exercise of the police pow-

er, and that, when the highway crosses the right of way at a point where the company has only a main track and two switch tracks, no question can justly arise as to the impairment of its franchise by such taking, for under such circumstances both the use as a highway and as a railway can stand together, and do not interfere with each other. *Lake Erie, etc., R. Co. v. Shelley*, 163 Ind. 37, 71 N. E. 151, and cases cited; *New York, etc., R. Co. v. Drummond*, 46 N. J. Law, 644, 20 Am. & Eng. Ry. Cas. 13, and note, p. 16; *Morris, etc., R. Co. v. Orange*, 63 N. J. Law, 252, 43 Atl. 730, 47 Atl. 363; *Chicago, etc., R. Co. v. Chicago*, 140 Ill. 309, 29 N. E. 1109; *Ill. Central R. Co. v. Willenborg*, 117 Ill. 203, 7 N. E. 698, 57 Am. Rep. 862; *Ill. Central R. Co. v. Chicago*, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 530; *Lake Shore, etc., R. Co. v. Chicago*, 148 Ill. 509, 37 N. E. 88; *Chicago, etc., R. Co. v. Chicago*, 149 Ill. 457, 37 N. E. 78; *Chicago, etc., R. Co. v. City of Cicero*, 157 Ill. 48, 41 N. E. 640; *Cleveland, Receiver, v. The City of Augusta*, 102 Ga. 233, 29 S. E. 584, 43 L. R. A. 638, and cases cited; *Boston, etc., R. Co. v. County Commissioners*, 79 Me. 386, 10 Atl. 113; *Portland, etc., R. Co. v. Inhabitants of Deering*, 78 Me. 61, 2 Atl. 670, 57 Am. Rep. 784; *Thorpe v. Rutland, etc., R. Co.*, 27 Vt. 140, 62 Am. Dec. 625; *Lake Shore, etc., R. Co. v. Cincinnati R. Co.*, 30 Ohio St. 604; *Railway Co. v. Sharpe*, 38 Ohio St. 150; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; *Albany, etc., R. Co. v. Brownell*, 24 N. Y. 345, 349-353; *Boston, etc., R. Co. v. Village of Greenbush*, 52 N. Y. 510.

Whether or not the proposed highway would interfere with the operation of appellant's railroad was a question of fact, and was by said instruction properly submitted to the jury for determination. *Baltimore, etc., R. Co. v. Board, etc.*, 156 Ind. 266, 274, 275, 58 N. E. 837, 59 N. E. 856. It is evident from what we have said and the authorities cited that under the evidence in this case the court did not err in giving said instruction, unless it was in not saying that "appellant would only be entitled to nominal damages." *Chicago, etc., R. Co. v. Town of Cicero*, 157 Ill. 48, 41 N. E. 640; *Chicago, etc., R. Co. v. City of Chicago*, 149 Ill. 457, 460-463, 37 N. E. 78; *Chicago, etc., R. Co. v. City of Chicago*, 140 Ill. 309, 314, 29 N. E. 1109; *Lake Shore, etc., R. Co. v. City of Chicago*, 148 Ill. 509, 37 N. E. 88; *Chicago, etc., R. Co. v. City of Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; *City of Grafton v. St. Paul, etc., R. Co.*, 16 N. D. 313, 113 N. W. 598, 601, 602.

The failure, however, to assess nominal damages affords no ground for a reversal of said judgment on appeal. *Smith v. Parker*, 148 Ind. 127, 134, 45 N. E. 770, and cases cited; *Coffin v. State*, 144 Ind. 578, 582, 43 N. E. 654, 55 Am. St. Rep. 188, and cases cited; *Elliott's App. Proc.* § 636.

Appellant complains of the refusal of the court to give instructions 5, 6, 8, and 9 re-

quested by it. Instructions 8 and 9 were properly refused because they were so general and indefinite as to authorize the jury to assess as damaging elements and items of expense for which appellant was not entitled to recover. Said instructions 5 and 6 informed the jury that appellant was entitled to such damages as will compensate it for the value of the real estate taken and the diminution in value of its property because of the location of such proposed highway across its tracks, the same as any other landowner. By condemning the land of appellant for the purpose of extending said highway across its right of way, it was not sought to obstruct the tracks already laid nor prevent appellant from laying other tracks along its right of way. The use of the right of way by appellant for its tracks was a public use, and the use of the right of way for a highway crossing was also a public use, and each use might be exercised without being an obstruction to the use for that public purpose by the other. The use is a joint use, and a different rule for ascertaining a just compensation must be applied than that which obtains in condemnation of land of other landowners. In the later case the landowner is absolutely deprived of the use of his land, and the market value of the land taken and the damage, if any, to the remainder of said land not taken, are proper elements to be considered. In the case of extending a highway across the right of way of a railroad, the latter is not deprived of its public use of its right of way. Such use by it may continue after the highway is located and opened; the use for the purposes of a highway being subject to the use of the company for railroad purposes. *Chicago, etc., R. Co. v. Town of Cicero*, 157 Ill. 48, 41 N. E. 640; *Elliott's Roads and Streets* (2d Ed.) § 222, p. 236. It is evident from what we have said and cases cited that said instructions 5 and 6 did not correctly instruct the jury as to the measure of damages. Said instructions 5 and 6 are also objectionable because they invade the province of the jury in assuming that the value of appellant's railroad property would be diminished by the location of the proposed highway across its right of way.

Judgment affirmed.

(171 Ind. 529)

FARRA v. BRAMAN. (No. 21386.)

(Supreme Court of Indiana. Jan. 8, 1909.)

1. PLEADING (§ 8\*)—CONCLUSIONS.

In testing the sufficiency of a pleading on demurrer, only the facts well pleaded, and not mere conclusions, can be considered.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 12; Dec. Dig. § 8.\*]

2. PLEADING (§ 8\*)—CONCLUSIONS.

The averments of the complaint, in an action by the widow against divorced wife of deceased to determine the right to insurance un-

der the policy of a benefit association, in which the divorced wife was named as beneficiary, that deceased, "in accord with the rules and regulations of said association," applied to and requested the local agent of the association to change the name of the beneficiary; that he "did and performed all things that he could do and perform" in an effort to have plaintiff substituted as beneficiary; that an "absolute divorce was granted to him, thereby depriving \* \* \* (defendant) of any right to participate in said fund as beneficiary or otherwise"; and that on account of the rules and regulations of the association defendant ceased to be and has never since been the legal beneficiary of deceased—are mere conclusions.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 19; Dec. Dig. § 8.\*]

3. INSURANCE (§ 718\*)—MUTUAL BENEFIT ASSOCIATIONS—CONTRACT.

The application for membership in a mutual benefit association does not constitute the entire contract, but the by-laws, rules, and regulations enter into and form a part of the insurance contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1854; Dec. Dig. § 718.\*]

4. INSURANCE (§ 784\*)—MUTUAL BENEFIT ASSOCIATIONS — BENEFICIARIES — SUBSTITUTION.

The application for membership in a mutual benefit association provided that the death benefit should be payable to the member's wife, E., if living at his death, and not withdrawn as his beneficiary, or to such other person as he should later "designate in writing," in substitution, with the approval of "the superintendent." *Held* that, in the absence of fraud or wrong on the part of E., preventing the substitution of beneficiary, no substitution was effected by the member by his merely applying to and requesting the local agent to substitute a certain person as beneficiary, and the agent neglecting and failing to make a substitution; or by the member delivering to another person than the one originally named as beneficiary the certificate and the book of rules attached thereto, and as a part of the transaction informing her that the insurance money was her property.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1951-1954; Dec. Dig. § 784.\*]

5. INSURANCE (§ 783\*)—MUTUAL BENEFIT ASSOCIATION—RIGHT OF BENEFICIARY.

Though the beneficiary in a certificate in a mutual benefit association has no vested right till death of assured, she has an interest, subject only to the right of substitution of another in the mode prescribed by the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1949; Dec. Dig. § 783.\*]

6. INSURANCE (§ 793\*)—MUTUAL BENEFIT ASSOCIATIONS—BENEFICIARIES—ELIGIBILITY.

The rules of an association declared its object to be to establish a relief fund for payment to members when disabled, and in the event of their death to the relatives or "other beneficiaries specified in the applications" of the members, that an applicant might in his application, or subsequently, designate a beneficiary to receive his death benefit other than relatives, on giving good and sufficient reason therefor, and that the death benefits should be payable only to the beneficiary designated in the application, if living at death of the member. *Held*, that a divorce secured by the member from his wife, designated in the certificate as beneficiary, did not alone render her ineligible to receive the death benefits.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1968; Dec. Dig. § 793.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Superior Court, Allen County; J. Morris, Jr., Special Judge.

Action by Ada A. Farra against Eva J. Braman. From a judgment for defendant, plaintiff appealed to the Appellate Court, whence the case is transferred to the Supreme Court under Burns' Ann. St. 1908, § 1394, subd. 2. Affirmed.

See, also, 82 N. E. 926, 84 N. E. 155.

Elmer Leonard, for appellant. Vesey & Vesey and Heaton & Yapple, for appellee.

JORDAN, C. J. The record, among other things, in this case discloses that appellant and appellee each claimed the right to receive \$500 as a death benefit from the Voluntary Relief Department of the Pennsylvania Lines West of Pittsburgh, on account of insurance on the life of John F. Ried, deceased. Appellant was the surviving widow of the latter, but since his death she has intermarried with Frank Farra. Appellee was the divorced wife of said Ried, but since her divorce she has married one Braman. The Pennsylvania Company declined to pay either of said claimants, and thereupon appellant filed a complaint in the Allen superior court, making that company and appellee parties defendant. It is shown that the company appeared in court and filed an answer, admitting its liability that it owed \$500 to whomsoever was authorized to accept it, and requested to be permitted to pay the money into court and be discharged from further liability. This it was permitted to do, and the controversy in regard to the right to receive the money proceeded between appellant and appellee.

The original complaint upon which appellant based her right or cause of action consisted of two paragraphs, the first of which was dismissed. Subsequently she filed a third paragraph. Appellee, a nonresident of the state, having been notified by publication of the pendency of the action, appeared in court by counsel and filed an answer of general denial to appellant's complaint, and also filed a cross-complaint, demanding affirmative relief. She subsequently withdrew her answer and demurred for insufficiency of facts to the second and third paragraphs of appellant's complaint. The court sustained this demurrer to each of these paragraphs, to which ruling appellant excepted. Appellant also demurred for insufficiency of facts to the cross-complaint of appellee. This demurrer was overruled, to which she also excepted. She then elected to stand upon the second and third paragraphs of her complaint and abide by the ruling of the court on the demurrers thereto, and upon her refusal to further plead the court rendered its judgment in favor of appellee, awarding her the insurance money paid into court by the Pennsylvania Company and ordered the clerk to pay this money over to appellee. From this judgment, appellant prosecutes this appeal.

Errors are assigned upon the ruling of the

court on the demurrer to the second and third paragraphs of complaint and upon the overruling of appellant's demurrer to appellee's cross-complaint. By the second paragraph of the complaint it is alleged: That the Pennsylvania Company, in operating various lines of railroad throughout the United States, has also in connection with its said business what is known as a "Voluntary Relief Department of the Pennsylvania Lines West of Pittsburgh." This department is conducted upon the line of a mutual benefit society, and extends over and embraces a large number of railroads, one of which is known as the "Pittsburgh, Ft. Wayne & Chicago Railroad," which road runs from Pittsburgh, through the city of Ft. Wayne, Ind., on to the city of Chicago, in the state of Illinois. It is further averred that the object of said relief department is the establishment and management of a fund known as the "relief fund" for the payment of definite amounts to employes only who contribute thereto and who, under its regulations, should be entitled thereto when they are disabled by accident or sickness, and, in the event of their death, payable to the relatives or those dependent upon the insured, or the beneficiaries specified and named in the application of the member. Such funds from which the benefits are to be paid are accumulated by the voluntary contribution of employes who are members, etc. The Pennsylvania Company has general charge of the fund and guarantees the performance of the obligations assumed by it in conformity with the rules and regulations from time to time made. Members admitted are known as "members of the relief fund." Membership is effected by an application, filed with said company, on forms and blanks furnished by the company, to be approved by the superintendent of said department. In the application so made for membership the applicant may designate the name of the beneficiary to whom such fund shall be paid on the death of the insured. That said fund and the members thereof are divided into five classes, according to the amount of wages received by them per month. Those of the first class are insured to the amount of \$250, those of the second class to the amount of \$500, in the third class to the amount of \$750, in the fourth class \$1,000, and the fifth class \$1,250, respectively. Upon the approval of an application made for membership, a certificate is issued to such applicant, which certificate indicates the class to which he belongs.

It is further alleged: That in pursuance of the rules and regulations of said defendant company, which rules and regulations are attached to and made a part of the pleading, and marked "Exhibit C," John F. Ried applied to the company to become a member thereof in the second class and duly filed his application for admission in said association, which application is made a part of the pleading, and marked "Exhibit B." This ap-

plication was duly approved by the superintendent, and upon the 1st day of June, 1899, a certificate, duly numbered, etc., in said association, was executed and issued to said John F. Ried as evidencing the fact that he was a member in good standing of the second class of said association, which certificate, together with the book of rules attached thereto, is made a part of the pleading, and marked "Exhibits A and C." It is further averred: That, as the time Ried applied to be admitted as a member in said association, he was the husband of Eva J. Ried (appellee herein), and in said application he named Eva J. Ried, his wife, as his beneficiary, to receive on his death the sum of \$500. It is averred that said Ried so named Eva J. as beneficiary in said certificate solely on account of the fact that she was then his wife, and on account of the further fact that she was then dependent upon him. It is alleged that the object of said voluntary relief department is the establishment of a fund for the payment of definite amounts to employees contributing thereto, and this fund, in the event of their death, is to be paid to relatives or other dependents upon the insured. On October 17, 1899, as averred, said John F. Ried applied for and procured a decree of divorce, divorcing him and his wife, Eva J. Ried. It is averred that by said divorce said Eva J. Ried was deprived of any right to participate in said fund as beneficiary or otherwise, for the reason that she no longer sustained the relation to said insured as required by the rules and regulations of said association and on account of which said Eva J. Ried ceased to be, and never since has been, the legal beneficiary of said John F. Ried; and that thereafter, on the 17th day of October, 1901, said John F. Ried intermarried with the plaintiff (appellant herein), Ada A. Ried, who is now his widow. It is further alleged: That, subsequent to the marriage of said Ried to the plaintiff, he, in accord with the rules and regulations of said association, applied to and requested the local agent of said association to change the name of the beneficiary, Eva J. Ried, named in his application, and to substitute therein, the name of his then wife, Ada A. Ried, the plaintiff, and that said Ried at said time "did and performed all things that he could do and perform in an effort to have the name of this plaintiff substituted in lieu and instead of the beneficiary first named in this application, but that, owing to the neglect and failure of said agent of said association, the name of this plaintiff was not actually substituted as the beneficiary in place of the name of Eva J. Ried, but that said John F. Ried did all that he could and all that was in his power to consummate the same." On the 15th day of October, 1902, said John F. Ried, while in the employ of the railroad company, was accidentally killed. That his death occurred before there was an actual substitution of

the name of the plaintiff as his beneficiary in said association in lieu and instead of the defendant, Eva J. Ried, which, as alleged, was not caused and was not the result of any omission or failure on the part of said Ried to do and perform all things necessary for him to do and perform in order that said substitution might actually be made and effected. There are other averments as to proof of death, etc., alleged in this paragraph, and it is further charged that the defendant, Eva J. Ried, claims to hold and have some interest in or right to said fund, or a portion thereof, which claim is wholly unfounded, etc. The prayer is that the court render judgment, decreeing the equitable substitution of the beneficiary, and that this plaintiff be declared the real beneficiary in said contract of insurance, instead of defendant, Eva J. Ried, and that she have judgment against said defendant company in the sum of \$500, and that said Eva J. Ried be required to set up any claim or right which she may have to said fund, etc.

In the main the facts set up in the third paragraph of the complaint are substantially the same as in the second, except there are no averments of any attempt or effort upon the part of Ried, the insured, to substitute appellant for appellee as the beneficiary in the certificate of insurance. The plaintiff, in this paragraph, apparently relies wholly upon the assignment by Ried of the certificate of insurance to her, who at that time was his wife. It is therein alleged that on October 17, 1901, immediately after Ried's marriage to the plaintiff (appellant), he assigned to her all of his right, title, and interest in and to the certificate of insurance and delivered said certificate to her, together with the book of rules attached thereto, for the purpose of vesting in her the absolute title thereto and to enable her upon his death to receive the amount mentioned in said certificate. It is averred that she accepted the same and thereafter paid the assessments thereon to the amount of \$35, which she agreed to pay if Ried would assign to her said certificate. The prayer is for judgment against the Pennsylvania Company and appellee, etc.

It is argued that the second and third paragraphs of the complaint present two questions for our determination: First, is the wife of a member of the relief department in question, whose name is designated as a beneficiary in the application of a member, displaced as such beneficiary and rendered incapable of remaining as such on account of a divorce being decreed in favor of the husband, or, in other words, does such decree of divorce ipso facto render her ineligible thereafter as such beneficiary and serve to deprive her of the benefits upon the death of the insured? Second, under the facts as alleged, did John F. Ried, the insured, effect a change of beneficiaries, or vest in appellant the right to have and receive

the amount of insurance in question upon his death?

In testing the sufficiency of a pleading on demurrer the court can only regard the facts well pleaded, and not mere conclusions of the pleader. The averments in the complaint that John F. Ried, the insured, "in accord with the rules and regulations of said association," applied to and requested the local agent of said association to change the name of the beneficiary, etc., and that he "did and performed all things that he could do and perform in an effort to have the plaintiff substituted in lieu of the beneficiary first named in said application," and further, as alleged, that an "absolute divorce was granted to him, thereby depriving the said Eva J. Ried of any right to participate in said fund as beneficiary or otherwise," and that on account of the rules and regulations of said association the said Eva J. Ried ceased to be and has never since been the legal beneficiary of the deceased, John F. Ried, and other averments of a similar character, are but conclusions and lend no support to the pleading. It is well settled that a mere averment of a conclusion in a pleading, without alleging facts which sustain the conclusion, is not sufficient and of no avail.

The agreement of association, the certificate of insurance, and application therefor, together with the rules and regulations of the relief department, filed as exhibits and made a part of each paragraph of the complaint, serve to aid us in determining the questions argued by the respective parties. The second subdivision of the agreement of the voluntary relief department of the Pennsylvania Lines West of Pittsburgh is as follows: "Second. That the companies, parties hereto, in order to secure uniformity and economy, do hereby associate themselves for the purpose of a joint administration and regulation of the said respective relief departments under one common organization, to be known as the 'Voluntary Relief Department of the Pennsylvania Lines West of Pittsburgh' and to this end they mutually agree to designate the same person to act as superintendent of the same, and the same persons for any other general officers necessary for conducting the business thereof, such joint superintendent to be subject to the control of the general manager of the Pennsylvania Company." Subdivision 3 of the book of rules provides: "The object of this department is the establishment and management of a fund to be known as 'the relief fund' for the payment of definite amounts to employes contributing to the fund, who under the regulations shall be entitled thereto, when they are disabled by accident or sickness, and in the event of their death, to the relatives or other beneficiaries specified in the applications of such employes." (Our italics.) Rule 8, among other things, provides that the superintendent shall have

general charge of all the business pertaining to the department, etc. He is authorized to employ, with the approval of the general manager, a chief clerk, medical examiners, and such other employes as may be necessary for the proper conduct of the business of the department. The form of the application to be made for membership in the relief department is provided for by rule 22 and contains a blank for the designation of the name of the beneficiary to whom the death benefits shall be payable. Rule 28 contains the following provision: "An applicant may, in his application or subsequently, designate a beneficiary to receive his death benefit other than relatives entitled to recover the amount payable in event of the death of the applicant, on giving good and sufficient reasons for such designation." Rule 29, among other things, provides as follows: "29. Benefit payable on account of the death of a member, shall be payable only to the beneficiary or beneficiaries designated in his application to receive the same, if living at the death of said member. If the designated beneficiary shall not be living at the death of said member, then the benefit shall be payable to the wife (or husband), or in the event of the applicant at death having no wife (or husband) living, then to the children of the member collectively. \* \* \*" In the application made by John F. Ried for membership in the relief fund, and the one upon which the certificate of his membership was issued, is the following stipulation: "I also agree that this application, when approved by the superintendent of the relief department, shall make me a member of the relief fund and constitute a contract between myself and such company." In said application it was further stipulated and provided by him that *death benefits "shall be payable to my wife, Eva J. Ried, of Ft. Wayne, Ind., if living at the time of my death and not withdrawn as my beneficiary, or to such other person or persons as I shall subsequently duly designate in writing in substitution therefor, with the approval of the superintendent of the relief department, otherwise," etc. (Our italics.)*

Eliminating the conclusions from the second paragraph of the complaint, and the only facts therein remaining to show the attempt made by Ried to substitute appellant as beneficiary in place of appellee are those disclosed by the averments that he "applied to and requested the local agent of the association to change the name of his beneficiary first named in his application, to wit, Eva J. Ried, and to substitute therefor the name of his then wife, Ada A. Ried," but that owing to the neglect and failure of said agent the substitution was not actually made. There is an entire absence of any facts going to establish that the local agent in question was the proper person to make the change requested, or that he was invested with power or authority to carry into effect the change in the beneficiary as requested by Ried, the

insured. It will be noted that the latter in his application, after stipulating that the death benefit "shall be payable to my wife, Eva J. Ried, of Ft. Wayne, Ind.," further provided therein, "or to such other person or persons as I shall subsequently duly designate in writing in substitution therefor, with the approval of the superintendent of the relief department." It is also disclosed that he expressly agreed in his application that its approval by the superintendent of the relief department "shall make me a member of the relief fund and constitute a contract between myself and such company." Of course it is not to be understood that the application alone constituted the entire contract, for it is well settled that the by-laws, rules, and regulations of a mutual benefit association are elements which enter into and form a part of the insurance contract. *Supreme Lodge, K. of P. v. Knight*, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409, and authorities there cited.

No facts are averred to disclose that Ried, in his desire to displace appellee as the original beneficiary, in any manner complied with the method or mode prescribed in the application, by applying to the superintendent of the relief department and designating in writing the name of the person he wished to substitute as a beneficiary in place of appellee and in securing the superintendent's approval of such change. The case of *Mason v. Mason*, 160 Ind. 191, 65 N. E. 583, arose over the payment of a death benefit upon an insurance certificate issued by the same relief department as is herein involved. In that appeal the same rules, by-laws, and regulations governing the change of a beneficiary were fully considered by this court. That decision, so far as applicable, must be regarded and adhered to as a ruling authority in the case at bar. George W. Mason, the insured, was an employé of the Pennsylvania Company, and, in becoming a member of the relief department in question, had designated his mother as his beneficiary. He subsequently married, and after his marriage he, together with his wife, went to the authorized agent of the association and then and there surrendered to him the original certificate of membership and a book containing copies of the contract and regulations that he had received with his former certificate. He requested that a new certificate of membership be issued to him, in a different class, "and then and there designated his wife, Jennie Mason, as his beneficiary in case of his death." The agent authorized to do so issued to Mason a certificate of membership in said association, together with a book of rules, etc. Thereupon he delivered the new certificate and book of rules to his wife. At the time of the issuing of the new certificate he designated her as his beneficiary, but the new certificate as issued and delivered to her did not state or mention her name or the name of any one as the

beneficiary. Under the facts it was held in that case that there was no new designation or change of a beneficiary in accordance with the contract. In considering this question, the court, by Gillett, J., said: "But whatever the character of the association, it is obvious that the relations of the insured and the beneficiary to the insurance contract may be made to depend upon the provisions of the contract. To the extent that the contract gives the beneficiary rights, its provisions are a law unto the parties. If there is a right reserved by the insured to change the beneficiary, but if the contract points out the manner in which the change is to be made, then it is the duty of the insured to pursue the contract, if he would displace the beneficiary"—citing authorities.

In *Holland v. Taylor*, 111 Ind. 121, 12 N. E. 116, the action arose out of a death benefit certificate issued by the Royal Arcanum, a mutual benefit association. The change of beneficiary was involved in that appeal. The rules of that society provided that a change of beneficiaries might be made by the insured by a surrender of the old certificate and the execution of the direction for a change according to the prescribed form. This court held in that appeal that the insured could not make such change by provision in his will. In referring to the relation of the beneficiary to the contract, the court said: "It would be saying too much to say that she had no rights. She was the beneficiary named in the certificate. \* \* \* So long as the contract remained as executed, she had the right of a beneficiary, subject to be defeated by change of beneficiary by the insured. So long as the certificate remained as executed, the assured had reserved to himself the power to change the beneficiary, and that was the extent of his right in or power over the certificate, or the amount agreed to be paid at his death. He had no interest in or to the certificate or the amount agreed to be paid, but that would have gone at his death to his personal representative. By virtue of the by-laws and the certificate which, as we have seen, constituted the contract between him and the Royal Arcanum, he had power to change the beneficiary. That same contract fixed the mode and manner in which that change might be made, and we think that, taking the by-laws and certificate together, the mode and manner of changing the beneficiary was fixed as definitely and was as binding upon the assured as was the right to make such change binding upon the association and the beneficiary. In other words, under the contract the assured had the right to change the beneficiary provided he made the change in the manner provided in the contract."

In cases of the character of the one at bar the mode or method prescribed in the contract for making a change of the beneficiary is a matter of essence or substance and as

a general rule must be pursued. *National Mutual Aid Soc. v. Lupold*, 101 Pa. 111; *Gentry v. Supreme Lodge, K. of H. (C. C.)* 28 Fed. 718; *Highland v. Highland*, 109 Ill. 366; *Olmstead v. Masonic, etc., Soc.*, 37 Kan. 93, 14 Pac. 449; *Supreme Conclave, etc., v. Cappella (C. C.)* 41 Fed. 1; *McLaughlin v. McLaughlin*, 104 Cal. 171, 37 Pac. 865, 43 Am. St. Rep. 83; *Wendt v. Legion of Honor*, 72 Iowa, 682, 34 N. W. 470. Of course, as asserted in *Mason v. Mason*, supra, there are cases arising upon mutual benefit insurance in which the principles of equity may be invoked to aid a defective exercise of power by the assured in making a change in the beneficiary, or in a case in which an element of fraud upon the part of the beneficiary is involved. Generally speaking, however, such cases, in the absence of any question of fraud or other wrong on the part of the beneficiary preventing the change from being made in accordance with the prescribed mode, are those in which the change has been actually made by the assured, but in so doing the method provided has not been strictly pursued. *Grand Lodge, etc., U. W. V. Noll*, 90 Mich. 37, 51 N. W. 268, 15 L. R. A. 350, 30 Am. St. Rep. 419; *Isgrigg v. Schooley*, 126 Ind. 94, 25 N. E. 151; *Supreme Conclave, etc., v. Cappella*, supra; *Jory v. Supreme Council A. L. of H.*, 105 Cal. 20, 38 Pac. 524, 26 L. R. A. 783, 45 Am. St. Rep. 17.

In the case at bar, there is no room for invoking the aid of equity, as there is no element of fraud therein, and there is no defective exercise by the assured of the power or right to change his original beneficiary. It is not shown that he endeavored or undertook to comply with the method prescribed in the contract for displacing the appellee and substituting appellant in her place as beneficiary. Neither does it appear that appellee did anything whatever to prevent him from substituting appellant, by the mode provided, as the beneficiary to whom the death benefit should be paid. It is a rule well established that a policy of insurance issued by a mutual benefit society or association is unlike an ordinary life policy of insurance, as it creates no vested right in the beneficiary. As the authorities affirm, it is only an expectancy, and the right of the beneficiary to the proceeds of such policy does not become vested or absolute until the death of the insured. Nevertheless, the beneficiary has an interest therein, subject, however, to the right of the assured to substitute another by complying with or by following the mode or method prescribed by the contract, or by the rules and regulations of such society or association. *Holland v. Taylor*, 111 Ind. 121, 12 N. E. 116; *National Mutual Aid Soc. v. Lupold*, supra; *Gentry v. Supreme Lodge, K. of H.*, supra; *Highland v. Highland*, supra; *Olmstead v. Masonic, etc., Soc.*, supra; *Supreme Conclave, etc., Cappella*, supra; *McLaughlin v. McLaughlin*, supra; *Wendt v. Legion of Honor*, supra.

The second paragraph of the complaint manifestly is insufficient in facts to establish that appellee was by the acts of the assured displaced as the beneficiary of the insurance and appellant substituted as such in her place. Equally deficient in this respect is the third paragraph under the facts therein alleged. In the latter the complainant relies upon what is claimed to be an equitable assignment to her of the certificate of insurance by reason of the facts that the insured delivered to her said certificate and the book of rules attached thereto, and as a part of the same transaction informed her that the insurance money was her property, etc. It may be said that the third paragraph discloses that the insured wholly ignored the prescribed method for changing his beneficiary by means of which, had he pursued it, he might have successfully exercised such right.

The next and final question presented for consideration is: Did the divorce secured from appellee by John F. Ried, the assured, alone operate to render her thereafter ineligible as the beneficiary and deprive her of receiving the death benefits in controversy in this action? Counsel for appellant argue and contend: That the very object of the relief department in question was the establishment of a fund for the payment of definite amounts to employees contributing thereto, and in the event of their death to be paid only to relatives or other dependents; that by reason of the divorce appellee no longer thereafter sustained the relation to the insured as is required by the laws of such department or association; that, inasmuch as the decree terminated all of the relations existing between appellant and her said husband, therefore she was neither his relative, a member of his family, nor in any manner dependent upon him for support. Consequently, it is argued, she ceased to be the lawful beneficiary and must be held to be deprived of receiving payment of the money in question.

It may be conceded that by the divorce in question the relation of husband and wife was terminated, and the wife was no longer a relative or dependent of her former husband, and in the event of his death could not in any sense be regarded as his heir; but it does not follow that from the mere fact of the divorce alone she was thereby disqualified as a beneficiary and deprived of the benefits provided for by the insurance certificate. Of course, the relief department might have provided, either in the contract of insurance or in its by-laws, rules, and regulations, that in the event the wife of the insured, whom he had designated as his beneficiary, should be divorced from him, such divorce should terminate her rights as a beneficiary and deprive her of the death benefits. This, however, was not done, for we discover no provision to that effect, either in the application, certificate, by-laws, or regulations

of the department. Under the circumstances, there is nothing which will require a court to read such a condition or provision into the contract of insurance herein involved. In view of the by-laws, rules, and regulations, it certainly is not tenable to argue that no one but relatives of the assured, members of his family, or dependents, can be lawfully designated by him as his beneficiaries, and that such beneficiaries must not only occupy such a relation to the assured when appointed, but must maintain the same status at his death; otherwise they will be deprived of their right as beneficiaries. It will be noted that rule 3 of the relief department provides that the fund is payable "to relatives or other beneficiaries specified in the application of such employes." Rule 28 does not require that the beneficiary shall be confined alone to the relatives of the employe, for it provides that an applicant "may, in his application or subsequently, designate a beneficiary to receive his death benefit other than relatives," etc. Rule 29 provides that the death benefits "shall be payable only to the beneficiary or beneficiaries designated in the application to receive the same, if living at the death of the member," etc.

It may be asserted that neither the rules of the relief department nor the provisions of the insurance contract in question limit or confine the appointment of a beneficiary by an applicant to members of his family or his relatives, or to others who are dependent upon him for support. It appears that, under the rules and regulations in question, there are only two essential requirements in regard to a beneficiary: First, that he or she, as the case may be, be appointed or designated by the insured; second, that he or she remains living as such beneficiary at the death of the insured. If not living, then and in that event the death benefit shall be payable to the persons and in the order as provided by rule 29, *supra*. Appellant's counsel cite and rely upon decisions of the courts of sister states in cases arising out of policies issued by mutual benefit societies wherein the wife of the insured had been made the beneficiary, but subsequently the relations of husband and wife were severed by divorce. In these cases it is true it was held that the divorce of the husband and wife terminated the latter's rights as beneficiary, and thereafter she was not entitled upon his death to receive the benefits. These cases, however, are not applicable to the case at bar for the reason that the decisions therein depended upon, and in the main were controlled by, the rules and regulations of the society or association issuing the policy of insurance, which rules and regulations were quite different from those involved in this appeal. Notably among these decisions is *Tyler v. Odd Fellows Mutual Relief Association*, 145 Mass. 134, 13 N. E. 363. The latter case involved a policy of insurance issued to the husband, in which he had designated his wife as the beneficiary.

Some five years after receiving the policy, he and his wife were divorced. The association, in that case, was organized under an agreement that the organization was for the purpose of defraying the expenses of sickness, burial of its deceased members, and rendering pecuniary aid to the families of the deceased members or other heirs. The by-laws of the association provided that: "After payment of the expenses of the funeral and of last sickness, the balance shall be paid to the person or persons designated by the member in his application for membership, or last legal assignment, *provided such person or persons are heirs or members of the decedent's family.*" (Our italics.) It was held in that case that at the death of the insured the relation of the beneficiary to him at that time must be such as was contemplated and provided by the agreement of the association and its by-laws relating to the payment of benefits, and that consequently, as the divorced wife did not sustain such a relation, she was not entitled to receive the death benefit on the death of the insured. The court in that appeal said: "At the time of the death of L. E. Tyler, his former wife, Etta A. Tyler, was not a member of his family, nor one of his heirs, but her connection with him had been severed by divorce. We therefore think she had lost her rights under the designation of her former husband and was not entitled to anything from the defendant association after his death." Under the by-laws of the society involved in the latter case, the decision of the court therein is quite inapplicable to the case at bar. Had the by-laws or regulations of the relief department in question provided or contemplated that the beneficiary of a member, in order to be eligible to be appointed as such, must, at the time of the appointment, belong to a certain designated class, or in other words, that the beneficiary must be confined or limited to relatives of the assured or members of his family, or to dependents, and that such relation of the beneficiary must continue to exist at the maturity of the insurance, then under the circumstances we would have for consideration quite a different proposition from that which is presented. Appellant was, under the rules and regulations of the relief department, eligible or qualified for appointment as beneficiary in the first instance, and, as we have held, had not been displaced as such by the insured prior to his death. The fact that the conjugal relations existing between her and her former husband at the time she was designated or appointed his beneficiary thereafter had been severed by a divorce, prior to the maturity of the policy, did not, under the governing rules, by-laws, and regulations of the relief department, render her ineligible as such beneficiary, or bar or deprive her of the right to receive the insurance money paid into court by the relief department upon the certificate of insurance. The following cases

fully sustain this view of the question. *Brown v. A. O. U. W.*, 208 Pa. 101, 57 Atl. 176; *Courtois v. Grand Lodge, A. O. U. W.*, 135 Cal. 552, 67 Pac. 970, 87 Am. St. Rep. 137; *Overhiser v. Overhiser*, 14 Colo. App. 1, 59 Pac. 75.

In each of these cases the wife of the assured person had been appointed by him as his beneficiary. Thereafter, but prior to his death, the parties were divorced. In each case the court held that, as there was nothing in the contract of insurance, by-laws, or regulations of the society or association to the contrary which disqualified the wife as a beneficiary in the event of her divorce from the assured, she was not therefore rendered ineligible or deprived of receiving the death benefit at its maturity. As a general rule, the authorities affirm that a policy of life insurance or the appointment or designation of a beneficiary, which is valid in its inception, continues and remains valid, although the insurable interest or relationship of the beneficiary has ceased or terminated, unless it is otherwise stipulated or provided in the contract to the contrary. *Bacon on Benefit Societies*, § 253; *Conn. Mutual Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251.

We conclude that the lower court did not err in sustaining the demurrer to the second and third paragraphs of appellant's complaint.

Judgment affirmed.

(171 Ind. 508)

**KUNKALMAN et al. v. GIBSON et al.** (No. 20,999.)

(Supreme Court of Indiana. Jan. 5, 1909.)

**1. DRAINS (§ 2\*)—JURISDICTION.**

It is for the General Assembly to determine the measure of jurisdiction it will grant or withdraw in the matter of construction of public drains.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 2.\*]

**2. DRAINS (§ 2\*)—CONSTRUCTION—REPEAL OF STATUTES—CONTINUANCE OR MODIFICATION OF PROCEEDINGS.**

Under Act March 6, 1905 (Acts 1905, p. 456, c. 157), providing a new drainage law, and declaring all prior laws relating to drainage repealed, but that such repeal shall not affect any pending proceedings in which there is no attempt to, and which will not lower or affect any lake exceeding 10 acres in area, there is no jurisdiction to continue a proceeding which at the time the act goes into effect attempts to affect lakes of that area, or to modify the proceeding to one that shall not so attempt.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 2.\*]

**3. CONSTITUTIONAL LAW (§ 112\*) — VESTED RIGHTS — UNADJUDGED COSTS — REPEAL OF STATUTES—"LIABILITY."**

As between the parties to a pending proceeding to establish a public drain, unadjudged costs do not constitute a liability within *Burns' Ann. St. 1908*, § 248, providing that repeal of a statute shall not extinguish any liability incurred under it; so that as between such parties repeal of the statute for the proceeding by

Act March 6, 1905 (Acts 1905, p. 456, c. 157), and its consequent dismissal, did not affect any vested or contractual right.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 270; Dec. Dig. § 112.\*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4111-4116.]

On petition for rehearing. Overruled.

For former report, see 84 N. E. 985.

H. G. Zimmerman, Robt. W. McBride, O. L. Ballow, and Wigton & Green, for appellants. Marshall, McNaguy & Chigston, J. W. Hanan, F. P. Bothwell, and L. H. Wrigley, for appellees.

**PER CURIAM.** It is for the General Assembly to determine the measure of jurisdiction which it will grant or withdraw in relation to the construction of public drains. *Taylor v. Strayer*, 167 Ind. 23, 78 N. E. 236, 119 Am. St. Rep. 469. An examination of the drainage legislation of 1905 shows a predominate purpose in the legislative mind to prevent the drainage of lakes of more than a specified area, and to that end the General Assembly, in repealing all prior drainage laws, saved existing proceedings only in certain cases. As to the excepted proceedings, it left the prior laws in force to secure their consummation. This proceeding was stricken down by the statute because it amounted to an "attempt to" drain a protected lake. Concerning the legislation here involved, we said in *Taylor v. Strayer*, supra: "It was also the expressed intent of the Legislature to save all pending ditch proceedings which had not progressed to final judgment, provided the proposed ditches were not designed to and would not affect lakes with the surface area named." The time when the law went into operation was the testing time for the determination of the question as to whether this proceeding should continue. The further language of the clause, which had to do with the actual result of lowering a protected lake, was to guard against eventualities, which might have that result. It is only upon the construction which we have given to the saving clause that all of its language can be made operative.

It must not be forgotten that the saving clause dealt with two classes of cases only: Those existing proceedings which were to be concluded under former laws, and those which were to abate. As to the latter class, there was no authority left to modify the character of such proceedings, for former laws were repealed as to cases not within the class referred to, while the new law did not govern such cases, since pending proceedings which were not affected by the repeal would be concluded as if the "act had not been passed." It was therefore impossible to change a proceeding that had failed by reason of the repeal of the old law so as to continue it under the new law. In oth-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

or words, appellants' claim of a right to have the report modified so as to avoid the statute involves the objection that there is no law under which they can proceed. Counsel for appellant state that they are unable to understand how there could be any justice in a repealing clause which would leave the petitioners with a heavy burden of costs. At the most, the question whether the act operates fairly is a consideration which goes to its construction, but we may say that we fail to perceive how justice would be promoted by permitting a large amount of costs, made in the effort to carry out a materially larger scheme of drainage, to be laid upon land-owners within the restricted district who had nothing whatever to do with the institution and carrying out of the proceeding. Doubtless it was the consideration that equal and exact justice could not be done in many cases wherein jurisdiction was withdrawn which prompted the Legislature to make no provision whereunder the character of the proceedings could be modified. As between the parties hereto, it cannot be said that unadjudged costs constitute a liability within section 248, Burns' Ann. St. 1908, and, as between such parties, the repeal of the statute and the dismissal of the proceeding did not affect any vested or contractual right. *Taylor v. Strayer*, supra.

We have again considered the points originally made for a reversal in addition to considering the petition and argument for a rehearing, and we continue of opinion that no available error exists.

The petition is therefore overruled.

(173 Ind. 409)

OLARK, Auditor, et al. v. VANDALIA R. CO.  
et al. (No. 20,908).<sup>1</sup>

(Supreme Court of Indiana. Jan. 6, 1909.)

1. TAXATION (§ 25\*)—EQUALITY OF TAXATION.

Under the Constitution directing the General Assembly to provide by law for a uniform and equal rate of assessment and taxation and to prescribe such regulations as will secure a just valuation of all property for taxation, the method best calculated to secure equality and uniformity is left to the judgment of the Legislature, and its decision must be followed by all taxing officers.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 59; Dec. Dig. § 25.\*]

2. TAXATION (§ 890\*)—RAILROADS—STATUTES—CONSTRUCTION — "EARNINGS" — "NET EARNINGS."

Burns' Ann. St. 1901, §§ 8496-8499, 8503, 8538, 8555, providing for the taxation of railroads, requiring railroads to make statements giving the amount of the capital stock, annual gross, and net earnings, etc., when considered in the light of the history of legislation on the subject of railroad taxation and the construction placed on such legislation, require the ascertainment of the value of railroad property for taxation, which valuation includes all the property of the railroad company, except that specifically exempt, and the state board of tax commission-

ers in assessing the property of a railroad company must take into consideration its money on hand or on deposit, and the money on hand cannot be retaxed as money; the word "earnings" signifying money, and "net earnings" the sum received in excess of operating expenses.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 390.\*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2302-2304; vol. 8, p. 7646; vol. 5, pp. 4777, 4778.]

3. TAXATION (§ 611\*)—RAILROADS—ASSESSMENT—JUDICIAL REVIEW.

The court, in a suit by a railroad company to enjoin the collection of taxes levied by the local taxing officers on money of the railroad, cannot inquire into the evidence on which the state board of tax commissioners acted in assessing the property of the railroad company, but must presume that the board discharged its duty and considered the money of the company in determining the valuation of the property.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 611.\*]

4. TAXATION (§ 390\*)—RAILROADS.

An Indiana corporation operated lines of road in Indiana belonging to another Indiana railroad corporation under a contract binding it to pay a specified percentage of the gross earnings as rentals. *Held*, that the funds set apart for the leased lines in Indiana belonged to the lessor corporation, and were not taxable separately from the property of the corporation, but must be considered in determining the taxable value of its property.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 390.\*]

5. TAXATION (§ 390\*)—RAILROADS.

An Indiana railroad corporation operated lines of road belonging to an Illinois railroad corporation under a contract to pay a specified per cent. of the gross earnings as rentals. *Held*, that the funds set apart for and belonging to the Illinois corporation, being physically in Indiana in the possession of the receiver of the Indiana corporation, were subject to taxation for state and county purposes under Burns' Ann. St. 1901, § 8421, subd. 9, providing that the personal property of nonresidents in the possession of any person or corporation as receiver shall be assessed for state and county purposes, but only on an assessment against the Illinois corporation, or the receiver as trustee thereof.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 390.\*]

6. TAXATION (§ 890\*)—RAILROADS.

An Indiana railroad corporation operated lines of road belonging to an Illinois corporation under a contract binding it to pay a specified per cent. of the gross earnings as rentals. The Indiana corporation was in the hands of a receiver, who had possession of the funds set apart for and belonging to the Illinois corporation as rentals. *Held*, that the taxes assessed against funds of the Illinois corporation, or in the hands of the receiver as trustee thereof, must be collected from the property of the Illinois corporation found in possession of the receiver as agent, pursuant to Burns' Ann. St. 1901, § 8587.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 390.\*]

7. TAXATION (§ 390\*)—RAILROADS.

An Indiana railroad corporation operated lines of road of an Illinois corporation under a contract binding it to pay a specified per cent. of the gross earnings as rentals. The Indiana corporation was in the hands of a receiver, and the funds belonging to the Illinois corporation as rentals were erroneously assessed to the Indiana corporation. Subsequently, there was a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup> Rehearing denied.

consolidation of the companies and the formation of a new corporation. *Held* that, since the funds belonging to the Illinois corporation should not be assessed and collected against the property of the Indiana corporation, the fact that there had been a consolidation of the companies did not validate the taxes.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 390.\*]

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by the Vandalia Railroad Company and others against Cyrus J. Clark, Auditor of Marion County, and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Caleb S. Denney, Morton S. Hawkins, and Merrill Moores, for appellants. S. O. Pickens and Holtzman & Coleman, for appellees.

HADLEY, J. In 1904, the taxing officers of Vigo and Marion counties made certain assessments for taxes against the Terre Haute & Indianapolis Railroad Company, and Volney T. Malott, receiver of said company; said assessments being made on moneys in the possession of said receiver, including special funds, or rentals, arising from leases, or operating contracts, with other railroad companies located in Indiana and Illinois, and the same being assessed, as omitted property, for the years 1889 to 1904, inclusive, and as belonging to the Terre Haute & Indianapolis Railroad Company. After the making of said assessments, the Terre Haute & Indianapolis Railroad Company consolidated with all of said leased and other companies, thereby forming the Vandalia Railroad Company, appellee, and by virtue of the consolidating contract the appellee company took over and became the owner of all the property of the Terre Haute & Indianapolis Railroad Company. The tax collection officers of Vigo and Marion counties are attempting to collect said omitted taxes by levy on the property formerly owned by the Terre Haute & Indianapolis Railroad Company. The appellee company brings this action to enjoin such collection of taxes, and claims that under the railroad taxing law of Indiana money is not taxable as a distinct and specific article of property, but must be, under the statute, considered and estimated, by the assessing officers, as but a constituent element of value of that part of railroad property which, from its very nature, should be taxed as a unit, and that the special assessments complained of are void, particularly those pertaining to moneys belonging to the Terre Haute & Indianapolis Railroad Company, or its lessor companies, located in the state of Indiana. The trial court adopted the view urged by appellee company, and we have not been convinced that the conclusion reached was erroneous.

Our Constitution directs that the General Assembly shall provide, by law, for a uniform

and equal rate of assessment and taxation, and shall prescribe such regulations as will secure a just valuation of all property for taxation purposes. From the great variety of property which should bear the burden of taxation, the diverse character of owners, and multiplicity of uses to which it is put, our legislative body, for more than a half century, has recognized the necessity for different methods for the assessment of different classes of property, to secure a just and uniform valuation. In its first enactment under the new Constitution, to wit, in June, 1852 (1 Gav. & H. Rev. St. 1870, p. 68), for the valuation and assessment of property for taxation, it is plainly evident that it was the legislative intent to differentiate the valuation and appraisal of railroad property for taxation from that of individuals. Section 10 makes it the duty of all persons of full age, of sound mind, and not married women, to list all his property, and specifically requires him to list all moneys in his possession, or on deposit, and all credits due and owing him. Section 32 of the act classes railroads with other public service corporations, such as plank and turnpike roads, telegraph and bridge companies, and requires the proper accounting officers of the company to furnish, under oath, to the auditor of the county where its principal office is situate, a list of the capital stock of the company, its value, and a statement dividing all the capital stock among the several counties through which, or into which, the road runs. The details as to railroads are meager, but it is apparent that the effort was to provide a system by which all railroad property of every kind should be valued as a unit, and the valuation distributed equitably along the line for taxation.

It is also important to note that, while the act of 1852 is specific in more than one section that all moneys and credits belonging to private persons shall be given in and taxed, there is an entire absence of mention of moneys and credits belonging to railroad companies. A further significant fact is furnished by the amendatory act of 1858 (Acts 1858, p. 24; c. 4), which provides that railroad companies may omit from their lists all lands owned by the company that are not used in operating the road, and declaring that such lands should be assessed and taxed in the counties where situate, and in the same manner as lands belonging to private persons. This provision is equivalent to an affirmative declaration that all other property of railroads should be assessed and taxed in a manner different from private persons. It was not hard to see, even in 1852, that the transient, mobile character of locomotives and cars used in transacting the business of railroads, that the company's earnings, its capital stock, its franchise—in fact all the company's belongings, except its track

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and real estate, having a situs as much in one county occupied by the road as in another, here to-day and there to-morrow, in this state or out of it, as business need require—could not be assessed under the general taxing laws as located in any county, and could not have the principal values accredited to the county containing the home office, without great injustice to other counties traversed by the railroad. At that early date in the history of railroads, the purpose then adopted, of devising a scheme for the taxation of railroads that would not only secure a fair valuation of the whole property, but an equitable distribution of that value among the several counties affected, has threaded through every taxation statute passed from that day to this, and, accordingly, the statute of 1891 (Acts 1891, p. 199, c. 99; section 8408, Burns' Ann. St. 1901; section 10,140 et seq., Burns' Ann. St. 1908), which governs in this case, except for the years 1889 and 1890, differ from the old law only in giving fuller and more complete details in matters of classification and assessment. In these latter respects the evolution has proceeded along with the rapid multiplication of railroads through Acts 1859, p. 3, c. 1, Act 1865, p. 121, c. 27, Acts 1872, p. 57, c. 37, Rev. St. 1881, §§ 6269-6521, and Acts 1891, p. 199, c. 99 (section 8408, Burns' Ann. St. 1901, section 10,140, Burns' Ann. St. 1908), until it was found necessary, in 1872, to place railroads in a class of themselves, and there was then adopted, and has since been maintained, a more perfect system for listing and assessing such property, that is complete within itself, and draws support from no other statute.

The method best calculated to secure equality and uniformity in assessment and taxation is left to the judgment of the Legislature, and the decision of that body must be followed by all taxing officers. The Legislature, in the exercise of its power, has conferred upon the state board of tax commissioners jurisdiction to assess the unit property of railroads under two heads, namely, "railroad track" and "rolling stock," and has given the board power, if not satisfied with the information contained in the reports and schedules submitted by the companies, touching the value of their property, to send for persons and papers, and make a thorough investigation of its own. The statute provides: "That the right of way, including the superstructures, main, side, or second track, and turnouts, turntables, telegraph poles, wires, instruments and other appliances, and the stations and improvements on such right of way (except machinery, stationary engines and other fixtures which shall be considered personal property) shall be held to be real estate for the purpose of taxation, and denominated 'railroad track,' and shall be so listed and valued." Section 8496, Burns' Ann. St. 1901. "The value of 'railroad track' shall be taxed in the several counties, townships, cities, or towns, in the proportion that

the length of the main track in such county, township, city or town, bears to the whole length of the road in this state, except the value of the side, or second track, and all the turnouts, stationhouses, depots, machine shops, or other buildings belonging to the road, which shall be taxed in the county townships, city or town in which the same is located." Section 8497, Burns' Ann. St. 1901. "The movable property belonging to railroad company shall be held to be personal property, and denominated for the purpose of taxation, 'rolling stock.' The taxable value of the rolling stock as listed shall be distributed and taxed in the several counties, and in the same way as the property denominated 'railroad track,' except fixed personal property, not specifically taxed, including tools, raw material, machinery, etc., shall be listed and taxed where located." Sections 8498 and 8499, Burns' Ann. St. 1901.

In order to furnish the state board a basis for ascertaining the value of this unit property, railroad companies are by the statute required to file with the auditor of state, who in turn is required to lay the same before the state board, verified statements, or lists, on forms prescribed by the board, showing, as to the property denominated "railroad track": The length of the main and side tracks, and turnouts; the proportion in each county and township, and the total in the state; the "rolling stock," whether owned or hired; the number of ties in track per mile; the weight of iron, or steel, per yard, in the main and side tracks; the joints used in the track; the ballasting of the road, whether gravel, stone, or dirt; the number and quality of buildings; the length of time the rails have been in use and that the road has been built; the amount of capital stock and number of shares; the amount of capital stock paid up; the market value, or, if no market value, then the actual value of the shares of stock; the total amount of all indebtedness, except for operating expenses; and the total listed valuation of all the company's tangible property within the state. Section 8508, Burns' Ann. St. 1901. If the list, as prescribed by the statute, shall not furnish the board with satisfactory information, it has the power to seek further knowledge by compelling the production of books, papers, records, and the attendance of witnesses. Section 8555. And if the board find the schedules, as required by law, inadequate to bring out a full disclosure of all taxable property and values, such board has authority to add to the statutory interrogatories submitted to the company whatever it deems proper and effective. Section 8538, Burns' Ann. St. 1901. The statute further provides that, when the blanks and forms prepared by the state board shall be acted upon by the railroad company, and transmitted to the auditor of state, the latter shall lay such statement, or schedule, before the state board at its annual meeting, "and said board shall as-

sess such property in the manner hereinafter provided." Section 1905. The manner referred to is set forth in these words: "Sec. 8555. Said board shall also assess the railroad property, denominated in this act as 'railroad track' and 'rolling stock,' at its true cash value; and said board is hereby given the power and authority, by committee or otherwise, to examine persons or papers. The amount so determined and assessed shall be certified by the auditor of state to the county auditors of the proper counties. The county auditor shall, in like manner, distribute the value so certified to him by the Auditor of State, to the several townships, cities and towns, in his county, entitled to a proportionate value of such 'railroad track' and 'rolling stock.'"

The procedure in the assessment of railroad property for taxation, as provided by later statutes and supplemented by assessing officers, is full and complete, yet in all the taxing systems that have been evolved by the General Assembly, and the many changes and modifications that have been made therein by way of amendment since 1852, the listing, or assessment, of money, or cash, as a separate and distinct item of taxable value, so far as the books show, has not even been suggested. It could not have been an oversight. In all cases where money on hand, or on deposit, is to be taxed, as in the case of private persons, the inquiry for the amount occupies a prominent place in tax lists. When it is entirely omitted from a tax list by both the statute and by officers who have imposed upon them the duty of prescribing all proper and necessary forms, its absence is significant. Another fact worthy of consideration is that where the capital stock of corporations is to be taxed, or where capital stock is to be considered in fixing taxable value, without exception, so far as we have noted, there is no mention of money on hand, or deposit, as a separate item to be listed. In the assessment of incorporated banks, the market value of the capital stock, less the value of real estate and tangible property, is the taxable value. No one ever thought of taxing the money in the bank as a separate item, or in addition to the value of the capital stock, since it takes the money belonging to the bank, associated with every other element of value, to create the market value of the stock. Sections 8470, 8471, Burns' Ann. St. 1901. The taxing of foreign insurance companies is based on gross receipts, less gross losses paid, and not on the amount of moneys on hand, or deposit on any particular day. Section 8477, Burns' Ann. St. 1901. Telegraph, telephone, express, sleeping car, and pipe line companies, whether organized in this state or another, are all assessed on the value of their capital stock; that assessable value being ascertained from a consideration of all the belongings of the company as exhibited on schedules and lists directed by the statute. In none of these sched-

ules and lists is the item of money mentioned. Sections 8478 to 8481a, Burns' Ann. St. 1901, inclusive. The same is true in the taxation of waterworks, gas, manufacturing, mining, gravel and turnpike roads, savings banks, insurance and other corporations organized under the laws of this state. What is sought against such corporate bodies is the unit value of the capital stock, less the real estate and localized tangible property.

As before observed, the apparent policy has been to distribute the amount of the assessment for taxation against transportation companies, as to all property that has no local situs, ratably to all the counties and smaller municipalities occupied by the railroad. *Railway Co. v. Backus*, 133 Ind. 513, 543, 33 N. E. 421, 18 L. R. A. 729. This is the only equitable and efficient method. Money is like rolling stock. It comes and goes every day, at every important station along the line. The principal sum may, on taxing day, be found on deposit in a single county where the rate is lowest, and that county reap the full benefit of the taxes, to the exclusion of the other counties that assisted in earning it. Besides, money is kept under cover, and is of a character to be easily shifted from place to place, or from state to state, to meet the exigencies of taxation. Therefore, to avoid unfairness, and to prevent the escape of taxable property, the present method of requiring the state board, in the assessment of railroad property, to take into consideration the value of the company's capital stock, was adopted. It is not provided, nor intended, that the stock value shall be conclusive as to the taxable value, as is the case with some other corporations, but the selling value of shares, which represent so many units of value in the whole of the corporate property, as an active operating railroad, must be accepted as one of the highest tests of real value of the whole; but under the assessment scheme in this state, the board cannot stop here, but must consider the market value of such shares, along with the general character of every kind and class of asset, including money, that affects the stock value, whether located in one county, or a dozen. We will call further attention to some of the things which the law requires shall be spread before the taxing board when the assessment is made: The amount of the capital stock, and number of shares; the amount of capital stock paid up; the market value, or, if no market value, then the actual value of shares; the total listed valuation of all the company's tangible property in the state; the total amount of indebtedness, except for operating expense; amount of current operating expenses; amount of mortgage bonds; annual gross earnings of entire road; annual net earnings of entire road; annual gross earnings of miles of road within the state; average amount of net earnings per mile over entire line. Earnings signify money; net earnings, the sum received in ex-

cess of operating expenses. And whether the sum be much or little, it goes far to exemplify the actual value of the corporate property. When surplus earnings are considered by the board to enhance the value of the capital stock for taxation, as it must be, to reassess and retax the same as money on hand, or on deposit, is double taxation, pure and simple, and we can see no difference in principle whether such surplus earnings have been disbursed as dividends to the stockholders, applied on corporate indebtedness, expended for betterments, or deposited in bank.

It therefore seems plain to us that it has been the intention of the Legislature from the first, and has been so construed continuously by our taxing officers, that the taxable value of railroad property shall be ascertained and distributed to the municipalities occupied, in the manner pointed out, and that such procedure and such valuation shall and does include all the property of the company, real and personal, under the respective heads of "railway track" and "rolling stock," except the local real estate, outside that denominated "railroad track," as designated in section 8497, Burns' Ann. St. 1901, and except, further, all personal property, under the head of "rolling stock," but that which has a fixed location and is specifically excepted by section 8499, Burns' Ann. St. 1901. Hence it was the duty of the state board of tax commissioners, in assessing the railroad property of the Terre Haute & Indianapolis Railroad Company and resident lessor companies for the years aforesaid, to take into consideration their moneys on hand, or on deposit, at the several tax accruing dates. We cannot inquire into the evidence upon which the board acted. It is presumed to have discharged its duty, and, in the absence of fraud, its final action is conclusive as to the assessment against corporations involved in this case for the years 1889 to 1904, both inclusive. *Railway Co. v. Backus*, 133 Ind. 513, 542, 33 N. E. 421, 18 L. R. A. 729. The court finds that the Terre Haute & Indianapolis Railroad Company and each of the resident lessor companies, for the years 1889 to 1896, and Malott, as receiver for the years 1897 to 1904, both inclusive, within the time prescribed by law, made returns of its property for taxation to the state and county auditors, on forms and schedules furnished first by the state board of equalization, and afterwards by the state board of tax commissioners, and that all the taxes assessed against the companies, and against said receiver, in the counties of Marion and Vigo, for all of said years, except the taxes in controversy, were fully paid at the times they became due. This finding should have ended the case.

We next come to consider the question as to the taxation of the special funds in the hands of the receiver. When Malott was appointed receiver of the Terre Haute & Indianapolis Railroad Company, said company

was operating certain leased lines, as follows: The St. Louis, Vandalia & Terre Haute Railroad and the Terre Haute & Peoria Railroad, both Illinois corporations, and the Terre Haute & Logansport Railroad and the Indiana & Lake Michigan Railroad, both Indiana corporations. Under the contracts, the lessee company agreed to pay to each of the Illinois companies 30 per cent., and to each of the Indiana companies 25 per cent., of the gross earnings of the respective roads, as rentals, and these rentals in the hands of the lessee company, and in the hands of its receiver, are the special funds involved. These funds separate themselves into two classes, to wit: First, the funds set apart for the use and benefit of the leased lines located in the state of Indiana; and, second, the funds set apart for the use and benefit of the leased lines located in the state of Illinois. The arrangement under which the Terre Haute & Indianapolis Railroad Company was operating the other lines are not strictly leases, but operating contracts, and the per cent. of gross earnings of the lessor companies became the property of said lessor companies as soon as it was earned, and especially was this true as soon as the amount was ascertained and set apart and deposited in separate special deposits for said companies. This was done by Malott, receiver, by order of the court, each and every month during the continuance of the receivership; and in equity these special funds, from the time they were set apart in a separate deposit, became and were the property of the lessor companies, respectively. The fund could not be used to pay any of the creditors of the Terre Haute & Indianapolis Railroad Company. It had no right whatever to the same. In the case of *Terre Haute & Indianapolis Railroad Company v. Cox*, 102 Fed. 825, 42 C. C. A. 654, a case which involved these same operating contracts, Judge Grosscup uses this language: "We were unable to see why, in equity \* \* \* the 30 per centum is not immediately upon receipt already set apart and appropriated to the obligation of the Peoria company. The money, \* \* \* it is true, is physically in the possession of the Indianapolis company, but equitably and beneficially becomes, the moment it is earned, the property of the Peoria company." As these special funds belong to the lessor companies, then it follows that the same were taken into consideration in fixing the value of capital stock of those companies just as any other moneys belonging to them; and, as to the Indiana lessor companies, it must be held that such special funds were taken into consideration by the state board of tax commissioners when it fixed the valuation of such companies for taxation, and is not therefore liable to be taxed specifically.

The special funds set apart and belonging to the Illinois companies, however, present a different question. These funds, belonging to nonresident corporations, but being physical-

ly in this state in the possession of a trustee or receiver, are subject to taxation for state and county purposes only. Subdivision 9, § 8421, Burns' Ann. St. 1901. The taxes, however, on such property of a nonresident, must be assessed against the owner, or in the name of the trustee, as trustee, of such owner, and not against some third person, and the taxes must be collected from the property of such owner found in the possession of the agent, trustee, or receiver, having possession of the same, and our statute (section 8587, Burns' Ann. St. 1901) makes ample provision for the collection of the tax out of the fund in the hands of the trustee or receiver. In this instance, however, the assessment of the special funds were not assessed to the owner, the Illinois companies, or to Volney T. Malott, as their trustee, or receiver, holding funds for them in this state, but they were assessed to the Terre Haute & Indianapolis Railroad Company, and Volney T. Malott, receiver of the Terre Haute & Indianapolis Railroad Company, and the defendants are attempting to collect a tax against said special funds belonging to said Illinois companies, from the property of said Terre Haute & Indianapolis Railroad Company. It goes without saying that a tax on money belonging to the St. Louis, Vandalla & Terre Haute Railroad Company, and money belonging to the Terre Haute & Peoria Railroad Company, both nonresident corporations, should not be assessed and collected against the property of the Terre Haute & Indianapolis Railroad Company, an Indiana corporation.

The fact that Volney T. Malott was receiver of the Indiana corporation and had in his possession money that belonged to the Illinois corporations furnished no reason whatever for taxing said money to the Indiana corporation, and the fact that since said assessment there has been a consolidation of the Terre Haute & Indianapolis Railroad Company and the St. Louis, Vandalla & Terre Haute Railroad Company, and other companies, now forming the plaintiff company, is immaterial. The attempt that was made to assess the money in said special funds to the Terre Haute & Indianapolis Railroad Company was void so far as the Terre Haute & Indianapolis Railroad Company was concerned. No attempt was at any time made to assess, or tax, the moneys in said special funds to the owners, the St. Louis, Vandalla & Terre Haute Railroad Company and the Terre Haute & Peoria Railroad Company, nor to Volney T. Malott, as receiver, or agent, of said companies, and said Malott, as receiver of the Terre Haute & Indianapolis Railroad Company, on October 28, 1904, by order of the court of his appointment, paid over to the respective Illinois corporations the full balance of said special funds; but whether a lien existed against all, or any part of, the special funds belong-

ing to the Illinois corporations, that might have been effective under proper and timely proceedings, in rem, in no way affects the question we have under consideration, to wit, an attempt to collect said taxes by levy on property owned by the Terre Haute & Indianapolis Railroad Company, or its grantee, the Vandalla Railroad Company, appellee.

Judgment affirmed.

(45 Ind. App. 32)

**MORGANTOWN MFG. CO. v. HICKS.**

(No. 6,894.)

(Appellate Court of Indiana, Division No. 2  
Jan. 7, 1909.)

**1. APPEAL AND ERROR (§ 649\*)—RECORD—CORRECTION.**

While a bill of exceptions, or other part of the record, may be corrected, in order to justify a correction there must be some written memorandum, memorial, paper, or minute of the transaction by which to make the amendment, as the record imports absolute verity, and cannot be contradicted by parol.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 649.\*]

**2. APPEAL AND ERROR (§ 649\*)—AMENDMENT—WRITTEN MEMORANDUM—STENOGRAPHER'S NOTES.**

Stenographer's notes are a sufficient memorandum by which to amend the record of the evidence contained in the bill of exceptions so as to make the bill conform thereto.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 649.\*]

**3. EVIDENCE (§ 188\*)—INANIMATE OBJECTS—ADMISSION.**

Inanimate objects can only be introduced in evidence by exhibiting them to the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 676; Dec. Dig. § 188.\*]

**4. EXCEPTIONS, BILL OF (§ 13\*)—CONTENTS—INANIMATE OBJECTS.**

The only way that an inanimate object introduced in evidence can be brought into a bill of exceptions is by a description of the object exhibited to the jury.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 13.\*]

**5. APPEAL AND ERROR (§ 659\*)—INTRODUCTION OF EVIDENCE—AMENDMENT.**

Where a bill of exceptions, referring to a piece of timber offered in evidence, recited an agreement that "this is the piece of timber introduced in evidence, and is the piece used by [plaintiff], and was being used there when he was injured," certiorari would not be granted to direct the amendment of the bill so as to recite an agreement that "this is the piece of timber, now exhibited before the jury, used by [plaintiff], and which was being sawed by him when injured"; the two expressions being identical in meaning.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 659.\*]

Appeal from Circuit Court, Morgan County; J. W. Williams, Judge.

Action by Willard Hicks against the Morgantown Manufacturing Company. On certiorari to compel the clerk of the trial court to certify to the correction of the bill of exceptions. Denied.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

James Bingham, for appellant; Willis Hickam and E. M. McCord, for appellee.

**RABB, J.** The appellee brought this action in the court below. Issues were formed, a trial had, and verdict returned in favor of appellee, appellant's motion for a new trial overruled, and time given in which to file bills of exception, and judgment rendered on the verdict. Within the time fixed by the court the appellant filed its bill of exceptions, in due form, setting out the evidence in the case. The bill of exceptions was properly signed by the trial judge, and filed in the clerk's office, and became a part of the record in the cause. The cause was then appealed to this court. After this the appellee filed his motion in the court below to correct the bill of exceptions in this respect, there being this agreement set out in the original bill of exceptions: "It is agreed by and between the parties, this is the piece of timber introduced in evidence, and is the piece used by Mr. Hicks, and was being used there when injured." It was claimed that this entry should have read: "It is agreed by and between the parties this is the piece of timber, now exhibited before the jury, that was used by Mr. Hicks, and was being sawed by him when injured." The record was asked to be corrected so that the bill of exceptions in this respect would correspond with what appellee claimed it should be. To this proceeding appellant appeared, and such proceedings were had that the court ordered the bill of exceptions corrected as prayed for. An appeal was taken from this order, and is now pending in this court as auxiliary to the appeal taken from the judgment in the cause, and appellee has applied to this court for a writ of certiorari requiring the clerk to certify to the correction of the bill of exceptions. Appellant moved in the court below to dismiss the appeal, to have the bill of exceptions corrected, for the reason that no showing of any memoranda in writing existed of any mistake in the bill of exceptions, and no evidence thereof further than oral evidence. After the evidence was heard upon the appellee's motion to correct the record, appellant again moved to dismiss the petition for the same reason. It is competent to correct the bill of exceptions, as well as any other part of the record of the proceedings of courts, but to justify such correction there must be some written memorandum, memorial paper, or other minute of the transaction by which to make the amendment, or the same cannot be made. *Morgan v. Hays*, 91 Ind. 132; *Driver v. Driver*, 153 Ind. 88, 54 N. E. 389. The record imports absolute verity, and cannot be contradicted by parol evidence, under the guise of correcting the record, any more than it can be done in any other manner.

In this cause it is sought to make the amendment by parol proof as to what was stated as the agreement during the introduction of the evidence. It is not pretended that the stenographer's shorthand notes are at all different from what the record appears to be. If they were, this would be such a memorandum as would authorize the amendment to the record, but it was not competent to dispute the record of the evidence contained in the bill of exceptions by parol testimony pure and simple, and for that reason the appellee's petition to amend the record should have been dismissed.

The petition should have been dismissed for the further reason that the amendment sought to be made, while changing the phraseology somewhat, does not change the sense and meaning of the matter sought to be amended. The stick or piece of timber about which the subject relates could be introduced in evidence only by exhibiting it to the jury. That is the only way that inanimate articles or property are in evidence, and the only way they can properly come into a bill of exceptions is by a description of the article exhibited to the jury. They could not bring the piece of timber into the bill of exceptions. To say that "It is agreed between the parties this is the piece of timber now exhibited before the jury that was used by Mr. Hicks, and was being sawed by him when injured," means the same thing as, "It is agreed by and between the parties this is the piece of timber introduced in evidence, and is the piece used by Mr. Hicks and was being used there when injured."

Appellant's auxiliary appeal is sustained, at appellee's costs, and the motion for a writ of certiorari refused.

(44 Ind. App. 84)

**HUNTINGTON CONSOL. LIME CO. v.  
POWHATAN COAL CO. (No. 6,273.)<sup>1</sup>**

(Appellate Court of Indiana, Division No. 2  
Jan. 7, 1909.)

**1. DEPOSITIONS (§ 83\*)—SUPPRESSION.**

Depositions taken before a notary who is a clerk in the employment of plaintiff's attorneys are subject to a motion to suppress, and when the notary's disqualification is shown by affidavit in support of the motion and no counter showing is made, the overruling of the motion cannot be sustained on the ground that the attorneys at whose office the depositions were taken are not shown by the record to be the attorneys in the case.

[Ed. Note.—For other cases, see *Depositions*, Dec. Dig. § 83.\*]

**2. DEPOSITIONS (§ 83\*)—SUPPRESSION.**

A motion to suppress depositions for the disqualification of the notary for whom they were taken, such disqualification being known to both parties to the action, is in time if made before the trial, as required by *Burns' Ann. St. 1903*, § 455, though the depositions were taken more than two months before the motion.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. § 223; Dec. Dig. § 83.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup> Rehearing denied, 87 N. E. 1017. Transfer to Supreme Court denied.

Appeal from Circuit Court, Huntington County; H. B. Shively, Special Judge.

Action by the Powhatan Coal Company against the Huntington Consolidated Lime Company. From a judgment for plaintiff, defendant appeals. Reversed.

W. & E. Leonard, for appellant. C. W. Watkins and Bowers & Feightner, for appellee.

ROBY, J. Appellee recovered judgment for \$260 on account of coal which it alleged was sold and delivered by it to appellant. The controverted question in the case was as to whether appellant, after having leased a lime plant, owned and operated by it prior to July 1, 1904, to Martin Mindnich, who was previous to that time its foreman in conducting said business, had so held itself out as to be estopped from denying the authority of said lessee to bind it in the purchase of said coal. The depositions of two witnesses were taken in the city of Toledo, which depositions were introduced in evidence, and are essential to support the judgment. Before the trial appellant moved to suppress said depositions, for the reason, among others, that they were taken before a notary public who was at the time a clerk in the employment of the plaintiff's attorneys. An affidavit was filed in support of this motion, wherein such facts were stated. No counter showing was made, and the court overruled said motion. Upon the authority of *Knickerbocker Ice Company v. Gray* (1905) 165 Ind. 140, 72 N. E. 869, this was reversible error. It is attempted to sustain the ruling on the ground that the attorneys at whose office the depositions were taken are not shown by the record to be attorneys in the case. The fact is, however, shown by affidavit, and it is the fact, not the form in which it is made to appear, that is essential.

It is also argued that appellant is estopped, by delay in filing the motion, from insisting upon it. The deposition was taken February 8, 1906. The affidavit setting up the aforesaid facts was made February 5, 1906, and the motion to suppress was made April 17, 1906. The statute requires that a motion to suppress be filed before the beginning of the trial. Section 455, Burns' Ann. St. 1908. This was done. The mere fact that the trial was shortly to begin does not prevent the making of a motion to suppress depositions. The appellee vigorously insists that appellant had notice of the disqualification of the notary, and should therefore have made the motion at an earlier time, but to this it must be answered that appellee also had full knowledge both of the facts and the law involved, and therefore knew that a deposition so taken would be suppressed, upon motion made at any time before trial. Such knowledge deprives it of any basis for a claim of estoppel.

Other questions argued are not likely to arise upon a subsequent trial.

Judgment reversed, and the cause remanded, with instructions to sustain the motion for a new trial.

(43 Ind. App. 1)

HILL v. KERSTETTER. (No. 6,319.)

(Appellate Court of Indiana, Division No. 2. Jan. 5, 1909.)

1. PLEADING (§ 84\*)—COMPLAINT—CONSTRUCTION.

A complaint in an action to determine the ownership of stock in a national bank, and to whom dividends declared by a receiver should be paid, alleging that plaintiff agreed with defendant to take the stock in payment of a note, and that in execution of such contract the certificate of stock had been delivered to plaintiff, and asserting no rights under the note, was based upon title to the stock, and not upon the note.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 84.\*]

2. CORPORATIONS (§ 116\*)—SALE OF STOCK—CONSIDERATION—SUFFICIENCY.

Payment of a debt after a discharge in bankruptcy is a sufficient consideration for a transfer of stock to the creditor by the debtor.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 116.\*]

3. CORPORATIONS (§ 129\*)—TRANSFER OF STOCK—DELIVERY OF CERTIFICATE.

Though it is essential to the transfer of a complete legal title to corporate stock that it may be made upon the corporate books, yet, as between the immediate parties, the delivery of the certificate of stock alone passes the equitable title to the stock, and as between them the transaction will be upheld.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 479, 480; Dec. Dig. § 129.\*]

4. APPEAL AND ERROR (§ 1040\*)—HARMLESS ERROR—RULINGS ON PLEADINGS.

Error in overruling a demurrer to insufficient answers is not rendered harmless because defendant has filed a general denial to the complaint, under which all facts that might have been proved under such answers are admissible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4101; Dec. Dig. § 1040.\*]

Appeal from Circuit Court, Elkhart County; Wm. J. Davis, Judge.

Action by Warren G. Hill against Edmund R. Kerstetter to determine the ownership of shares of stock in the Elkhart National Bank. Judgment for defendant, and plaintiff appeals. Reversed, with instructions.

Zook & Jay, for appellant. Skinner & Wider, for appellee.

RABB, J. The receiver of the Elkhart National Bank filed his petition in the court below, showing that he had sufficient funds in his hands to pay a dividend to the stockholders, and that appellant and appellee both claimed to be the owners of certain shares of stock and entitled to the dividend, and asked that they be required to come into court and litigate their right to the stock and the dividend to be paid thereon. The prayer

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the petition was granted, the proper order made, and the parties appeared, and, in order to present for adjudication their respective claims to the said stock, the appellant filed a complaint alleging that the stock in question was originally owned by appellee, who held a certificate therefor; that afterwards, in the year 1899, without more specifically naming the date, the appellee was indebted to appellant in the sum of \$200, for which appellant held appellee's note, and making the note part of the pleading; that in payment of this note appellee sold the stock in controversy to appellant, and in execution of the contract of sale delivered to him the certificate therefor, which he then held; that as a part of the contract for the purchase of said stock, and the further consideration therefor, appellant agreed to pay the appellee all that he might realize on the stock over and above the \$200, and interest on that sum from the date of the note until the payment on the stock, and the costs of collecting the money on the stock; and that he had never received any money whatever upon said stock. The appellee filed his answer to this complaint in four paragraphs, the first of which was a general denial. In the second it was averred that, after the execution of the note described in appellant's complaint, for a good and valuable consideration appellant released the appellee from any liability thereon. The third paragraph averred that, after the said note was executed, the appellee was duly discharged in bankruptcy, and thereby released from the payment of the note. The fourth paragraph averred that on May 19, 1899, the appellee was about to file a voluntary petition in bankruptcy, and that in consideration of a promise by appellee that the name of the appellant should not appear in the schedule of his creditors, filed by the appellee in such bankruptcy proceeding, the appellant released appellee from the payment of said note, and all obligations thereon.

Appellee contends that appellant's complaint is based upon the promissory note, and these paragraphs of answer proceed upon that theory. While the appellant's complaint is not as full and as clear as it might have been made, we think it is not susceptible of the construction given to it by the appellee. The question the parties were called into court to adjudicate was the question of their claims to the bank stock, and the dividend to be paid thereon, and the complaint was addressed to this question. Its averments are that the appellant took the stock under an agreement with appellee in payment of the note. No rights are asserted under the note, but, on the contrary, it is thus directly averred that the note was paid, and was paid by the sale to appellant of the stock. It is averred, further, that in execution of this contract of sale the certificate of stock was delivered to appellant. These allegations of

the complaint are admitted by each one of these three separate paragraphs of appellee's answer by failing to deny them, and they are sought to be avoided by averring the release of the debt in the second paragraph for an alleged valuable consideration. This valuable consideration may have been, as appellant avers it was, the sale of the stock in question. The third paragraph avers no valuable consideration for the release of the debt. The discharge in bankruptcy did not discharge the debt, and the payment of the debt would be a sufficient consideration to support the transfer of the stock to the appellant by appellee after his discharge in bankruptcy. The fourth paragraph, setting up the agreement of appellee to omit appellant's name from the list of his creditors in his schedule filed in the bankruptcy proceeding, is equally bad, and not responsive to the complaint. It is addressed to a supposed right of recovery upon the note, and not to the title to the stock in controversy.

It is earnestly insisted by appellee that the transfer of the stock by the simple delivery of the certificate to the appellant would vest in appellant no right whatever. In this view we cannot concur. While it is essential in order that a perfect and complete legal title to stock in a private corporation pass by a sale of such stock, the transfer of the stock should be made upon the books of the corporation. The certificate issued by the corporation is not the stock. It is simply evidence of the owner's right to the stock, very much the same as a promissory note is evidence of a debt. Where the stock is sold by the holder, or pledged as a security for the payment of a debt, and as evidence of the transaction the certificate is delivered to the purchaser or creditor as between the parties to the transaction, the sale or pledge will be upheld. *Cook on Corporations*, § 374; 10 Cyc. 598, and cases cited; 2 *Beach on Private Corporations*, §§ 612, 620, 639, and cases cited; *Baldwin v. Canfield*, 28 Minn. 55, 1 N. W. 261, 276; *Pitot v. Johnson*, 33 La. Ann. 1286; *Blouin v. Liquidation, etc.*, 30 La. Ann. 714; *Beardsley v. Beardsley*, 138 U. S. 262, 11 Sup. Ct. 818, 34 L. Ed. 928; *Bruce v. Smith*, 44 Ind. 1; *Boone v. Van Gorder*, 164 Ind. 504, 74 N. E. 4, 108 Am. St. Rep. 314. Appellee cites the court, with apparent confidence, to the case of *State ex rel. Koons v. First National Bank of Jeffersonville*, 89 Ind. 302, as being an authority decisive of this question. There are some statements to be found in the opinion in that case that lend support to the appellant's contention, but they are obiter dictum, and do not correctly state the law, and are not binding.

The question there arose between the sheriff and the bank officers upon an application for a writ of mandate to the officers, requiring them to permit the sheriff to enter upon the books of the bank the transfer of stock which he had sold on execution, and which

stood in the name of the execution defendant, and the question presented was whether or not the officers of the bank had the right to refuse the sheriff access to the books for this purpose, because the certificate of the stock sold had been delivered to some third person. We think the court correctly held that the bank officers had no right to refuse the sheriff access to the books to perform his official duty. The question as to the rights between the holder of the certificate and the purchaser at the sale were not involved in the controversy, and no court has ever held that, as between the immediate parties to the transaction, the delivery of the certificate of stock in a private corporation to the purchaser, or the delivery of the certificate of stock to a creditor in pledge for a loan made, will not vest them with the equitable right to the stock, although no transfer has been made upon the books of the corporation. No rule of law or principle of equity would justify such holding. The Supreme Court say in the case of *Boone v. Van Gorder*, supra, which was a case involving a question precisely similar to the one in the case of *State ex rel. Keons v. First National Bank of Jeffersonville*, supra: "Under the facts alleged in the complaint, and as found by the court, the title which appellee acquired to the stock in controversy, as between herself and her husband, the legal owner, was merely an equitable one; in other words, she had the right as against him to have his legal title or interest in the stock transferred to her, subject or subordinate, however, to any existing and paramount rights of the corporation and third persons." So here, under the facts averred in the complaint, the appellant is entitled to the stock and all dividends therein evidenced by the certificate which he holds as between him and the appellee; the rights of no third persons intervening.

The point is made by appellee, we think without due consideration, that because he has an answer of general denial to the complaint, under which all facts that might have been proved under his special answers would have been admissible, therefore no error intervened in the court holding these answers sufficient and overruling the demurrer. Appellee's counsel have evidently confounded the rule that, where a demurrer has been sustained to a good paragraph of a pleading, no reversible error intervenes if all the facts that are pleaded in the paragraph to which a demurrer has been sustained are admissible in evidence under other paragraphs remaining in, with what he is contending for; but there is a very wide difference between holding a bad paragraph of answer good, and a complete defense to an action standing by itself, and holding a good paragraph of answer bad, where everything that is alleged in it may be proved under some other plea.

The judgment of the court below is re-

versed, with instructions to sustain appellant's demurrer to the second, third, and fourth paragraphs of appellee's answer.

(43 Ind. A. 58)

**SLATTERY v. SCHOOL CITY OF SOUTH BEND et al. (No. 6,284.)**

(Appellate Court of Indiana, Division No. 2.  
Jan. 8, 1900.)

**1. APPEAL AND ERROR (§ 1078\*)—REVIEW—  
WAIVER OF ERROR.**

A ruling not discussed by appellant is waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

**2. SCHOOLS AND SCHOOL DISTRICTS (§ 80\*)—  
CONTRACTS—CONSENT OF COMMON COUNCIL.**

Under Acts 1903, p. 418, c. 225, § 7 (Burns' Ann. St. 1908, § 6497), authorizing the board of trustees in any school city, with consent of the common council, to erect such school buildings as it may deem necessary, there can be no recovery on a contract, made by the school trustees without the common council's consent, which involved more than a mere change in the plan of the school building originally contracted for, and which was entered into with a contractor other than the original contractor.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 80.\*]

**3. SCHOOLS AND SCHOOL DISTRICTS (§ 79\*)—  
CONTRACTS—POWERS OF TRUSTEES.**

Persons contracting with school trustees must recognize that their powers are limited by law.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 188; Dec. Dig. § 79.\*]

Appeal from Circuit Court, St. Joseph County; Walter A. Funk, Judge.

Action by William J. Slattery against the School City of South Bend and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Guy & Pattee and Talbot & Talbot, for appellant. George R. Fish, Thad. M. Talcott, Jr., and D. D. Bates, for appellees.

COMSTOCK, P. J. Appellant, as the surviving member of the firm of Edward Slattery & Son, sought to recover damages for the breach of a contract alleged to have been entered into on the 7th day of May, 1904, between said firm and the board of trustees of the school city of South Bend, Ind. Separate and joint demurrers for want of facts were sustained to each of the four paragraphs of the second amended complaint; and, appellant refusing to plead further, judgment was rendered against him, and in favor of appellees, for costs. This action of the court is assigned as error. The rulings as to the separate demurrers of the appellees, John B. Stoll, Fred P. Eastman, and Francis M. Jackson, trustees, are not discussed, and they are therefore waived. Each paragraph presents several questions, one of which is, "Was it necessary to obtain the consent of the common council prior to the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

execution of the contract sued on?" If this question is answered in the affirmative, it disposes of the case, and the judgment must be affirmed.

The first paragraph of complaint, so far as it is necessary for the consideration of the above-stated question, alleges, in substance, that on the 24th day of March, 1902, the school city of South Bend, by its board of trustees, filed its petition with the common council of the city of South Bend, Ind., praying permission for the erection of a grammar school building and boiler house; that on said date a resolution was duly passed by said common council authorizing the school city to erect said buildings, said petition setting out among other things that "there is immediate and pressing necessity for said building," and estimating the probable cost at \$90,000; that afterward, on the 26th day of May, 1902, they asked for an amendment to the original permit, increasing the estimate of probable cost to \$90,000. Both petitions were granted, and a contract for the construction of said buildings ratified by said common council. Afterwards, while said structures were in the process of construction, and before the completion of the same, the board of trustees discovered certain defects in the plans of said buildings, and in the materials used in the building of certain parts thereof; that certain trusses did not have sufficient support; that said trustees deemed it necessary to make certain changes and alterations in said building; that said changes and alterations were necessary in the safe and proper construction of said building; that on the 6th day of May, 1904, one Edward Slattery and this plaintiff were partners doing business under the firm name of Edward Slattery & Son; that the plaintiff is the sole surviving member of said firm; that on the 6th day of May, 1904, the defendants entered into a written agreement with said partnership, whereby the latter undertook and agreed to shore the walls and replace the foundation wall and footings, etc., in said school building, and the defendant promised and agreed to pay said Edward Slattery & Son for the services, labor, and material furnished in completing said contract in the sum of \$14,400; that said Edward Slattery & Son executed a good and sufficient bond in the sum of \$25,000 to the school city of South Bend, Ind., as required by said contract, and did keep and perform all the conditions on their part and proceeded, under the direction and with the knowledge of said defendant trustees, to do the work and furnish the materials; that the said plaintiff was put to an expense of \$800 in preparing for said contract; that on the 11th day of June, 1904, the board of trustees of said school city wholly repudiated said contract with said Edward Slattery & Son, and notified them to abandon all work under their said contract, and passed a resolution designed to rescind and cancel their said

contract, which resolution is in the words and figures following, to wit, etc.; that neither said Edward Slattery & Son nor this plaintiff have ever in any manner consented to the rescission, cancellation or repudiation of said contract; that said defendant school city of South Bend had money and funds on hands sufficient to pay the amounts contracted for with said Edward Slattery & Son in said contract and by reason thereof did not create an aggregate indebtedness on account of school buildings in excess of \$200,000 as provided by an act of the General Assembly of the state of Indiana, approved March 10, 1903 (Laws 1903, p. 417, c. 225); that the plaintiffs are damaged in the sum of \$12,000. The second paragraph alleges substantially the same as the first, except that there is no direct allegation that the work is necessary, nor that there are funds sufficient to pay for said services and material. The third paragraph, in addition to the allegations as set out in the first paragraph, sets out with more particularity the defects and the changes and alterations necessary to the proper and safe construction of said building; and that the said contract of defendant school city with one Christman for the construction of said buildings authorized said defendant to make changes and alterations in the plans of said buildings while in process of building, and to discharge any contractor or architect, or both, and that said provisions were in writing duly ratified and consented to by the common council of the said city of South Bend, Ind. That said board of trustees had called for and received bids for said work from competent contractors, and that the bid of Edward Slattery & Son was found to be the lowest received for said work. The fourth paragraph of complaint alleges substantially the same as the first paragraph, and in addition alleges, with more particularity, the entering into the contract, the erection and construction of the building, setting out the facts showing the necessity for the changes and alterations deemed necessary; that the building was still uncompleted; that all of such changes and alterations were requisite and essential to the proper and safe completion of said building.

There is no averment in complaint that the contract with Christman had been canceled or nullified in any way at the time of the contract with appellant. It will therefore be presumed that, while the contract was in force and effect with Christman, with the right and authority in the board to authorize any changes which they might see fit in the construction of the building, to be made by him, the board on the 7th day of May, 1904, entered into a contract with Edward Slattery & Son "to shore the said walls and replace the foundation walls and footings and place two new steel columns to carry trusses" in said building for the sum of \$14,400,

without attempting to have any of said changes made by said Christman under the terms of his contract, and without obtaining the permission of the common council to enter into said contract. Section 6497, Burns' Ann. St. 1908, § 7 (Acts 1903, p. 418, c. 225), provides: "Such board of school trustees in any such school city may, with the consent of the common council of such city, purchase such land as it may deem necessary for school purposes, and with the consent of the common council of such, may erect thereon such building or buildings as it may deem necessary for the adequate use of such school city, including common schools, high school, grammar school and manual training school buildings." The statute makes the consent of the common council a condition precedent before entering into any contract for the erection of a building. The contract entered into by appellant was an entirely independent and separate contract from that under which the building was being constructed and to which the council had given its consent. It involved more than a mere change in the plan of the building originally contracted for. It is not a mere provision for extra work in the way of minor details by the contractor, but a new contract for the construction of an important part of the building, and by a contractor who had no interest in the original contract for construction. The purpose of the statute is to give the common council knowledge of any contract for the expenditure of public funds. Its object is to secure careful scrutiny, for the purpose of avoiding extravagant, if not fraudulent, contracts affecting the public interest. It is significant that for a breach of a contract stipulating for the payment of \$14,400 to the contractor for the work, appellant claims damages in the amount of \$12,000. It is beside the question that the trustees of the school city are the exclusive judges of the necessity of building. Persons contracting with school trustees must recognize the fact that their powers are limited by law. Other defects are pointed out, but for the failure to obtain the consent of the common council to enter into the contract in suit, if for no other reason, the demurrer to each paragraph of complaint was correctly sustained. As pertinent to the question here involved we cite: Burns' Ann. St. 1908, § 6497; Oppenheimer v. Greencastle School Township, 164 Ind. 99, 72 N. E. 1100; Lincoln School Tp. v. American School Furniture Co., 31 Ind. App. 413, 68 N. E. 301; Peck-Williamson, etc., Co. v. Steen School Tp., 30 Ind. App. 637, 66 N. E. 909; Honey Creek Tp. v. Barnes, 119 Ind. 214, 21 N. E. 747; Bloomington Tp. v. National Co., 107 Ind. 43, 7 N. E. 760; State v. Board, 147 Ind. 235, 46 N. E. 525; Am. & Eng. Ency. of Law (2d Ed.) vol. 20, p. 1162; Smith, Munic-

ipal Corp. vol. 1, pp. 711, 729, § 739; Advisory Board of Coal Creek, etc. v. Levandowski (Ind. App.) 84 N. E. 348.

Judgment affirmed.

(43 Ind. A. 16)

NATIONAL SURETY CO. et al. v. MAAG et al. (No. 6,320.)

(Appellate Court of Indiana, Division No. 2. Jan. 6, 1909.)

1. MUNICIPAL CORPORATIONS (§ 376\*)—PUBLIC IMPROVEMENTS—CONTRACTS—LIENS—ASSIGNMENT.

Where a materialman furnishes materials to a contractor making public improvements, and the contractor thereafter abandons the work, and makes an assignment of the assessment roll and of all his rights thereunder to money and bonds to be derived from and accruing on account of the assessments to be levied as security for advancements made by the assignee who completed the work, the materialman cannot hold the assignee liable for the materials furnished, since the assignment of the money to become due under the contract was not an assignment of the contract.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 376.\*]

2. ASSIGNMENTS (§ 73\*) — MONEY DUE ON CONTRACT—EFFECT.

An assignment of moneys due or to become due under a contract is not an assignment of the contract.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 142; Dec. Dig. § 73.\*]

Appeal from Superior Court, Marion County; James M. Leathers, Judge.

Action by Henry Maag and others against the National Surety Company and others for materials furnished for public improvements. From the judgment rendered, defendants appeal. Affirmed.

Chambers, Pickens, Moores & Davidson, for appellants. Hawkins, Smith & Hawkins, Weaver & Young, and Morgan & Morgan, for appellees.

ROBY, J. This action, for an amount claimed to be due on account of material and labor furnished, was brought by appellee Maag against George Kessler and the National Surety Company on certain contracts and bonds executed by Kessler as principal and the surety company as surety in favor of the city of Indianapolis, by which Kessler undertook to make certain street improvements. John and William Wocher, composing the firm John Wocher & Bro., the Consolidated Coal & Lime Company, George Shelby, and Ashman & Ashman, each of whom claimed that certain amounts were due them on contracts with Kessler and for labor and material furnished by them, were made defendants, and each filed a general denial to the complaint and also a cross-complaint. Issue was joined to the complaint and the several cross-complaints by answers in general denial. The cause was tried by the court, which made a special finding of facts

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and stated conclusions of law thereon, to each of which appellants excepted.

The findings show: That on July 27, 1903, the defendant Kessler entered into a written contract with the city of Indianapolis to improve parts of two streets therein. Kessler executed bonds to the city in the sum of \$3,800, conditioned that he should faithfully perform his contracts with the National Surety Company as surety. That Kessler began the said improvements, but later abandoned the contracts, and in February, 1904, became a bankrupt. That on August 28, 1903, during the prosecution of the work, Kessler, in order to procure funds to pay for the labor employed upon said work, entered into contracts in writing with John Wocher & Bro. whereby he made assignments of the assessment rolls and all his rights thereunder to the money and Barrett law bonds accruing on account of the assessments to be levied on real estate abutting upon the line of said improvement. That under the contracts of assignment John Wocher & Bro. advanced Kessler the sum of \$7,000, \$5,500 of which Kessler expended in the payment of labor in the construction of the improvements. That, after Kessler abandoned the improvement of the streets, John Wocher & Bro. completed the improvement at a cost of \$2,637, which was expended for necessary labor and materials. That upon such completion John Wocher & Bro. received in bonds and cash from the city \$6,725.88, being the full amount realized from said assessments, less the amount retained by the city for the repairs of the streets. Appellants base their argument upon the assumption that the contract of Kessler was assigned to John Wocher & Bro. Had the contracts been assigned to John Wocher & Bro., they would be bound in the same manner that Kessler was bound under the contracts to complete the streets and pay the bills. But such is not the case presented. All that Wocher & Bro. had from Kessler was "assignments of the assessment rolls and all his rights thereunder to moneys and Barrett law bonds to be derived from and accruing on account of the assessments to be levied \* \* \* as security for the advancement by said John Wocher & Bro. of such sums as were required by Kessler for weekly pay rolls and to pay for the labor in the construction of said improvements." An assignment of moneys due or to become due is not an assignment of the contract. *Dickson v. City*, 97 Minn. 258, 260, 106 N. W. 1053; *Chapin v. Pike*, 184 Mass. 184, 186, 68 N. E. 42; *Segee v. Downes*, 143 Mass. 240, 241, 9 N. E. 565. Unless the work was completed, the city would not accept the streets, and no assessment rolls would be issued upon the streets against the abutting property holders. The surety company had the right to complete the work if it saw fit, but it did not do so, and the streets lay for

several months until John Wocher & Bro., to protect themselves for the money advanced by them to Kessler under their contracts of assignment, completed the improvements so that an assessment could be levied.

The trial court in its fifth conclusion of law stated "that the defendants John Wocher & Bro. have and are entitled to a first and paramount lien upon and interest in said equitable fund for the payment of moneys advanced by said John Wocher & Bro. and expended by them in constructing and completing the work upon said streets, amounting in the aggregate to the sum of \$8,137." The plaintiff and other defendants were given judgment for their labor and material claims against defendants George Kessler and the National Surety Company, and John Wocher & Bro. were given judgment against George Kessler for "the balance due upon the indebtedness of said defendant Kessler to the defendants John Wocher & Bro. by reason of the insufficiency of said equitable fund to pay in full said indebtedness."

Judgment affirmed.

(43 Ind. A. 57)

**RALEY v. EVANSVILLE GAS & ELECTRIC LIGHT CO. (No. 6,891.)**

(Appellate Court of Indiana, Division No. 2.  
Jan. 7, 1909.)

**APPEAL AND ERROR (§ 797\*)—DISMISSAL—MOTION—TIME FOR MAKING.**

A motion to dismiss an appeal because questions arising on the pleadings are not properly presented in the briefs, as required by Supreme Court Rule 22, par. 5 (55 N. E. vi), must be made at the earliest opportunity, and the objection is waived by filing a brief on the merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3151; Dec. Dig. § 797.\*]

Appeal from Circuit Court, Gibson County; O. M. Welborn, Judge.

Action by the Evansville Gas & Electric Light Company against Jefferson C. Raley. From a judgment for plaintiff, defendant appeals. Motion to dismiss overruled.

Logsdon & Veneman, for appellant. Elmer E. Stevenson and Elam & Fesler, for appellee.

RABB, J. On December 12, 1907, judgment was rendered in the court below in this case. The appeal was perfected by filing the transcript in this court on May 13, 1908. Appellant's brief on the merits was filed on May 16, 1908, and the cause submitted June 12, 1908. On September 10, 1908, appellee filed its answer brief upon the merits. On December 18, 1908, after the year within which appellant might have perfected his appeal had expired, appellee filed its motion to dismiss the appeal for the reason that appellant's brief fails to comply with paragraph 5 of rule 22 of this court (55 N. E. vi), in that it does not set out the substance of the complaint or answer, or the demurrers to the answer which present

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the questions that are sought to be presented by the appeal.

Motions to dismiss an appeal upon this ground must be presented at the earliest opportunity, and are waived by filing a brief upon the merits. It is a matter within the discretion of this court whether it will consider questions that are not properly presented in the briefs of counsel in the case, as required by the rules of the court; but the right of the appellee to demand a dismissal is waived by failing to seasonably present it.

Motion to dismiss appeal overruled.

(43 Ind. A. 293)

**ROZELL v. CRANFILL.** (No. 6,426.)<sup>1</sup>  
(Appellate Court of Indiana, Division No. 2.  
Jan. 6, 1909.)

**1. ESTATES (§ 6\*)—NATURE—BASE FEE.**

The laws of descent in Indiana do not recognize such an estate as a base fee.

[Ed. Note.—For other cases, see Estates, Cent. Dig. § 6; Dec. Dig. § 6.\*]

**2. DESCENT AND DISTRIBUTION (§ 57\*)—ESTATE PASSING—CHILDLESS SECOND WIFE—STATUTES.**

Under the statute of descents, one-third of a deceased husband's real estate descends to his widow in fee, though a childless second or subsequent wife cannot alienate such interest; it passing to his children by a former marriage on her death.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 145; Dec. Dig. § 57.\*]

On petition for rehearing. Petition overruled.

For former opinion, see 85 N. E. 792.

**RABB, J.** Appellee earnestly insists in his petition for a rehearing that in the decision of this case the court misconceived the nature of the issues in the partition proceedings in which the appellee's grantor's interest on her deceased husband's lands was set off to her in severalty, and the legal effect of the judgment therein. The complaint in that proceeding filed by the widow set forth as the source of her title and foundation of her right to partition the fact that Barzilla Rozell died intestate, the owner of the premises, and left the plaintiff, his widow, and the appellants here, his children, as his sole heirs at law, and that she was the owner of one-third of the premises in fee simple, and her children the owners of the two-thirds thereof, and the sole relief asked was that her interest be set off to her in severalty. Other parties were joined, and the facts with reference to the claim of title set forth in the complaint showed that they had an interest in the land described in the complaint, but no relief of any kind was asked against them. They set up a cross-complaint, averring substantially the same facts appearing in the complaint, and asked for partition, and that their interest be set off in severalty; but neither the

complaint nor cross-complaint stated facts which entitled any party to the action to a judgment quieting title, and no such judgment was rendered.

And not only does the express terms of the statute declare that "If a husband die testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee simple," but it has repeatedly been held, and never denied, that, under the original section 24 of the statute of descents, a childless second or subsequent wife whose husband's children or their descendants survive took a fee-simple interest in her husband's real estate, although she was powerless to sell the estate, and the husband's children took the same by descent from her at her death. *Thorp v. Hanes*, 107 Ind. 324, 6 N. E. 920; *Utterback v. Terhune*, 75 Ind. 363; *Hendrix v. McBeth*, 87 Ind. 287; *Flenner v. Benson*, 89 Ind. 108; *Montgomery v. McCumber*, 128 Ind. 374, 27 N. E. 1114; *Habig v. Dodge*, 127 Ind. 31, 25 N. E. 182; *Reagan v. Sheets*, 130 Ind. 185, 29 N. E. 1065; *Rushton v. Harvey*, 144 Ind. 382, 43 N. E. 300; *Helt v. Helt*, 152 Ind. 142, 52 N. E. 699; *Byrum v. Henderson*, 151 Ind. 102, 51 N. E. 94; *Johnson, Trustee, v. Johnson*, 153 Ind. 60, 54 N. E. 124; *Griffis v. First National Bank* (Ind. App.) 79 N. E. 236; *Garrison v. Day*, 36 Ind. App. 543, 76 N. E. 188. The identical question presented by the record in this case was decided adverse to the contention of appellees in the case of *Thorp v. Hanes*, supra.

We are referred to an obiter expression in the opinion of the court in the case of *McAdams v. Bailey*, reported in 169 Ind. 518, 82 N. E. 1057, 13 L. R. A. (N. S.) 1003, to the effect that the estate of the widow under such circumstances was in the nature of a base or terminable fee. Our law of descents recognizes no such thing as a base fee, and the court did not mean to be understood as holding that a widow did not take an estate in fee simple in the lands of her deceased husband.

Petition for rehearing overruled.

(43 Ind. A. 26)

**BAKER et al. v. BAKER.** (No. 7,050.)  
(Appellate Court of Indiana, Division No. 1.  
Jan. 6, 1909.)

**1. EVIDENCE (§ 271\*)—SELF-SERVING DECLARATIONS—RES GESTÆ.**

In an action by an administratrix to recover securities representing loans of decedent, which his sister took possession of under claim of ownership, evidence that at a time not stated, and in the absence of the parties interested, witness had a conversation with decedent, in which decedent stated that he had made numerous loans, and that the loans were made in his sister's name to escape taxation, was inadmissible, because self-serving declarations by decedent, and because the declarations were not explaining or qualifying any act which was in itself admissible in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1094, 1095; Dec. Dig. § 271.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup> Transfer denied.

## 2. EVIDENCE (§ 121\*)—DECLARATIONS—EXPLAINING RES GESTÆ.

In such action evidence that at the time decedent was making a loan decedent stated that the money was his, and that he loaned it in his sister's name to escape taxation, was admissible, since the act itself, which the declaration explained, was admissible in evidence.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 121.\*]

## 3. EXECUTORS AND ADMINISTRATORS (§ 450\*)—ACTIONS—RECOVERY OF SECURITIES—EVIDENCE.

In an action by an administratrix to recover securities representing loans of decedent, a bank cashier, which his sister took possession of under claim of ownership, evidence that decedent wanted to buy a controlling interest in the bank, but that the sale was never consummated, and that at the time decedent was appointed cashier witness made an investigation of decedent's financial standing, and became satisfied from such investigation that decedent was worth from \$7,000 to \$8,000, is inadmissible.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 450.\*]

## 4. APPEAL AND ERROR (§ 1169\*)—DETERMINATION OF CAUSE—REVERSAL—ERRONEOUS EVIDENCE.

A cause will be reversed on appeal where in a trial by the court erroneous evidence is repeatedly introduced over the objection of appellant, and it is not at all clear that the judgment pronounced is right.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1169.\*]

Appeal from Circuit Court, Starke County; J. C. Nye, Judge.

Action by Viola Baker, administratrix, etc., against Louisa Baker and others. From a judgment for plaintiff, defendants appeal. Reversed, with instructions to grant a new trial.

M. M. Hathaway, M. Winfield, and Bee-man & Foster for appellants. W. C. Pentecost, Oscar B. Smith, and Henry A. Steis, for appellee.

**HADLEY, J.** This was an action brought by appellee Baker against appellants to recover some notes, mortgages, bank stock, and other personal property which, it is averred, belonged to the estate of said appellee's decedent, Julius E. Baker, and that appellant Louisa Baker had intermeddled with the estate and unlawfully obtained possession of said property, and refused to deliver up the possession or account for the same, although demand therefor had been made.

It is shown by the uncontradicted evidence that decedent was a son of appellant Louisa Baker, and brother of appellants Tracy G. Miles and Cleo Humphrey; that he was cashier of the Bank of Starke County at Hamlet; that he made numerous loans to divers persons in the names of appellants Tracy G. Miles and Cleo Humphrey; that he kept notes and mortgages representing a part, if not all, of these loans in a drawer in the safe of the bank. The evidence is undisputed that this drawer had two keys—

one kept by decedent, the other by appellant Louisa Baker. The keys to this drawer were each numbered "1." The drawer had no number on it. A few days before the death of decedent, and while he was confined to his bed, appellant went to the bank and took the securities in controversy from the drawer, stating, in effect, that decedent had authorized her to do so. There is no evidence that she was not so authorized. It was the theory of the administratrix that decedent used his own money in making these loans and investments, taking them in the names of his sisters to avoid taxation, while on the part of appellant Louisa Baker it was claimed it was her money he was using, handling it as his own, and that the securities representing these loans were her property.

On the trial a Mr. Corbit was called as a witness, and was permitted to testify over the objections of the appellant that at a time not stated, and in the absence of all the appellants, he had had a conversation with decedent in which decedent stated that he had made numerous farm loans in Starke county; that the most of the loans were in his sisters' names; that he gave as a reason for this that he did not want to pay any more tax than other money lenders were paying. This testimony was incompetent. It is a general rule of law that self-serving declarations made in the absence of the adverse party are inadmissible in evidence (*Brown, Adm'r, v. Kenyon*, 108 Ind. 233, 9 N. E. 283; *Bristol v. Bristol*, 82 Ind. 276); the exception to this rule being that, when such declarations accompany and are connected with some act which of itself is admissible as tending to prove some question in issue, they may be given as qualifying or explaining such act as a part of the *res gestæ* (*Creighton v. Hoppis et al.*, 99 Ind. 369; *Boone County Bank v. Wallace*, 18 Ind. 82; *McConnell v. Hannah, Adm'r*, 96 Ind. 102; *Durham v. Shannon*, 116 Ind. 408, 19 N. E. 190, 9 Am. St. Rep. 860; *Burr v. Smith*, 152 Ind. 469, 53 N. E. 469; *Remy v. Lilly*, 22 Ind. App. 109, 53 N. E. 387). The rule and exception and principle governing the same are clearly stated in *Creighton v. Hoppis et al.*, *supra*, where the court say: "It is the general rule that, where an act is competent, so also are the declarations accompanying the act. It was said by Prof. Greenleaf: 'But no reason is perceived why every declaration accompanying the act of possession, whether in disparagement of the claimant's title, or otherwise qualifying his possession, if made in good faith, should not be received as part of the *res gestæ*.' \* \* \* The rule of law is that where it is necessary, in the course of a cause, to inquire into the nature of a particular act, and the intention of the person who did the act, proof of what the person said at the time of doing it is ad-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

missible in evidence for the purpose of showing its true character.' \* \* \* In the cases cited by the appellant the evidence consisted of naked declarations unaccompanied by any act, and in such cases a very different rule obtains. We do not hold, nor mean to hold, that declarations unaccompanied by an act are admissible; on the contrary, we understand the rule to be against their admissibility. Nor do we hold that declarations accompanying an act are competent, where the act itself cannot be proved, but we do hold that, where the act is competent, so also are the declarations made at the time it was performed. Even in such cases, it is only declarations explanatory of the act and immediately connected with it that are admissible. Narratives of a past transaction, although given at the time an act is done, are not competent. In order that the declarations may be competent, it must appear that they relate to the thing then done, and that they have a direct connection with it." Measured by this standard, it can be readily seen that the evidence should have been excluded. It was a broad general statement unconnected with any act itself admissible. It could not have been a part of the *res gestæ*, since there was no *res gestæ*. It might have been an idle boast or a part of his scheme of "four-flushing with his mother's money," as was testified he said he was doing, or a plan to build up a title in himself. These suggestions illustrate the dangers of such testimony.

It is urged on behalf of appellee that at this time decedent was in possession of the securities in controversy, and that it was this act of possession of which the conversation formed a part of the *res gestæ*. But, in the first place, it is not shown that decedent at that time was in possession of this property. There was not a word said about his possession or in explanation thereof. The name of no debtor was mentioned. If the conversation tended to prove anything, it was to prove his general custom of making loans. The rules of this class of evidence are well established, and should not be extended. Such declarations to be admissible must be something more than mere general or random statements. They must not only be connected with some act, but the act itself must be something in relation to the property in controversy. For example, a witness was asked what decedent said at the time he was making a loan, as to why the loan was made in the name of his sister. If the loan inquired about had been one of the debts in controversy, the evidence would have been admissible; but it was not, and therefore was not admissible. What was said about a transaction not connected with the matter in controversy would have no probative force. The transaction itself could

not be proven. Therefore conversation relating thereto could not.

Other witnesses were permitted to testify to substantially the same conversations and similar conditions, and for the same reasons such testimony was inadmissible. A Mr. Stanton was permitted to testify that, at a time not stated, the money that he had loaned to one Joe Ballinger at a time previous to the conversation was his own money, and not the bank's, and the bank had nothing to do with it. This was a narrative of a past occurrence, unconnected with any act. The Joe Ballinger loan was not one of the securities in controversy, and the evidence was inadmissible.

Objection is made to the testimony of witness Jolly, who testified that at a time when decedent was making a loan to one Carlson, one of the notes in controversy, he said that the money was his money, but that he was putting it in the name of his sister to avoid taxation. This declaration was made in connection with an act itself admissible, and therefore formed a part of the *res gestæ*, and under the rule above laid down was admissible. It is a good illustration of the distinction sought to be made in this opinion. The same witness was, however, permitted to testify to a number of general statements disconnected from any act, and under the above rule such statements would be admissible. Witness McCormich was permitted to testify that decedent wanted to buy a controlling interest in the bank, and said he wanted to pay part in cash and part in mortgage loans, which sale was never consummated; and also at the time that decedent was appointed cashier of the bank he made an investigation of decedent's financial standing, and, as a result of such investigation, witness became satisfied that decedent was conservatively worth seven or eight thousand dollars. We can conceive of no possible theory under which such testimony would be admissible, and appellee has not favored us with any reason justifying it.

Appellee insists that, since the cause was tried by the court and the judgment is clearly right, the cause should not be reversed, even though erroneous evidence was admitted. But the court permitted the erroneous evidence to be introduced over the continued objections of appellant. Having ruled it was competent, he must be presumed to have considered it in arriving at a decision. The erroneous testimony was not a single isolated case, but occurred many times. It is not at all clear that the judgment is right. In some instances it is clearly not right.

Numerous other questions are presented, but they may not arise on another trial, and are therefore not considered.

Judgment reversed, with instructions to grant a new trial.

(43 Ind. A. 43)

## NESBITT v. NESBITT. (No. 6,265.)

(Appellate Court of Indiana, Division No. 1.  
Jan. 7, 1909.)

## 1. TRIAL (§ 295\*)—INSTRUCTIONS AS TO BURDEN OF PROOF.

Defendant having answered by three special defenses to which plaintiff replied by general denial, the court instructed that this placed on "defendant the burden of proving all the material averments contained in them by a preponderance of evidence as stated in these instructions." The court then in other instructions considered the averments in each paragraph of the answer, and instructed the jury as to the necessary proof as to each in order to justify a recovery thereunder. *Held*, that the instructions considered as a whole did not convey the meaning that it was necessary for defendant to prove the material averments in all three of the affirmative paragraphs of the answer.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 710, 711; Dec. Dig. § 295.\*]

## 2. APPEAL AND ERROR (§ 1078\*)—REVIEW—FAILURE TO URGE OBJECTION.

Where appellant fails on review to urge objections to instructions, the objections will be disregarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4259; Dec. Dig. § 1078.\*]

## 3. BILLS AND NOTES (§ 534\*)—JUDGMENT—ATTORNEY'S FEES AND COLLECTION CHARGES.

In an action on a note, it is error to include in the judgment items for attorney's fees and expense of collection.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1946, 1947; Dec. Dig. § 534.\*]

## 4. APPEAL AND ERROR (§ 1140\*)—AFFIRMANCE ON REMISSION OF PART OF RECOVERY.

Where there is no error in the judgment except that it includes items for attorney's fees and collection charges, to which plaintiff is not entitled, the order will be an affirmance on remission of such items.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4468; Dec. Dig. § 1140.\*]

Appeal from Superior Court, Howard County; B. F. Harness, Judge.

Action by Serena E. Nesbitt against William A. Nesbitt. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

Kirkpatrick & Morrison, for appellant. St. John, Charles & Gemmill and Blackledge, Shirley & Wolf, for appellee.

WATSON, C. J. This was an action by appellee to recover on a promissory note executed by appellant, in the sum of \$496.72, to John S. Nesbitt on January 27, 1904, payable one day after date at the Farmers' Banking Company, of Swayzee, Ind., and indorsed to appellee by said payee under the name of J. S. Nesbitt. It appears from the complaint and note that \$200 was paid on said note to John S. Nesbitt on February 22, 1904. Judgment was demanded, including attorney's fees, in the sum of \$375. On motion of appellant, the venue of the cause was changed from the Grant superior to the Howard superior court.

Appellant answered in four paragraphs: (1) General denial; (2) alleging, in substance,

that the note was not delivered or transferred to appellee until after its maturity, and that it was fully paid to John S. Nesbitt, the payee, by appellant before appellant had notice that it had been assigned or delivered to appellee, and before this action was begun; (3) in substance, denying that appellee was the owner or entitled to the proceeds of said note for the reason that it was the property of John S. Nesbitt, "that said note, prior to its maturity, was indorsed by said John Nesbitt and placed as collateral security with a bank in the town of Swayzee, Ind., and that the same was afterwards taken up by the said John Nesbitt and kept in his file of notes at his home in a note book, and that after the maturity of said note the said plaintiff, without the knowledge or consent of said John Nesbitt, took the same from the said note book into her possession, and kept the same and pretended to hold it as collateral security for a note executed by said John Nesbitt to her, that she so took said note without any right, consent, or direction of said John Nesbitt, and that the said John Nesbitt has been at all times up to the time of the payment of said note the owner thereof, and that said note was fully paid to said John Nesbitt by the defendant before said defendant knew that said plaintiff held said note or claimed any interest therein;" (4) denying the delivery, transfer, or assignment of said note to appellee for collateral security or any other purpose, and denying that she had any interest in said note. The fourth paragraph of answer was verified by appellant. Appellee replied to the answer by general denial. The cause, being thus at issue, was submitted to a jury, a verdict being returned for appellee in the sum of \$437.38. Itemized as follows: (1) Balance on note, \$299.58; (2) interest on note, \$43.50; (3) attorney's fees, \$60; (4) collections \$34.30—total \$437.38. Judgment was rendered on the verdict for said amount. Appellant's motion for new trial was overruled, and the overruling of such motion is the only assignment of error presented in this court.

One of the reasons assigned for new trial is that the court erred in giving instruction No. 2½, which was as follows: "The plaintiff has replied to the answer by a general denial which puts upon defendant the burden of proving all the material averments contained in them by a preponderance of the evidence as stated in these instructions." Appellant contends that it is clear that the jury must have understood therefrom that it was necessary for him to prove the material averments in all three of the affirmative paragraphs of answer in order to recover. The instruction was that appellant must prove the material averments of said paragraph of answer "as stated in these instructions." The court then considered the material averments of each paragraph in other instructions, and so instructed the jury in reference to the nec-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

essary proof in each in order to justify a recovery thereunder. When thus considered as a whole, the language objected to does not convey the meaning contended for by appellant.

The seventh instruction given by the court at appellee's request was as follows: "There is a fourth paragraph of answer which avers that the note in suit was never delivered, transferred, or assigned to the plaintiff as for collateral security or for any other purpose and that she had no interest in the note. The truth of this paragraph of the answer is sworn to by the defendant. This paragraph does not deny the execution of the note by the defendant, but only that it was delivered, transferred, or assigned to her. This makes it necessary for the plaintiff to prove by a preponderance of the evidence that the note was delivered, assigned, or transferred to her. Therefore, if you find from the evidence by a preponderance thereof that the note was delivered to her or assigned or transferred to her as a collateral security or other purpose, your verdict should be for the plaintiff for such sum as may be due on the note in suit, together with attorney's fees in whatever sum you may believe from the evidence has been proven in the case." This instruction is objected to for the reason that it disregards the second and third paragraphs of answer. It is a familiar and well-settled rule of law that instructions shall be considered as a whole, and if the instructions, when so considered, state the law of the case correctly, error in a single instruction or clause of an instruction will not be ground for reversal. *Cleveland, etc., R. Co. v. Penketh*, 27 Ind. App. 210, 217, 60 N. E. 1095; *Indiana Gas Co. v. Anthony*, 28 Ind. App. 307, 58 N. E. 868; *Bowman v. Bowman*, 153 Ind. 498, 55 N. E. 422. The jury was told that "the verdict should be for the plaintiff for such sum as may (be) due on the note in suit, together with attorney's fees in whatever sum you may believe from the evidence has been proven in the case." The jury was correctly instructed as to the material averments necessary to be proved under each of the second and third paragraphs of answer. No objection is urged thereto in this court. It must be assumed, therefore, that he was content with the same.

Appellant relies upon the case of *Chicago, etc., R. Co. v. Glover*, 154 Ind. 584, 57 N. E. 244; but that case is distinguishable from the case at bar. In the instruction there objected to the fact of knowledge by the decedent of the defect occasioning his death was entirely ignored. In the present case the jury was told to return a verdict for the plaintiff if it found the note had been assigned or transferred to her in such sum as was shown to be due by the evidence in the case; thus leaving to the jury the question of fact as to the amount lawfully due on said notes to be determined by the evidence under the other

instructions. When thus considered as a whole, it does not appear that the jury was misled or erroneously instructed to justify a reversal of this cause. One of the reasons assigned for a new trial was: "The assessment of the amount of recovery is erroneous, being too large." The jury for some reason itemized the verdict, which shows that appellee has recovered for and on behalf of her attorneys two items, to wit: Item 3, attorney's fees, \$60, and item 4, collections, \$34.30. We do not believe in equity and good conscience this should be permitted to stand, and especially when we consider evidence in this case as to attorney's fees.

Therefore, if the appellee will file her remittitur for \$34.30 with the clerk of the Howard superior court, and cause the same to be certified to the clerk of this court within 30 days, the judgment will be affirmed, and, if not so remitted and certified to this court, the judgment will be reversed, with instructions to the trial court to sustain the appellant's motion for new trial.

(43 Ind. A. 19)

CLEVELAND, C. C. & ST. L. RY. CO. v.  
CYR. (No. 6,307.)

(Appellate Court of Indiana. Jan. 6, 1909.)

1. APPEAL AND ERROR (§ 1078\*)—REVIEW—  
WAIVER OF ERROR ASSIGNED.

An assignment of error not discussed is deemed waived.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

2. PLEADING (§ 34\*)—SPECIFIC ALLEGATIONS  
CONTROLLING GENERAL ALLEGATIONS.

Where specific allegations of fact contradict the general allegations, the specific allegations control.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 68; Dec. Dig. § 34.\*]

3. RAILROADS (§ 439\*)—ACCIDENTS AT CROSS-  
INGS—COMPLAINT—SUFFICIENCY.

Specific allegations of a complaint for damage to a horse and buggy in a railroad crossing accident held not necessarily inconsistent with the general allegation of freedom from contributory negligence.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 439.\*]

4. RAILROADS (§ 446\*)—ACCIDENTS AT CROSS-  
INGS—QUESTIONS FOR JURY.

Where plaintiff, whose horse and buggy were damaged in a railroad crossing accident, checked his horse as he approached the crossing, and looked and listened for a train, and continued to look and listen until he had driven upon the right of way, when, as soon as he was past an embankment, he saw a train, and his horse became frightened and unmanageable, and he was unable to stop it before it reached the track, and the statutory signals required on approaching a crossing had not been given for the crossing or one above it, whether plaintiff's conduct was that of a reasonably prudent person under the circumstances was for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1639; Dec. Dig. § 446.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**5. RAILROADS (§ 421\*)—ACCIDENTS AT CROSSINGS — DUTY OF DRIVER APPROACHING TRACK.**

It is the duty of a driver approaching railroad tracks to use caution commensurate with the known danger and conditions, not the utmost caution.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1508; Dec. Dig. § 421.\*]

**6. RAILROADS (§ 446\*)—ACCIDENTS AT CROSSINGS — DUTY OF DRIVER APPROACHING TRACK.**

A failure to look or listen at any point where the approach of a train could have been seen or heard does not necessarily preclude a recovery for damage to a horse and buggy sustained in a collision with it, but it is for the jury whether due care required the driver to look and listen at a particular place.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1639; Dec. Dig. § 446.\*]

**7. RAILROADS (§ 443\*)—ACCIDENTS AT CROSSINGS—EVIDENCE.**

Evidence in an action for damage to plaintiff's horse and buggy sustained in a railroad crossing accident held to support a verdict for plaintiff.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 443.\*]

Appeal from Circuit Court, Benton County; Joseph M. Rabb, Judge.

Action by Zephir Cyr against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. M. Snyder, for appellant. Benton B. Berry, for appellee.

COMSTOCK, P. J. Appellee, Cyr, sued the appellant to recover damages to appellee's horse and buggy occasioned by appellant's train striking the horse and buggy on a public highway crossing in Benton county, Ind. A demurrer for want of facts was overruled; the cause put at issue by general denial, and a trial had, resulting in a verdict and judgment for appellee for \$188. The jury returned with their verdict answers to interrogatories. Appellant's motion for judgment on the answers to the interrogatories and for a new trial were overruled.

Of the specifications of error assigned, appellant discusses the first, second, and sixth. The others are deemed waived.

Said first and second specifications challenge the sufficiency of the complaint. Against the sufficiency of the complaint, it is urged that, although it alleges that appellee was free from fault contributing to the accident, the specific facts alleged show that he was guilty of contributory negligence. When the specific allegations of facts contradict the general allegations of facts, the specific allegations control. Conceding the legal proposition, we can determine whether appellant's claim is well taken without setting out the entire complaint, but only the parts pertinent to this question. The complaint shows that on the day of the accident the plaintiff was driving said horse and rid-

ing toward appellant's railway track, which crossed said public highway, extending southeast and northwest, making an acute angle with said highway on the north side of said railway; that, as plaintiff approached said crossing, he checked his said horse and carefully looked in both directions along said track and listened for the approach of a train, and continued to look and listen for any train until he drove upon the said defendant's right of way; that when he drove upon the right of way at a point where his horse's head was within a few feet of the track, and as soon as he was past an embankment which prevented him from seeing a train coming from the northwest, he looked and saw a passenger train within 75 or 100 feet of the crossing, rapidly approaching from the northwest; that at said point where plaintiff saw the said train, and was aware of it for the first time, his horse, which was reasonably gentle, became frightened and unmanageable on account of the near approach of the said train, the rapidity of its approach, and by the locomotive whistle which was carelessly and negligently sounded by those in charge of said locomotive, and within 70 feet of said crossing and which was so sounded after plaintiff had discovered the approach of the train; that as a consequence thereof plaintiff was unable and did not stop his horse before it reached the said railway track, although he endeavored to his utmost so to do; that the defendant in approaching said crossing, and when not less than 80 nor more than 100 rods from said crossing, negligently and carelessly failed and omitted to sound the whistle on said locomotive engine three times, and carelessly, negligently, and unlawfully omitted to ring the bell attached to said engine continuously for not less than 80 rods nor more than 100 rods from said crossing until said engine had fully passed said crossing; that the defendant, through its servants operating said train unlawfully failed and neglected to so sound the whistle of said engine and ring the bell attached to the same for another public crossing 80 rods to the northwest of the crossing where plaintiff was traveling; that, although plaintiff diligently looked for a train before passing on to the said right of way, he did not see and was unable to see the approach of said train by reason of an embankment, bushes, trees, and other obstructions between said highway over which plaintiff was traveling and the said railway track on the north side thereof; that plaintiff diligently listened for the approach of a train, and did not know of its approach until he was on the right of way, for the reason that the said defendant had negligently and carelessly failed to give the statutory signals of an approaching train, as hereinbefore set forth, and that he did not hear the noise made by the train running for the reason

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that wind was blowing from the southeast, the train was running downgrade, and a damp snow had fallen on the ground and track; that the plaintiff when on the right of way, when he saw the train approaching, did not have sufficient time to cross the track, but endeavored to his utmost to stop his horse before reaching the railway track, but was unable to do so on account of the fright of the horse, caused by the negligence and carelessness of the defendant, as aforesaid, and was unable by the exercise of reasonable care and prudence to avoid said injuries. None of the specific allegations are necessarily inconsistent with the general averment of freedom from fault. Whether the plaintiff's conduct at the time of the accident was that of a reasonably prudent person under the circumstances was a question of fact for the jury. *Greenawaldt v. Lake Shore, etc., R. Co.*, 165 Ind. 219, 223, 74 N. E. 1081. The demurrer was correctly overruled.

The other questions properly arise on the motion for a new trial. An exception was taken by appellant to the refusal of the court to give instructions Nos. 6, 7, 8, 11, and 23. Instructions 2, 6, and 8 were covered by 1, 2, 4, 7, and 25 given. Instruction 7, refused, would have told the jury that it was the plaintiff's duty as he approached the railway tracks to use his faculties to his utmost ability and in proportion to the danger impending to ascertain if the railway train was coming. It was properly refused. It was the duty of appellee to use caution commensurate with the danger and conditions, not the utmost caution. In an instruction given the court so charged. Instruction 8, refused, was as follows: "If you find from the evidence that the crossing where the accident happened was peculiarly dangerous, then I instruct you that the plaintiff was required to use extraordinary precaution to avoid danger, and, failing so to do, your verdict must be for the defendant." The rule is that caution commensurate with the known danger must be exercised. The rule was clearly stated in other instructions given. Instruction 11, refused, in part, stated the law. The remainder of said instruction, and 23, also refused, said that if the plaintiff by looking or listening at any point could have seen or heard the approach of the train, and he failed to do either, than the verdict should have been for the defendant. These instructions were correctly refused; for it is a question of fact for the jury to determine whether under the evidence care and prudence requires a person approaching a crossing to look and listen at a particular place. It might or might not be negligence for a traveler to fail to look or listen at

some designated place, depending upon the circumstances and knowledge and all the conditions shown. Instruction 24 is covered by instruction 25 given at the request of appellant.

The remaining propositions discussed are that the judgment is not fairly supported by the evidence, and is clearly against the weight of the evidence. Upon some of the facts the evidence is conflicting. There is evidence that the statutory signals were not given. Plaintiff lived 100 rods north of the place where the accident occurred. A hedge, a grove of bushes, trees, and an embankment of earth were obstacles obscuring to a greater or less extent the view of the railroad at various points along the way traveled by the plaintiff as he approached the crossing. The morning was foggy. Mist was flying through the air. There was several inches of damp snow on the ground and adhering to the hedge trees and bushes, and the buggy made no noise. The wind was blowing from the southeast. When he went out of his gate, he looked for a train. He could not see any. He then went south, and was listening practically all the time. At a point 125 feet north of the track he checked his horse to a walk and listened. At 60 feet he stopped his horse, and looked and listened. When his horse was 8 feet and plaintiff 15 feet from the track, he looked again. Passing from behind an embankment, the horse became frightened and unmanageable, and passed on the track, and was struck by appellant's locomotive. It is ably argued in behalf of appellant that physical facts evidenced by measurements and photographs show that, if appellee had properly used his senses of sight or hearing, he must have known of the approach of its train in time to have avoided it; but there is evidence to show that the surface conditions between the time of the accident and the taking of the measurements and photographs had changed, besides, the atmospheric conditions as they existed are not reproduced. Whatever conflict in the testimony was thus created has been passed upon by the jury adversely to appellant. Another jury might have reached a different conclusion. We cannot say that the verdict was without support in the evidence. The instructions given fairly stated the law.

No complaint is made of the exclusion of evidence. Two trials have been had. It does not appear that a new trial would lead to a result more favorable to appellant.

Judgment affirmed.

RABB, J., not participating. WATSON, ROBY, MYERS, and HADLEY, JJ., concur.

(43 Ind. A. 47)

**AMBRE v. POSTAL TELEGRAPH CABLE CO. (No. 6308.)**(Appellate Court of Indiana, Division No. 2.  
Jan. 7, 1909.)**1. MASTER AND SERVANT (§ 217\*)—INJURIES—ASSUMPTION OF RISK.**

Where an employé knew, when he entered a telegraph company's service, that a lighting company's wires were strung on the telegraph poles, and the telegraph and lighting wires were plainly distinguishable, he assumed all ordinary risks incident to that fact, and could not recover for injuries from the lighting wires.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

**2. EVIDENCE (§ 472\*)—OPINION EVIDENCE—PROPER CONDUCT.**

In an employé's action for injuries caused by permitting a bare grounded wire, which he took up a telegraph pole with him to test the telegraph wires, to come into contact with lighting wires strung thereon, it was error to permit a witness to give his opinion whether a lineman of ordinary caution and experience would have taken the bare wire up the pole without taking precaution to prevent contact with the lighting wires.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195; Dec. Dig. § 472.\*]

**3. MASTER AND SERVANT (§ 289\*)—ACTION FOR INJURIES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**

In an employé's action for injuries caused by a bare grounded wire, which plaintiff took up a telegraph pole to test the wires, coming into contact with lighting wires strung thereon, whether he was bound to assume that they were charged in the daytime, in the absence of actual knowledge, and to take precautions to prevent contact with them, *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.\*]

**4. MASTER AND SERVANT (§ 288\*)—INJURY TO SERVANT—ASSUMED RISK—QUESTION FOR JURY.**

Generally the question of assumed risk is for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.\*]

**5. MASTER AND SERVANT (§ 289\*)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**

As a general rule, whether a servant was guilty of contributory negligence is a jury question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.\*]

**6. MASTER AND SERVANT (§ 296\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF DANGER—INSTRUCTIONS.**

An instruction that if there is both a safe and an unsafe way of doing work, and a servant undertakes to do the work without asking instructions, he must choose the safe way at his peril, was erroneous, in omitting the element of the servant's knowledge that one way was safer than the other.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.\*]

**7. MASTER AND SERVANT (§ 238\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF DANGER.**

If a servant, injured by permitting a bare grounded wire, which he was using to test tele-

graph wires, to come into contact with lighting wires on the same pole, was justified in assuming that the lighting wires were dead wires, and not dangerous, it could not be said that he knew, or should have known, that it was more dangerous to use the grounded wire to make the test than by making it with a cable box, which involved no risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 743-745; Dec. Dig. § 238.\*]

Appeal from Superior Court, Laporte County; Chas. H. Truesdell, Judge.

Action by August Ambre against the Postal Telegraph Cable Company and another. From a judgment for defendant telegraph company, plaintiff appeals. Reversed, and new trial ordered.

Crumpacker & Moran, for appellant. John B. Peterson, for appellee.

**RABR, J.** The appellee is a corporation engaged in the transmission of electric telegrams, and whose lines run through the city of Hammond. The South Shore Gas & Electric Company is a corporation engaged, among other things, in furnishing to the city and citizens of Hammond electric lights, and by a mutual agreement between the two companies they both used the same line of poles for their wires along a certain street in the city of Hammond, and on the particular pole in question here the telegraph company had 22 wires strung on three cross-arms, and the light company had 13 wires strung on two cross-arms; the cross-arms being about 20 inches apart, and the light wires below the telegraph wires. The appellant was engaged in the service of appellee in what is known to the business as a "trouble man," his duties being to locate and remedy any disturbance on the line that interrupted the transmission of its messages, and in the discharge of these duties it was necessary that he climb the poles, and work among the wires. While engaged at this work on the pole mentioned, having taken with him, to be used in making tests to locate an interruption on one of appellee's lines, a short bare wire attached to the ground, the appellant was knocked off of the pole by an electric shock caused by coming in contact with one of the electric light wires which at the time was carrying a heavy and dangerous voltage of electricity, and for his injuries thereby occasioned appellee brought this action against both companies. Issues were formed, a jury trial had, resulting in a general verdict in favor of appellant against the light company, and in favor of appellee against appellant, and with the verdict the jury returned answers to certain interrogatories. Appellant's motion for a new trial was overruled, and judgment rendered on the verdict in favor of the appellee for costs.

The only error assigned here is the overruling of appellant's motion for a new trial.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The court, over appellant's objection and exception, permitted appellee to propound the following interrogatory to its witness Harrison: "You may state whether or not a line-man of ordinary experience and caution would undertake to carry a bare grounded wire up a pole, the two cross-arms of the pole carrying electric light wires, without using any precaution to prevent the bare grounded wire coming in contact with the insulated wire of the electric light company on the lower cross-arm." This was answered as follows: "I should say he did not use good judgment."

Over the objection and exception of appellant, the court gave to the jury the following instructions:

"(23) The defendant Postal Telegraph Cable Company was not bound to give the plaintiff warning or notice of the fact that these wires upon the pole belonging to the South Shore Gas & Electric Company where the plaintiff was injured were at the time carrying a dangerous current of electricity. The presence of the said company's wires upon the pole was in itself sufficient to put the plaintiff upon inquiry as to their condition in that respect."

"(13) If there is a safe and an unsafe way, both reasonably convenient, of doing work, and an adult of ordinary understanding voluntarily, without instruction and without asking for instructions, undertakes to do such work, he must at his peril choose the safe way, and, if he chooses the unsafe way and is injured, he cannot recover for such injury."

The admission of this evidence and the giving of these instructions are among the reasons assigned for a new trial, and urged here as grounds for a reversal of the judgment below.

The appellee contends that whatever errors in the admission or rejection of evidence or in the instructions given by the court to the jury are apparent in the record, they furnish no sufficient reason for a reversal of this cause, because the answers to the interrogatories render the instructions complained of harmless, and the evidence which is in the record clearly shows that appellant had no case against the appellee; (1) that whatever hazard there was in connection with the joint use of the telegraph poles by both companies was open and apparent, and was known to appellant, and therefore assumed by him; (2) that the evidence clearly shows that the appellant was guilty of contributory negligence, that he could, by the exercise of his sense of sight, have seen the splices in the electric light wire where there was no insulation, and that the taking of a bare grounded wire among the electric light wire was itself an act of negligence regardless of appellant's knowledge or want of knowledge of the uninsulated places in the light wires; (3) that the evidence discloses that there was

a cable box on the pole from which appellant fell, and that, by opening this cable box, appellant could have made a test from the wires in the box in a manner that would have involved no risk whatever of the injury he received, and that he voluntarily chose to perform the work in the manner he did, thereby encountering the risk and danger, and for that reason he has no case.

The appellant's action is, so far as the appellee is concerned, grounded on two alleged acts of negligence—one of commission, and the other omission on the part of appellee. It is alleged that appellee was guilty of negligence in stringing its wires on the same pole on which electric light wires were carried, and it is alleged that appellee knew the electric light wires carried dangerous currents of electricity in the day time as well as at night, and that appellant was ignorant of the fact that the light wires were used in the daytime, and that appellee gave to appellant no notice or warning of the fact that the electric light wires were charged with dangerous currents of electricity during the day time, when appellant's work was to be performed, and that for its failure to so notify appellant it was guilty of negligence. It is manifest that the appellant has no cause of action against appellee on the sole ground that the wires of the two companies were carried on the same pole. The telegraph wires and light wires were plainly distinguishable, and, when the appellant entered the appellee's service, he knew all about the wires of the two companies being carried on the same pole, and therefore assumed all ordinary risks incident to this fact. But the other charge of negligence presents a different proposition. We think the appellant's testimony fully justifies the statement that he understood all about the dangerous character of currents of electricity carried over electric light wires; that he knew that it was a dangerous and deadly element; that its presence was unheralded to the sense of sight or hearing, or any human sense, save that of touch; that it was impossible to determine the presence of this mysterious and powerful agent until too late for self-protection. The evidence at the same time shows, and we know as a matter of common knowledge, that when the electric current is not passing over wires the wires are perfectly harmless, and can be handled as safely as wires on a farm fence or in a hardware store. The evidence in this case shows that appellant was injured about 4 p. m. on a bright day in the summertime. It shows that the light company had been in business for several years, and that some six months previous to the accident they had put a day current on some of their wires strung on the pole in question; that appellee knew of this fact at the time of appellant's employment, which was about a month preceding the accident, and that appellant had no

knowledge that the electric light wires were used in the daytime; that appellee gave appellant no notice or warning that the light wires were dangerous in the daytime, or that any of them were used by the electric light company in the daytime, and we think the evidence justifies the inference that appellant assumed that the light wires were not in use at the time he met with the accident; that, acting upon this assumption, he took no precaution whatever to protect himself from danger from contact with the electric light wires, and carried a bare grounded wire with him up among them, and which, coming in contact with one of the light wires carrying a heavy voltage of electricity, gave him such a shock as caused his fall from the pole, and consequent injury. The evidence also disclosed the fact that appellant might have performed the same work without the use of the grounded wire, and without involving himself in any danger whatever from a shock from the light wires by opening the cable box on the pole, and making his test through it.

The whole question in the case turns upon whether or not appellant was bound to assume, from the presence of the light wires on the pole, that they were live wires, and use precautions to protect himself accordingly. If he was, then the instructions to the jury complained of were correct, and the admission of the evidence complained of harmless, and the appellant's action both in taking the bare grounded wire up among the electric light wires and his failure to use the safe way of doing the work instead of the one involving the danger clearly negligent, and such negligence proximately contributing to his injury. If these are, however, questions not for the court, but for the jury to pass upon, then the appellee's contention must fail, and there was error in the instructions of the court, and very manifest error in permitting the witness Harrison to give his opinion as to what a lineman of ordinary experience and caution would undertake to do under the circumstances set forth in the complaint (*Giraudi v. Electric Light Co.*, 107 Cal. 120, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114; *Bemis v. Central Vermont, etc.*, 58 Vt. 36, 3 Atl. 531; *Dallas v. Mitchell, etc.*, 33 Tex. Civ. App. 424, 76 S. W. 935), and the jury might have found that appellant had the right to consider at the time his work was being done that one way of performing it was equally as safe as the other. If he had the right to assume that the light wires were dead, this would be true. We think this question must be determined against appellee's contention. Whether or not the appellant was bound to assume that the light wires were in use in the daytime, in the absence of actual knowledge, was properly a question of fact, to be determined by the jury. What inferences were proper to be drawn from all the facts shown by the evidence, the fact that the light wires were present on the pole,

attached in such manner as to indicate that they were to be used to transmit electric currents of dangerous intensity over them, that such currents were ordinarily used for illuminating purposes, and that the accident happened in the daytime, presented a state of facts from which reasonable men might draw different inferences as to whether or not the electric light wires were at that particular time dangerous. *Central Union, etc., v. Sokola, Adm'r*, 34 Ind. App. 429, 73 N. E. 143; *Mahan v. Newton*, 189 Mass. 1, 75 N. E. 59; *East Tenn., etc., v. Carmine*, 93 S. W. 903, 29 Ky. Law Rep. 479; *Snyer v. New York, etc.*, 73 N. J. Law, 535, 64 Atl. 122.

In the case of *Mahan v. Newton, supra*, decided by the Supreme Court of Massachusetts, it appeared that the plaintiff's intestate was killed while in the employ of an electric light company, as lineman, by a current of electricity which it was claimed came from the defendant's (the street car company's) trolley line, which was in close proximity to the light line. The action was brought by the administrator against the street car company, and the theory of the complaint was that the defendant was guilty of negligence in not properly guarding its line to prevent the escape of electricity to the light company's lines. A rule of the electric light company required its employees when engaged in their duties to treat every wire as a live wire, and to wear rubber gloves in handling dangerous wires. The deceased treated the wires he was handling as dead wires, and did not wear rubber gloves, as required by the rules of the company, and it was contended that he was guilty of contributory negligence. There was evidence that the deceased had no reason to believe that the light wires were dangerous. It was held that whether the observance of the rule to treat every wire as a live wire, under the circumstances there shown, was an act of negligence, was a question for the jury. In the case of *East Tennessee, etc., Co. v. Carmine, supra*, decided by the Supreme Court of Kentucky, the appellee was employed by a telephone company as a lineman. The telephone company and electric light company both used the same poles in the city of Paris, Ky. The light company had not been using their lines until after 5 o'clock p. m. up to a few days before the accident out of which the suit originated. They then notified the telephone company that they would turn the electric current on their wires at 4 p. m. instead of 5. The appellee was directed by the superintendent of the telephone company to do certain work which required the handling of the electric light wires after 4 o'clock p. m., but before 5 p. m. He had no knowledge of the change in the time of turning on the current of the electric light wires, and no notice was given him of the change by his employer, and, on the assumption that the light wires were dead and not dangerous, he took them in his hand, and was

working with them when the current was turned on, and he was injured. It was held that the company was guilty of gross negligence in its failure to notify appellee of the danger to be apprehended from the light wires at the time he was required to work with them, and that the question of appellee's contributory negligence and assumption of risk were properly for the jury. The case of *Snyder v. New York, etc., Co.*, supra, from the Supreme Court of New Jersey, is in many respects similar to the case at bar; the only distinction between the cases being in the fact that in the case cited the evidence disclosed that the electric light wires had not formerly been used in the daytime, and that the injured employé was cognizant of such fact. There, as here, the light wires were used in the daytime, and the fact was known to the master and unknown to the servant, and no notice was given by the master to the servant, and there, as here, the servant assumed that the wires were dead and harmless, and, acting upon that assumption, was injured by coming in contact with them in the performance of his work.

It does not appear in the evidence in this case that the appellant had any knowledge or information on the subject as to the time when the electric light wires on the poles were in use. It was held in the case cited that it was negligence upon the part of the master to fail to give notice and warning to the servant of the danger to be apprehended from the wires at the time his work was required to be done, and that the question of the assumption of the risk and of contributory negligence from a knowledge of the presence of the wires upon the part of the employé were properly for the jury. We think that the distinguishing circumstances between the two cases cannot be controlling. It is the general rule that the question as to whether a given hazard is assumed by the employé, and the question as to whether or not in a given case there has been contributory negligence upon the part of the party injured, are for the jury, and what are proper inferences to be drawn from the facts appearing in evidence are properly for the jury, and not for the court.

In this case the jury might very properly have inferred from the fact that the light wires were on the pole that the appellant knew they were designed to carry electric currents of dangerous energy, and from the subtle and mysterious character of the element, which prevented its presence being known, save by the sense of touch, that the appellant was guilty of contributory negligence in failing to treat the wires as live wires and dangerous; and that from his knowledge of the presence of the wires the risks arising from dangerous currents of electricity that might be passing over them were assumed by him. But it was error for the

court to tell the jury, as it did in instruction 23, that this evidence was conclusive upon them, and that they were bound to draw the inference from the facts that appellant was guilty of contributory negligence, and that he assumed the risk. This was an invasion of the province of the jury. Instruction 13 was also plainly erroneous, in that it omitted the element of appellant's knowledge that one way of performing the work was more safe than the other. If the light wires were dead wires, the way in which appellant undertook to do his work was equally as safe, and perhaps more convenient, than to open the cable box and make the test through it; and if the jury, from the evidence, inferred that the appellant had the right to treat the live wires as not in use, and therefore not dangerous, then it could not be said that he knew that one of the ways of doing the work was any more safe than the other.

Numerous other questions are discussed in the elaborate brief of counsel for appellant that will probably not arise upon another trial of the case, and are therefore not considered.

Judgment reversed, with instructions to grant a new trial.

(48 Ind. A. 35)

MILBOURN et al. v. BAUGHER et al.

(No. 6,239.)

(Appellate Court of Indiana, Division No. 1.  
Jan. 7, 1909.)

1. PARTITION (§ 62\*)—ANSWER—EFFECT.

Where, in partition, defendants, other than B., filed their answer, consisting of a general denial and a paragraph that the defendants were the owners of the whole tract and demanding judgments for costs, the answer raised no issue as to the rights of B. as between himself and his codefendants.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 62.\*]

2. COURTS (§ 99\*) — PREVIOUS DECISION IN SAME CASE—LAW OF CASE—SEPARATE JUDGMENTS.

In partition defendant M. answered, claiming title to the entire premises, and also filed a cross-complaint against plaintiff and his codefendant B. to quiet title. Plaintiff replied, and answered the cross-complaint, but B., on whom no notice or process on the cross-complaint had been served, only pleaded in denial of the complaint. Findings, followed by judgment, were made that plaintiff and M. were tenants in common and for sale for partition. Held that, no issue having been raised by B.'s answer as to his rights as against M., the judgment was not conclusive against B.'s attempt by permission later to litigate the issues between himself and M.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 99.\*]

3. COURTS (§ 99\*)—PREVIOUS DECISIONS IN SAME CASE—LAW OF THE CASE.

In partition, defendant M. answered, claiming title to the entire premises, and also filed a cross-complaint against plaintiff and defendant B. to quiet title. B., not having been served

with process or notice on the cross-complaint, answered only in denial of the complaint. On trial of the issues so raised judgment was given that plaintiff and M. were tenants in common and for sale for partition. M. at the same time took a default judgment against B. for failure to answer the cross-complaint. This B. had set aside with leave to answer and to file a cross-complaint asserting his interest, which he did. *Held* that, the setting aside the judgment and permitting B. to answer being an accomplished fact, it was too late for M., after pleading to issue on B.'s cross-complaint and dismissing his own, to question B.'s right to file his cross-complaint, on the ground that B.'s rights were adjudicated by the judgment rendered on the trial of the issues on the complaint and the pleadings thereto, or on the ground that the default judgment should not have been set aside.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 99.\*]

#### 4. EXCEPTIONS, BILL OF (§ 13\*)—CONTENTS—ORDER SETTING ASIDE DEFAULT.

A bill of exceptions containing a motion to set aside a default judgment and the evidence submitted should show that no further evidence was introduced, or should state that the evidence included in the bill was all the evidence given on the hearing.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 13.\*]

#### 5. JUDGMENT (§ 143\*)—DEFAULT—VACATION—DISCRETION.

After the granting of a new trial as of right in partition, a formal appearance by an attorney was entered of record for defendant B., against whom judgment by default had been rendered on the cross-complaint of his codefendants to quiet title. No rule was taken against B. at any time to answer the cross-complaint, nor was any answer filed for him except by the attorneys for his codefendants. B. was not present in person or by attorney when the judgment was rendered, and, on his application to set aside his default and the judgment, it appeared that the judgment had disposed of his interest without the court considering it, and that B. had engaged an attorney who was absent because of illness and who had left B.'s interest in the care of one of plaintiff's attorneys, who had recognized it in the complaint, judgment having been taken against him, in the absence of that attorney, by his associate. *Held*, that the vacation of the judgment and default was not an abuse of discretion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 281-284, 288; Dec. Dig. § 143.\*]

Appeal from Circuit Court, Noble County; Jos. W. Adair, Judge.

Action by Nancy Phillips against David Milbourn and others. From a decree awarding equal shares to complainant and defendant Isaac Baugher and the remainder to the defendants Milbourn equally, they appeal. *Affirmed*.

R. P. Barr and L. W. Welker, for appellants. J. W. Hanan, L. H. Wrigley, and R. W. McBride, for appellees.

MYERS, J. Nancy Phillips, one of the appellees, brought suit for the partition of certain land in Noble county, alleging that she and David Milbourn and James Milbourn, who are the appellants, and Isaac Baugher, appellee, were the owners thereof

in fee simple as tenants in common, stating the undivided fractional share of each party, alleging the indivisibility of the land without injury, and asking the sale thereof. The record shows service of summons on the appellee Baugher. On March 29, 1905, the appellants filed their answer, a general denial, and a second paragraph addressed to the complaint, to the effect that the appellants were the owners of the whole tract of land, and demanding judgment for costs. At the same time appellants filed their cross-complaint against their codefendant, Baugher, and the plaintiff, being a complaint in the ordinary form to quiet title in the appellants to the whole tract of land. On the same day an answer of the appellee Baugher in denial was filed, addressed to the plaintiff's complaint alone, signed by the attorneys who signed the answer and cross-complaint of the appellants. The appellee Nancy Phillips replied to the second paragraph of the answer of the appellants, and answered their cross-complaint. May 31, 1905, a trial was had and judgment was rendered against the appellee Phillips on her complaint, and upon the cross-complaint of the appellants they were adjudged to be the owners in fee simple of all the land of which partition was sought. October 3, 1905, upon the motion of the appellee Phillips, the judgment of May 31st was set aside and a new trial as of right was ordered, the cause being thereby treated as one in which the title to real estate was directly in issue. *Kreitline v. Franz*, 106 Ind. 359. The record shows that on October 20, 1905, John W. Hanan entered his appearance as attorney for the defendant Baugher "in this cause." January 3, 1906, the appellee Phillips made proof of service of notice of the granting of a new trial upon the appellants December 12, 1905, and upon the appellee Baugher November 10, 1905. The record of the proceedings of January 3, 1906, also show proof of service March 9, 1905, upon the appellee Baugher of the summons issued March 3, 1905, to answer the complaint of the appellee Phillips. The record then proceeds: "And, there being no appearance by or on behalf of said defendant Isaac Baugher to the said cross-complaint of said defendants David Milbourn and James Milbourn in this cause, thereupon said defendant Isaac Baugher is three times duly called in open court, comes not, but herein wholly makes default. And by agreement of the parties hereto this cause for the trial thereof upon the complaint of said plaintiff Nancy Phillips herein and the answers filed thereto and the issues joined thereon and upon the said cross-complaint of said defendants David Milbourn and James Milbourn herein and the answers filed thereto and the issues joined thereon is now submitted to the court without a jury." The

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

court found for the appellee Phillips upon her complaint and for the appellants upon their cross-complaint that they were the owners of the land in question in fee simple as tenants in common, and it was thereupon adjudged accordingly. The land was ordered sold by a commissioner designated, etc., and the cause was continued for the sale of the land.

At the same term, January 25, 1906, appellee Baugher filed his motion to set aside the said judgment rendered against him, and the default entered against him upon the cross-complaint of the appellants, and to permit him to enter his appearance to the cross-complaint of the appellants, and to file his answer thereto and to file a cross-complaint. On March 19, 1906, the appellee Baugher filed his own affidavit, and the affidavit of John W. Hanan in support of his said motion. At the date last mentioned, the court sustained the motion of appellee Baugher, and ordered that "said default and judgment heretofore entered and rendered against said defendant Isaac Baugher upon the said cross-complaint of" the appellants "be and the same are hereby set aside and vacated." It was further ordered that the appellee Baugher be permitted to enter his appearance to the cross-complaint of the appellants, and to file an answer thereto, and to file and prosecute a cross-complaint in his own behalf. It was adjudged, also, that the order of sale of the real estate should remain in force, and that neither such order nor any proceedings had in pursuance thereof should be affected or invalidated. Thereupon the appellee Baugher, by his attorneys, entered his appearance to the cross-complaint of the appellants, and filed his answer of general denial thereto and also his cross-complaint against his codefendants and the plaintiff. The appellants by their attorneys, and the appellee Phillips, by her attorney, thereupon each entered appearance to the cross-complaint of the appellee Baugher. On March 27, 1906, the commissioner made report of sale, which the court approved, and the commissioner was ordered to execute a deed to the purchaser, which was done and approved by the court, and upon the order of the court the deed was delivered to the purchaser. May 29, 1906, appellants filed their answer in two paragraphs to the cross-complaint of Baugher, the second paragraph being a general denial, and the first set forth the proceedings in the cause down to and including the 3d day of January, 1906, by reason of which it was claimed the cause of action stated in the cross-complaint of the appellee Baugher had been fully settled and adjudicated, and that such judgment was in full force and effect. To this second paragraph Baugher filed his reply, a general denial, and a second paragraph, wherein he alleged that he never entered an appearance to the cross-complaint of the appellants un-

til after the judgment of January 3, 1906, had been set aside and annulled; that no summons, writ, or process was ever issued on appellants' cross-complaint or served upon him, and no notice by publication or otherwise was ever given him of the filing or pendency of the same, and no appearance on his behalf was made to the appellants' cross-complaint, and that no process, writ, or summons was ever issued against him or given him or served upon him in the cause, except the summons issued on the complaint, etc. The reply then recites the facts and the proceedings relating to the setting aside of the judgment of January 3, 1906, as hereinbefore stated. Thereupon, on the motion of the appellants, their cross-complaint was dismissed, and they demurred to the second paragraph of reply of the appellee Baugher, which demurrer was overruled. The cause was tried by the court, and at the request of the appellants the court made special findings of fact and stated conclusions of law, on which judgment was rendered. The land was apportioned among the parties as their shares were indicated in the complaint of Nancy Phillips; she and the appellee Baugher being awarded equal portions and the remainder to the appellants equally.

There is no question that the rights of the parties were correctly adjudged, or that they did not each receive by the judgment rendered from which this appeal is taken the share of land or its proceeds to which they severally were entitled legally. The appellants in their answer to the cross-complaint of Baugher, and in their action in dismissing their cross-complaint apparently intended, as their argument on appeal also indicates, to proceed upon the theory that the judgment of January 3, 1906, was sufficiently based upon their answer to the complaint, and was not based upon their cross-complaint. Their answer, however, raised no issue as to the rights of the appellee Baugher in the real estate as between him and the appellants. *Jones v. Vert*, 121 Ind. 140, 22 N. E. 882, 16 Am. St. Rep. 379. The interest asserted by Baugher in his cross-complaint against which the answer of the appellants was directed was expressly adjudicated under the default taken upon the cross-complaint of the appellants, and, when the judgment on that cross-complaint was set aside, they could not successfully claim as against Baugher's cross-complaint that his rights were settled and adjudicated without reference to their cross-complaint. The setting aside of the judgment being an accomplished fact, and the appellee Baugher having been permitted to set up his rights, it was then too late to question his right to assert his interest by cross-complaint upon the ground that the court's action in setting aside the judgment did not affect the rights of the parties, or upon the ground that the judgment ought not to have been set aside.

Whether or not the court erred in sustaining the application of Baugher to set aside his default upon the cross-complaint of the appellants, and to permit him to appear thereto and to plead, is another question, and is to be considered separately from the pleadings filed after the default had been set aside and said permission had been granted. The application was made at the term at which the interlocutory judgment of partition was rendered, and while the cause was in fieri. In support of his motion, as we have seen, the appellee Baugher filed his own affidavit and the affidavit of John W. Hanan. But the bill of exceptions containing the motion and this evidence submitted on the hearing thereof does not show that no other evidence was introduced or state that this was all the evidence given on such hearing, as is required in such cases. *Beatty v. O'Connor*, 106 Ind. 81, 5 N. E. 880. The judgment of January 3, 1906, did not in terms quiet the title of the appellants, but it was thereby adjudicated that the plaintiff Nancy Phillips was the owner in fee simple of a certain undivided part of the land, as claimed by her in her complaint, and that the appellants were the owners in fee simple of all the remainder of the land, and the court ordered the sale of all of the land by the commissioner, and that the proceeds be distributed to the owners in the proportion of their shares as so adjudged, and that all the rights, titles, interests, and claims of each and all the parties hereto in and to the real estate so sold should be completely and effectually barred and vested in the purchaser. The judgment did not proceed expressly upon a default of Baugher on the complaint, though it was made to appear that the court had jurisdiction of his person by service of summons on the complaint. The only answer of Baugher to the complaint then appearing in the record was signed by the attorneys of appellants, whose interests were adverse to the interest of Baugher. The judgment which disposed of his interest, as well as that of the other parties, was entered upon a default of Baugher on the cross-complaint of appellants and upon the submission of the cause for trial on the complaint and the answers thereto and the issues joined thereon and the cross-complaint of the appellants and the answers thereto and the issues joined thereon. No issue was tendered between the codefendants except that tendered by the appellants' cross-complaint, and the court, professing to proceed thereon, disposed of the interest of Baugher.

After the granting of the new trial as of right, a formal appearance of a certain attorney was entered of record for Baugher in the cause. It does not appear that any

rule was taken against Baugher at any time to answer, or that any answer was filed for him except by attorneys for the appellants. Baugher was not present in court in person or by attorney when the judgment was rendered. The question whether the court should be regarded as having jurisdiction of Baugher upon the cross-complaint without the issue or service of process thereon need not be decided. Upon the application to set aside the default and judgment, it was made apparent to the court that by its judgment it had disposed of the real and substantial interest of the defendant Baugher without the consideration of that interest in the disposition of the cause, and therefore strong reason existed for setting aside the adjudication so far as he was concerned and of permitting him to present such interest for trial and determination. It was made to appear that Baugher had engaged an attorney to take care of his interest; that this attorney absented himself because of illness, leaving the interest of his client in the care of one of the attorneys for the plaintiff, who had recognized Baugher's interest expressly in the complaint; and that the judgment cutting out the interest of Baugher was taken in the absence of that attorney by an associated attorney. What might properly be said of this showing if the court below had refused to accept it as sufficient, and such action was before us for review, need not be decided. If the court was not required to sustain the application, yet the case was one in which there was a strong appeal for the exercise of judicial discretion for the relief of Baugher in the interest of justice, the question whether there was a sufficient showing of mistake, inadvertence, or excusable neglect was a question of fact, and the determination by the court in favor of the applicant should not be disturbed if there was evidence which can be said to support the conclusion. *Williams v. Grooms*, 122 Ind. 391, 24 N. E. 158; *Casto v. Shew*, 32 Ind. App. 338, 68 N. E. 1041. As was said in *Hoag v. Old People's, etc., Society*, 1 Ind. App. 28, 27 N. E. 438: "The courts, even independently of statutes, possess and exercise a very large discretion in vacating judgments by default, for the purpose of permitting a defense to be made upon the merits, and in deciding upon the question of diligence the action of the court will be reviewed only in extreme cases, involving an abuse of the discretion vested in the court." *Masten v. Ind., etc., Co.*, 25 Ind. App. 175, 57 N. E. 148. It does not appear to us that the court below abused its discretion, while it does appear that this action secured to the parties their exact legal rights.

Judgment affirmed.

(43 Ind. A. 64)

**NICHOLS v. CENTRAL TRUST CO. et al.**  
(No. 6,339.)(Appellate Court of Indiana, Division No. 1.  
Jan. 8, 1909.)**1. EXCEPTIONS, BILL OF (§ 40\*)—PRESENTATION—TIME—JUDICIAL AUTHORITY.**

A trial court has no authority, except that granted by statute, to grant time extending beyond the term in which to present a bill of exceptions.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 40.\*]

**2. EXCEPTIONS, BILL OF (§ 40\*)—PRESENTATION—TIME—JUDICIAL AUTHORITY.**

Power to grant time beyond the term in which to present a bill of exceptions must be exercised at the time of the rulings excepted to or at the time of the ruling upon the motion for a new trial, which carries rulings assigned as causes for new trial and the exceptions thereto forward to the time of the ruling on such motion.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 60; Dec. Dig. § 40.\*]

**3. EXCEPTIONS, BILL OF (§ 40\*)—PRESENTATION—EXTENSION OF TIME—JUDICIAL AUTHORITY.**

Under Act April 15, 1905 (Acts 1905, p. 45, c. 40), authorizing extension of time for filing a bill of exceptions on application before expiration of the time first given, when the time beyond a term for filing has expired, it cannot be extended, and signing a bill thereafter presented gives it no validity.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 60; Dec. Dig. § 40.\*]

**4. EXCEPTIONS, BILL OF (§ 40\*)—PRESENTATION AFTER EXPIRATION OF TIME—JURISDICTION.**

A trial court cannot be given jurisdiction of a bill of exceptions presented out of time by agreement of the parties.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 63, 64; Dec. Dig. § 40.\*]

**5. APPEAL AND ERROR (§ 918\*)—REVIEW—PRESUMPTIONS.**

Where the evidence is not presented in the record, the Supreme Court cannot assume against the action of the trial court in refusing to allow an amendment of the complaint that there was such proof or offer of proof as to make allowance of the amendment obligatory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8712; Dec. Dig. § 918.\*]

**6. APPEAL AND ERROR (§ 499\*)—REVIEW—INSUFFICIENT RECORD.**

The Supreme Court cannot review a ruling refusing to allow an amendment of a pleading where the record does not show that any reason for the amendment was suggested below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2296; Dec. Dig. § 499.\*]

**7. PLEADING (§ 238\*)—MOTION TO AMEND—FORM.**

Under Act April 23, 1903, § 2 (Acts 1903, p. 339, c. 193), requiring motions to insert new matter or to strike parts of a pleading, etc., to be in writing, an oral motion to amend a complaint by inserting words is properly overruled.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 238.\*]

**8. APPEAL AND ERROR (§ 713\*)—RECORD—MOTIONS.**

Under Act April 23, 1903, § 2 (Acts 1903, p. 339, c. 193), motions properly made orally may be made part of the record without a bill of exceptions, as may motions in writing; but,

where a motion required by statute to be written is not shown to have been so made, it is insufficient to state it in a bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2957; Dec. Dig. § 713.\*]

**9. MASTER AND SERVANT (§ 97\*)—INJURY TO EMPLOYÉ—NEGLIGENCE—PROOF—REQUISITES.**

In an action for injury to an employé caused by an accidental fall of a drop hammer, the business being lawful, proof of some defect from which the injury must have been foreseen, and from which the injury proceeded, was essential to a recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. § 97.\*]

**10. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—INSTRUCTIONS.**

When special findings returned with a general verdict show that appellant was not injured by an instruction, error therein will be deemed harmless, and no ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4225; Dec. Dig. § 1068.\*]

Appeal from Circuit Court, Boone County; S. R. Artman, Judge.

Action by Earl O. Nichols against the Central Trust Company and another, receivers. From a judgment for defendants, plaintiff appeals. Affirmed.

Chas. B. Clarke, Walter C. Clarke, and A. J. Shelby, for appellant. Smith, Duncan, Hornbrook & Smith, for appellees.

**MYERS, J.** The appellant brought his action against the appellees as receivers of the Indianapolis Drop Forging Company to recover damages for a personal injury incurred by the appellant while engaged in operating certain machinery in the service of the appellees. This action was commenced in the Marion superior court, and the complaint consisted originally of a single paragraph. After a trial and the granting of a new trial, the venue was changed to the Boone circuit court, where two additional paragraphs of complaint were filed. An answer of general denial to each paragraph of the complaint formed the issues submitted to a jury for trial, resulting in a general verdict for appellees, and with the general verdict the jury returned answers to 58 interrogatories. From a judgment in favor of appellees, appellant appeals, and here complains of the action of the lower court in refusing to allow an amendment to the third paragraph of the complaint, in overruling his motion for a new trial, and in overruling his petition for additional time in which to file a bill of exceptions containing the evidence. The first and second paragraphs of the complaint proceeded upon the theory that the machine in question, a drop hammer, by long use had become weak and defective; that the appellees, upon complaint of the appellant, promised to repair the machine, and ordered the appellant to proceed with his work, but the appellees negligently failed to repair the machine. The third paragraph proceeded upon

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the theory that the appellees violated the statutory duty to guard the machinery.

It will be proper first to determine whether the evidence is in the record. At the April term of the trial court, June 30, 1906, appellant's motion for a new trial was overruled, and the court then gave 60 days to file a bill of exceptions, and thereupon rendered final judgment upon the verdict. At the September term of the court, September 13, 1906, appellant was permitted to file his petition for an extension of time for the filing of a bill of exceptions. This petition was overruled. The appellant on September 14, 1906, tendered to the court his bill of exceptions No. 2 containing the evidence, which on that day was signed by the court and filed.

The court had no authority, except as granted by the statute, to give time extending beyond the term for the presentation of the bill of exceptions. This special power must be granted at the time of the rulings excepted to or at the time of the ruling upon the motion for a new trial, which carries the rulings of the court assigned as causes for a new trial and the exceptions thereto forward to the time of the ruling on such motion. *Citizens' Street Ry. Co. v. Marvill*, 161 Ind. 506, 67 N. E. 921. When the time beyond the term has expired, there is no authority to extend the time. The court or judge has then no jurisdiction over the subject-matter, and cannot be given such jurisdiction by the agreement of the parties. The signing of a bill presented after the expiration of the time granted extending beyond the term gives no vitality to the bill. *Lengelsen v. McGregor*, 162 Ind. 258, 67 N. E. 524, 70 N. E. 248, and cases there cited; *City of Huntington v. Boyd*, 25 Ind. App. 250, 57 N. E. 939. By the act of April 15, 1905 (Acts 1905, p. 45, c. 40), provision is made for extending the time given for filing a bill of exceptions, with a proviso that the application for such extension "must be made prior to the expiration of the time first given." In the case at bar the time first given had expired before the application for extension was made or any bill containing the evidence was presented. There was no error in overruling the application for extension, and, the presentation of the bill being after the expiration of the time granted beyond the term, the signature of the judge and the filing of the so-called bill could not make it effective for the want of a compliance with the statute. Therefore the evidence is not properly in the record.

During the progress of the trial, as stated in bill of exceptions No. 1 in the transcript, the appellant moved the court to be allowed to amend the third paragraph of his complaint by inserting in line 54 of said paragraph, after the words "board and hammer head," the words "ways and uprights," to which motion the defendant at the time objected, and the court, sustaining said objection, refused to allow said amendment to be made. No ground for the application to

amend appears by the record to have been suggested to the court below, but we are told in appellant's brief that the proposed amendment was to make the complaint conform to the facts as they had been or could be established by proof, and reference is made by counsel to what is by them claimed to be a rule of practice where there is merely what is termed a variance between the allegations and the proof by the party having the burden of proof. In the absence of the evidence, we cannot assume, against the action of the trial court, that there was such proof or offer of proof as would have made the allowance of the proposed amendment obligatory upon the court, nor can we, in the condition of the record before us, say that the reason for the amendment urged here or any reason was suggested to the trial court. This should have been done. *Borror v. Carrier*, 34 Ind. App. 353, 37<sup>2</sup>, 73 N. E. 123. It is our province to review decisions of the court below, for which purpose we must be informed as to the basis on which it acted. Furthermore, by the act of April 23, 1903 (Acts 1903, p. 339, c. 193, § 2), it is provided "that every motion to insert new matter or to strike out any part or parts of any pleading, deposition, report or other paper, in the cause shall be made in writing and shall set forth the words sought to be inserted or stricken out." It was said in *Crystal Ice Co. v. Morris*, 160 Ind. 651, 67 N. E. 502, that the rule prescribed by this statute is mandatory, and that "such motion cannot be made in any other manner after the taking effect of said act." Motions which may properly be made orally may be a part of the record without a bill of exceptions, as may motions in writing. Acts 1903, p. 339, c. 193, § 3. But when, as here, a motion which by imperative requirements of statute must be in writing is not shown to have been so made, it will not be sufficient to state it in a bill of exceptions, nor can it be held that the court erred in overruling it. The fact that the motion was oral would of itself be sufficient reason for overruling it.

The appellant has criticised many of the instructions given by the court to the jury. The jury by their answers to interrogatories specially found, amongst other things, that there was not anything in the condition of the drop hammer at which the appellant was employed at and immediately prior to the time of his receiving the injuries complained of that would lead a person of ordinary prudence and sagacity and familiar with the operations of such hammer to suppose that there was any danger of the hammer head falling at the time it did fall; that the falling of the hammer at the time it did fall and injured the appellant was a pure accident not reasonably to have been expected by any person; and that the fact was not established by the evidence introduced as to what caused the hammer in question to fall upon the appellant. It was said in *Wabash, etc., R. Co. v. Locke*, 112 Ind. 404, 411, 14 N. E. 391, 394,

2 Am. St. Rep. 193: "Where an event takes place, the real cause of which cannot be traced, or is at least not apparent, it ordinarily belongs to that class of occurrences which are designated as purely accidental; and in a case like this, where the plaintiff asserts negligence, he must show enough to exclude the case from the class of accidental occurrences." The business being lawful, it was necessary to a recovery for negligence that there should have been proved some defect from which injury might have been anticipated, and from which the injury in question did proceed. *Welsh v. Cornell*, 168 N. Y. 508, 61 N. E. 891; *Bennett v. Ford*, 47 Ind. 264, 271; *Connor v. Citizens', etc., R. Co.*, 146 Ind. 430, 437, 45 N. E. 662; *Thompson's Negligence* (2d Ed.) §§ 5358, 7840, 7917.

The special findings of the jury stand as facts established by the evidence and unquestioned here. They showed a condition which made it impossible to render properly a general verdict in favor of the appellant. Under such circumstances, it seems useless to take space for a discussion of the appellant's criticisms upon a long series of instructions, none of which could work a reversal; the only result possible having been arrived at by the jury in their general verdict. When the special findings of the jury returned with a general verdict in answer to interrogatories submitted to them by the court show that the complaining party was not injured by an instruction given, error in such instruction will be deemed harmless, and will furnish no ground for reversal. *Roush v. Roush*, 154 Ind. 562, 578, 55 N. E. 1017, and cases there cited; *Ellis v. City of Hammond*, 157 Ind. 287, 61 N. E. 565; *Muncie Pulp Co. v. Hacker*, 87 Ind. App. 194, 209, 76 N. E. 770; *Indianapolis Street Ry. Co. v. Brown*, 82 Ind. App. 130, 69 N. E. 407. When the answers of the jury to such interrogatories affirmatively show that the general verdict was right, the judgment will not be reversed because of the giving of erroneous instructions. *Ellis v. City of Hammond*, supra.

Judgment affirmed.

(79 Ohio St. 174)

MIRICK v. GIMS, Treasurer.

SUNDAY CREEK CO. v. WOODWORTH,  
Treasurer, et al.

(Supreme Court of Ohio. Dec. 22, 1908.)

TAXATION (§ 26\*)—VALIDITY OF TAX—POLICE POWER.

Section 2833, Revised Statutes, as amended and took effect April 4, 1906 (98 Ohio Laws, p. 87), so far as it requires the levy of the per capita tax on dogs upon the real estate upon which the dogs may have been kept and harbored, and the collection thereof as other taxes upon real estate, notwithstanding the owner of such real estate had no knowledge that the dogs had been harbored thereon and was not consenting thereto, is an arbitrary and unreasonable exercise of

police power not required by the general welfare, and therefore unconstitutional and void.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 26\*.]

Summers, J., dissenting in part.

(Syllabus by the Court.)

Error to Circuit Court, Scioto County.

Error to Circuit Court, Athens County.

Action by one Mirick against Gims, Treasurer, and action by the Sunday Creek Company against Woodworth, Treasurer, and others. Demurrer to the petition in the first action overruled. Judgment dismissing plaintiff's petition was affirmed by the circuit court, and he brings error. Demurrer to the petition in the second action was sustained and petition dismissed, and, from a judgment of the circuit court sustaining such judgment, plaintiff brings error. Reversed.

Mirick, who is a nonresident owner of land situate in Scioto county and who alleges that he has continuously resided in Washington, D. C., ever since he acquired title to such land, brought suit in the court of common pleas of Scioto county to enjoin the collection of a tax assessed against his real estate for three dogs charged against him upon the tax duplicate. He averred that he was not the owner of any dogs in Scioto county, did not harbor any dogs on his said real estate, did not permit or suffer any one else to do so, and did not know of any dogs being kept on said premises until his tax bill was presented, and denied that any dogs were kept on his premises. He averred that, when said tax was assessed upon his real estate, the said premises were in possession and under the control of one McCall, his lessee, and that he did not make or change the lease of said land since the passage of the statute under which said tax was assessed. A demurrer to the petition was overruled, and after an answer by defendant, alleging that the tax was levied upon a certain three dogs kept and harbored on the estate, a trial was had in the court of common pleas, and that court dismissed the plaintiff's petition, and rendered judgment against him for costs. This judgment was subsequently affirmed by the circuit court. The Sunday Creek Company, which is a corporation engaged in the business of mining, shipping, and selling coal, filed its petition in the court of common pleas of Athens county to restrain the collection of a tax for dogs assessed upon its lands and amounting to \$336. It alleged that such tax was assessed under and by virtue of section 2833, Rev. St. Ohio; that it is the owner of about 300 dwellings on its premises, which are rented to miners and others in its employ and with express notice and orders that no dogs shall be kept or harbored thereon, or on the close adjacent thereto, or elsewhere on plaintiff's premises; and that, if any dogs have been kept or harbored on said premises by any of its tenants, the same has been done

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

without the knowledge or consent of the plaintiff, and against its orders and protest. It alleged that it was not the owner of any dogs listed for taxation, nor that it had ever had any interest in any of them. A demurrer to the petition was sustained and, the plaintiff not electing to plead further, the petition was dismissed at plaintiff's costs. On appeal to the circuit court the demurrer was sustained, and the same judgment rendered.

Evans & Crawford, for plaintiff in error Mirick. Harry W. Miller, Pros. Atty., for defendant in error Gims. W. O. Henderson and Grosvenor, Jones & Worstell, for plaintiff in error Sunday Creek Co. I. M. Foster, Pros. Atty., for defendants in error Woodworth and others.

DAVIS, J. (after stating the facts as above). These cases are alike in the particular that in both the landowner claims to have had no knowledge of the fact that dogs were kept or harbored on his premises; and they challenge the validity of the statute which charges the tax upon the land notwithstanding the owner may not have had such knowledge. They differ somewhat in the claim that in the one case the real estate was leased before the enactment of the present statute, and that the land has never since been within the possession or control of the owner, and that, in the other case, if dogs were kept and harbored on the land, it was done contrary to the express orders of the owner. It may be, and is, conceded, at least for the purposes of this case, that a tax on dogs, having for its object the protection of the sheep industry, is within the legitimate exercise of the police power. *Holst v. Roe*, 39 Ohio St. 340, 48 Am. Rep. 459. The question which is raised in these cases is a narrower one. Here it is not whether dogs may be taxed for such a purpose; but whether the tax may be made a charge on the land where the dogs are kept, when they are kept there without the knowledge or consent of the landowner.

There is no express limitation in the Constitution of this state upon that branch of legislative power which is commonly called "police power." Such limitations as are recognized arise by construction from the nature of the power itself, and from the Declaration of Rights contained in article 1, as well as the limitation contained in section 28 of article 2; and in considering these the first clause of section 20, art. 1, must not be overlooked, viz.: "This enumeration of rights shall not be construed to impair or deny others retained by the people." The police power is an attribute of sovereignty, and has its origin, purpose, and scope in the general welfare, or, as it is often expressed, the public safety, public health, and public morals. These terms indicate its field, yet its boundaries are necessarily vague and indefinable. The broad discretion thus vested in the state

is fraught with dangers to the personal and property rights of private persons; and therefore the courts have always asserted the right to restrain the exercise of the power to the extent that private rights may not be arbitrarily or unreasonably infringed. Such cases are within the rights reserved by the Bill of Rights, and are therefore the unconstitutional, or rather extraconstitutional, exercise of police power, and void.

Section 2833, Rev. St., was amended into its present form and took effect from April 4, 1906 (98 Ohio Laws, p. 87). Here for the first time appears in our statutes a provision that a "per capita tax on dogs" shall be collected, not from the owner or the keeper and harbinger of the dogs, but from the owner of the land on which they are kept or harbored. The statute provides: "Which per capita tax shall be levied upon and entered against the real estate upon which said dog is kept or harbored and collected as are other taxes upon real estate," etc. There does not appear to be any way of avoiding, by construction, the conclusion that by this enactment the landowner, and the landowner alone, must bear the penalty, although he may not be the owner, or keeper or harbinger of the dogs and may be ignorant of their existence, and even though he may have done all in his power to prevent the occurrence of such an offense; yet the real offender is subjected to no penalty at all, unless the payment of a trifling property tax, measured by the value of the dogs, is a penalty. Thus the property of an innocent person may be taken without notice and without due process of law to recompense an injury to another, committed by a third person who holds no relation to the landowner except that of tenant under a lease. While we recognize and approve the doctrine that every man holds his property subject to the condition that he must so use it as not to injure others, we are not persuaded to accept the view that the general welfare, or even the protection of a favored class of industries, justifies such drastic legislation as this appears to be. To us it seems to be inequitable, arbitrary, and unreasonable, unnecessarily infringing upon the natural and inalienable rights of citizens, and therefore void.

The case of *Mirick* might be disposed of on another ground. His land at and before the passage of this act was under lease and in the control of tenants, and has been so ever since. If there were no other sufficient objection to the statute, it could not apply to *Mirick's* case without a violation of section 28, art. 2, Const.

The judgments of the circuit courts and those of the courts of common pleas are reversed.

PRICE, C. J., and SHAUCK, CREW, SUMMERS, and SPEAR, JJ., concur. SUMMERS, J., does not concur in the judgment in the *Sunday Creek Case*.

(79 Oh. St. 181)

**VERNON v. HARPER et al.**

(Supreme Court of Ohio. Dec. 22, 1908.)

**MUNICIPAL CORPORATIONS (§ 373\*)—STREET IMPROVEMENTS—LIENS—SUBCONTRACTORS.**

The death of the principal contractor during the completion of a contract for the improvement of a village street, which contract was thereafter completed by the administrator, does not deprive a subcontractor, who has furnished material which has gone into the work, of his statutory right to a lien upon the fund arising from the contract.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 373.\*]

(Syllabus by the Court.)

**Error to Circuit Court, Athens County.**

Action by Vernon, administrator, against George H. Harper and others. Demurrer to the answers were sustained in the common pleas and reversed by the circuit court, and plaintiff brings error. Affirmed.

The controversy between the parties in the courts below was determined upon a demurrer filed by the plaintiff in error, administrator, to the answer of the defendant in error George H. Harper, and like demurrer to the answer of defendants in error Rumer & Blyth. Those demurrers were sustained by the common pleas, and judgment entered against the answering defendants, and that judgment was reversed by the circuit court. This court is asked to reverse this latter judgment and affirm that of the common pleas. The pleadings present this question: Can a materialman (a subcontractor) who, under a contract with the principal contractor, has furnished material for the completion of the principal contractor's contract for the paving of a village street obtain a lien on the fund which has accrued by virtue of the contract between the village and the principal contractor, the latter having died during the progress of the work, and the same having been completed to the acceptance of the village by his administrator? And if he can, should the money be paid into the hands of the administrator, to be paid out by him to the persons entitled thereto?

L. A. Koons and Grosvenor, Jones & Worstell, for plaintiff in error. Lewis & Sayre and Ivers & Danford, for defendants in error.

**SPEAR, J.** (after stating the facts as above). The first question is answered when proper construction is given to certain sections of our statute relating to liens, being sections 3193, 3194, 3198, 3200, 3203, Rev. St. These sections, so far as pertinent to this case, provide that any subcontractor who has furnished material for the construction of a street, provided for in the contract between any public authority and a principal contractor, and under a contract

between such subcontractor and the principal contractor, may at any time thereafter, not to exceed four months from the delivery of such material, file with the board or officer a sworn and itemized statement of the amount and value of such material furnished. Thereupon such board or officer shall retain subsequent payments from the principal to secure such claims. The board or officer shall, or the lien claimant may, furnish the principal contractor with a copy thereof within five days, and if such principal contractor shall fail within five days to notify in writing the board or officer of his intention to dispute the claim, he shall be considered as assenting to its correctness, and thereupon subsequent payments shall be applied pro rata upon such claim. If the head contractor shall neglect or refuse to pay, within 5 days after his assent to or adjustment of the claim, the amount thereof and costs incurred to the subcontractor, the board or officer shall pay when due the whole or pro rata amount thereof out of payments subsequently falling due, and on failure within 10 days the subcontractor furnishing material may recover, in an action for money had and received, the whole or pro rata amount of his claim, not exceeding the balance due the principal contractor. If by collusion or fraud the board or officer pay in advance the payments due under the contract, he shall be liable to the subcontractor for the amount due on such contract on the date of filing of the sworn account the same as if no payment had been made.

It is not claimed that there was a literal compliance with the requirements of the statute with respect to furnishing the original contractor with a copy of the verified account of the subcontractors. There could not have been. The original principal contractor was dead. The claim is, and the record shows, that the uncompleted contract between the original contractor and the village was completed by the administrator, the plaintiff, and that the material furnished by the subcontractor was furnished in pursuance of their agreement with the principal contractor, and was accepted by the administrator, and went into the completion of the job thus being conducted to a successful termination by the administrator. And the notice, with copy of the sworn account, was in due time served on the administrator, having first been served on the village authorities, and the amount or justice of the accounts has never been, and is not now, disputed. This it is claimed was a sufficient compliance with the statute to entitle the subcontractors to the benefit of the statutory lien, and it was so held by the circuit court. We are of opinion that this claim is well founded. The policy of the state with respect to the claims of laborers and materialmen to be compensated for their work and material out

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the structure to which their work and material have contributed is indicated by the statute as to liens, and has been clearly defined in a number of decisions in this and other courts. The statute should be liberally construed in order to carry out the purpose of the General Assembly in its enactment, the legislation being highly remedial in character. This policy is fully elaborated in *Bullock v. Horn*, 44 Ohio St. 420, 7 N. E. 737, and need not be enlarged upon here. In an earlier case, *Williams, Adm'r, v. Webb*, 2 Disn. 430, it is held that: "The death of the owner of property before a lien has been taken does not interfere with the rights of or prevent the necessary steps to secure a lien by the person performing labor or furnishing materials." It is further held that, although the statute in terms provides that the account shall be verified by the person performing the labor or furnishing the material, yet that the oath may be made by an agent of the party entitled to the lien, *Gholson, J.*, observing in the opinion that, "while we might be disposed to accede to the general proposition that such statutes should not be extended beyond what their terms clearly import, yet this does not require us to stick to the letter." See, also, *Foster v. Stone*, 20 Pick. (Mass.) 542, and *Bergin v. Braun*, 15 Ohio Dec. 382. So in the case at bar we are not required to stick to the letter. The contract was an executory one, which the administrator might properly complete. *Gray v. Hawkin's Adm'r*, 8 Ohio St. 450, 72 Am. Dec. 600. In doing so he acted as principal contractor, stepping into the shoes, for all practical purposes, of his decedent. And as such principal contractor he did finish the work with the aid of these men who furnished the material, they acting in good faith in compliance with their contract with the deceased. Their contribution to the work, thus accepted by the administrator, enabled him to complete his decedent's agreement with the village. To all intents and purposes they complied with the spirit and purpose of the statute. To deny them the advantage of their outlay would be to stick in the bark, to permit the mere letter to override and defeat the plain spirit and purpose of the statute.

The second question seems to present no difficulties. The fund arising from the completion of the paving contract should not be paid to the administrator. It was brought within the jurisdiction of the court of common pleas by the answer of the village in the nature of an interpleader. That court has all the parties before it, with full jurisdiction to determine all their rights and render final judgment, and there is no reason for paying money over to the administrator which belongs to the subcontractors, and which they have a right to receive undimin-

ished by any fees or cost of any kind on the part of the administrator.

The judgment of the circuit court will be affirmed, and the cause remanded to the court of common pleas of Athens county to carry into effect the judgment of the circuit court and this judgment, and the cause to be there proceeded in conformably to the said judgment of the circuit court and of this opinion.

Judgment affirmed.

PRICE, C. J., and SHAUCK, CREW, and SUMMERS, JJ., concur.

(200 Mass. 425)

# OELSCHLEGER v. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 5, 1909.)

## 1. EMINENT DOMAIN (§ 271\*)—PROPERTY APPROPRIATED—REMEDIES OF OWNERS.

Under St. 1896, p. 552, c. 530, authorizing the city of Boston to alter the course of and make a new channel for Stony brook, and to take any lands in the city which the street commissioners deem necessary for such purpose, or any rights or easements in said brook, or in any lands which the commissioners may deem necessary, the city has no right to take the waters of the brook, its only right being to alter its course and to take such land, rights, and easements as were necessary for that purpose; and the fact that the water right was not mentioned in the condemnation proceedings did not render the taking unlawful, so as to afford an action in tort in place of the statutory remedy.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 720; Dec. Dig. § 271.\*]

## 2. EMINENT DOMAIN (§ 84\*)—COMPENSATION—INJURING PROPERTY—CHANGING COURSE OF STREAM.

Where the city of Boston, under St. 1896, p. 552, c. 530, empowering the city to make a new channel for Stony brook, has condemned land for a new channel for the brook and has changed its course, the riparian owners, from whose lands the stream has been diverted, may recover damages.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 227; Dec. Dig. § 84.\*]

## 3. EMINENT DOMAIN (§ 140\*)—INJURY TO PROPERTY NOT TAKEN.

In estimating damages to property which is injuriously affected by a taking of other property for a public use, the nature and effect of the use may be considered.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 140.\*]

Exceptions from Superior Court, Suffolk County; Edward P. Pierce, Judge.

Action by John A. Oelschleger against the City of Boston. From a judgment for plaintiff, defendant brings exceptions. Exceptions sustained.

Charles W. Bartlett, Elbridge R. Anderson, and Arthur T. Smith, for plaintiff. Philip Nichols, for defendant.

KNOWLTON, C. J. St. 1896, p. 552, c. 530, § 1, is as follows: "The city of Boston may alter the course of and make a new channel, covered or uncovered, for Stony

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

brook in the city of Boston, from a point at or near the Tremont Street crossing of the Boston & Providence Railroad to a point at or near Boylston Station on said railroad." Section 2 gives a right to the street commissioners to take "for the purpose aforesaid, any lands in said city which they may deem necessary therefor," and to "take any rights or easements in said brook, or in any lands which they may deem necessary," etc. If the taking was otherwise than by purchase, they were required to file in the registry of deeds a description of the lands or rights or easements taken.

Acting under this statute, on April 22, 1897, they filed in the registry of deeds a statement of a taking "for the purposes specified in section one of this act." This included the fee of one parcel of land, with easements of the right to use several other parcels, all definitely described, with a reference to two plans on file in the office of the superintendent of streets, one of which is entitled "Plan of Taking for Relocation of Stony Brook Channel and Gatehouse, Columbus Avenue, Roxbury," and the other, "Plan of Taking for the Relocation of Stony Brook, Junction Center and Amory Streets." This taking was duly filed in the registry of deeds, and the city began the making of a new channel for Stony brook through these lands immediately, and completed the work and turned the brook into the new channel on October 1, 1897. In the parcels in which easements only were taken, there was a reservation to the owners of the "right to erect and maintain buildings over and upon said brook, and to use the waters of said brook, so far as said acts may not obstruct the free flow of said waters, it being the intention of this taking to acquire merely the right to improve the channel of said brook."

These parcels included land on both sides of the brook, beginning at a point a considerable distance up the stream from the land of the plaintiff, who was a riparian proprietor further down, and extending away from the line of the brook, so that a new channel through the land would take the brook a considerable distance from its former course, away from the land of the plaintiff. In this part, the brook in its original channel was crooked and winding. In passing to the plaintiff's land it made a curve, a considerable distance away from its general direction, towards Boylston Station. The land and the easements through these several parcels were taken for the purpose specified in section 1 of the act, namely, to alter the course and make a new channel for Stony brook, from a point at or near the Tremont Street crossing of the railroad to a point at or near Boylston Station on the railroad. Under the taking the land could be used for no other purpose. Under the statute the taking was an appropriation of the land to this use, which necessarily involved a material change in the course of the

brook. This would take away the flow of the stream from the land of riparian proprietors below, until it entered the old channel again, near Boylston Station. It was manifest that the land of the plaintiff would be deprived of the flow of the stream as a necessary result of the taking and of the appropriation of this land to the use specified in section 1. In estimating damages to any one whose property is injuriously affected by a taking of land for a public use, the nature and effect of the use are always considered. A taking for one use may have no detrimental effect upon an estate near by, while a taking for another use may cause special and peculiar damages to such an estate.

The question here is whether this taking by the city gave it a right to use the land for a new channel of the brook, and gave the plaintiff a right to recover damages, under the statute, for this alteration of the course of the brook. We are of opinion that it did. It deprived the plaintiff of the water that previously flowed through his land. The taking of the land for this purpose, coupled with the authority of the city under the statute to use it for this purpose, made it certain from the time of the taking that this alteration of the brook would follow, and would divert the water from the plaintiff's estate. Accordingly he could recover damages under the statute for the taking for this authorized purpose.

The contention of the plaintiff is that the city ought to have gone further and taken the plaintiff's right to the waters of the brook by name. But the city did not desire to take the waters of the brook as property, and it had no right, under the statute, to take the waters of the brook so as to become the owner of them. Its only right was to alter the course of the brook, and to take such land, rights and easements as it deemed necessary for that purpose. It took all that was necessary to enable it to make the change, and thereby, under the statute, it acquired, with the easements, a right to use the easements for this purpose. When it acquired these easements for this use and thus appropriated them to this use its right to change the course of the brook was complete, and it was liable to all persons damaged in their property by the taking, and by the change in the course of the stream that was necessarily included in it. It became the owner of the right to make the change, although it did not seek to become the owner of the water for use. So far as the riparian owners on the stream below had a right of property to have the brook flow through their lands, this right was taken by the action of the city, under the statute, which gave it a right to change the course of the brook. In its principles the case is like many others under the water acts, where, by some general act of taking, a right to divert water is acquired which gives proprietors on the stream below a right to recover damages for

the injurious effect of the diversion upon their property.

Under most of these statutes it is not necessary, nor is it the practice, to mention the rights of riparian owners below, nor to register a taking of their individual rights, beyond a general statement of the taking of that which, under the statute, authorizes a diversion of the water. See *Northborough v. County Commissioners of Worcester*, 138 Mass. 263; *Ætna Mills v. Waltham*, 120 Mass. 422; *Smith v. Concord*, 143 Mass. 253, 9 N. E. 642; *Howe v. Weymouth*, 148 Mass. 605, 20 N. E. 316. For cases in which the channel of a brook has been altered or improved, see *Washburn & Moen Manufacturing Company v. Worcester*, 153 Mass. 494, 27 N. E. 664, and cases there cited; *Morse v. Worcester*, 139 Mass. 389-394, 2 N. E. 694; *Washburn & Moen Manufacturing Company v. Worcester*, 116 Mass. 458; *Boston Belting Company v. Boston*, 149 Mass. 44, 20 N. E. 320; *Id.*, 152 Mass. 307, 25 N. E. 613.

We are of opinion that the defendant was not called upon to refer to the plaintiff's right in the stream, in order to make the taking one that would give it a right to change the course of the brook, and would give the plaintiff a right to damages under the statute. As his remedy was under the statute, in connection with the taking of land and easements by the city for the alteration of the course of the stream, he cannot recover in an action of tort.

Exceptions sustained.

(200 Mass. 579)

**PETERS v. EQUITABLE LIFE ASSUR. SOCIETY OF THE UNITED STATES.**

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 7, 1909.)

**1. INSURANCE (§ 522\*)—LIFE INSURANCE—MATURED POLICY—RELATION BETWEEN INSURER AND INSURED.**

The relation between the holder of a matured tontine dividend policy and the insurance company is that of creditor and debtor.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1306; Dec. Dig. § 522.\*]

**2. INSURANCE (§ 522\*)—LIFE INSURANCE—MATURED DIVIDEND POLICY—ACCOUNTING.**

A holder of a matured tontine dividend policy, entitled at his option to withdraw in cash the policy's share of the accumulated reserve and surplus equitably apportioned by the insurance company or to use such share for future insurance, is entitled to come into equity for an accounting, under Rev. Laws, c. 159, § 3, cl. 6, conferring jurisdiction on the Supreme Judicial and superior courts of suits on accounts, on his showing that the company has not equitably apportioned the surplus and has not furnished any account, and that the company has been guilty of specified acts of mismanagement and fraudulent conduct in the management and investment of the funds of the company, so as to enable him to intelligently exercise his option.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1306; Dec. Dig. § 522.\*]

**3. INSURANCE (§ 522\*)—LIFE INSURANCE—MATURED DIVIDEND POLICY—ACCOUNTING.**

A bill by the holder of a matured tontine dividend policy, giving him the option to withdraw in cash his policy's entire share of the accumulated reserve and surplus equitably apportioned to his policy, or to use his share for future insurance, alleged that the insurance company had not equitably apportioned the surplus due him, that it had not furnished him any account, that it had not dealt honestly with the dividends retained by it, that it had misappropriated and wasted the dividends and had failed to manage the tontine funds or its accumulations prudently, and charged specific acts of mismanagement and of wrongful, dishonest, and fraudulent conduct on the part of the company and its directors in the management and investment of the funds. *Held*, that the bill charged such fraud and wrongful misappropriation as entitled complainant to an accounting.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 522.\*]

**4. ACCOUNT (§ 17\*)—BILL—SUFFICIENCY.**

The fact that a bill for an accounting does not expressly aver the amount of complainant's damages, and thereby exclude the idea that the damages may be too small to warrant equity in interfering, is not available on demurrer; but defendant may have the benefit of it, on the fact so appearing.

[Ed. Note.—For other cases, see *Account*, Dec. Dig. § 17.\*]

**5. INSURANCE (§ 522\*)—LIFE INSURANCE—ACCOUNTING.**

Where a bill for an accounting by the holder of a matured tontine policy, giving him an option to withdraw in cash the accumulated reserve and surplus equitably apportioned to the policy or to use his share for future insurance, expressly charged fraudulent conduct on the part of the company in apportioning to the policy the surplus due, the bill was not demurrable, though the apportionment by the company is *prima facie* correct, and will not be overthrown without evidence of fraudulent conduct affecting the result, or some error in the manner of making the apportionment.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 522.\*]

**6. PLEADING (§ 216\*)—DEMURRER—SCOPE OF INQUIRY—MATTERS NOT PLEADED—LAWS OF OTHER STATES.**

What the laws of a sister state are is a matter of fact, which cannot be considered on demurrer to a bill containing no allegation as to such laws.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 536; Dec. Dig. § 216.\*]

Report from Supreme Judicial Court, Suffolk County.

Bill of complaint by George Gorham Peters against the Equitable Life Assurance Society of the United States. The justice ordered that the demurrer to the bill of complaint be overruled, and defendant appealed from the order, and the cause was reported for the full court. Demurrer overruled.

Gaston, Snow & Saltonstall, for plaintiff. Brandeis, Dunbar & Nutter (George R. Nutter and J. Butler Studley, of counsel), for defendant.

SHELDON, J. Material parts of the agreement which the defendant, by its poli-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cy of insurance, made with the plaintiff, were in substance that on the expiration of the tontine dividend period all surplus of profits derived from similar policies which should not then be in force should be apportioned equitably among such policies as should complete their tontine dividend periods, and that thereupon the plaintiff should have the option "to withdraw in cash [his] policy's entire share of the assets, i. e., the accumulated reserve, and in addition thereto the surplus apportioned" by the defendant to his policy, or to use his share wholly or in part in payment for future insurance. The plaintiff's policy has completed this dividend period; but he avers that the defendant has not equitably apportioned the surplus due to him under the terms of the policy, that it has not furnished him a sufficient account or any account, or produced any such account, that it has not dealt honestly with the dividends retained by it, that it has misappropriated and wasted said dividends, and has failed to manage the tontine fund or its accumulations or the general business of the company honestly, carefully or prudently. And by an amendment to the bill he has charged certain specific acts and kinds of mismanagement and of wrongful, dishonest and fraudulent conduct which he avers have been committed by the defendant and its directors in the management and investment of its funds. There is no averment in the bill that the plaintiff has exercised his option as to the disposition of the share of the assets that has been or should have been allotted to his policy. He asks that the defendant be ordered to furnish him with an account; that the amount to which he is fairly entitled may be ascertained, and that such amount be paid to him; and that the damages sustained by him be assessed and ordered to be paid to him.

Some of the general questions raised by the defendant's demurrer to this bill have been already considered in *Pierce v. Equitable Life Assurance Society*, 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433, and in the decision made upon the defendant's objections to the right of this court to entertain this case reported in 196 Mass. 143, 81 N. E. 964. It is true, as was said in the *Pierce Case*, *ubi supra*, that the relation between the defendant and the plaintiff is not that of trustee and cestui que trust, but that of debtor and creditor. This rule is now well settled in the courts. See, besides the decisions referred to in the *Pierce Case*, 145 Mass. at page 59, 12 N. E. at page 861 (1 Am. St. Rep. 433); *Peters v. Equitable Assurance Co.*, 196 Mass. 143, 148, 149, 81 N. E. 964; *Uhlmann v. New York Ins. Co.*, 109 N. Y. 421, 17 N. E. 363, 4 Am. St. Rep. 482; *Brown v. Equitable Assurance Society (C. C.)* 142 Fed. 835; *Everson v. Equitable Assurance Society (C. C.)* 68 Fed. 258. But under the allegations of this bill the plaintiff is

entitled to know before exercising the option given to him what is the amount of his policy's share of the assets, including the accumulated income and the surplus apportioned by the defendant to his policy, especially in view of the defendant's express agreement that all surplus of profits from policies like his "shall be apportioned equitably" among the policies which shall complete their dividend periods. *Pierce v. Equitable Assurance Society*, 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433. He cannot wisely exercise his option until he shall have received this information. Upon the averments of the bill, under Rev. Laws, c. 159, § 3, cl. 6, the plaintiff has a right to come into equity, and to have such an accounting, unless some of the defendant's specific objections to the maintenance of the bill can be sustained.

The defendant's contention is that irrespective of the allegations of fraud this bill will not lie for an accounting; that in the absence of fraud the plaintiff is bound by the apportionment of the surplus made by the defendant; and that the bill does not contain such allegations of fraud or irregularity as to justify a court of equity in reviewing the apportionment made by the defendant.

1. In reference to the first contention of the defendant we need not consider whether we should now follow all of the reasoning in *Pierce v. Equitable Assurance Society*, or rather should adopt the defendant's contention that the plaintiff's only right to compel an accounting from the defendant is incidental to the enforcement of some legal claim against it, and that until the exercise of his option as to what he will require from the defendant he has no such legal claim; that there is not shown to be at present any obligation on the part of the defendant to render an account to the plaintiff either by reason of the relationship between them or because of any provision in the policy or the language of any statute. *Brown v. Equitable Assurance Society (C. C.)* 142 Fed. 835, 842; *Everson v. Equitable Assurance Society (C. C.)* 68 Fed. 258, and 71 Fed. 570. 18 C. C. A. 251; *Huntton v. Equitable Assurance Society (C. C.)* 45 Fed. 661; *Greeff v. Equitable Assurance Society*, 160 N. Y. 19, 54 N. E. 712, 46 L. R. A. 288, 73 Am. St. Rep. 659, much of the reasoning in which may be applied to this case. although the stipulations of the policy there considered were not the same as are now before us. There is very much force in what was said by Peckham, J., in *Uhlmann v. New York Ins. Co.*, 109 N. Y. 421, 434, 17 N. E. 363, 367, 4 Am. St. Rep. 482, as to the consequences that would follow if every policy holder of a class like this had the right to call the defendant to account "and to cause it to give in the trial of the action a detailed account of every transaction (proved by reference to or the production of its books and the oaths of its officers) which took place from the

commencement to the termination of the tontine period in regard to those matters material to be known upon the question of an equitable apportionment of the fund. There would be no necessity for an allegation, much less even the slightest *prima facie* proof of wrongdoing or that there had been any mistake made by the company in the apportionment made by it. But the mere fact that an individual was the owner of one of those policies in force at the termination of the tontine period would give him a right of action and a right to demand this proof from the defendant. \* \* \* That this should be permitted without an allegation, even on information and belief, that any fraud, mistake of impropriety in the accounts or in the manner of their statement had been made by the officers or agents of the company would seem to be intolerable." This was said however in a case in which the plaintiff had abandoned all allegations as to any misappropriation of the funds or any wrongdoing in regard thereto, and claimed a right to an accounting from the mere nature of the transaction as shown by the policy. It well may be that this plaintiff would not be allowed to have the accounting for which he asks without first offering proof of his averments of fraud on the part of the defendant. But it is generally agreed that such an accounting would not be denied where there had been actual wrong doing and fraudulent misappropriation of the assets that should have been accounted for and apportioned. This is either expressly declared or assumed in *Greeff v. Equitable Assurance Society*, 160 N. Y. 19, 54 N. E. 712, 46 L. R. A. 288, 73 Am. St. Rep. 659; *Uhlmann v. New York Ins. Co.*, 109 N. Y. 421, 17 N. E. 363, 4 Am. St. Rep. 482; *Watts v. Equitable Assurance Society*, 55 Misc. Rep. 454, 105 N. Y. Supp. 363; *Brown v. Equitable Assurance Society*, 151 Fed. 1, 81 C. C. A. 1; *Gadd v. Equitable Assurance Society (C. C.)* 97 Fed. 834; *Everson v. Equitable Assurance Society (C. C.)* 68 Fed. 258, and 71 Fed. 570, 18 C. C. A. 251; and *Bain v. Aetna Ins. Co.*, 20 Ont. 6.

The bill before us expressly charges such fraud, dishonesty and wrongful misappropriation; and the amendment at least makes these allegations sufficiently specific to call for an answer. The bare charge that the defendant or its officers had been guilty of fraud would not of course be sufficient without setting out the facts which constituted the fraud relied on. *May v. Wood*, 172 Mass. 11, 51 N. E. 191; *Blair v. Telegram Newspaper Co.*, 172 Mass. 201, 203, 204, 51 N. E. 1080; *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 590, 61 N. E. 219, 55 L. R. A. 631; *Nye v. Storer*, 168 Mass. 53, 55, 46 N. E. 402; *Tetrault v. Fournier*, 187 Mass. 58, 61, 72 N. E. 351. But any deficiency in this respect in the

original averments of the bill is cured by the amendment. *Brown v. Equitable Assurance Society*, 151 Fed. 1, 81 C. C. A. 1. The allegations as amended go further than those which were held to be insufficient in *Blair v. Telegram Newspaper Co.*, 172 Mass. 201, 204, 51 N. E. 1080. Such dishonesty as is charged, directly diminishing the fund from which an apportionment was to be made to the plaintiff's policy, was necessarily injurious to him; and the rule stated in *Lewis v. Corbin*, 195 Mass. 520, 524, 81 N. E. 248, 122 Am. St. Rep. 261, is not to be applied. Nor is it now material that the plaintiff has not limited the extent of his possible recovery by expressly averring the amount of his damages, and that these may turn out to be too small to warrant equity in interfering, within the rule of *Giragosian v. Chutjian*, 194 Mass. 504, 507, 80 N. E. 647, 120 Am. St. Rep. 570, and cases cited. There is no presumption that this will be the case; if it should so turn out, the defendant will have the benefit of it.

2. As to the defendant's second contention, the weight of authority elsewhere undoubtedly is against the dictum in *Pierce v. Equitable Assurance Society*, 145 Mass. 56, 58, 59, 12 N. E. 858, 1 Am. St. Rep. 433, and is to the effect that the apportionment made by the defendant is *prima facie* correct, and is not to be overthrown without evidence of fraudulent conduct on its part affecting the result, or at least of some error in the manner of making the apportionment or in the principles upon which it was based. *Greeff v. Equitable Assurance Society*, 160 N. Y. 19, 54 N. E. 712, 46 L. R. A. 288, 73 Am. St. Rep. 659; *Uhlmann v. New York Ins. Co.*, 109 N. Y. 421, 17 N. E. 363, 4 Am. St. Rep. 482; *Buford v. Equitable Assurance Society (Sup.)* 98 N. Y. Supp. 152; *Gadd v. Equitable Assurance Society (C. C.)* 97 Fed. 834; *Everson v. Equitable Assurance Society (C. C.)* 68 Fed. 258, and 71 Fed. 570, 18 C. C. A. 251; *Bain v. Aetna Ins. Co.*, 20 Ont. 6. But we need not further consider this question; for the fact that such fraudulent conduct is expressly charged in the bill makes it impossible to sustain the demurrer for this reason.

3. The contention that the bill as amended does not contain such allegations of fraud or misconduct as to warrant equity in interfering has been already sufficiently considered.

It may be added that while there is ground for the contention that this policy is a New York contract, to be governed by the laws of New York, we have not felt at liberty to consider whether this action can be maintained under those laws. What those laws are is of course a question of fact in this jurisdiction, and cannot be considered upon demurrer to a bill which contains no allegation as to the New York laws.

Demurrer overruled.

(200 Mass. 406)

**MORRISON CO. v. WILLIAMS.**(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 5, 1909.)**1. ABATEMENT AND REVIVAL (§ 5\*)—ANOTHER ACTION PENDING—ACTION FOR DEBT AND TO FORECLOSE MECHANIC'S LIEN.**

Under Rev. Laws 1902, c. 197, § 33, providing that the provision of the chapter relating to mechanics' liens shall not prevent one entitled to a lien thereunder from having an action at law as if he had no lien, considered in view of the construction of similar prior statutes (Rev. St. 1836, c. 117, § 33; Gen. St. 1880, c. 150, § 40; Pub. St. 1882, c. 191, § 46), one may enforce his lien, though a contract action for the debt was then pending, if the proceedings did not conflict; but he can have only one satisfaction for the debt.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 27; Dec. Dig. § 5.\*]

**2. CONTRACTS (§ 287\*)—CONSTRUCTION—BUILDING CONTRACTS.**

A building contract required monthly statements by the contractor to the architect, and provided for the issuance of certificates of payment of a part of the amount earned. The next paragraph provided for final settlement 40 days after completion and acceptance by the architect, and another paragraph provided that in each of the cases of payment the contractor, if required, should present a certificate by the recorder of liens showing that the property was free from liens chargeable to the contractor. Held, that the provision for the certificate did not apply to the final settlement, but only to the monthly payments.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1308, 1314; Dec. Dig. § 287.\*]

**3. MECHANICS' LIENS (§ 93\*)—ESTABLISHMENT—CONDITIONS OF CONTRACT.**

A provision of a building contract requiring the contractor, when payment was made, if required, to present to the owner a certificate of the recorder of liens showing that the property was free from liens chargeable to him, would not affect the contractor's right to payment or to a mechanic's lien, where no certificate was required by the owner.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 124; Dec. Dig. § 93.\*]

**4. MECHANICS' LIENS (§ 260\*)—ENFORCEMENT—TIME TO SUE.**

That a building contract provided that final settlement should be made 40 days after the completion and acceptance of the building, so as to enable the owner to determine whether there were any liens on the building before payment, would not prevent the contractor from instituting proceedings to enforce a mechanic's lien for partial payments then due, as, in determining the amount due him, any claims for labor, materials, etc., which he had failed to pay could be considered and deducted therefrom.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 458; Dec. Dig. § 260.\*]

Report from Superior Court, Suffolk County; Francis A. Gaskill, Judge.

Petition by the Morrison Company against Henry Bigelow Williams. On report from superior court upon sustaining a demurrer to the answer. Case directed to stand for trial.

Charles F. Kittredge, for petitioner. Roger F. Sturgis, for respondent.

KNOWLTON, C. J. To this petition for the enforcement of a mechanic's lien the respondent filed a plea in abatement, averring first, that the petitioner had previously brought an action of contract, which was still pending, for the collection of the same indebtedness, and secondly, that there was a provision in the contract in regard to the existence of other liens or claims upon the property chargeable to the petitioner which was a cause for the abatement of the petition. The questions come before us on a demurrer to this plea.

1. The statute provides that one may maintain an action of contract for a debt of this kind, and at the same time have the benefit of the provisions of law for the enforcement of a lien upon the land and building. Rev. Laws, c. 197, § 33. This is the meaning of the prior statutes covering the same subject in similar language. Rev. St. 1836, c. 117, § 33; Gen. St. 1880, c. 150, § 40; Pub. St. 1882, c. 191, § 46. That this is the proper interpretation of the provision was decided in *Angier v. Bay State Distilling Company*, 178 Mass. 163, 59 N. E. 630, in which the decision was not made upon a question of pleading, but upon substantive grounds. Of course the petitioner can have but one satisfaction, but he may pursue both remedies until he obtains satisfaction in one of them, so long as his action in one proceeding is not in conflict with that in the other.

2. An article in the contract provides for the making of monthly statements, by the contractor to the architect, of the amount in value of labor and materials provided and used in the erection of the building and for the issuing by the architect of certificates of payment of 80 per cent. of such amount, or of so much as he deems just. The next paragraph is in these words: "Final settlement to be made 40 days after the full completion of said building and its acceptance by the architect." Then in another paragraph is the following: "Provided, however, that in each of said cases of payment, if required, the said party of the first part shall present a certificate from the clerk of the office where liens are recorded, signed by said clerk, to the effect that the works and estate are, at the time said payments are due, free from all liens or claims chargeable to the said party of the first part."

The plea in abatement sets up this last quoted provision, with an averment that no certificate was furnished under it. It contains no averment that any certificate was required. It is also averred that there are liens of certain persons filed against the property for labor and materials used in the erection of the building, and that petitions for the enforcement of some of these liens are pending.

These averments furnish no ground for the abatement of the petition. In the first place

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

we are of opinion that the quoted provision does not apply to the final settlement, to be made 40 days after the completion of the building, but only to the payments to be made monthly according to the earlier requirement of the contract. Secondly, the failure to furnish a certificate when none was required would not affect the petitioner's right.

The postponement of the settlement until 40 days after the completion of the building was undoubtedly intended to enable the owner to ascertain whether there were liens upon the building, and to protect himself from them. But this part of the contract does not preclude the petitioner from bringing a petition or suing out a writ for the recovery of the amount due him. In determining the amount to be paid him, if he had failed to pay for labor and materials included in his contract, and had left them to be paid for out of the owner's property through the enforcement of a lien, that fact would be taken into account. The rights of the respondent in this particular would be protected by the court.

Case to stand for trial.

(200 Mass. 354)

#### ROGERS v. CITY OF LYNN.

(Supreme Judicial Court of Massachusetts. Essex. Jan. 4, 1909.)

#### 1. TAXATION (§ 697\*)—TAX SALES—REDEMPTION—PERSONS ENTITLED—"OWNER."

Where a statute limits the right of redemption from a sale of land for taxes to the owner, the word "owner" is not limited to the person who owned the land when the tax from which redemption is sought was assessed, but includes a purchaser of the land at tax sale, who thereupon becomes entitled as owner to redeem from prior sales.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. 1400; Dec. Dig. § 697.\*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5134-5151; vol. 8, p. 7744.]

#### 2. MUNICIPAL CORPORATIONS (§ 982\*)—TAX SALES—DEEDS—FAILURE OF TITLE—CONSIDERATION.

Where, after land had been sold to a city for prior taxes, plaintiff purchased the same at a subsequent tax sale, and the city conveyed its interest to him in consideration of the amount due on its tax lien, such transaction operated as a payment of the prior taxes, and hence to that extent the conveyance was not void, either for failure of title or consideration.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 982.\*]

Exceptions from Supreme Judicial Court, Essex County.

Action by Harlow H. Rogers against the City of Lynn. Judgment for defendant, and plaintiff brings exceptions. Overruled.

The following is the agreed statement of facts:

"The defendant is a municipal corporation in said county of Essex. Chapter 367, p. 291. of the Acts of 1900 was accepted by the

voters of the said city as therein provided, and took full effect on the first Monday of January, 1901. On September 1, 1900, Hartwell S. French, collector of taxes for the said defendant city of Lynn, offered for sale a certain parcel of land situated on Evelyn street in said city at a duly advertised tax sale to enforce payment of taxes assessed to Georgianna Elliott thereon for the year 1898. At the time of this tax sale on September 1st above mentioned, the defendant city held tax deeds of said property in the form prescribed by statute dated respectively October 12, 1896, September 20, 1897, September 12, 1898, and September 18, 1899, for taxes assessed to said Georgianna Elliott for the years 1894, 1895, 1896 and 1897 respectively. The plaintiff, Rogers, was the highest bidder at said tax sale, and said French as said collector gave to the plaintiff a tax deed in proper form of said land. Said tax deed bore date of September 14, 1900, and was acknowledged on said September 14, 1900, and was recorded on September 25, 1900. The defendant gave to the plaintiff a release deed without covenants, signed, sealed, executed and delivered in the name and in behalf of defendant by its then mayor, purporting to convey to the plaintiff all the right, title and interest acquired by the defendant under the four tax deeds first above referred to. Said deed bore date of October 15, 1900, was acknowledged on said October 15, 1900, and was recorded on October 29, 1900. The consideration for the last-named deed was the sum of \$176.84, which was on September 15, 1900, paid by the plaintiff to the defendant therefor and appropriated by defendant to its own use, the amount so paid being the amount due to the city of Lynn under the said four tax sales. On June 10, 1902, the plaintiff demanded of the defendant said sum of \$176.84, being the consideration of said deed to him dated October 15, 1900. This demand the defendant has neglected and refused to comply with.

"On August 31, 1901, Hartwell S. French, collector of taxes for the said defendant city of Lynn, offered for sale a certain parcel of land situated on High street in said city at a duly advertised tax sale to enforce payment of taxes assessed to Malinda A. Walker thereon for the year 1899. At the time of this tax sale, August 31st, above mentioned, the defendant city held tax deeds of said High street land in the form prescribed by statute, dated respectively September 20, 1897, September 12, 1898, September 18, 1899, and September 14, 1900, for taxes assessed to said Malinda A. Walker for the years 1895, 1896, 1897, and 1898, respectively. The plaintiff, Rogers, was the highest bidder at the said tax sale, which took place August 31, 1901, and said French as said collector in accordance with said sale gave to the plaintiff a tax deed in proper form of said High

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

street land. Said last-mentioned tax deed bore date of September 11, 1901, was acknowledged on September 12, 1901, and recorded on September 26, 1901. The defendant gave to the plaintiff a release deed without covenants, signed, sealed, executed and delivered in the name and in behalf of defendant by its then mayor, purporting to convey to the plaintiff all right, title and interest acquired by the defendant under the four tax deeds above referred to, which are dated September 20, 1897, September 12, 1898, September 18, 1899, and September 14, 1900. Said release deed bore date of September 20, 1901, and was acknowledged on September 20, 1901, and was recorded on September 26, 1901. The consideration for the last-named deed was the sum \$862.51, which was on September 13, 1901, paid by the plaintiff to the defendant therefor and appropriated by defendant to its own use, the amount so paid being the amount due to the city of Lynn under the said four tax sales. On June 10, 1902, the plaintiff demanded of the defendant said sum of \$862.51, being the consideration of said deed to him bearing date of September 20, 1901. This demand the defendant has neglected and refused to comply with. There had not been previously to the defendants giving either of said release deeds any final sale by public auction under the provisions of section 88, c. 390, p. 376, of the Acts of 1888 of the respective parcels of land described therein.

"The plaintiff had not at the times when he received the release deeds to him above-mentioned nor had he previously thereto, nor did he at said times or previously claim any title or interest in said lands other than what may have been conveyed to him by the two collectors' deeds to him referred to.

"Said French and said Rogers, at the times of the respective transactions above referred to, were of the mutual belief and opinion that the city of Lynn could rightfully as a matter of law release said tax deeds to said Rogers in the manner in which the same was done and that said release deeds did convey the title which the city had acquired by said tax deeds to the city."

N. D. A. Clarke, for plaintiff. Arthur G. Wadleigh, City Sol., for defendant.

MORTON, J. In each instance before he paid the taxes which he now sues to recover back, the plaintiff had become the purchaser at a tax sale of the premises on which the taxes that he paid had been assessed, and had received from the collector deeds in proper form duly acknowledged which he had caused to be regularly recorded. In other words, by virtue of the tax deeds he had become the owner of the two parcels subject only to the liens which the defendant had for prior taxes, and to the right of the former owner to redeem. *Butler v. Stark*, 139 Mass.

19, 29 N. E. 213; *O'Day v. Bowker*, 143 Mass. 59, 62, 9 N. E. 16; *Perry v. Lacy*, 179 Mass. 183, 60 N. E. 472. As such owner we think that he was entitled to redeem the premises by the payment of the prior taxes to which they were still subject in the defendant's favor. The language of the statute is broad enough to include any kind of ownership and has been, in effect, so construed. *Hillis v. O'Keefe*, 189 Mass. 139, 75 N. E. 147. In order to redeem the person seeking to redeem must be the owner, but we see no reason for limiting the right of redemption as between one who seeks to redeem and the city, to the person who was the owner at the time when the tax, from which redemption is sought, was assessed. It has been distinctly held that the right of a mortgagee to redeem is not limited to one who was such at the time when the tax was assessed. *Barry v. Lancy*, 179 Mass. 112, 60 N. E. 395, and cases cited. The plaintiff could not have redeemed from the taxes for which the parcels were sold to him, because he was not then in any sense an owner. Neither for the same reason could he have redeemed at the time when the premises were sold for the prior taxes. But when he became an owner by purchase at the tax sale, we do not see why the rights of redemption from prior taxes did not attach, by virtue of the statute, to his ownership, as well as to that of one who was an owner when the taxes were assessed.

But however that may be, and whether he was an owner or not within the strict meaning of the statute, the transaction between the plaintiff and the collector must be regarded as operating as a payment of the prior taxes even though the plaintiff and the collector may have supposed that it was a purchase by an assignment to the plaintiff for a consideration equal to the prior taxes of any right or interest which the city had in the premises, and may have intended that it should have that effect. Whether the parties intended it or not the receipt by the collector of the prior taxes released the premises from the liens which the defendant had thereon to secure their payment and therefore operated as a payment of such taxes. To that extent whatever the exact nature of the plaintiff's interest in the property conveyed to him, he was benefited by the release which he received, and the case is not, therefore, at the worst one of a total failure of title or of consideration.

Exceptions overruled.

(200 Mass. 459)

DEANE et al. v. AMERICAN GLUE CO.  
(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 6, 1909.)

1. PRINCIPAL AND AGENT (§ 23\*)—EVIDENCE OF AGENCY.

Where plaintiffs, in consideration of a commission of 2½ per cent., permitted C., a glue

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

broker, to purchase and sell glue on plaintiffs' credit, C. being also permitted to fix the price, to make sales, and to collect the proceeds, he should be deemed plaintiffs' agent.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 23.\*]

## 2. PRINCIPAL AND AGENT (§ 22\*)—EVIDENCE—DECLARATIONS OF AGENT.

Under the rule that, unless some proof of agency is offered, mere declarations of one assuming to be an agent are inadmissible to bind his alleged principal, a letter claimed to have been written by the agent on paper bearing defendant's letter head, unless connected with defendant company, was not sufficient to support a finding that the writer was defendant's agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. § 22.\*]

## 3. APPEAL AND ERROR (§ 692\*)—EXCLUSION OF EVIDENCE—LETTERS—RECORD.

Where the text of a letter, which was excluded, and the purpose for which it was offered, were not stated, plaintiffs did not show that they were aggrieved by the ruling, so as to require a review thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2905; Dec. Dig. § 692.\*]

## 4. PRINCIPAL AND AGENT (§ 143\*)—UNDISCLOSED PRINCIPAL—RIGHTS OF THIRD PERSONS.

Where defendant purchased glue from C., without information or knowledge of his agency for plaintiffs, title to the glue so sold by C. passed, as against plaintiffs, and defendant was not liable to plaintiffs, either in tort for conversion or in contract for the price, except so far as the proceeds, if any, exceeded any liability of C. to defendant.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 504; Dec. Dig. § 143.\*]

Exceptions from Superior Court, Suffolk County; John A. Aiken, Judge.

Action by Phillip S. Deane and others against the American Glue Company for the value of shipments of glue alleged by plaintiffs to have been sold by them to defendant, or to have been converted by defendant. The court found for defendant, and plaintiffs bring exceptions. Overruled.

One George W. Cummings, a glue broker and jobber, induced plaintiffs to permit him to use their name and credit in the purchase of glue for them, to be resold; plaintiffs to receive therefor a commission of 2½ per cent., and the glue to be invoiced in plaintiffs' name. Orders for glue selected by Cummings were signed by plaintiffs, as directed by Cummings, and delivered to him for use in purchasing glue, and the bills of lading, when received by plaintiffs, were indorsed by them, turned over to Cummings, and duplicate invoices were made in defendant's name and delivered to Cummings, who received payment on account of sales of the glue from defendant, for which Cummings did not account. Plaintiffs summoned Cummings to testify at the trial, but were unable to produce him, and his whereabouts at that time were unknown to either.

Winfield F. Prime, for plaintiffs. Benjamin L. M. Tower and Samuel H. Pillsbury, for defendant.

BRALEY, J. It was undisputed that the plaintiffs were copartners doing business as "electrical contractors," but never had dealt in glue until at his suggestion they entered into an arrangement or contract with one Cummings, who was a glue broker and jobber, whereby they permitted him to use their name and credit in the purchase and resale of glue to be invoiced and billed in their names, in consideration that on all sales they were to receive a commission of 2½ per cent. In acting for them it further appears that with their knowledge and assent he fixed the price for which glue should be sold, made sales, and collected the proceeds. Having been clothed with this authority, he must be deemed the agent of the plaintiffs. The averment, in the first count of the declaration, that he acted as the agent of the defendant, is wholly unsupported by any evidence, for the letter claimed to have been written by him on paper bearing the defendant's letter head, unless connected with the company, was not evidence which would support a finding that he was acting for it. It is familiar law that, unless some proof of agency is offered, the mere declarations of one who assumes to be an agent cannot be admitted to bind his alleged principal. A foundation must first be laid from which such a relation can be inferred, and from whom he procured the letter head is not shown. The admission of the letter head, and that the letter paper of the defendant was used, at least was sufficiently favorable to the plaintiffs. The plaintiffs do not show that they are aggrieved by the ruling excluding its contents, as the text of the letter, or the purpose for which it was offered, are not stated. *Baker v. Gerrish*, 14 Allen, 201; *Phenix Nerve Beverage Co. v. Dennett & Lovejoy Wharf & Warehouse Co.*, 189 Mass. 82, 75 N. E. 258; *Magnolia Metal Co. v. Gale*, 191 Mass. 487, 78 N. E. 128. The agent, having been clothed with these powers, entered into negotiations with the defendant for the sale of the parcels or invoices of glue described in the several items of the account annexed, of which only the proceeds of the sales under the tenth and thirteenth items were finally in issue at the close of the evidence. If there was testimony which would justify a finding that at the time of purchase, without information or knowledge of his agency, the defendant dealt with Cummings, the title legally passed, and it is not liable to the plaintiffs, either in tort for its conversion, or in contract for the price, except so far as the proceeds, if at all, may have exceeded any liability of their agent to the company. In making the sales in suit, the agent, although he did not disclose his agency, did not act in excess of the scope of his employment. If for their own protection, and under the arrangement with him, the invoices ran in the plaintiffs' firm name, and ordinarily would have to be prop-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

erly indorsed by them before the railroad company would deliver, yet, the sale having been effected by their representative, there was no conversion by the defendant, and no question of the election of remedies, or of ratification, where there has been an unauthorized sale of the owner's property to a third person, is presented. *Metcalf v. Williams*, 144 Mass. 452, 11 N. E. 700.

The plaintiffs testified that they never purchased any glue except for the purpose of reselling it to the defendant, and there seems to have been no doubt, as stated by the court, and admitted by its counsel, that the plaintiffs believed they were selling the glue in suit directly to the company when they indorsed to the company's order the bills of lading or invoices, and gave them to Cummings, after he reported that the sale had been negotiated. It would seem to be plain that according to the common course of business the carrier would not have delivered the glue to the defendant, under this indorsement, without its order. By what means he either used or suppressed these invoices, and invoiced the merchandise in his own name to the company, as testified by its general manager, is not stated. If the testimony of the plaintiffs, and the general manager, who was called as a witness by them, is believed, that they must have been manipulated in some way is evident. But, even if it would have been possible to find that at the time of sale duplicates of some of the invoices of the sales in suit, properly addressed and mailed, had previously been received, or from the conversation which the plaintiffs claim to have had with the general manager, the defendant was put upon its inquiry, and might have been charged with knowledge, that the plaintiffs were the principals, these matters were purely questions of fact. The credibility of the witnesses also was solely for the trial court. In view of the form which the transaction finally assumed and the contradicted testimony of the general manager, that Cummings invoiced all goods in his own name to the company and brought to him the bills of lading, we cannot say, as matter of law, that the general finding in favor of the defendant, which, of course, must have rested upon a finding that it did not know, or have any reasonable cause to apprehend, that the plaintiffs were the principals, was unwarranted. If, while sustaining the relation of agent to the plaintiffs, he made the sales for value to the defendant, who dealt with him without knowledge of his agency, when the plaintiffs as undisclosed principals seek to avail themselves of the benefit of the contract they are subject to any equities in its favor which existed between the company and Cummings. *Cushman v. Snow*, 186 Mass. 169, 174, 71 N. E. 529, and cases cited. The defendant, therefore, had a right to apply in set-off the amount of the sales against his

indebtedness, and when this had been done no balance remained.

The first request, that on all the evidence the plaintiffs were entitled to recover, was properly refused, and the other requests became immaterial under the general finding, to which, for reasons stated, their exception cannot be sustained. *American Malting Co. v. Souther Brewing Co.*, 194 Mass. 89, 80 N. E. 528.

Exceptions overruled.

(200 Mass. 507)

**EISNER v. HORTON et al.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 6, 1909.)

MASTER AND SERVANT (§ 216\*)—INJURIES TO SERVANT—ASSUMED RISK.

During the construction of a building, the tenth floor had been laid in terra cotta, on which planks had been placed to protect the floor. A plank passageway had also been laid from the elevator to the side of the building on which material for the workmen was carried. The planks were not fastened, and while plaintiff, a laborer, was carrying a stone, one end of a plank on which he stepped went down, and his leg went through the floor, causing the stone to fall and plaintiff to break one of his fingers. *Held*, that the planks were not a structure, but were provided for a use that might properly be intrusted to ordinary workmen, and that plaintiff assumed the risk of the superintendent's failure to inspect the runway and ascertain whether a plank over an opening in the floor was out of position.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 216.\*]

Exceptions from Superior Court, Suffolk County; William Cushing Wait, Judge.

Action by Titus E. Eisner against Fred B. Horton and another. Judgment for defendants, and plaintiff brings exceptions. Overruled.

George P. Beckford, for plaintiff. Walter I. Badger, Wm. Harold Hitchcock, and Chester M. Pratt, for defendants.

**KNOWLTON, C. J.** The plaintiff was working in the erection of a building of steel construction, with granite walls. The tenth floor had been laid in terra cotta, and it had upon it a large number of planks, resting upon the iron floor beams and the terra cotta. They were put there chiefly for the protection of the floor from stones and other material, which they supported in large quantities, and which had been brought there for use in the construction of the next story of the building. From the approach by the elevator, in the center of the building, there was a line of planks, laid side by side to a point near the front of the building, which furnished a convenient way for the passage of men and the transportation of material, and adjacent to the front wall there was a similar line of planks on which the masons stood in laying the wall, and other men passed in moving stone and bricks and mortar to be

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

used in the construction of the wall. The plaintiff testified that this runway was four planks in width, measuring out from the wall, while one of his witnesses said it was two or three planks wide. There were places in the terra cotta floor between the iron floor beams, where openings had been left for pipes or wires to pass. The planks were put in place by the workmen as they were needed, and were laid upon the floor, without being fastened. There was uncontradicted testimony, from the plaintiff and others, that this mode of using planks and of leaving openings in the terra cotta was a usual and proper mode of construction. There was no contention that the defendants failed to furnish a sufficient supply of suitable planks. As the plaintiff and one Garity were walking along the line of planks by the front wall, carrying a stone about three feet long, eighteen inches high, and from four to eight inches thick, Garity going in front, and holding one end of the stone up against his back, and the plaintiff going behind, holding the stone in front of him, one end of a plank on which the plaintiff stepped went down and his leg went through the floor, the stone fell, and the plaintiff fell and broke one of his fingers. The evidence tended to show that the end of the plank was left, or had slipped, so that it was not supported as it should have been by the terra cotta floor, and the weight upon it caused it to go down. The plaintiff's principal contention is that there was negligence of the superintendent in failing to discover this condition of the plank and to make it safe.

The planks were not there as a structure. They were for use by the workmen as needed for their convenience and the protection of the floor. This was a kind of use that might properly be entrusted to ordinary workmen. There were no serious dangers involved in the use of them by reason of an occasional small hole in the terra cotta floor. If workmen were reasonably careful in putting them down and in observing their condition afterwards, there was no such danger of an injury as called for systematic inspection. There was nothing to show whether this plank had been out of position for any considerable time before the accident. It seems probable that it had been slid a little at some time by an accident, or by the negligence of some workman. The plaintiff had been accustomed to work upon buildings of this kind for six or eight years, and he, or any other workman of experience, could see whether a plank over an opening was out of position, and could judge of the risk of such an accident as well as the superintendent could. To hold that it was the duty of a superintendent, under such circumstances, to go about the building in every place where a plank was over an opening and observe its position, with such frequency as to prevent the possibility of such

an accident, would impose upon the builder an unreasonable responsibility.

We are of opinion that the risk from the use of planks in this way was one of the risks of the business when the plaintiff assumed when he entered the defendant's service; and that there was no evidence of negligence on the part of the defendants or their superintendent.

Exceptions overruled.

(200 Mass. 551)

**MCGILVERY v. BOSTON ELEVATED RY. CO.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 6, 1909.)

**MASTER AND SERVANT (§ 180\*)—INJURIES TO SERVANTS—"RAILROAD"—STATUTORY PROVISIONS—CONSTRUCTION.**

Rev. Laws 1902, c. 106, § 71, cl. 3, which first appeared in St. 1887, p. 899, c. 270, gives a right of action to an employé injured through the negligence of any person in the service of the employer who has charge or control of a train on a railroad. The Revised Laws, which were enacted 10 years after railroad corporations were authorized to use electricity as motive power, described in chapter 111, § 1, a railroad as a railroad or railway of the class usually operated by steam power. St. 1908, p. 370, c. 420, expressly changes said clause 3 by adding to it the term "elevated railway," as distinguished from the term "railroad," and makes the clause applicable to a train on an elevated railway. *Held*, that the latter statute was not declaratory of the law as before existing, but amendatory, imposing on elevated railway companies a burden to which they had not before been subjected, and that prior to the passage of such statute an elevated electric railway was not a "railroad," within the meaning of said clause.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 360, 367; Dec. Dig. § 180.\*

For other definitions, see *Words and Phrases*, vol. 7, pp. 5899–5908; vol. 8, pp. 7777, 7778.]

Report from Superior Court, Suffolk County; Edgar J. Sherman, Judge.

Action by Luella McGilvery, administratrix of the estate of Daniel R. McGilvery, against the Boston Elevated Railway Company, for personal injuries to plaintiff's intestate. A verdict for plaintiff was set aside, and the case was by agreement of the parties reported to the Supreme Judicial Court. Judgment for defendant.

James P. Magenis and David Benshimol, for plaintiff. Robert G. Dodge and Sanford H. E. Freund, for defendant.

**HAMMOND, J.** The crucial question is whether as contended by the plaintiff the train of the defendant is a train upon a railroad within the meaning of Rev. Laws 1902, c. 106, § 71, cl. 3, or, more briefly stated, whether the defendant is a railroad within the meaning of that clause. If it is not, then there must be judgment for the defendant.

The clause first appears in St. 1887, p.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

899, c. 270, and provides that under certain conditions named in the statute a right of action may arise against an employer in favor of an employé who, while in the exercise of due care, is injured by reason of "the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine or train upon a railroad." At the time this act was passed the defendant had not been chartered, and it is not contended by the plaintiff that there was any elevated railway in the commonwealth. In *Fallon v. West End Street Railway*, 171 Mass. 249, 60 N. E. 536, it was held that a street railway car, operated by electricity upon a street railway track, was not a "locomotive engine or train" upon a railroad within the meaning of this clause. In giving the opinion of the court Morton, J., used the following language: "But we think that by the words 'locomotive engine or train upon a railroad' must be understood a railroad and locomotive engines and trains operated and run or originally intended to be operated and run in some manner and to some extent by steam. This undoubtedly was the sense in which the words were used by the Legislature when the statute was enacted, and we do not feel justified now in giving to them the broad construction for which the plaintiff contends. Possibly a railroad, where the motive power has been changed in part or altogether from steam to electricity, or some other mechanical agency, but which retains in other respects the characteristics of a steam railroad, would come within the purview of the act."

The original charter of the defendant is to be found in St. 1894, p. 761, c. 548. This statute was the outgrowth of an agitation extending over several years with reference to rapid transit in Boston and its suburbs; and it provided in the first part for the incorporation of the defendant, and in the last part for the creation of the Boston Transit Commission, with power to build certain subways. The defendant was empowered to construct "lines of elevated railway" through certain specially designated streets (section 6) and to take by "purchase or otherwise," certain lands outside the limits of these ways, for the purpose of constructing its railway and other necessary structures. Section 11. And it was subject to all general laws "which now are or may hereafter be in force relating to railroad corporations, so far as applicable, except as hereinafter provided"; but it was forbidden to transport freight or baggage. Section 1. The railway was to be constructed according to the Mels system or such other plans or systems (except the Manhattan system then in use in New York) as the board of railroad commissioners might approve. It is unnecessary to go further into the details of this charter. While the corporation was au-

thorized to use locomotives and trains with steam as the motive power and in some other respects resembled the ordinary steam railroad, still its route lay almost exclusively through the public ways, and in substance it was an elevated street railway, the purpose of its creation being to give more rapid transit to street travel.

No railway was built under this charter until after the important amendments which were made to it by St. 1897, p. 498, c. 500. By that statute the restriction as to the Manhattan system was removed, and steam could not be used as a motive power (section 2); and it was provided that with certain exceptions the corporation should have all the powers and privileges and be subject to all the duties, liabilities and restrictions of street railway companies so far as applicable; and finally, the provision of the first section of the original charter that the corporation should be subject to the general laws relating to railroad corporations "is hereby repealed." It is urged, however, by the plaintiff that throughout this amending statute the term railroad is frequently used to describe the defendant and in connection with its cars and other equipment. While this is true it does not seem to us to be conclusive as to the legal character of the defendant.

It is still further urged by the plaintiff that by Rev. Laws 1902, c. 111, § 1, a railroad is described as "a railroad or railway of the class usually operated by steam power," and that the defendant may properly be held as coming within this class. But the history of this clause seems to look another way. The Revised Laws were enacted 10 years after railroad corporations had been authorized to use electricity as motive power (St. 1892, p. 116, c. 110), and 5 years after the defendant had been authorized to build the railway in question. In St. 1874, p. 347, c. 372, § 2, a codification of the railroad acts up to that time, the term "railroad" was defined to mean "a railroad or railway operated by steam power," and it was not until Rev. Laws 1902, c. 111, § 1, that the definition was changed to "a railroad or railway of the class usually operated by steam power." Between 1874 and 1902 the Legislature had authorized railroads operated by steam power to use electricity as a motive power; and realizing this and the possible tendency of the times to a more extensive use of electricity for this purpose, the Legislature adopted a change of phraseology which would indicate more clearly than the old phrase would the class of commercial railroads. The new phrase in our opinion was not to enlarge the class, but simply, under the changed conditions to indicate more precisely the individuals included in the former term. Therefore even if the question rested here, the indications would point to the conclusion that at the time of the accident to

the plaintiff, which occurred in 1905, the defendant was not a railroad within the meaning of the clause in question.

The question however is made comparatively easy of solution by reason of St. 1908, p. 370, c. 420. This statute expressly changes this clause 3 which we have been considering, by adding to it the term "elevated railway" as distinguished from the term "railroad," and expressly makes the provision of the clause applicable to a train upon an elevated railway. We regard this statute not as declaratory of the law as before existing, but as amendatory. And the amendment consisted in imposing upon the elevated railway companies a burden to which they had not been subject before that time. It follows that at the time of the accident the defendant was not a railroad within the meaning of Rev. Laws 1902, c. 106, § 71, cl. 3, and that there must be

Judgment for the defendant.

(200 Mass. 379)

**COMMONWEALTH TRUST CO. v. COVENEY.**  
**COVENEY v. COMMONWEALTH TRUST CO.**

(Supreme Judicial Court of Massachusetts.  
Middlesex. Jan. 5, 1908.)

**1. EVIDENCE (§ 441\*)—PAROL EVIDENCE—VARYING OF TERM OF WRITTEN CONTRACT.**

The rule that a contemporaneous oral agreement cannot be shown to contradict or vary a written contract applies to suits in equity as well as to actions at law.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 441.\*]

**2. EVIDENCE (§ 441\*)—PAROL EVIDENCE—VARYING OF TERMS OF WRITTEN CONTRACT.**

A prior oral agreement, which purports to change the meaning and legal effect of a written contract subsequently to be made, is governed by the parol evidence rule, excluding contemporaneous oral agreements contradicting or varying a written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2030; Dec. Dig. § 441.\*]

**3. EVIDENCE (§ 441\*)—PAROL EVIDENCE—VARYING OF TERMS OF WRITTEN CONTRACT.**

A parol agreement, made prior to the making of notes, stipulating that one will discount notes for another, and renew them from time to time, and require payment only of such sums as the latter will realize as profits from the sales of his real estate, being inconsistent with the notes when executed, is inadmissible in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2043, 2044; Dec. Dig. § 441.\*]

**4. CONTRACTS (§ 332\*)—ACTIONS—COMPLAINT—SUFFICIENCY.**

A count in a declaration, which alleges the existence of indebtedness from plaintiff to defendant, and a contract, for a valuable consideration, to look for the liquidation of the indebtedness only to the profits realized from the sales of plaintiff's real estate, and a breach of the contract by attempting to collect the indebtedness by a suit, states a good cause of action as against a demurrer.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 332.\*]

Appeal from Superior Court, Suffolk County; Wm. B. Stevens, Judge.

Actions by the Commonwealth Trust Company against James S. Coveney and by said Coveney against said trust company. There was a judgment for plaintiff in the first action and for defendant in the second action, and defendant in the first action and plaintiff in the second action appeals. Judgment in first action affirmed, and judgment in second action reversed.

Phillip P. Coveney, for appellant. Southard & Parker, for appellee.

KNOWLTON, C. J. The first of these suits was brought by the indorsee against the indorser to recover the amount of several promissory notes. The second is an action brought by this indorser against the holder of these notes, upon an alleged contract made prior to the making of the notes, in which the defendant, for a valuable consideration, agreed to discount notes for the plaintiff and renew them from time to time, and to require payment only of such sums as the plaintiff should realize as profits from the sales of his real estate. The first two counts of the declaration in this action allege the making of the contract, performance by the plaintiff, and a breach of it by the defendant in endeavoring to enforce collection of the notes according to their terms instead of postponing the collection until profits are realized by the plaintiff from the sales of real estate. The third count is more general, alleging the existence of indebtedness from the plaintiff to the defendant, and a contract, for a valuable consideration, to look for the liquidation of the indebtedness only to the profits realized from sales of the plaintiff's real estate, and a breach of the contract by attempting to collect the indebtedness by a suit. As a defense to the first action the defendant sets up in his answer the contract relied on in the second action. The cases come to this court upon a demurrer to this answer in the first action, and a demurrer to the declaration in the second action. The principal questions of law are the same in both cases.

In neither case has any question of pleading been argued, but both parties have discussed the cases on the merits, upon the assumption that the contract set up in defense of the first action and declared on in the second action was an oral contract. The counsel of the party relying upon it expressly concedes in his briefs that it was an oral contract. Without considering any nice questions of construction, we shall, therefore, treat the averments of the pleadings in both cases as showing it to be an oral contract.

The contention of the defendant in the first action is that it was an independent, execu-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tory contract, referring to the course of dealing and the conduct of the parties in the future, by which the plaintiff agreed that notes made payable and discounted in the usual way should not be collected when due, but should be renewed from time to time and finally paid only as profits should be derived from sales of real estate sufficient for the purpose. As we understand his contention, it is that such an agreement, as between the original parties, can be availed of as a defense to an action upon the notes, either under an answer at law by way of estoppel to avoid circuity of action, or when pleaded as an equitable defense under Rev. Laws, c. 173, § 28.

If we assume in favor of the defendant, without deciding, that such a defense would be sustained if the contract were in writing, the law is different when the agreement is oral. An oral agreement of this kind cannot be proved to affect the rights of parties under the notes. The familiar rule that a contemporaneous oral agreement cannot be shown to contradict or vary a written contract applies as well to suits in equity as to actions at law. A prior oral agreement, which purports to change the meaning and legal effect of a written contract subsequently to be made, is governed by the same rule as such an agreement made contemporaneously with the making of the written contract. *Davis v. Randall*, 115 Mass. 547, 15 Am. Rep. 146; *Spring v. Lovett*, 11 Pick. 417; *Hall v. First National Bank of Chelsea*, 173 Mass. 16, 53 N. E. 154, 44 L. R. A. 319, 73 Am. St. Rep. 255. The effect of the writing is to merge and control all previous oral agreements inconsistent with it. The first of these cases, in the principles involved, is almost identical with *Hall v. National Bank of Chelsea*, 173 Mass. 16, 53 N. E. 154, 44 L. R. A. 319, 73 Am. St. Rep. 255. The effect of the writing is to merge and control all previous oral agreements inconsistent with it. The first of these cases in the principles involved, is almost identical with *Hall v. National Bank of Chelsea*, 173 Mass. 16, 53 N. E. 154, 44 L. R. A. 319, 73 Am. St. Rep. 255. The decision in that case settles the rights of the present parties.

The third count in the second declaration purports to apply only to indebtedness existing when the agreement was made, and it states a contract, for a valuable consideration, to look for the liquidation of indebtedness in a particular way, without a suggestion of the renewal of notes or the making of any future notes. There is nothing to indicate that the facts relied upon in support of this count are different from those referred to in other parts of the pleadings in the two cases. But standing alone, this count states a good cause of action.

In the first action the entry will be judg-

ment affirmed. In the second action the judgment will be reversed, and the demurrer sustained as to the first and second counts, and overruled as to the third count.

So ordered.

(200 Mass. 360)

# MATTSON v. AMERICAN STEEL & WIRE CO.

(Supreme Judicial Court of Massachusetts.  
Worcester. Jan. 5, 1909.)

## 1. MASTER AND SERVANT (§ 279\*)—INJURY TO SERVANT—NEGLIGENCE OF SUPERINTENDENT.

In an action for injuries to an employé while riding on the footboard of a dummy engine in the yard of a manufacturing plant, in a collision between the engine and a bucket car projecting over the line of passage of cars and the engine on the other track, evidence held to authorize a finding that a co-employé was the superintendent of the department in charge of the work and that his negligence caused the accident.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 279.\*]

## 2. MASTER AND SERVANT (§ 289\*)—INJURY TO SERVANT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

Whether an employé, injured in a collision, was guilty of contributory negligence, held, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089–1132; Dec. Dig. § 289.\*]

Exceptions from Superior Court, Worcester County; Wm. F. Dana, Judge.

Action by Charles Mattson against the American Steel & Wire Company. The court ordered a verdict for defendant, and plaintiff excepts. Sustained.

Victor E. Runo, for plaintiff. Frank B. Smith, T. H. Gage, Jr., and Frank F. Dresser, for defendant.

KNOWLTON, C. J. The defendant is the proprietor of an important manufacturing business in Worcester, and its yard covers a large space upon which are broad-gauge tracks for railroad cars and an extensive network of narrow-gauge tracks over which bucket cars are run by dummy engines. Bucket cars are eight feet long and four feet high, built with a platform that carries three iron boxes or buckets, which are unloaded by lifting the buckets from the platform and dumping their contents into the steel furnaces. One Hartman, called a "stock chaser," received a list of the different kinds and amounts of material that were needed for the steel furnaces, and he then gave direction to one Locks, who was in charge of the cars and commanded the users of them, the scrapyard engine crew, to take the requisite number of bucket cars to the proper places to be filled, and to make distribution of the quantities that he was called upon to supply. The jury well might have found that Locks had the entire charge

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and superintendence of the business of getting these various kinds of material, called for by Hartman, from the different places where it was kept, and delivering it to the furnaces where it was needed, and that this superintendence was his principal duty. He and his crew were busy loading and unloading, using bucket cars for the delivery of the property. The plaintiff was going about the yard from place to place upon different tracks, with a dummy engine, moving these bucket cars to be loaded and unloaded. The accident happened at 10 o'clock at night, from a collision of the engine with a corner of a bucket car which had been standing with others on the next track parallel to that on which the engine was moving, but had been pushed down by hand upon a switch track crossing over to the other, so far that a corner and a part of its side projected over the line of passage of cars and the engine on the other track where the engine was running. Such cars were frequently moved short distances by hand, in connection with loading and unloading, but there was testimony that when they were so moved Locks usually informed the engine crew of it. This car was moved by Locks a short time before the accident, but the engine crew did not know it. Because the regular engineer was away and the acting engineer was not familiar with the yard, the plaintiff was employed as a lookout, and was riding on the footboard at the rear of the engine, which was going backward when the collision occurred. The jury might have found that Locks was a superintendent of this department of distribution, and was guilty of negligence in moving this car as he did without afterwards informing the plaintiff what he had done. While the plaintiff was expected to look out for cars and other obstacles as the engine moved about, the jury might have found it to be negligent for Locks greatly to increase the risk in a place where the plaintiff, from his observation and knowledge of conditions a few minutes before, had reason to believe that the track was clear. The lights and shadows in the nighttime made it far more difficult to discover the exact position of the bucket cars than it would have been in the daytime.

We are also of opinion that it was a question for the jury whether the plaintiff was in the exercise of due care. There was much to show that he was not so vigilant as he ought to have been. The engineer testified that he and the plaintiff were talking together, and while he said in general that they were both looking forward, there were indications in his testimony that the plaintiff was not looking carefully. But the plaintiff denied that he was talking with the engineer, and testified that just before the accident he was looking forward to see if the

track was clear. We are of opinion that the question whether he was exercising as much care as one ought to exercise under such circumstances was for the jury to determine as a matter of fact.

Exceptions sustained.

(200 Mass. 378)

# SWEETSER v. MANNING.

(Supreme Judicial Court of Massachusetts.  
Middlesex. Jan. 5, 1909.)

## 1. TAXATION (§ 499\*)—ENFORCEMENT AGAINST PERSON—REMEDIES FOR WRONGFUL ENFORCEMENT.

If a tax is wrongly assessed upon personal property, the taxpayer's only remedy is by an application for an abatement under Rev. Laws 1902, c. 12, §§ 73, 74.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 920-924; Dec. Dig. § 499.\*]

## 2. TAXATION (§ 75\*)—LIABILITY OF PROPERTY—PRIVATE PROPERTY—NATURE OF PROPERTY—MORTGAGES.

When the mortgaged real estate is exempt from taxation under Rev. Laws 1902, c. 12, § 5, the mortgage loan cannot be taxed as real estate under section 16, making taxable as real estate the interest of the holder of a mortgage on real estate not exempt from taxation; but it is taxable as personal property under section 4, cl. 2, providing that "any loan on mortgage of real estate taxable as real estate" is not included among debts taxable as personal property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 161; Dec. Dig. § 75.\*]

Exceptions from Superior Court, Middlesex County; John C. Crosby, Judge.

Action by one Sweetser against one Manning. The court found for plaintiff, and defendant excepted. Exceptions overruled.

Frederic A. Fisher, for plaintiff. John W. McEvoy, for defendant.

KNOWLTON, C. J. The plaintiff brings this suit as collector of taxes of the town of Chelmsford, to recover a tax assessed upon the personal property of the defendant on May 1, 1904. His right to recover is questioned only on the ground that a part of the tax was assessed upon the defendant's money at interest, secured by mortgages on St. Peter's Cemetery in the city of Lowell, which cemetery is exempt from taxation under Rev. Laws, c. 12, § 5, cl. 8.

Seemingly the case might be decided in favor of the plaintiff on the ground that, if the tax was wrongly assessed, the defendant's only remedy was by an application for an abatement. Rev. Laws, c. 12, §§ 73-74; Hicks v. Westport, 130 Mass. 478. But as both parties have argued the question whether the property is liable to taxation, we prefer to put our decision on broader grounds.

Rev. Laws, c. 12, § 2, provide that "all property, real and personal, situated within the commonwealth, \* \* \* unless exempted by law, shall be subject to taxation." Personal property subject to taxation includes "money at interest and other debts due the per-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

son to be taxed, more than he is indebted or pays interest for, but not including in any such debts due him, or indebtedness from him any loan on mortgage of real estate, taxable as real estate, except the excess of such loan above the assessed value of the mortgaged real estate." Rev. Laws, c. 12, § 4, cl. 2. The property in question is money at interest represented by promissory notes secured by mortgages. But it is not a "loan on mortgage of real estate taxable as real estate," because the mortgages which secure it are upon a cemetery, and cemeteries are exempt from taxation. Loans on mortgages are taxable as real estate only under Rev. Laws, c. 12, § 16. That section makes taxable as real estate the interest of a holder of a duly recorded mortgage in real estate not exempt from taxation under section 5. If the mortgaged real estate is exempt from taxation under section 5, the loan on the mortgage cannot be taxed as real estate, and it is left subject to taxation as personal property like other money at interest. See *Knight v. Boston*, 159 Mass. 551, 35 N. E. 86.

It follows that there is no ground for the defendant's contention that the tax upon these mortgage loans was wrongly assessed.

Exceptions overruled.

(200 Mass. 396)

**SILVERMAN v. CARR et al.**

(Supreme Judicial Court of Massachusetts.  
Middlesex. Jan. 5, 1909.)

**1. NEGLIGENCE (§ 20\*)—OPERATION OF MACHINERY.**

Defendant, who had contracted to supply plaintiff with power by a rope drive and had agreed to turn on the power during working hours only unless previous notice was given that power was required at other times, was liable for injuries to plaintiff caused by the starting of the machinery by defendant's act in turning on the power after working hours without notice.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 27; Dec. Dig. § 20.\*]

**2. NEGLIGENCE (§ 136\*)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**

Where plaintiff was injured by a sudden and wrongful starting of machinery while he was lacing a belt, the question of his contributory negligence in lacing the belt while it remained on the pulleys was for the jury; there being evidence that plaintiff was doing the work in the ordinary manner and that it would have been practically impossible to lace the belt while hanging loosely on the shaft.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 312; Dec. Dig. § 136.\*]

**3. NEGLIGENCE (§ 68\*)—CONTRIBUTORY NEGLIGENCE—EQUIPMENT OF MACHINERY.**

Where plaintiff was injured by the wrongful starting of machinery while he was lacing a belt which was on a tight pulley, plaintiff's failure to equip the shaft with tight and loose pulleys was not conclusive evidence of contributory negligence; the use of such pulleys not being customary.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 95; Dec. Dig. § 68.\*]

Reported from Superior Court, Middlesex County; Robt. R. Bishop, Judge.

Action for personal injuries by one Silverman against one Carr and others as executors. Verdict was directed for defendants, and the case reported to the Supreme Judicial Court. Reversed.

Taylor & Thierry, for plaintiff. Edwin S. Sibley and John W. Keith, for defendants.

**BRALEY, J.** It was not in dispute that the plaintiff, having leased the premises to be used in the manufacture of tables and chairs, also hired from the defendant's testator, whose factory was on the opposite side of the street, power to operate the machinery which he used in his business. The power supplied was communicated by a rope drive running from the factory across the street to the plaintiff's shop, where by means of a jack shaft it was transmitted to the main shaft, and thence to the various machines. It also could have been found that the entire mechanical arrangements for starting and stopping the rope drive was in the factory, and wholly under the direction and control of the testator. By the terms of the contract it was agreed, for a fixed price, that the plaintiff should have the right to use the power during the working hours of the factory, but, if he desired to run his machinery longer, the overtime would be an additional charge. A further finding would have been justified that as lessor the testator must have understood and been fully informed of the purpose for which the premises had been let and the use of the power hired. Consequently he was reasonably bound from common experience to know and anticipate that if without warning, after having been properly stopped, the rope drive was shortly after set running, the plaintiff's machinery unexpectedly would be put in motion, and either he or his workmen might be injured. *Schofield v. Wood*, 170 Mass. 415, 49 N. E. 636; *Turner v. Page*, 186 Mass. 600, 602, 72 N. E. 329, and cases cited; *Oulighan v. Butler*, 189 Mass. 287, 292, 75 N. E. 728, and cases cited; *Lebourdais v. Vitriified Wheel Co.*, 194 Mass. 341, 344, 80 N. E. 482.

If they found these facts, then the testator for a consideration had undertaken, not only to maintain the rope drive with its connections in the factory in proper repair to furnish power during the time required, but to exercise reasonable diligence to see that, unless notice had been given previously, the power should not be turned on until the next morning, after having been shut off at the close of the day. *Gill v. Middleton*, 105 Mass. 477, 478, 7 Am. Rep. 548; *Poor v. Sears*, 154 Mass. 539, 28 N. E. 1046, 26 Am. St. Rep. 272.

It is stated in the report that on the day of the accident "the power in the plaintiff's shop stopped as usual about 6 o'clock" when "at about 25 minutes past 6 o'clock \* \* \*

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the machinery suddenly and without notice started in rapid motion," causing the injuries for which damages are sought. The defendants contend that these circumstances are insufficient to prove negligence of their testator. But again, no intervening cause having been shown or suggested or any explanation offered, the jury were at liberty to infer, from his exclusive control of the appliances, that according to common experience, until otherwise explained, the machinery would not have started, nor the accident occurred, except for some defect in the belting, or appliances used in starting the rope drive, or in the improper use of them, arising from the negligence of either himself or his servants. *Ryan v. Fall River Iron Works Co.*, 200 Mass. 188, 191, 193, 86 N. E. 310, and cases cited. It has been said that "the happening of an accident, if it is one that the exercise of ordinary care would ordinarily prevent, is some evidence of negligence." *Mahoney v. New York & New England Railroad Co.*, 160 Mass. 573, 579, 36 N. E. 588.

The issue of the plaintiff's due care also was for the jury. The power was furnished and used as a whole, and, when withdrawn, no part of the machinery would be left in operation. His carefulness, or want of it, is to be measured by the conditions existing at the time. A belt connecting the countershaft of the molding machine with the main belt had become partially unlaced, and after the power had been discontinued, and the machinery at rest, the plaintiff, discovering this condition, began to put in a new lacing. It could have been found, from his experience in the management of the shop, that the rope drive regularly ceased running each working day at 6 o'clock in the evening, and did not start again until the next morning. The only time in which repairs of this nature could be made was when the machinery was idle, and, as he had no reason to apprehend the usual practice would be disregarded, his conduct, which rested on this assumption, cannot be said as matter of law to have been negligent, even if, having regard for every possible contingency, he might while at work have slipped the belt from the pulley to the shaft itself. It was plain enough from his evidence, as well as from the testimony of the expert engineer, that, if the belt hung loosely on the shaft, to relace it properly would be practically impossible, and that he was doing the work in the ordinary way. *Droney v. Doherty*, 186 Mass. 205, 71 N. E. 547; *Wagner v. Boston Elevated Railway Co.*, 188 Mass. 437, 441, 74 N. E. 919, and cases cited. Nor is the further contention of the defendant, that the plaintiff's failure to equip the shaft with tight and loose pulleys must be deemed conclusive evidence of his contributory negligence, tenable. The expert testified that the absence of tight and loose pulleys by which main belts could be shipped was customary,

and practically their use for this purpose had become obsolete. If believed, this evidence would warrant a finding that the mechanical equipment was neither defective nor deficient.

By the terms of the report the verdict ordered for the defendant must be set aside, and the case is to stand for trial.

So ordered.

(200 Mass. 470)

**PICQUETT v. WELLINGTON-WILD COAL CO.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 5, 1909.)

**1. MUNICIPAL CORPORATIONS (§ 821\*)—DEFECTS IN SIDEWALK—QUESTIONS FOR JURY.**

In an action by a pedestrian against a coal company for injuries received by falling into an unguarded coal hole in the sidewalk, plaintiff's contributory negligence held, under the evidence, to be a question for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 821.\*]

**2. TRIAL (§ 194\*)—INSTRUCTIONS TO JURY—PROVINCE OF COURT AND JURY—CHARGE UPON FACTS.**

An illustration given by the court, which is apposite to the evidence and questions which the jury must consider, is not objectionable as being a charge upon facts, within the prohibition of Rev. Laws, c. 173, § 80.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 194.\*]

Exceptions from Superior Court, Suffolk County; Robert O. Harris, Judge.

Action by Charles H. Picquett against the Wellington-Wild Coal Company. Verdict for plaintiff, and defendant excepta. Exceptions overruled.

Edward F. McClellenn, Alfred L. Fish, and Brandeis, Dunbar & Nutter, for plaintiff. John Lowell and James A. Lowell, for defendant.

**RUGG, J.** The plaintiff seeks in this action of tort to recover for personal injuries received by falling into a coal hole, while traveling on a public way in Boston. At about half-past 5, on the afternoon of a snowy day in early January, the plaintiff was walking along Arch street, when he saw the defendant's coal team at the sidewalk, and supposed that coal was being delivered from it into a coal hole. He went into the street to go around the horses' heads, but, finding the street slushy, returned to the sidewalk. The plaintiff's testimony tended to show that the place was dark, that one could see an object, but could not tell a man's face, that he walked close to the side of the building, and could not see any coal, but saw something black on the sidewalk, close to the rear of the team and a man poking a few pieces of coal left in the cart, and while thus going close to the building, so that his shoulder was 4 or 5 inches from it, he fell into the coal hole, and that this hole was rectangular, 22 inches by 34 inches, while the ordi-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

nary coal hole is circular in shape, and 12 to 15 inches in diameter. The defendant strongly argues that there was no sufficient evidence to warrant a finding that the plaintiff was in the exercise of due care, basing this contention largely upon his statement in cross-examination that he "went around the team to avoid disaster. The disaster might have been a coal heap. \* \* \* He didn't look to see if any coal hole was there." Too much weight, however, cannot be attached to isolated expressions of a witness. His conduct as to due care must be determined in the light of all the circumstances, of action and omission, and of the knowledge that he had or ought to have had at the time as well as of detached scraps of testimony, which the jury may regard as the result of too severe stress or strategic skill in cross-examination and weigh accordingly. The jury might have found upon this evidence that the sidewalk was a more convenient and reasonable place for pedestrians than the street, in the then existing weather that the appearance of the sidewalk in connection with the cart in the dim light was such as to justify the inference, which the plaintiff testified he drew, that the delivery of the coal was finished, the lantern taken away, and the coal hole closed, and that the plaintiff saw only the dark spot next the curbing, and walked as near as he conveniently could to the building, where coal holes are not commonly found. These conditions, if found to exist, together with the fact that the opening was of different shape and of materially larger dimensions than the ordinary coal hole, and was not plainly visible nor seen by the plaintiff, are enough to sustain the finding that he was in the exercise of ordinary care. That he did not look for the coal hole may have been found to be due to the darkness being so dense that looking would not have disclosed it. His statement, that he went into the street to avoid disaster, and then, on finding it slushy, returned to the sidewalk, cannot be ruled as matter of law to have constituted knowledge of the danger and appreciation of its extent, but was rather a graphic way of stating his design in first leaving the sidewalk. In conjunction with his other testimony, it certainly did not fix him with knowledge of the existing danger. It was for the jury under all the circumstances to draw what inference seemed reasonable to them, as men of experience in the common affairs of life, not only from what the plaintiff knew or could have known of the precise condition existing on the sidewalk, but also from his consciousness that the defendant in delivering coal owed a duty to those passing upon the sidewalk to see that the coal hole was properly guarded and protected so that pedestrians would not be liable to fall in. The case is well within recent decisions. *French v. Boston Coal Co.*,

195 Mass. 334, 81 N. E. 265, 11 L. R. A. (N. S.) 993, 122 Am. St. Rep. 257; *Owens v. Harvard Brewing Co.*, 194 Mass. 493, 80 N. E. 509; *Wakefield v. Boston Coal Co.*, 197 Mass. 527, 83 N. E. 1116.

The defendant also complains of an illustration given by the court, as being a charge upon the facts within the prohibition of Rev. Laws, c. 173, § 80. There was conflicting evidence as to whether the plaintiff had been warned of danger by the defendant's driver. One issue apparently was whether any warning, if given, was timely or too late. The illustration given is not open to objection. While it was picturesque and pointed, it was apposite to the evidence which the jury were to consider and to one of the questions which they must pass upon. It falls within the authority of the court in charging a jury, as stated at length in the cases of *Whitney v. Wellesley & Boston Street Railway Co.*, 197 Mass. 495, 84 N. E. 95, and *Plummer v. Boston Elevated Railway Co.*, 198 Mass. 490, 84 N. E. 849. These principles have been so recently and so fully discussed that it is not necessary now to amplify them further.

Exceptions overruled.

(200 Mass. 580)

#### BAMFORD v. BOYNTON.

(Supreme Judicial Court of Massachusetts.  
Essex. Jan. 1909.)

**BILLS AND NOTES (§ 119\*)—SUCCESSIVE INDORSERS.**

A note, sued on by an indorser, who paid the same, was executed to the order of the maker, and was then indorsed by the maker and three others, including plaintiff and defendant; plaintiff signing under the others. *Held* that, in the absence of an agreement to the contrary, the rights of plaintiff and defendant were not those of joint makers, or of co-sureties or guarantors, but were those of successive indorsers.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 119.\*]

Exceptions from Superior Court, Essex County; John C. Crosby, Judge.

Action by Benjamin B. Bamford against Sewell A. Boynton. There was a judgment for plaintiff and defendant excepta. Exceptions overruled.

This was an action of contract on a promissory note executed by the Bay Side Coal Company to its own order, and which plaintiff indorsed after defendant, the maker, and another had signed their names on the back of it.

The declaration alleged that the coal company made the note described; that it was indorsed as stated above, and negotiated for value; that at its maturity it was duly presented, but not paid, wherefore due notice was given to the indorsers; that thereafter plaintiff was compelled to pay it, and did in fact pay the holder the amount due thereon; and that no part of such sum had been paid to him.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Before the jury were impaneled defendant requested a ruling that proof of all the allegations pleaded by plaintiff did not entitle him to recover, because he alleged that he was one of several joint makers and indorsers of the note, and alleged payment of the same by himself, one of the indorsers, at maturity, after presentment and nonpayment, with notice, and plaintiff brings action on the note against defendant, one of his associates, as a successive indorser for the accommodation of a third party, to recover the amount paid; whereas, according to his own allegations, his relation to defendant was that of joint maker and indorser, and not that of a successive indorser for the accommodation of a third person.

Starr Parsons, H. Ashley Bowen, and Joseph F. Hamman, for plaintiff. James E. Odlin, for defendant.

**HAMMOND, J.** It is settled, in this commonwealth at least, that in the absence of any agreement to the contrary, in a case like this, the rights of the plaintiff and defendant are not those of joint makers, or of co-sureties or guarantors, but are those of successive indorsers. *Lewis v. Monahan*, 173 Mass. 122, 53 N. E. 150, and cases cited. The declaration therefore was sufficient.

It follows that, even if the question involved in the ruling requested, not having been raised by demurrer, could have been raised for the first time by the defendant after the case was called for trial and before the jury were impaneled, the court properly refused the ruling.

Exceptions overruled.

(200 Mass. 546)

#### ROWELL v. GIFFORD.

(Supreme Judicial Court of Massachusetts. Essex. Jan. 7, 1909.)

#### 1. MASTER AND SERVANT (§ 276\*)—INJURY TO SERVANT—DEFECTIVE MACHINERY—EVIDENCE.

Where, in an action for injuries to an employé while working on a buzz planer, there was evidence that the machine was defective because the pulley on the end of the shaft to which the cutting cylinder was attached was loose, causing the cylinder to jump, which jumping tended to throw the hand of the operator onto the knives in the cylinder, and there was evidence that the defect was more adequate to explain the accident than any other, the jury were authorized to find for plaintiff, though there was evidence that the movable table was not adjusted as securely as it ought to have been, and that that might have had something to do with the accident, and that the failure to properly secure the table was due either to the negligence of plaintiff or that of a fellow workman.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 951, 959; Dec. Dig. § 276.\*]

#### 2. MASTER AND SERVANT (§ 265\*)—INJURY TO SERVANT—CAUSE OF ACCIDENT—BURDEN OF PROOF.

An employé, suing for a personal injury received while working on a machine, is not obliged to exclude all doubt as to the cause of the accident, but is bound to show by a fair preponderance of the evidence that the cause was one for which the employer was, or could be found to be, liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 894-897; Dec. Dig. § 265.\*]

#### 3. MASTER AND SERVANT (§ 286\*)—INJURY TO SERVANT—NEGLIGENCE OF MASTER—QUESTION FOR JURY.

Where, in an action for injuries to an employé while working on a buzz planer, there was evidence that the machine was defective because a pulley on the end of the shaft to which the cutting cylinder was attached was loose, causing the cylinder to jump, and that the jumping tended to throw the hand of the operator onto the knives of the cylinder, the question whether the employer in the exercise of due care should have discovered and remedied the defect, or whether he was justified in waiting till some of the workmen called his attention to it, and then repair it, was for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.\*]

#### 4. MASTER AND SERVANT (§ 217\*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

A skilled and experienced workman, who understood all about the machine on which he was working, but who did not know that there was any defect in the machine, did not assume the risk of injury arising from a defect.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

Exceptions from Superior Court, Essex County; Lloyd E. White, Judge.

Action by Thomas A. Rowell, prosecuted after his death by Margaret S. Rowell, his widow and administratrix, against Nathan P. Gifford. There was a verdict directed for defendant, and the parties stipulated that, if the exceptions were sustained, judgment should be entered for plaintiff in a specified sum. Exceptions sustained, and judgment for plaintiff.

Joseph F. Quinn and Alfred W. Putnam, for plaintiff. Daniel N. Crowley, for defendant.

**MORTON, J.** This is an action of tort, brought originally by plaintiff's intestate and after his death prosecuted by his administratrix, to recover for injuries received by him while at work in the defendant's employment upon a buzz planer in the defendant's factory. At the close of the plaintiff's evidence the court directed a verdict for the defendant subject to the plaintiff's exceptions—the parties stipulating that, if the exceptions should be sustained, judgment should be entered for the plaintiff in the sum of \$2,000.

There was evidence tending to show that the machine was defective. Witnesses testified that the pulley on the end of the shaft to which the cutting cylinder was attached was

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs 1907 to date, & Reporter Indexes

loose and that this would cause the cylinder to jump and that the jumping would tend to throw the hand of the operator onto the knives in the cylinder. There was also evidence tending to show that the movable table was not adjusted as securely as it ought to have been, and that that might have had something to do with the accident. There was no defect in the table or in the appliances for securing and adjusting it and any failure to properly secure or adjust it would have been due to the negligence of the plaintiff or that of a fellow workman. And if the accident was due to the improper adjustment or fastening of the table, or if the evidence was such as to leave it a matter of conjecture whether the accident was due to that, or to the loose pulley, the defendant would not be liable. But we do not think that it can be said that as the case was left the cause of the accident was wholly a matter of conjecture and we think that it fairly could have been found that the cause of the accident was the loose pulley. No other cause seems to have been regarded as so adequate to explain the accident as that. The plaintiff was not obliged to exclude all doubt as to the cause of the accident, but was bound to show by a fair preponderance of the evidence that the cause was one for which the defendant was, or could be found to be, liable. If the pulley was loose then it was a question for the jury whether the defendant in the exercise of due care should have discovered and remedied the defect or whether he was justified in waiting till some one of the workmen called his attention to it and then having it properly repaired as he did. The plaintiff's intestate was a skilled and experienced workman and understood all about the machine, but the evidence shows that he did not know that there was any defect in the machine and therefore he cannot be said to have assumed the risk. It cannot be said as matter of law that there was no evidence to show whether he was or was not in the exercise of due care. So far as appears he was operating the machine in the usual way with material and for a purpose with and for which he was expected to use it. On the whole, though the case is not entirely free from doubt, we think that the evidence would have warranted a verdict for the plaintiff, and that the exceptions must be sustained.

Exceptions sustained. Judgment for plaintiff in the sum of \$2,000.

(200 Mass. 594)

**COLE v. NEW ENGLAND TRUST CO.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 7, 1909.)

**1. BANKS AND BANKING (§ 152\*)—DEPOSIT OF SHARES IN BANK.**

On the refusal of an heir to receive his distributive share, the amount thereof was de-

posited in defendant bank in accordance with Pub. St. 1882, c. 144, § 16. The certificate of deposit was issued to the probate judge, and recited that the fund was to accumulate for the distributee, and contained a promise to pay the fund to the probate judge, or his assigns, with interest at a specified rate, until defendant should give 10 days' notice of a reduction of the rate or a discontinuance of the interest. *Held*, that the debt was due to the probate judge, the distributee having but an equitable interest therein, and a notice of discontinuance of the payment of interest addressed to the distributee, or to the register of probate, was insufficient, where such notice was not brought to the knowledge of the probate judge, there being no duty on the part of the register to give any counter notice to defendant.

[Ed. Note.—For other cases, see *Banks and Banking*, Dec. Dig. § 152.\*]

**2. EVIDENCE (§ 71\*)—PRESUMPTION—REGISTER AND JUDGE OF PROBATE—RELATION—NOTICES.**

The register of probate is not the agent of the judge of probate, and there is no presumption that a letter to the register, addressed to him in his official capacity only, is given to the judge.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 71.\*]

Action by Harry J. Cole, administrator of the estate of Hazen V. Thompson, deceased, and another, against the New England Trust Company. Decree for plaintiff.

A person entitled to a distributive share of the estate refused to take the amount of such share, and it was deposited by the administrator with defendant under a decree by the probate judge. The certificate of deposit stated the receipt of the money by defendant from the probate judge through the administrator, to accumulate for the person entitled to the share, and the certificate further stated that the defendant would allow interest at 2½ per cent. from date, but reserved the right upon 10 days' notice to reduce the rate or discontinue the payment of interest, and further provided to repay the amount due on the certificate to the said probate judge or his assigns. Defendant notified the person entitled to the distributive share that it would cease paying interest on the certificate on the following day, and sent the notice by registered letter, and subsequently notified the register of probate, stating that no acknowledgment of its former letter had been received and that defendant distinctly wished him to understand that the interest ceased on the date specified.

Peters & Cole, for plaintiff. Tyler & Young and B. E. Eames, for defendant.

**SHELDON, J.** The certificate issued by the defendant acknowledged that it had received the money from the judge of probate, and contained a promise to repay it to him or his assigns. It must be treated as

showing that the agreement was made with him. The agreed facts sufficiently show that the deposit was intended to be made under the provisions of Pub. St. 1882, c. 144, § 16, now Rev. Laws, c. 150, § 23. These provisions contemplated that the amount so deposited should "accumulate for the benefit of the person entitled thereto," and accordingly the defendant agreed to pay interest thereon at the annual rate of  $2\frac{1}{2}$  per cent., reserving however the right, upon giving 10 days' notice, to reduce the rate or discontinue the payment of interest. The defendant now contends that by reason of its notice of May 31, 1895, to Mr. Thompson, the cestui que trust for whose benefit the deposit was held, especially in view of its letter of June 14, 1895, to the register of probate, its liability to pay interest was determined; and this is the question contained in the case.

The debt from the defendant was due to the judge of probate and Thompson had only an equitable interest therein. *Chase v. Thompson*, 153 Mass. 14, 26 N. E. 137. The defendant's notice to stop the accruing of interest should therefore have been given to the judge of probate, who, in the ordinary case of an unclaimed deposit made under the statute in question, would be the only person who could withdraw the deposit and place it where it might continue to accumulate as contemplated by the statute. The defendant's right to give the notice either by personal service or "through the post office, directed to the address named" on its own books, is not of consequence; for it does not appear that the defendant had put any such address on its books; and its counsel at the argument in this court disavowed any desire to have the agreed facts discharged or amended in this respect.

We think it plain that neither a notice of one day given to Thompson, nor a letter to the register of probate stating the claim that the stipulated interest had ceased in consequence of that notice to Thompson, can be said to be a 10 days' notice to the judge of probate, especially when it does not appear that either the notice or the letter was brought to the knowledge of the judge.

The defendant could terminate its agreement to pay interest at the stipulated rate only by meeting the burden of showing that it had given the notice specified in its agreement to the person and in the manner therein provided. This it has not done, and accordingly its liability has continued under its original agreement. It cannot of course be held liable for a higher rate of interest than was stipulated for, but it must be held to perform the agreement which it made.

We have carefully considered the suggestions made in the able argument for the defendant; but we have not been able to assent to them. As to the defendant, the title

to the deposit was in the judge of probate. The deposit was made in his name, as the statute contemplated that it should be; the defendant's promise was to pay to him or his assigns; under the agreement no one could require payment without his order and authority, whether the deposit was or was not made under the statute. He was in no sense the undisclosed principal of Thompson, or of any one else who might have been found to be entitled to the money. And the plaintiff does not strictly claim under Thompson, but under the decree made by the judge of probate in October, 1907. Without this decree the plaintiff would have had no standing in court.

There can be no presumption that a letter to the register of probate is given to the judge, nor is the former in any sense the agent of the latter. He is a public officer whose duties are prescribed by law, and the defendant's letter was addressed to him in his official capacity only.

There was no duty upon Thompson either to take any action or to give any counter notice to the defendant when he received its unauthorized notice. His inaction could create no estoppel that would be operative against any future order of the judge of probate; and manifestly the plaintiff cannot be in a worse position than Thompson would have been.

Accordingly, under the agreement of the parties, a decree is to be entered that the plaintiff recover of the defendant the sum of \$2,049.67, without costs.

So ordered.

(200 Mass. 372)

#### HARTLEY v. ROTMAN.

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 5, 1909.)

#### 1. SALES (§ 263\*)—IMPLIED WARRANTY OF TITLE.

The possession of property sold, coupled with the act of sale, is equivalent to an implied warranty of title.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 750; Dec. Dig. § 263.\*]

#### 2. SALES (§ 429\*)—ACTION FOR BREACH OF WARRANTY—CONDITIONS PRECEDENT.

A return or offer of return of the property need not be made to the seller before suing for breach of warranty of title.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1227; Dec. Dig. § 429.\*]

#### 3. SALES (§ 429\*)—ACTION FOR BREACH OF WARRANTY—CONDITIONS PRECEDENT.

Delivery by the buyer to one claiming title, without surrender or offer of return to the seller and without giving him an opportunity to retake the goods, does not bar recovery for breach of warranty.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1226-1228; Dec. Dig. § 429.\*]

#### 4. SALES (§ 441\*)—ACTION FOR BREACH OF WARRANTY—EVIDENCE.

Evidence in an action for breach of warranty of title *held* sufficient to warrant a finding that the buyer had returned the property to the lawful owner.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1283; Dec. Dig. § 441.\*]

#### 5. TRIAL (§ 260\*)—REFUSAL OF INSTRUCTIONS GIVEN.

No error can be predicated on the refusal of an instruction which, so far as it correctly stated the law, was embodied in instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.\*]

Exceptions from Superior Court, Suffolk County; Lloyd E. White, Judge.

Action by Fred Hartley against Samuel Rotman for breach of warranty. There was a judgment for plaintiff, and defendant excepts. Exceptions overruled.

The following is defendant's bill of exceptions:

"This was an action of contract brought to recover damages for the alleged breach of an implied warranty of title in the sale of a certain quantity of wool by the defendant to the plaintiff. The pleadings may be referred to.

"The plaintiff sought to recover under the first count the value of 1,643 pounds of wool, and under the second count the value of 5,271 pounds of wool.

"In support of the plaintiff's action, he introduced the testimony of one Thomas Dooner, the agent of the plaintiff who was employed in the capacity of buyer, and who testified that he bought from the defendant, on February 21, 1905, the wool described in the first count for \$199.35, and, on February 28th, the wool described in the second count for \$579.81; that at the time of the purchase the wool was in a damaged condition, being saturated with water and filled with charcoal; that the wool had a yellow and reddish cast and was similar to a sample produced in court and submitted to the inspection of the jury; that at a later time this wool was forwarded by the plaintiff to the Norton Cleaning Works at Norton, Mass., and that still later the plaintiff received a notice that the wool was claimed by the Board of Salvage Underwriters. In consequence of such claim he went to the defendant and had a conversation, the substance of the conversation being that the defendant said that the first lot was purchased by the defendant from a licensed boatman who had collected it while the pier hereinafter referred to was being rebuilt, and that he bought the second lot from one Feinberg, a junk dealer. The witness told the defendant that the underwriters had run across the wool in question at the Norton Mills and claimed that it had been stolen from them, and that the plaintiff had turned it over to the underwriters under an agreement that the

latter should return it or its equivalent to the plaintiff if the plaintiff could prove title to it. The defendant also said that the second lot was bought from the underwriters themselves by Feinberg. The defendant did not contradict Dooner's version of this conversation.

"The plaintiff further introduced the testimony of one Jones, who, among other things, testified that he was manager for the Board of Salvage Underwriters, and that on November 17, 1904, a fire occurred on pier No. 5 of the Boston & Maine Railroad; that this pier was about 500 feet long and 100 feet wide, with docks on each side so that boats could lie at the front and on the sides of the pier; that about half of the pier was solid and the remaining half on piling floored over, and that the pier was covered by a building or warehouse; that the witness, on behalf of the Board of Salvage Underwriters, went the next day with a gang of workmen and took possession of all of the property on the pier; that the property consisted of various kinds of merchandise, including catch, red lead, pipe clay, rope, rags, wool and other articles; that at the time of taking possession the fire was not entirely out, but nearly so; that he placed the actual work of salvaging the property under the supervision of one Daniels, and that he spent about an hour each day upon the wharf until the property was either sold or removed; that he had the sole and exclusive control of making sales, and that when sales were proposed to Daniels, the superintendent in charge of the work, the same were reported to the witness and he authorized or refused to authorize the making thereof; that Feinberg, under whom the defendant claimed title to a part of the property, had purchased from the Board of Salvage Underwriters certain lots of property piled upon the undestroyed portion of such dock, or pier; that the witness subsequently went to the scouring factory at Norton, Mass., and took from a lot of about 5,000 pounds of wool in that factory a sample, which was produced in court and hereinbefore referred to, claiming it as the property of the Board of Salvage Underwriters; that he identified the property as part of the wool on the pier by reason of its mixture with pipe clay, its discoloration and its general texture and appearance. The witness also testified that the salvage company was at work at the pier something over a month and during that time got out about 21,000 pounds of wool similar to the sample referred to; that the witness authorized no sales of wool to Feinberg, and so far as he knew no such sales were made to Feinberg or to any other person to be transported or taken from the pier, either by boat or otherwise; that at the time the salvage company left the pier the work of cleaning up the dam-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

aged goods had been done thoroughly; that the witness personally examined the ruins to see what wool had been covered up and that none was left, and that his investigations covered not only the solid part of the pier and the ruins, but the water beneath the pier; that his men went with baskets all through every portion of the ruins to gather the wool all in; that the salvage company packed the wool in boxes and shipped it; that the witness authorized sales to Feinberg which were in person made by Daniels, none of which were of wool, amounting to less than \$150.00, the dates and amounts of which, referring to books of the salvage company are stated to be as follows:

1904. Nov. 29 .....	\$50 00
Dec. 5 .....	33 00
" 8 .....	5 00
" 9 .....	5 00
" 12 .....	38 00

"On cross-examination the witness testified that persons to whom the salvage company made the sales were allowed to remove the property only when Mr. Daniels, the superintendent, was present, and never after nightfall or before sunrise; that after the fire there was on the wharf in the ruins bleaching powder, cotton waste, silk nolls, cutch, burlap, old rope and rags.

"The testimony of Daniels introduced by the plaintiff tended to show that he directed the help employed by the Board of Salvage Underwriters to secure all the wool then in the debris and superintended their so doing; that in the progress of their work they got all of the wool out of the debris and took it to a house at the head of the pier, where it was placed in bags and transported to the office of the Board of Salvage Underwriters; that he made in person the sales to said Feinberg, first obtaining from Feinberg a bid for the lots so sold, telephoning such bid to Jones and, after receiving authority, making the sale; that the sales were of the amounts and at the dates above stated, and were of cotton waste, ropes and rags, which Feinberg collected from the ruins and carted away, and that no sales were made to Feinberg of refuse piles; that the salvage company got through work there December 17, 1904; and that the witness went over there until the middle of January daily to secure the property, if any, which might turn up. He testified that in all instances he told said Feinberg that no wool was to be sold him and that he, said Feinberg, was not to remove such from the wharf.

"The plaintiff further introduced the testimony of one Gordon E. Jenkins, who testified substantially the same as Daniels.

"The plaintiff further introduced testimony of one Talbot, the owner of the scouring factory at Norton, who testified that the lot of wool from which the sample was taken by Jones was the same lot of wool received from the plaintiff, Hartley.

"The testimony of Jones, Daniels and Jenkins all was to the effect that during the time when Feinberg was engaged in the removal of property purchased from the Board of Salvage Underwriters there was present some representative of the Board of Salvage Underwriters, who saw that Feinberg loaded into his team only the property purchased by him, and that Feinberg did not take away, in their presence or with their knowledge, any wool; and that none of the wool was with their knowledge taken from the pier by any person.

"The plaintiff introduced further the testimony of one Hobbs, fourth vice president of the Boston & Maine Railroad, who, among other things, testified that at the time of the fire he had all to do with insurance matters and goods which were damaged by fire while in the possession of the Boston & Maine Railroad and with the settlement of the claims for damages and losses by fire. Against the objection of the defendant he was permitted to testify that he had full control of the property in the warehouse on the morning of the fire, but showed no authority in writing or by vote for such position, and to such admission the defendant excepted and now prays that his exceptions be allowed. The said Hobbs further testified that on the day of the fire he made arrangements with the Board of Salvage Underwriters to take possession of all the property on said pier and to make returns to the Boston & Maine Railroad. The witness further testified, on cross-examination, that the pier in question was used by steamship companies to land their freight under an arrangement with the Boston & Maine Railroad, but whether this arrangement was in writing or not the witness did not recall; that when goods were consigned to Boston parties the teams of Boston parties were driven to the pier and the goods removed in that way from it, the pier being a warehouse temporarily for storage of goods until shipped to their destination by railroad or delivered, if it was to be a local delivery; that the pier was used also for outgoing goods which had been discharged from cars coming in on the Boston & Maine Railroad and destined to points by way of steamer; that when the goods are taken to the warehouse from interior points and delivered into the warehouse, they are then delivered to the steamship company, so that if delivered of the goods to the warehouse they then go into the possession of the steamship company; that when goods are discharged from steamer and into that warehouse they do not go into the possession of the Boston & Maine Railroad unless they are delivered to it for transfer, except that the Boston & Maine Railroad has a certain care over the premises and necessarily over the goods that are landed there whether they go out on the railroad or not; that the Boston & Maine Railroad furnished patrolment and

had a care over the premises, and could not escape if it allowed those who had any business on the piers to come in and take away the goods that had been discharged from the steamship company, although it might prove afterwards that the goods were not destined to any points on the line of the road or via the road.

"On cross-examination the witness further testified as follows:

"Q. The freight on incoming steamers landed on pier 5 didn't come into the possession of the Boston & Maine road until delivery on their cars for transportation, did it?

"A. That isn't hardly stated correctly, until delivery at their cars. It is a delivery on the wharf, with such papers as it is proper for us to receive, the goods being destined to points on or off our line."

"Witness could not tell what, if any, portion or all of the wool on the wharf was destined for domestic consignees, or what, if any, portion thereof was consigned to persons which would necessitate a handling by the Boston & Maine Railroad.

"The defendant offered in evidence the testimony of one Feinberg, who testified that all of the wool sold by him to the defendant was wool which he secured from the various lots sold him by the Board of Salvage Underwriters; that some time after the fire, on pier No. 5 Hoosac Tunnel docks, he went to the pier and found that some person had piled up in lots an indistinguishable mass of property composed, as it afterward developed, of rags, rope, wool and other property such as was on the wharf, it being mingled with the debris, charcoal and water incident to the ruins of the fire; that he paid for his purchases by checks which were made exhibits in the case; that after purchase he employed a team and the entire mass in its then condition was removed from the pier to his place of business, stored in a loft at such place of business, dried as far as possible and then the different ingredients of the pile separated; that in all he purchased from the Board of Salvage Underwriters lots aggregating in weight about 75 tons and in the separation secured wool which in its wet condition weighed about 15,000 pounds; that the wool in question was afterward sold to the defendant Rotman. Said Feinberg further testified that during the time of the removal of the lots so purchased by him or his representatives, persons in the employ of the Board of Salvage Underwriters were present, superintended and inspected the loading of such teams and that in no instance did he take or remove from the wharf or pier any property which had not been purchased by him of said Board of Salvage Underwriters; that at the time the said Board of Salvage Underwriters had cleaned up substantially all of the debris from the dock, the said witness purchased from said Board of

Salvage Underwriters all of the remaining property then upon the wharf of whatever name, nature or description, and that he placed men gathering from beneath the dock on the flats and beneath the water so far as could be reached by rakes, all property which had fallen through the end of the pier; that said Board of Salvage Underwriters saw said men at work gathering all the remaining material, saw the same placed upon the teams of the said Feinberg and removed by said Feinberg to his warehouse. The said Feinberg further testified that all of the said wool which he sold to the said Rotman was gathered from the debris in his warehouse when it became dry and, upon separation, distinguishable.

"At the conclusion of the testimony the defendant requested the court to rule and direct the verdict for the defendant, which the court declined to do, and to such refusal the defendant excepted and now prays that his exceptions be allowed.

"The defendant asked the court to rule and instruct the jury as follows:

"(1) The defendant requests the court to rule that there is no evidence upon which the plaintiff is entitled to recover.

"(2) The defendant requests the court to rule and charge that before a recovery may be had in this action it must affirmatively appear by a fair preponderance of the evidence that a return or offer of return of the property conveyed by the defendant to the plaintiff must have been made to the defendant before this action may be maintained, unless the property was taken from the plaintiff by the true owner under operation of law.

"(3) The defendant requests the court to rule and charge that in order to maintain this action it must affirmatively appear that the plaintiff's possession in the articles alleged in the plaintiff's declaration must have been taken from him by some person, firm or corporation claiming and having a legal and paramount title to all of the goods in dispute and that the voluntary delivery of such goods without dispossession is not such a delivery as entitled the plaintiff to maintain this action.

"(4) The defendant requests the court to rule and charge that the delivery of the goods in question by the plaintiff to any person claiming title without surrender or offer of return to the defendant and without giving the defendant an opportunity to retake said goods, bars the plaintiff from recovery in this action."

"The court refused to give the first ruling requested, and upon the subject-matter of the remaining requests instructed the jury as follows:

"When a man sells personal property to another, he impliedly warrants that he has title, that is, that he has a right to sell it, that it is his property and he has a right to

sell it, and there is an implied warranty that he has such right. There is no implied warranty that nobody will make a claim against it, because whatever property you have, there may be somebody who will make a claim against it, and there is no warranty on the part of the seller of goods that somebody won't claim it, and if the party who buys it yields to somebody's unauthorized claim, it does not give him a right to damages against the party who bought it. It is only when he yields to a legal claim that he has any rights to damage against the party from whom he purchased it, to recover back either the purchase price or the value of the goods; and so, a party yielding up property to another who demands it without process of law, that is, without a judicial determination, that is, when nothing comes from any court, does so at his peril, and can only recover in case he shows in court at the time of the sale there was an implied warranty of title on the part of the seller, and that the seller didn't have any right to sell it.

"And so, the burden is upon the plaintiff here in regard to both lots of wool, to show that Rotman, at the time he sold Hartley, didn't have any title to the things which he sold; and from that fact, if you find it to be a fact, that Rotman didn't have any title at the time he sold Hartley, then Hartley suffered damages for which he can recover one or both of these amounts. I say one or both of these amounts, because the title to two different parcels stands upon different grounds."

"Excepting so far as contained in the instructions above stated, the court did not give the rulings and instructions contained in the second, third and fourth requests.

"To the refusal to give each of said instructions as requested the defendant duly excepted, and prays that his exceptions may be allowed."

Boyd B. Jones and Philip N. Jones, for plaintiff. John N. Blanchard, for defendant.

**BRALEY, J.** It is conceded that at the time the wool was sold and delivered nothing was said as to the defendant's ownership. But by having possession, coupled with the act of sale, he represented himself to be the owner with the legal right of disposal, and this conduct was equivalent to an implied warranty of title in himself. *Stedman v. Lane*, 19 Pick. 547, 551; *Dorr v. Fisher*, 1 Cush. 271, 273; *Whitney v. Heywood*, 6 Cush. 82, 86; *Bennett v. Bartlett*, 6 Cush. 225; *Brown v. Pierce*, 97 Mass. 46, 93 Am. Dec. 57; *Shattuck v. Green*, 104 Mass. 42, 45; *Stratton v. Hill*, 134 Mass. 27, 29; *Boston & Albany Railroad Co. v. Richardson*, 135 Mass. 473, 474, 475. See *Sales Act 1908*, § 13 (*Acts 1908*, p. 176, c. 237, § 13). The defendant now makes no contention that the

plaintiff, having been called upon to surrender the wool to those who claimed to be the true owners, should not have yielded possession without suit, or affording to him an opportunity to retake it, because the breach of warranty, if any, occurred at the time of sale, when the cause of action also accrued. *Grose v. Hennessey*, 13 Allen, 389; *Perkins v. Whelan*, 116 Mass. 542. The second and fourth requests were rightly refused.

If the exception to the admission of evidence is treated as waived because not argued, the only question left for decision is whether there was testimony from which the jury could find that the plaintiff, upon whom rested the burden of proof, had returned the wool to the lawful owner. The validity of the defendant's title rested, according to his own admission, upon an abandonment of a portion of the wool, which then had been secured by the boatmen from whom he made the first purchase, and a sale to his vendor by the "board of exchange underwriters" from whom he made the second purchase. There was, however, abundant proof that this board, shortly after the fire had been substantially extinguished, took and retained possession, through their manager, of all the property at the pier, including the wool. It also appeared that he alone was authorized to see to the salvaging and sale of the property, and, having been called as a witness, if believed, his testimony very plainly showed that there had been no abandonment, and, while sales of wool had been made, none of the parcels sold included the plaintiff's purchases. In this state of the evidence the first ruling requested could not properly be granted, and the third so far as it correctly stated the law was embodied in the instructions given to the jury, to whose decision the dispute was properly submitted.

We find no error of law at the trial, and the order must be:

Exceptions overruled.

(200 Mass. 432)

### STEVENS v. STROUT.

(Supreme Judicial Court of Massachusetts.  
Essex. Jan. 6, 1909.)

1. MASTER AND SERVANT (§ 189\*)—INJURIES TO SERVANT—SUPERINTENDENTS—WHO ARE. That an employé, by reason of his experience, gave directions in the moving of a stone and the building of staging, does not make his principal duty that of superintendence.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 189.\*]

2. MASTER AND SERVANT (§ 185\*)—INJURIES TO SERVANT—FELLOW SERVANTS.

Where employés, engaged in moving and setting a stone, by the fall of which one of them was injured, were expected to build the temporary staging required for the work, and the negligence in the construction of the staging was that of a fellow workman in not making

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

proper use of the proper materials furnished by the employer, the employer is not liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 897; Dec. Dig. § 185.\*]

Exceptions from Superior Court, Essex County; George A. Sanderson, Judge.

Action by Sarah E. Stevens, administratrix of the estate of Frank Stevens, deceased, against Edward E. Strout, for injuries sustained by decedent and damages for his death. Judgment for defendant, and plaintiff excepta. Exceptions overruled.

James H. Sisk, William E. Sisk, and Richard L. Sisk, for plaintiff. Matthews, Thompson & Spring and Woodbury Rand, for defendant.

**HAMMOND, J.** Without reciting the evidence in detail it is sufficient to say that after a careful reading of it we are of opinion that it does not warrant a finding that Kallock was a superintendent. It is manifest that he acted principally as a workman. Even if it be assumed that by reason of his experience he gave directions in the moving of the stone and the building of the staging, still that is far from making his sole or principal duty that of superintendence.

There is some conflict of evidence as to whether Stevens, the plaintiff's intestate, assisted in making the staging. Kallock, called by the plaintiff, testified that "Stevens was around there; he did nothing in reference to the construction of the staging, only he passed planks from the sidewalk into the cellar," and (on cross-examination) "I should say when a man stood in the position Mr. Stevens was there was nothing to obstruct his vision of the basement; I don't know how long he stood there passing planks; it wouldn't take many minutes to build the whole thing, about fifteen or twenty; I couldn't say that Mr. Stevens was passing plank all the time; we were setting barrels part of the time; and when we were setting barrels nobody would pass plank; we placed barrels and then put planks on them." Stanton testified that when they started in to construct the staging, "Stevens was talking with me; I did not see him pass any plank."

We are of opinion, however, that upon the whole evidence this must be regarded as a case where the men employed in moving and setting the stone by the fall of which the injuries to Stevens were caused, were expected to build the temporary staging required for that specific work; that Stevens was one of the gang; and that the negligence in the construction of the staging was that of his fellow workman in not making proper use of the materials furnished by the employer. For the consequences of such a neglect the defendant is not answerable provided he furnished proper materials. *O'Connor v. Neal*, 153 Mass. 281, 26 N. E. 857;

*Thompson v. Worcester*, 184 Mass. 354, 68 N. E. 833, and cases cited. There was no evidence of a failure on the part of the defendant to furnish proper materials.

Exceptions overruled.

(200 Mass. 504)

#### SMITH v. PEACH.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 6, 1909.)

#### 1. MASTER AND SERVANT (§ 302\*)—INJURIES TO THIRD PERSONS—SCOPE OF EMPLOYMENT.

Defendant, who kept a livery stable, employed the owner of a gun as his foreman and driver. The gun was left on defendant's premises for defendant's use; but the owner subsequently resumed possession of it, and while exhibiting it to a friend it was discharged, and plaintiff was injured. The owner of the gun neither kept nor used the gun in the prosecution of his business as foreman, and his act in showing it to a friend had no connection with any service connected with his employment. *Held*, that defendant was not liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1217-1220, 1225; Dec. Dig. § 302.\*]

#### 2. NEGLIGENCE (§ 56\*)—CAUSE OF INJURY.

The cause of plaintiff's injury was not the neglect of defendant to inform the owner of the gun, on returning it to him, that the cartridge in the gun had not been exploded; but the cause was the act of the owner in deliberately taking the gun apart without first ascertaining whether it was in the same condition as when lent.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 60, 70; Dec. Dig. § 56.\*]

Exceptions from Superior Court, Suffolk County; Charles U. Bell, Judge.

Action by William H. Smith against John Peach. From an order directing a verdict for defendant, plaintiff brings exceptions. Exceptions overruled.

J. E. McConnell and D. J. Maloney, for plaintiff. Henry A. Eyges, for defendant.

**BRALEY, J.** The plaintiff before he can recover must establish that either the defendant's foreman in discharging the gun acted within the scope of his employment, or the defendant himself was negligent in leaving the loaded gun in his office. Upon the evidence neither proposition can be maintained. The defendant, who kept a livery stable, employed the owner of the gun as his foreman and driver, by whom, while exhibiting it to a friend, the cartridge exploded. Beyond this general statement, and that he gave orders to the teamsters, nothing further is stated as to the foreman's duties. It is manifest that the defendant neither kept nor used the gun as an instrument in the prosecution of his business, and the act of the foreman in taking it apart was outside of any service either directly or incidentally connected with his employment. He was engaged in handling his property as an affair of his own. *Oberton v. Boston & Maine Railroad*, 186 Mass. 481, 483, 71 N. E. 980,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

67 L. R. A. 422; and cases cited; *Berry v. Boston Elevated Railway Co.*, 188 Mass. 536, 74 N. E. 933; *Collins v. Wise*, 190 Mass. 206, 76 N. E. 657. If through his failure to take proper precautions to guard against a danger which he ought to have foreseen, the gun, while on the defendant's premises, and in his custody, had been taken and accidentally discharged by an intermeddler to the injury of the plaintiff, who was lawfully in the stable as an employé, a different question would be presented. *Lane v. Atlantic Works*, 111 Mass. 136; *Lebourdais v. Vitriified Wheel Co.*, 194 Mass. 341, 344, 80 N. E. 482, and cases cited. It is true that at his request the magazine gun had been left for the defendant's use, and when the owner resumed possession after having been informed by him that it had been used for the purpose for which it had been borrowed, he very likely assumed that the cartridge had been exploded. But even then the efficient cause of the plaintiff's injury was not the remote neglect, if any, of the defendant seasonably to give this information that the gun still remained charged, but the act of the owner, who was the wrongdoer, in deliberately taking the gun apart without first ascertaining whether it was in the same condition as when lent. *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 768; *Carter v. Towne*, 103 Mass. 507; *Glassey v. Worcester Consolidated Street Railway Co.*, 185 Mass. 815, 70 N. E. 199; *Lebourdais v. Vitriified Wheel Co.*, *ubi supra*.

Exceptions overruled.

-(200 Mass. 465)

### THORNTON v. FRANKLIN SQUARE HOUSE.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 6, 1909.)

#### 1. CHARITIES (§ 11\*)—"PUBLIC CHARITY"—HOME FOR WORKING GIRLS.

A corporation was incorporated under Pub. St. 1882, c. 115, relating to charitable associations, without capital or stockholders, for the purpose expressed in its charter "of providing a home for working girls at moderate cost." Its officers serve without compensation, and the funds to buy an equity in real estate, to equip a hospital, and to furnish parlors were the gifts of friends. Working girls are furnished a home-like place in which to live at prices for board, washing, and lodging, as cheap as or cheaper than could be elsewhere obtained by them under similar surroundings as to respectability and incentives to the proper conduct of life. A matron and resident nurse, paid by the corporation, are in constant attendance, while free medical attendance is furnished by physicians serving on the hospital staff without pay. A library, with weekly entertainments and lectures during the winter, are provided. *Held*, that the corporation is a "public charity."

[Ed. Note.—For other cases, see *Charities*, Dec. Dig. § 11.\*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5778-5780.]

#### 2. CHARITIES (§ 11\*)—PUBLIC CHARITY.

The fact that in any year the revenue derived from payments from inmates of the home prove sufficient to pay for fuel, light, food, laundry, and domestic service, which expenses form only a part of the necessary disbursements required to maintain the institution, does not change its character as a charity.

[Ed. Note.—For other cases, see *Charities*, Dec. Dig. § 11.\*]

#### 3. CHARITIES (§ 45\*)—LIABILITY FOR INJURY TO INMATE—NEGLIGENCE OF SERVANT.

A home for working girls, constituting a public charity, would not be liable for an injury to an inmate from the falling of a fire escape on the premises, if the injury was caused by the negligence of the institution's servants or agents properly selected by it and there was no proof of negligence on the part of the managers of the institution.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 103; Dec. Dig. § 45.\*]

Exceptions from Superior Court, Suffolk County; Daniel W. Bond, Judge.

Action by Jessie M. Thornton against Franklin Square House. There was a directed verdict for defendant, and plaintiff excepts. Exceptions overruled.

George R. Swasey and Edith M. Haynes, for plaintiff. Peabody & Arnold, for defendant.

**BRALEY, J.** In *Franklin Square House v. Boston*, 188 Mass. 409, 74 N. E. 675, the defendant was held to be a charitable corporation, and as such exempt from taxation. The plaintiff in the present case puts her right of recovery upon the ground that the evidence now abundantly proves it is not a charitable, but a private, corporation, and hence is liable to her in damages for the injury which she received. The defendant was incorporated under the provisions of Pub. St. 1882, c. 115, without either capital or stockholders, for the purpose expressed in its charter "of providing a home for working girls at moderate cost." In furtherance of this object the corporation was duly organized by the election of officers, who were to serve without pecuniary compensation, and the adoption of by-laws, which defined their powers and duties. The fund to buy the equity of the real estate, the equipment of the hospital department, and the furnishings of the two large and eleven small parlors, were the gifts of friends. The facts as to its humanitarian mission, and founding of the house, its financial resources, and the scope of the defendant's management, were all narrated by the clerk of the corporation, who was called as a witness by the plaintiff, and whose testimony remained uncontroverted. It is established for an indefinite class of the general public, who oftentimes by reason of low wages, or limited means, are unable to provide themselves with sufficient sustenance and clothing, and concurrently secure the comforts, with the educational and ethical environment, of a home devoted

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

solely to their welfare. In practical operation, as well as in design, working girls are afforded a homelike place in which to live, at prices for board, washing, and lodging alone, as cheap, or cheaper, than they could be obtained by them under similar surroundings as to respectability and incentives to the proper conduct of life. A matron and resident nurse, whom it pays for their services, are in constant attendance, while free medical attendance is furnished by physicians who serve on the hospital staff without pay. A library, with weekly entertainments, and lectures during the winter months, are also provided. To found, equip, maintain and contribute a home of this description for working girls, where at an outlay within their means they can obtain for the bare cost shelter and maintenance, and also free of expense be provided with large opportunities for mental and moral improvement, and, if sick, with proper medical attendance, constitutes in law a public charity. *Mass. Society for the Prevention of Cruelty to Animals v. Boston*, 142 Mass. 24, 6 N. E. 840; *Sherman v. Congregational Home Missionary Society*, 176 Mass. 349, 57 N. E. 702; *Amory v. Attorney General*, 179 Mass. 89, 60 N. E. 891; *Minns v. Billings*, 183 Mass. 126, 66 N. E. 593, 5 L. R. A. (N. S.) 686, 97 Am. St. Rep. 420; *Franklin Square House v. Boston*, 188 Mass. 409, 74 N. E. 675; *Farrigan v. Pevear*, 193 Mass. 147, 78 N. E. 855, 7 L. R. A. (N. S.) 481, 118 Am. St. Rep. 484. If in any year the revenue derived from payments received from them prove sufficient to pay for fuel, light, food, laundry, and domestic service, these expenses formed only a part of the necessary disbursements required to maintain the institution, and which could not have been met except by donations from those interested in its welfare. The primary purpose for the support of which the receipts from every source were appropriated remained unchanged, and there is an entire absence of the element of pecuniary gain in any form inuring to the benefit of the original corporators, or of their successors, and associates. By receiving these payments, therefore, the essential character of the trust was not perverted, nor did it cease to be a charity, and become a purely business enterprise conducted for private profit. *Powers v. Mass. Homeopathic Hospital*, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372.

The plaintiff, while an inmate, was injured by the falling of a fire escape on the premises, but no evidence whatever appears as to the circumstances of the accident, or any negligence of the defendant's servants or agents. If the injury was caused by the negligence of servants, or agents properly selected, the defendant is not liable for their torts, for reasons discussed in the recent case of *Farrigan v. Pevear*, 193 Mass. 147, 78 N. E. 855, 7 L. R. A. (N. S.) 481, 118 Am. St.

Rep. 484, by which upon this question the present case must be governed. But, if arising from the neglect of those who administered or controlled the management of the trust, no testimony was offered to charge them with having failed in the performance of their duties. *McDonald v. Mass. General Hospital*, 120 Mass. 432, 436, 21 Am. Rep. 529.

Exceptions overruled.

(200 Mass. 346)

# COMMONWEALTH v. BUCKLEY.

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 6, 1909.)

## 1. CRIMINAL LAW (§ 800\*)—INSTRUCTIONS—DEFINITIONS OF TERMS.

Where, in a prosecution for selling a book alleged to contain obscene, indecent, and impure language manifestly tending to corrupt the morals of youth, the instructions, so far as the court undertook to define the words "obscene," "indecent," "impure," and "manifestly," were correct, the court did not err in omitting to fully explain the meaning of such terms, which were common words, of well-understood meaning, by illustration or the use of synonyms.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1808–1810; Dec. Dig. § 800.\*]

## 2. OBSCENITY (§ 19\*)—MATTER MANIFESTLY OBSCENE—QUESTION FOR JURY.

In a prosecution for selling a printed book containing obscene, indecent, and impure language, manifestly tending to corrupt the morals of youth, specifications of alleged obscenity, consisting of descriptions of seductive actions and of highly wrought sexual passions, held to require submission to the jury of the question whether such matter was so indecent as to manifestly tend to the corruption of the morals of youth.

[Ed. Note.—For other cases, see *Obscenity*, Dec. Dig. § 19.\*]

## 3. CRIMINAL LAW (§ 829\*)—INSTRUCTIONS—REFUSAL OF REQUEST.

It is not error to refuse a requested charge substantially covered by the instructions given.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

Exceptions from Superior Court, Suffolk County; John F. Brown, Judge.

Joseph Buckley was convicted of selling a certain printed book, entitled "Three Weeks," alleged to contain certain obscene, indecent, and impure language manifestly tending to the corruption of the morals of youth, and he brings exceptions. Overruled.

Isaac Isaacs, Asst. Dist. Atty., for the Commonwealth. Frederic H. Chase and Henry A. Guller, for defendant.

HAMMOND, J. This is an indictment under Rev. Laws, c. 212, § 20, charging the defendant with selling "a certain printed book" which contained "certain obscene, indecent and impure language, and manifestly tending to the corruption of the morals of youth." The case is before us upon the defendant's exceptions to the overruling of the motion to quash the indictment and to the refusal of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the court to give certain rulings requested at the trial. It is stated in the defendant's brief that the questions raised in the motion to quash, so far as now relied upon, are covered in his request for rulings. We therefore shall consider that motion no further, but shall pass at once to the questions of law which arise out of the refusal to give the rulings requested at the trial.

There were 26 requests, none of which was given in the language asked for, although the law contained in some of them, so far as material to the case, was adopted by the judge in his charge. It seems best to treat the question in a topical way rather than to speak of the requests individually. This is substantially the way in which the questions are discussed upon the defendant's brief.

The defendant strongly contends that the judge should have defined at greater length than he did the terms "obscene," "indecent," "impure," and "manifestly." While it is true perhaps that by illustration or the use of synonyms the judge might have explained more fully the meaning of these terms, still it is to be remembered that they are not technical terms. They are common words and may be assumed to be understood in their common meaning by an ordinary jury. So far as the judge undertook to define we see no error, and we cannot say as matter of law that his failure to define more at length was erroneous in law or prejudicial to the defendant.

It is strongly contended by the defendant that the language complained of is neither obscene nor indecent nor impure, and that it does not manifestly tend to the corruption of the morals of youth; and in support of his contention the following language is used in his brief:

"The language of those parts of the book specified in the indictment is neither impure nor indecent within the meaning of the statute. No word, sentence or paragraph can be pointed out which can be described by either of these terms. If the statute is to be construed to cover all language which conveys or suggests thoughts of sexual relations, or even illicit intercourse, it will certainly include a great part of what is considered good and decent literature. Indecent and impure language cannot be such as is widely read and openly discussed. The very terms themselves import that matters thus described cannot be openly read or decently discussed; yet it is submitted that the book in question can be widely and openly read and discussed without causing general corruption of morals or denoting general depravity.

"The language referred to does not manifestly tend to the corruption of youth. It is not sufficient, under this clause of the statute, that the language be such as might tend to corrupt the thoughts of the young. It must obviously and incontrovertibly have that tendency. If there is any room for doubt up-

on that point the statute does not apply. The language of this book is not such that it can properly be said 'manifestly' to tend to corrupt or deprave."

But we think that the case was properly submitted to the jury. It could not be ruled as matter of law that the jury could not find the book within the prohibition of the statute. In prosecutions like this, considerations similar to those thus urged in this case are frequently, if not usually presented, in behalf of the defendant, and they are entitled to consideration. But after all there is a practical side. Doubtless an artist, when looking in his studio upon the model before him, in the figure of a perfectly formed young woman standing completely nude, may be so much under the influence of the æsthetic principles of his profession, and so intent in his wish to copy with perfect exactness the living picture, as not to have one obscene, indecent or impure thought or the slightest sexual desire, but on the contrary he may be perfectly absorbed in the purest feeling of admiration and wonder at the artistic beauty of the creation before him. But it by no means follows that if he should open wide the doors of his studio and fill it with people from the crowded streets, they would be moved by the same lofty and pure feelings. And in passing upon the question whether such an exhibition was obscene or tended to corrupt the morals of youth, a jury would not be justified in considering only the feeling of the artist. They should consider that not every person is so much absorbed in the artistic features, and that the exhibition of such a model may rather arouse in many spectators passions of a merely animal nature.

And so a reader may be so interested in the development of the character of a woman—no matter how wanton—as a merely psychic study, as to read such a book as this without a single impure or unworthy thought. And it may be that the author of this book was in full sympathy with such a state of mind when she wrote it and sent it forth to the reading public. It may be also that the literary style of the book is such that many a reader finds that to be the most attractive feature; and the thinly veiled allusions to an intense desire for sexual intercourse and to the arts of seduction leading to it and exciting it may be unheeded by him. But such an author cannot expect that the reading public as a whole will so read her production. Descriptions of seductive actions and of highly wrought sexual passion, even when sanctified by what the author has called "love," are very likely to be seen in another light tending towards the obscene and impure. And an author who has disclosed so much of the details of the way to the adulterous bed and who has kept the curtains raised in the way that the author of this book has kept them, can find no fault if the jury say that not the spiritual but the

animal, not the pure but the impure, is what the general reader will find as the most conspicuous thought suggested to him as he reads.

The twenty-sixth request was properly refused; and the language of the charge sufficiently and accurately stated the law on the subject-matter of this request. Although the twenty-first, twenty-second and twenty-third rulings were not given in their precise language, yet this subject was sufficiently treated in the charge. We see no error in the manner in which the court dealt with any of the requests.

Exceptions overruled.

(201 Mass. 23)

**MALONE, Atty. Gen., v. PROVIDENT INST. FOR SAVINGS IN BOSTON.**

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 11, 1909.)

**1. CONSTITUTIONAL LAW (§ 42\*)—CONSTITUTIONAL QUESTIONS—RIGHT TO URGE.**

Objection to the constitutionality of a statute, founded only on the interests of persons who do not appear, cannot be urged by other parties to the proceeding.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 39; Dec. Dig. § 42.\*]

**2. ABSENTEES (§ 6\*)—PROPERTY—CONTROL BY COMMONWEALTH.**

The charter of a savings bank and a contract between the institution and depositor is subject to the sovereign power of the commonwealth through proper proceedings to possess itself of a deposit abandoned by its owner absenting himself from the commonwealth without leaving any one to represent him for many years.

[Ed. Note.—For other cases, see Absentees, Dec. Dig. § 6.\*]

**3. ABSENTEES (§ 6\*)—RECEIVERS—BANK DEPOSIT.**

A receiver of the property of an absentee savings bank depositor, appointed as authorized by Rev. Laws, c. 144, § 4, as amended by St. 1904, p. 178, c. 206, has power to collect and hold the deposit.

[Ed. Note.—For other cases, see Absentees, Dec. Dig. § 6.\*]

**4. ABSENTEES (§ 3\*)—SAVINGS BANK DEPOSIT—PAYMENT TO STATE—STATUTES.**

St. 1908, p. 606, c. 590, §§ 56, 57, authorizing the probate court on the application of the Attorney General to direct payment of savings bank deposits to the State Treasurer after they shall have remained unclaimed for more than 30 years from the date of the last deposit, withdrawal of principal and interest, or addition of interest on the passbook, for which no claimant is known or when the depositor cannot be found, is constitutional.

[Ed. Note.—For other cases, see Absentees, Dec. Dig. § 3.\*]

**5. ABSENTEES (§ 6\*)—SAVINGS BANK DEPOSIT—PAYMENT TO STATE—NOTICE.**

Under Rev. Laws, c. 162, § 80, requiring probate courts to make rules for notice of proceedings to be given to parties interested, personal notice is required to a savings bank of a proceeding to require payment to the state of deposits belonging to an absentee depositor, un-

heard of for more than 30 years, as authorized by St. 1908, p. 606, c. 590, §§ 56, 57.

[Ed. Note.—For other cases, see Absentees, Dec. Dig. § 6.\*]

Case Reserved from Supreme Judicial Court, Suffolk County.

Application to probate court by Dana Malone, Attorney General, for the payment to the State Treasurer of certain unclaimed deposits in the hands of the Provident Institution for Savings in Boston. Decree for petitioner, and defendant appeals to the Supreme Judicial Court, where a single justice reserved the matter for consideration of the full court. Decree affirmed.

John Chipman Gray, Wm. R. Trask, and Roland Gray, for appellant. Dana Malone, Atty. Gen., and Fred T. Field, Asst. Atty. Gen., for appellee.

**KNOWLTON, C. J.** This application to the probate court was brought by the Attorney General, under St. 1907, p. 292, c. 340, which is now found in St. 1908, p. 606, c. 590, §§ 56, 57. This statute is as follows:

"Section 1. The probate court shall, upon the application of the Attorney General and after public notice, order and decree that all amounts of money heretofore or hereafter deposited with any savings bank or trust company to the credit of depositors who have not made a deposit on said account, or withdrawn any part thereof, or the interest, or on whose passbooks the interest has not been added, which shall have remained unclaimed for more than thirty years after the date of such last deposit, withdrawal of any part of principal or interest, or adding of interest on the passbook, and for which no claimant is known, or the depositor of it cannot be found, shall, with the increase and proceeds thereof, be paid to the Treasurer and Receiver General, to be held and used by him according to law, subject to be repaid to the person having and establishing a lawful right thereto, with interest at the rate of three per cent. per annum from the time when it was so paid to said treasurer to the time when it is paid over by him to such person.

"Sec. 2. Any person claiming a right to money deposited with the Treasurer and Receiver General under the provisions of the preceding section of this act \* \* \* may establish the same by a petition to the superior court, as provided in section 1 of chapter 201 of the Revised Laws, as amended by section 1 of chapter 370 of the acts of the year 1905."

The question presented by the report is whether the law is constitutional. The objections to it, on the part of the respondent, are that it is in contravention of the Constitution of Massachusetts, and particularly of sections 10 and 12 of the Declaration of Rights, that it is in contravention of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fourteenth amendment of the Constitution of the United States, in that it deprives persons of their property without due process of law, and that it is in contravention of the same Constitution in that it impairs the obligation of contracts.

Inasmuch as the depositors referred to in the application have not appeared, and no one represents them or any of them before the court, objections to the constitutionality of the statute, founded only on their interests, are not open to this respondent. *Hingham v. Quincy Bridge Corp.*, 6 Allen, 353-357; *Lampasas v. Bell*, 180 U. S. 276-284, 21 Sup. Ct. 368, 45 L. Ed. 527; *Hatch v. Reardon*, 204 U. S. 152-160, 27 Sup. Ct. 188, 51 L. Ed. 415. But inasmuch as most of the objections that they might make are founded upon considerations which are applicable to the claims of this respondent, although perhaps from a different point of view, we shall deal with the questions presented without close scrutiny of the respondent's right to raise them.

The principal argument of the respondent has been in support of six propositions, as follows:

"1. The Legislature cannot substitute another person for the person with whom the depositor made his original contract.

"2. The Legislature cannot substitute a right to the whole of a small fund for a proportional share of a deposit in a very large one.

"3. The Legislature cannot turn a cestui que trust of the savings bank into a mere creditor of the state.

"4. The Legislature cannot impair the depositor's right to interest.

"5. The Legislature cannot deprive the respondent of the right to retain the deposits until called for by the owners.

"6. The Legislature cannot deprive a bank of its right to do business in accordance with the terms of its charter."

The argument in support of these propositions seems to assume that the contract between the respondent and each depositor was made to continue for all time, even if the depositor should die, leaving no heirs, so that his property would escheat to the commonwealth under Rev. Laws, c. 140, § 3, or should absent himself for many years from the commonwealth, leaving no one to represent him or care for his estate, and should abandon his property altogether. On the contrary the charter granted to the Institution for Savings and the contract between the institution and its depositors must be assumed to have been subject to the sovereign power of the commonwealth; through proper proceedings, to take possession of property that escheats to the commonwealth and hold it as its own, and also to take into its care and custody property abandoned by its owner, when he is an absentee from the commonwealth, leaving no one to represent him for many years, and cannot be found. The right

of the commonwealth, in its sovereign power, so to take property into its control under such circumstances, is well established. *Nelson v. Blinn*, 187 Mass. 279, 88 N. E. 889, 15 L. R. A. (N. S.) 651; *Cunnius v. Reading School District*, 198 U. S. 458, 25 Sup. Ct. 721, 49 L. Ed. 1125; *Id.*, 206 Pa. 469, 56 Atl. 16, 98 Am. St. Rep. 790; *Deaderick v. County Court*, 1 Cold. (Tenn.) 202. The contract between the corporation and each depositor, by an implied condition, was to be subject to termination by the commonwealth whenever conditions should arise that would justify the state in exercising this power to take the property into its care for the benefit of the persons entitled to it, and when the commonwealth, in view of these conditions, should assert this power. There is nothing in the respondent's charter that limits the right of the commonwealth in these particulars. By the act of the Legislature the corporation was authorized to receive deposits of money, and to use and improve them to the best advantage for the persons making the deposits. St. 1816-18, p. 346, c. 92. The ownership of property by the depositors, and the right of the commonwealth to deal with property within its jurisdiction, are not affected by the statute.

The property is within the commonwealth and subject to its jurisdiction. The obligation of a savings bank, chartered in Massachusetts, to one of its depositors, is property subject to the jurisdiction of the state, as much as any tangible chattel. *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439; *Cunnius v. Reading School District*, 198 U. S. 458, 25 Sup. Ct. 721, 49 L. Ed. 1125; *Id.*, 206 Pa. 469, 56 Atl. 16, 98 Am. St. Rep. 790. If the court, under Rev. Laws, c. 144, § 4, as amended by St. 1904, p. 178, c. 206, had appointed a receiver of the property of any one of those depositors as an absentee from the commonwealth, there is no doubt that he would have been entitled to collect the money from the respondent and hold it, under the doctrine stated in *Nelson v. Blinn*, *ubi supra*. Most of the questions raised by the above-quoted propositions could be raised as well, in objecting to the constitutionality of the proceedings. If the suit were brought against the savings bank by a receiver appointed under that statute. Such a suit would be founded on the commonwealth's right to take possession of the abandoned property of an absentee. All the conditions necessary to the exercise of this right must exist before action can be taken under the statute now before us. Thirty years must elapse after the last act of the depositor in relation to his deposit; and the deposit must be one for which no claimant is known, or of which the depositor cannot be found. These facts show, at least *prima facie*, that there is no owner in charge or care of the property, and seemingly that it has been abandoned. The last-known owner is an absentee, within the meaning of the

word as used in the decisions above referred to. The length of time that the property has been left, without any action by him in regard to it, furnishes a strong presumption that, willingly or unwillingly, or ignorantly, he has permanently abandoned it. Such facts give the state jurisdiction to take it in charge.

There is nothing unconstitutional in the disposition made of it under the statute. It is to be held and used by the Treasurer and Receiver General according to law, but all the time in recognition of the rights of the owner, and of the necessity of repaying it to him, with interest, when he establishes his lawful right thereto. The commonwealth, under the statute, becomes a kind of trustee for the owner. The security of the owner is ample.

No question has been raised by the respondent in regard to the course of procedure under the statute. The courts can be trusted to apply the statute properly, under the rules of law. Under our statutes, probate courts are to make rules requiring notice of proceedings before the courts to be given to parties interested. Rev. Laws, c. 162, § 30. This means proper notice, which, as against a respondent savings bank, would be nothing less than a personal notice. Besides the general requirements of the Revised Laws, this act specially prescribes public notice. This is sufficient. Kentucky Railroad Tax Cases, 115 U. S. 321-334, 6 Sup. Ct. 57, 29 L. Ed. 414; *Beakes v. Da Cunha*, 126 N. Y. 293, 27 N. E. 251. The statute implies that the whole course of procedure will be legal and proper.

Inasmuch as the state has the substantive right to take the property into its charge and terminate the relations between the savings bank and the depositor under the conditions described in the statute, and to hold the property as a trustee for the true owner until he comes and establishes his right, the statute is constitutional.

Decree of probate court affirmed

(200 Mass. 571)

**BOWIE v. COFFIN VALVE CO.  
SAME v. FITCHBURG STEAM ENGINE  
CO.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 7, 1909.)

**1. MASTER AND SERVANT (§ 281\*)—INJURY TO  
EMPLOYÉ — CONTRIBUTORY NEGLIGENCE —  
EVIDENCE—SUFFICIENCY.**

Evidence held to warrant a finding that an employé, injured while helping move a casting, was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 281.\*]

**2. MASTER AND SERVANT (§ 279\*)—INJURY TO  
EMPLOYÉ — "SUPERINTENDENT"—EVIDENCE  
—SUFFICIENCY.**

Evidence held to warrant a finding that an employé having charge of the erection of a sta-

tionary engine was a "superintendent," within the employer's liability statute.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 279.\*]

For other definitions, see Words and Phrases, vol. 7, p. 6792.]

**3. MASTER AND SERVANT (§ 88\*)—RELATION OF  
PARTIES—SUPERINTENDENTS.**

If, while the seller of a stationary engine was installing it, an employé of the buyer voluntarily became an employé of the seller, the seller owed him a statutory duty of competent superintendence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 88.\*]

**4. MASTER AND SERVANT (§ 88\*)—IDENTITY OF  
EMPLOYER—INDEPENDENT CONTRACTOR.**

Unless an employé knew he was working for an independent contractor while the contractor was installing machinery for the employer, no relation of employer and employé existed between the employé and the contractor, since he could not be transferred from one employer to another without his consent, expressly given or implied.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 146; Dec. Dig. § 88.\*]

**5. EVIDENCE (§ 514\*)—EXPERT OPINIONS —  
MOVEMENT OF CASTINGS.**

It was not error to exclude an expert opinion as to whether one man at a rope was sufficient to prevent a casting, as it was being moved into position, from swinging too rapidly in toward the base where it was to rest; the jury being competent to decide the question for themselves, since it involved a simple mechanical operation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2319-2323; Dec. Dig. § 514.\*]

Exceptions from Superior Court, Suffolk County.

Actions by Henry J. Bowie against the Coffin Valve Company and against the Fitchburg Steam Engine Company. From a verdict for defendants, plaintiff brings exceptions under a single bill. Exceptions sustained.

S. A. Fuller and Chas. Toye, for plaintiff. John Lowell and James A. Lowell, for defendant Coffin Valve Co. Arthur P. Stone and Frederick W. Fosdick, for defendant Fitchburg Steam Engine Co.

**BRALEY, J.** These actions of tort were tried together, and, a verdict having been ordered in favor of both defendants, the cases are before us on a single bill of exceptions. The pleadings contain two counts at common law, and two under the statute; but, as the plaintiff relied only upon the third count charging negligence of some person intrusted by the defendants with superintendence, the other counts are immaterial. The question for decision is whether there was any evidence which would warrant a verdict for the plaintiff against either or both defendants. Independently of the inquiry as to which one of the two was his master at the time of the accident, each defendant contends that he was not in the exercise of due care and assumed the risk. But his general employment had been that of a machinist's

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

helper, and he never had worked in the manner described, in hoisting into place heavy castings while setting up a stationary steam engine. If, in connection with his inexperience in this particular line of service, there is taken into consideration the additional facts, that the work was done under the immediate supervision of a person who could have been found to have been acting as superintendent, and that when directed to pull upon the chain falls he had the right to rely upon the presumption that sufficient precaution had been taken to prevent the casting, or section of the fly wheel, as it rose from the ground from swinging in too quickly as it was lowered into final position, the jury could find that, being at work in his appointed place under the eye of the master's representative, he was not guilty of contributory negligence if he failed to appreciate fully the danger that his fellow servant, who was in charge of the guy rope, might be unable to prevent the rope from slipping and the load from swinging so rapidly forward as to strike him. *Feeney v. York Mfg. Co.*, 189 Mass. 336, 75 N. E. 733; *Meagher v. Crawford Laundry Machine Co.*, 187 Mass. 586, 589, 73 N. E. 853, and cases cited; *Connolly v. Booth*, 198 Mass. 577, 84 N. E. 799; *Robertson v. Hersey*, 198 Mass. 529, 84 N. E. 843. If there was evidence for the jury on this issue, the defendants urgently insist that they severally are without fault. But the jury would be warranted in finding that one Daniels, to whom was delegated the sole charge of erecting the engine, and whose orders the plaintiff was directed to obey, was acting as superintendent within the meaning of the statute. *Jordan v. New England Structural Co.*, 197 Mass. 43, 83 N. E. 332; *Murphy v. New York, New Haven & Hartford Railroad Co.*, 187 Mass. 18, 72 N. E. 830; *Baldwin v. American Writing Paper Co.*, 196 Mass. 402, 82 N. E. 1. The selection and use of the appliances, their proper adjustment, the method of operation, and the number of men who should be at the falls, or managing the guy rope, were all within his supervision and control. He was there because of his knowledge and skill to "superintend the erection of the engine, ready for steam connections." It was a matter peculiarly within his judgment to determine how many men were necessary safely to manage the rope attached to the casting, and the evidence plainly showed, or it could have been found, that either more men ought to have been directed to steady the load or a different method should have been adopted. But if this was sufficient to require the submission of this issue to the jury under the decisions in *Reardon v. Byrne*, 195 Mass. 146, 80 N. E. 827, and *Connolly v. Booth*, 198 Mass. 577, 84 N. E. 799, and cases cited, we are brought to the further question, in whose service was the plaintiff employed when injured? It was part of its contract that the Fitchburg Steam Engine Company should set up, connect and "turn over" the engine in

running order. In performance of this part of the contract, it sent Daniels. Upon the uncontradicted evidence he was there, and acting, not as the representative of the vendee, but of the vendor. In the prosecution of the work, he alone gave the necessary orders, which were obeyed by the men, including the plaintiff, all of whom had been furnished by the vendee. He was vested with the power of control, and the scope of his authority included everything which might be properly required for the installation of the engine, even if his expenses were to be borne by the Coffin Valve Company, which also was to furnish at its own expense such "laboring help as needed." If while performing this particular service the plaintiff voluntarily subjected himself to the commands of Daniels, and became the servant of the Fitchburg Steam Engine Company, then under the statute it would owe to him the duty of competent superintendence. *Delory v. Blodgett*, 185 Mass. 126, 69 N. E. 1078, 64 L. R. A. 114, 102 Am. St. Rep. 328; *Oulghan v. Butler*, 189 Mass. 200, 291, 75 N. E. 726; *Haskell v. Boston District Messenger Co.*, 190 Mass. 189, 193, 76 N. E. 215, 2 L. R. A. (N. S.) 1091, 112 Am. St. Rep. 324. Before the contract had been introduced, there was no evidence that Daniels was present as its representative, but after the contract had been put in it was a question of fact whether the plaintiff knew he was working for an independent contractor and consented to the transference. Unless this was found, the relation had not been established, for he could not be transferred from one master to another without his consent, either expressly given or implied from the nature and character of the work when compared with his ordinary employment. *Driscoll v. Towle*, 181 Mass. 516, 518, 63 N. E. 922; *Hefernan v. Fall River Iron Works Co.*, 197 Mass. 28, 83 N. E. 5.

But if the case against this company should have been submitted to the jury, it does not follow that a verdict in favor of the Coffin Valve Company was rightly ordered. This defendant rested on the testimony offered by the plaintiff. The contract had not been put in evidence, and no discussion is called for, to make plain, what is evident upon the record, that as the case then stood the jury could have found that Daniels was in its service, and had been intrusted with superintendence. *Feeney v. York Mfg. Co.*, 189 Mass. 336, 75 N. E. 733; *Murphy v. New York, New Haven & Hartford Railroad Co.*, 187 Mass. 18, 21, 72 N. E. 330; *Baldwin v. American Writing Paper Co.*, 196 Mass. 402, 408, 82 N. E. 1. The verdict, therefore, as to this defendant also must be set aside, and, as there must be a new trial, the exceptions to the exclusion of the question asked of the plaintiff's expert should be considered. The inquiry of fact was whether one man at the rope would be sufficient to prevent the casting, as it was being raised into position, from

too rapidly swinging in toward the base where it was to rest. While it might have been admitted in the discretion of the presiding judge, if he thought the jury would be aided by the expert's opinion, yet from their common knowledge of what at most was a simple mechanical operation not involving technical skill, they were fully competent to decide this for themselves. *Pren-dible v. Connecticut River Mfg. Co.*, 160 Mass. 131, 35 N. E. 675; *Meehan v. Holyoke Street Railway Co.*, 186 Mass. 511, 514, 72 N. E. 61; *Erickson v. American Steel & Wire Co.*, 193 Mass. 119, 126, 78 N. E. 761; *Whalen v. Rosnosky*, 195 Mass. 545, 547, 81 N. E. 282, 122 Am. St. Rep. 271.

Exceptions sustained.

(200 Mass. 483)

#### MUTUAL LOAN CO. v. MARTELL.

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 6, 1909.)

#### 1. CONSTITUTIONAL LAW (§ 81\*)—SCOPE OF POLICE POWER OF STATE.

In the exercise of its police power, the state may legislate for the public health, safety, morals, and welfare.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.\*]

#### 2. CONSTITUTIONAL LAW (§ 89\*)—FREEDOM OF CONTRACT—ASSIGNMENTS OF FUTURE WAGES—STATUTORY REGULATION.

St. 1908, p. 714, c. 605, §§ 7, 8, requiring for assignments of future wages as security for loans only of less than \$200 the written acceptance by the employer, and in addition, in the case of a married assignor, the written consent of his wife, and that the assignment be recorded, are constitutional as a proper exercise of the police power of the state to legislate for the public welfare.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 89.\*]

#### 3. CONSTITUTIONAL LAW (§ 208\*)—CLASS LEGISLATION—ASSIGNMENT OF FUTURE WAGES.

The fact that St. 1908, p. 714, c. 605, §§ 7, 8, requiring assignments of future wages securing loans of less than \$200 to comply with certain conditions, does not apply to assignments of such wages to secure other debts, is not an unlawful discrimination against the makers of small loans.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 208.\*]

#### 4. CONSTITUTIONAL LAW (§ 240\*)—EQUAL PROTECTION OF THE LAWS—ASSIGNMENT OF FUTURE WAGES.

The fact that by St. 1908, p. 714, c. 605, § 6, loans made by national banks, banking institutions under supervision of the banking commissioner, and loan companies and institutions established by special charter and under the same supervision, are exempt from the operation of the act, which by sections 7 and 8 regulates assignments of future wages as security for loans, does not make the act invalid, as denying the equal protection of the law to other lenders.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 240.\*]

#### 5. STATUTES (§ 64\*)—PARTIAL INVALIDITY—EFFECT.

The earlier part of St. 1908, p. 713, c. 605, provides a system of licensing the makers of

small loans without security. Section 6 exempts certain banks and loan institutions from the operation of the act. The last two sections require that assignments of future wages as security for loans of less than \$200 shall comply with certain requirements as to consent of the employer and of the employee's wife, if any, and shall be recorded. *Held*, that the latter part of the statute is so far independent of the earlier part that it would probably have been enacted by itself, if the Legislature had thought the earlier part unconstitutional, and hence the validity of the earlier part need not be considered in passing on the constitutionality of the latter part.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 64.\*]

Appeal from Superior Court, Suffolk County.

Action by the Mutual Loan Company against George J. Martell. From a judgment for defendant, plaintiff appeals. Affirmed.

Carver & Carver, for appellant. Otto C. Scales, for appellee. Guy A. Ham, for Mill Men's Assn. of Greater Boston.

KNOWLTON, C. J. This is an action of contract to recover the amount of two promissory notes for \$27.50 each, which were given by two different persons, with an assignment by each of wages to be earned in the future in the defendant's service. The declaration contains two counts, one for the amount of each note, and in each count it is averred that the assignment was recorded in the clerk's office of the city of Boston and a copy of it served on the defendant, and that the assignor earned wages to the amount of the note in the service of the defendant, which the defendant is bound, under the assignment, to pay to the plaintiff. The case comes before us upon an agreed statement of facts, under which a judgment for the defendant was ordered in the superior court and the plaintiff appealed.

The defense is founded upon St. 1908, p. 714, c. 605, of which sections 7 and 8 are as follows:

"Sec. 7. No assignment of or order for wages to be earned in the future, to secure a loan of less than two hundred dollars, shall be valid against an employer, of the person making said assignment or order, until said assignment or order is accepted in writing by the employer, and said assignment or order and the acceptance of the same have been filed and recorded with the clerk of the city or town where the party making said assignment or order resides, if a resident of the commonwealth, or in which he is employed, if not a resident of the commonwealth.

"Sec. 8. No such assignment of or order for wages to be earned in the future shall be valid when made by a married man, unless with the written consent of his wife to the making of such assignment or order attached thereto."

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Section 6 has this provision: "National banks; all banking institutions which are under the supervision of the bank commissioner, and loan companies and loan associations established by special charters and placed under state supervision, shall be exempt from the provisions of this act." Neither of these assignments was accepted in writing by the employer as required by section 7, and the assignor in the second assignment was a married man whose wife did not consent in writing to the making of the assignment. The question presented for our consideration is whether sections 7 and 8 are constitutional.

These sections interfere with the rights of the assignor and assignee to contract with each other, which right of contract, in general, is secured to all our citizens under the fourteenth amendment to the Constitution of the United States, as well as under the Constitution of Massachusetts. Such an interference by law with one's right to manage his property and to make contracts in relation to it and to pursue any proper vocation is in violation of the Constitution, unless it can be justified upon an independent ground. The defendant contends that there is such justification, in the present case, in the enactment of this statute by the Legislature in the exercise of the police power.

The state may legislate for the public health, the public safety, the public morals and the public welfare, in the exercise of this power. But, in balancing this right of the state against the constitutional right of the individual to personal liberty, it is often difficult to draw the line between permissible and impermissible legislation. The subject has been considered in many cases. *Commonwealth v. Strauss*, 191 Mass. 545, 78 N. E. 136, 11 L. R. A. (N. S.) 968; *Commonwealth v. Pear*, 183 Mass. 242, 66 N. E. 719, 67 L. R. A. 935; *Commonwealth v. Interstate Consolidated Street Railway Company*, 187 Mass. 436, 73 N. E. 530, 11 L. R. A. (N. S.) 973; *Welch v. Swazey*, 193 Mass. 365, 79 N. E. 745, 118 Am. St. Rep. 523; *Squire v. Tellier*, 185 Mass. 18, 69 N. E. 812, 102 Am. St. Rep. 322; *Commonwealth v. Perry*, 155 Mass. 117, 28 N. E. 1126, 14 L. R. A. 325, 31 Am. St. Rep. 533; *Wyeth v. Thomas*, 200 Mass. —, 86 N. E. 925; *Field v. Barber Asphalt Paving Company*, 194 U. S. 618-621, 24 Sup. Ct. 784, 48 L. Ed. 1142; *Yick Wo v. Hopkins*, 118 U. S. 356-369, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Allgeyer v. Louisiana*, 165 U. S. 589, 17 Sup. Ct. 427, 41 L. Ed. 832; *Lochner v. New York*, 198 U. S. 45-53, 25 Sup. Ct. 539, 49 L. Ed. 937.

In the present case we have to inquire how far the welfare of the community requires an interference by way of regulation with the right of workmen to dispose of their wages to be earned in the future. For many years statutes have been enacted in this commonwealth, and in other states, with a view to secure such wages against the

bankruptcy of employers and other hazards. To a certain amount they are made a preferred claim in statutes relating to insolvency and bankruptcy. *Rev. Laws*, c. 163, § 118; *U. S. Bankruptcy Law of 1898* (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]) § 64. To a certain amount they are exempt from attachment by trustee process. *Rev. Laws*, c. 189, § 27. They are required by law to be paid weekly, and the statute requiring it has been held constitutional. *Rev. Laws*, c. 106, § 62. Opinion of the Justices, 163 Mass. 589, 40 N. E. 718, 28 L. R. A. 344. It has been deemed important that they be received by the employé regularly and promptly after they are earned.

In *International Text-Book Company v. Weissinger*, 160 Ind. 349, 65 N. E. 521, 65 L. R. A. 599, 98 Am. St. Rep. 334, the court, in deciding that a statute which forbids altogether the assignment of future earnings of an employé was constitutional, used this language: "A large proportion of the persons affected by these statutes are dependent upon their daily or weekly wages for the maintenance of themselves and their families. Delay of payment or loss of wages results in deprivation of the necessities of life, suffering, inability to meet just obligations to others, and in many cases may make the wage-earner a charge upon the public. The situation of these persons renders them peculiarly liable to imposition and injustice at the hands of employers, unscrupulous tradesmen, and others, who are willing to take advantage of their condition. Where future wages may be assigned, the temptation to anticipate their payment and to sacrifice them for an inadequate consideration is often very great. Such assignments would, in many cases, leave the laborer or wage-earner without present or future means of support. By removing the strongest incentive to faithful service, anticipation of pecuniary reward in the near future, their effect would be alike injurious to the laborer and his employer." Without deciding, as the Supreme Court of Indiana did, that these considerations would furnish the Legislature constitutional authority for forbidding all assignments of wages, we think they justify a strict regulation of the right to make such contracts. The requirement that they be recorded is certainly reasonable. It tends to lessen the opportunity of wage-earners to be dishonest in procuring credit on the faith of their expected possession of earnings, as they might be if unrecorded assignments were outstanding. The requirement that the order or assignment be accepted in writing by the employer tends to diminish the risk of his refusal to pay, involving litigation the result of which might be loss of employment by the wage-earner and injury to the business of the employer. Then, too, this requirement might operate as a check upon the rapacity of unscrupulous money lenders who are inclined to take advantage of the needs

of employes. If the Legislature saw an advantage to the community from this provision, we cannot say that they were acting beyond their constitutional authority in enacting the law.

Nor can we say that they might not find grounds for a distinction between assignments to secure loans of money and assignments as security for necessities or other property furnished or to be furnished. The occasions for making assignments as security for necessities may be far more pressing than for making them to obtain money, and the risk of wasting that which is obtained may be much less in one case than in the other. The statute is not unconstitutional because it deals only with security for loans and does not include security for other debts.

Section 8 presents a similar but more difficult question. A married man is bound by law to support his wife. If he is a wage-earner, although she has no legal title to his wages, she has an interest in the right use of them. If there are such risks of his making an improper disposition of them by assigning them to secure the payment of money that he borrows for unnecessary purposes as to justify the Legislature in limiting and regulating his exercise of this right, might they not regulate it by requiring the consent of his wife as a prerequisite to the validity of his assignment? A strong argument can be made in favor of the plaintiff's contention on this point. But on the whole we are of opinion that the Legislature might look chiefly to the ordinary relations between husband and wife under the law, and adopt this form of regulation as salutary in its application to most members of the class with which they were dealing. The principles that are applicable to section 7 require us to hold section 8 to be constitutional.

It is contended that these sections are unconstitutional because of the provision of section 6 that renders the act inapplicable to certain banks, banking institutions and loan companies. The argument is that this makes a discrimination without reason, and thus deprives others of the "equal protection of the laws," secured by the fourteenth amendment to the Constitution of the United States. This would be so if no reason could be discovered by the Legislature for making the discrimination. But seemingly the Legislature might decide that the dangers which the statute was intended to prevent would not exist in any considerable degree from the business of national banks, or other banking institutions under the supervision of the bank commissioner, or from that conducted by a loan company established by a special charter and placed under the supervision of this commissioner. The Legislature may be supposed to have known the kind of business done and likely to be done by these corporations, and they may have believed rightly

that the business done by them would not need regulation in the interest of employes or employers. This was held by the Supreme Court of Delaware in an elaborate opinion in a similar case. *State v. Wickenhoefer*, 64 Atl. 273.

A large number of states have enacted statutes regulating to a greater or less degree the assignment of future earnings as security for debts. Several decisions have been made upholding the constitutionality of laws securing to employes payment of their wages in money. *Knoxville Iron Company v. Harbison*, 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55; *Hancock v. Yaden*, 121 Ind. 368, 23 N. E. 253, 6 L. R. A. 576, 16 Am. St. Rep. 396; *State v. Peel Splint Coal Company*, 36 W. Va. 802-822, 15 S. E. 1000, 17 L. R. A. 385. The Supreme Court of Illinois has made a contrary decision. *Massie, Assignee, v. Cessna* (June, 1906) 88 N. E. 152.

In this commonwealth St. 1905, p. 224, c. 308, limiting the right to make assignments of future earnings to a period not exceeding two years, has been held constitutional. *McCallum v. Simplex Electric Company*, 197 Mass. 388, 83 N. E. 1108. So also has the statute regulating the business of pawnbrokers. *Commonwealth v. Danziger*, 176 Mass. 290, 57 N. E. 461. We are of opinion that these two sections of the statute are constitutional.

The early part of the statute we have no occasion now to consider. The last part of the act is so far separable from the other that the Legislature probably would have enacted it by itself, if they had supposed that they could not constitutionally enact the other. Without intimating an opinion in regard to the other, we are of opinion that this can stand by itself. *Edwards v. Bruorton*, 184 Mass. 529, 69 N. E. 328; *Commonwealth v. Petranich*, 183 Mass. 217, 66 N. E. 807; *Commonwealth v. Anselvich*, 186 Mass. 376-379, 71 N. E. 790, 104 Am. St. Rep. 590; *Commonwealth v. Hana*, 195 Mass. 262, 81 N. E. 149, 11 L. R. A. (N. S.) 799, 122 Am. St. Rep. 251. Judgment affirmed.

(200 Mass. 445)

#### FROST v. MCCARTHY et al.

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 7, 1909.)

#### 1. NEGLIGENCE (§ 136\*)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Evidence in an action for personal injury held to present a question for the jury as to plaintiff's due care in entering and leaving defendant's store.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 136.\*]

#### 2. NEGLIGENCE (§ 66\*)—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF DANGER.

Mere "knowledge of the danger" of doing a certain act without a full "appreciation of the risk" involved is not sufficient to preclude recovery by a person injured, even though there

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

may be added to such knowledge a comprehension of some risk.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 86; Dec. Dig. § 66.\*]

**3. NEGLIGENCE (§ 68\*)—DUE CARE OF PERSON INJURED.**

The established standard of due care on the part of a person injured is whether, taking everything into account, the act is one which common sense pronounces to be a want of such prudence as the ordinarily careful person would use in a like situation.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 92; Dec. Dig. § 68.\*]

**4. NEGLIGENCE (§ 136\*)—DANGEROUS WALK—DUE CARE IN PASSING OVER.**

Observation of loose pieces of mortar and powdered plaster cannot be said, as a matter of law, to render a walk so obviously dangerous as to stamp the act of attempting to pass over it as one that no reasonable person would undertake.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 136.\*]

**5. NEGLIGENCE (§ 136\*) — TEMPORARY ENTRANCE TO STORE—QUESTION FOR JURY.**

Evidence as to a storekeeper's negligence in respect to a temporary entrance to his store in use by patrons while a contractor made alterations *held* to present a question for the jury.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 136.\*]

Exceptions from Superior Court, Suffolk County; John F. Brown, Judge.

Action by Cornelia Frost against James C. McCarthy and others. There was a judgment for plaintiff, and defendant McCarthy excepts. Exceptions overruled.

Elmer D. Sherburne and George W. Buck, for plaintiff. M. O. Garner, for defendant McCarthy.

RUGG, J. This is an action of tort to recover damages for personal injuries sustained by the plaintiff while coming out of the retail lace store of the defendant McCarthy, at the corner of West and Tremont streets in Boston. These exceptions relate only to the liability of McCarthy, who will hereafter be referred to as the defendant. The accident occurred on the morning of September 19, 1904, which was a pleasant day. For some time before this a general contractor had been at work making changes and alterations in the store. This work was still in progress on the day of the injury. The plaintiff had often transacted business at the store, and when she reached it on the day in question she saw that scaffolding was built across the front, that the old entrance had been closed, and that a new entrance had been constructed, which consisted of a narrow passageway, somewhat darkened by the overhead scaffold, leading into the store from the sidewalk. The door, which was half the ordinary size, was open, and it was necessary to ascend two steps before reaching it. There were other indications of repairs and alterations in progress. The plaintiff testified that as she went into the store she no-

ticed mortar or plaster upon the steps, some of which was dry and powdery, as though it had been trampled on and spread around, and some in lumps, and she had to pick her way into the store. As she came out of the store, after having remained there about five minutes, she slipped, but did not know whether she stepped upon the powdery substance or upon a lump. There was other evidence that the steps were covered with a substance that looked like mortar, "which had been dropped in a splash and gradually dried; part of it had been walked on; part of it had been dried and was broken off and had been scattered over the steps; there were bunches or collections of mortar there and also powdered mortar in considerable quantities; some of the bunches were attached to the step, and some loose rolling about under foot; \* \* \* some of the mortar or plaster had been tracked into the store, upon the floor near the door," and also that some of the substance had been tracked upon the sidewalk.

The question as to the plaintiff's due care, although close, was properly submitted to the jury. Albeit she observed the presence upon the steps of the powdered and lumped mortar before she entered, and had to pick her way along and feared that she might slip. The door was open leading into the store and business was in fact being conducted there as usual. An invitation on the part of the defendant was thus held out to customers to enter his store, which to some extent carried an implication of safety, if the invitation was accepted. The principle is too well settled to require a citation of authorities to support it, that mere knowledge of the danger of doing a certain act without a full appreciation of the risk involved is not sufficient to preclude a plaintiff from recovery, even though there may be added to the knowledge of danger a comprehension of some risk. It is still in most cases a question of fact whether, taking into account all the circumstances, including the knowledge and appreciation as well as every other material condition, the plaintiff is guilty of such negligence as to preclude recovery. Such knowledge and appreciation no doubt oftentimes, perhaps generally, constitute weighty evidence of negligence. They do not invariably rise to such clear and conclusive manifestation of want of ordinary prudence as to warrant a court in ruling as matter of law that there is want of due care. Facts are often present which require the court to say as a matter of law that no person of ordinary prudence would do the act which accompanied the injury. Although the terms "knowledge of danger" and appreciation of risk" are frequently used in discussion of due care, still these elements in and of themselves do not constitute negligence, as matter of law. These expressions are valuable aids

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in describing what may be found as matter of fact to constitute negligence. They aptly define what is evidence of negligence, but do not state that which is always such conclusive and indubitable want of care as to constitute negligence as matter of law. The established standard is whether, taking everything into account, the act is one which the common sense of mankind pronounces want of such prudence as the ordinarily careful person would use in a like situation. It is hard to conceive of anything more universally known to be plainly liable to cause a person to slip than ice, yet it has not infrequently been held that knowledge of the presence of ice on the part of one attempting to pass over it, sometimes even when there is another way open, is not such evidence of negligence as to warrant the court in ruling as a matter of law that the person injured by the attempt to get over the slippery place is precluded from recovery by negligence. *Dewire v. Bailey*, 131 Mass. 169, 41 Am. Rep. 219; *Dipper v. Milford*, 167 Mass. 555, 46 N. E. 122; *Foster v. Old Colony Street Railway Co.*, 182 Mass. 378, 65 N. E. 795; *Fleck v. Union Railway*, 134 Mass. 480; *Gilbert v. Boston*, 139 Mass. 313, 31 N. E. 734; *Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366; *Fitzgerald v. Conn. River Paper Co.*, 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep. 537. The instructions upon this branch of the case were accurate and sufficiently amplified to enable the jury to pass intelligently upon the facts in evidence. It seems plain that no court would be justified in ruling as matter of law that observation of loose pieces of mortar and powdered plaster rendered a walk so obviously dangerous as to stamp the act of attempting to pass over it as one that no reasonable person would undertake. *Mosheuvel v. Dist. of Columbia*, 191 U. S. 247, 24 Sup. Ct. 57, 48 L. Ed. 170.

The case is also close on the negligence of the defendant. The material upon the steps does not appear to have been great in quantity or obviously of imminent danger in its character, yet considering all the circumstances, the smoothness of the step, which was of glass and iron, the lumpiness of some of the mortar, and the fact that the place was evidently prepared as an entrance to a store where business was being conducted as usual notwithstanding the reconstruction of the front of the building, we cannot say as matter of law that this question was not for the jury. It is strongly argued that there is nothing to show that the condition complained of had existed for such a length of time as to charge the defendant with liability. But there was some evidence tending to show that the mortar splashed upon the step and had dried and had been trodden into the store and upon the sidewalk by the feet of persons passing through it. These

considerations, coupled with the fact that the defendant must have known that the repairs were in progress, and had for that reason provided a temporary entrance to his store for customers, were enough to warrant a finding that the situation had existed under such circumstances and for such a period of time that in the exercise of reasonable care for the safety of his patrons he ought to have known about it and was thus charged with responsibility. The due care of a storekeeper upon a chief street in a large city as to the access to his premises may fairly be found by a jury to require a considerable degree of inspection and supervision.

Exceptions overruled.

(201 Mass. 3)

**BEATTIE v. BOSTON ELEVATED RY. CO.**  
(two cases).

(Supreme Judicial Court of Massachusetts.  
Middlesex. Jan. 7, 1900.)

**1. CARRIERS (§ 346\*)—INJURY TO PASSENGER—EVIDENCE OF CONTRIBUTORY NEGLIGENCE.**

The fact that an injured passenger could not describe her action in leaving the car on which she was injured does not show that she did not exercise due care in so doing.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1401; Dec. Dig. § 346.\*]

**2. NEGLIGENCE (§ 121\*)—RES IPSA LOQUITUR.**

The doctrine of *res ipsa loquitur* applies in the case of an unexplained accident which in the ordinary experience of mankind would not have happened without fault on the part of defendant.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 218, 225; Dec. Dig. § 121.\*]

**3. CARRIERS (§ 316\*)—INJURY TO PASSENGERS—APPLICATION OF DOCTRINE OF RES IPSA LOQUITUR.**

Plaintiff was injured by an explosion or burst of flame from the controller on defendant's street car, in which she was a passenger. An expert witness testified that the accident could not have occurred from any other cause than a defect in the condition of the electrical mechanism and equipment of the car, and there was no evidence to warrant a finding that such an accident could have happened from any other cause. *Held* to present a case for the application of the doctrine of *res ipsa loquitur*.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1290, 1292; Dec. Dig. § 316.\*]

**4. CARRIERS (§ 230\*)—DUTY TO PASSENGERS.**

It is the duty of a carrier to exercise toward passengers the highest degree of care consistent with the proper management of its business.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1087; Dec. Dig. § 230.\*]

Exceptions from Superior Court, Middlesex County; John H. Hardy, Judge.

Separate actions by Kathryn L. Beattie and by William T. Beattie against the Boston Elevated Railway Company for personal injuries to plaintiff Kathryn. There were separate judgments for both plaintiffs, and defendant brings exceptions. Exceptions overruled.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Lafayette G. Blair, for plaintiffs. Hugh D. McLellan, for defendant.

KNOWLTON, C. J. There was evidence to warrant a finding that the female plaintiff was in the exercise of due care. According to the testimony, the explosion on the electric car was terrific. The controller in the front end of the car exploded, blowing a hole in its metallic covering, emitting a flame which lighted up the whole car. According to one witness "the flame appeared to leap up to the roof and envelop the whole car. The whole car appeared to be ablaze." Of the large number of passengers on the car all but one who was detained there rapidly left the car. The fact that the plaintiff could not describe her action in leaving it does not show that she was not in the exercise of due care. Under such circumstances she could not be expected to act with deliberation.

The question principally argued by the defendant's counsel arises upon the refusal of the judge to grant the defendant's sixth request for a ruling, namely: "The doctrine of *res ipsa loquitur* does not apply to this case"—and upon the instruction given, "that the mere happening of the explosion was some evidence of negligence on the part of the defendant as to matters alleged in the fourth count of the plaintiff's declaration."

The doctrine *res ipsa loquitur* applies in the case of an unexplained accident which, in the ordinary experience of mankind, would not have happened without fault on the part of the defendant. *Minihan v. Boston Elev. Ry. Co.*, 197 Mass. 387, 83 N. E. 871; *Piney v. Hall*, 156 Mass. 225, 30 N. E. 1016; *Cassady v. Old Colony St. Ry. Co.*, 184 Mass. 156, 68 N. E. 10, 63 L. R. A. 285. An accident such as appears in this case, with nothing to show that it might have been expected to happen if proper care was used by the defendant, is peculiarly a case for the application of the doctrine.

The defendant's principal argument is that, while the doctrine may apply so far as to be evidence of negligence of some kind on the part of the defendant or its servants, it has no tendency to show that the negligence was in regard to the condition of the car. It may be conceded that if a plaintiff counts upon a particular kind of negligence of a defendant, and no other, an accident that might have happened, with equal probability, from negligence of that kind, or from negligence of a very different kind, does not alone support the averments of the count. But in this case there was testimony from an expert witness, excluding, in his opinion, the possibility of such an accident from any other cause than a defect in the condition of the electrical mechanism and equipment of the car, and we are not aware of any fact or evidence to warrant a finding that such an accident could have happened from any other

cause. The case comes within the doctrine stated in *Cassady v. Old Colony Ry. Co.*, 184 Mass. 156, 68 N. E. 10, 63 L. R. A. 285, and *Gilmore v. Milford & Uxbridge St. Ry. Co.*, 193 Mass. 44, 78 N. E. 744.

The testimony of the expert and the other circumstances of the case would warrant a finding of negligence, notwithstanding that the car was not owned by the defendant, but was received from another corporation. The defendant was a common carrier of passengers, and it was its duty to exercise towards the plaintiff the highest degree of care consistent with the proper management of its business.

Exceptions overruled.

(200 Mass. 555)

### TUBBS v. CUMMINGS CO.

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 7, 1909.)

MASTER AND SERVANT (§ 8\*)—DURATION OF EMPLOYMENT—CONSTRUCTION OF CONTRACT.

The contract of plaintiff's employment recited that defendant would advance plaintiff "the sum of \$75 to cover his first week's salary and traveling expenses, \* \* \* and thereafter the sum of \$50 each week for such time as" plaintiff should be traveling in defendant's exclusive interest and under its direction, and that if plaintiff "shall complete a full year's service," and the payments for goods sold by him exceed a specified amount, plaintiff should be entitled to an additional per cent. on the excess. *Held*, that the contract was a hiring by the week at most, and not for a year.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 8-10; Dec. Dig. § 8.\*]

Exceptions from Superior Court, Suffolk County; William Cushing Walt, Judge.

Action by Frederick A. Tubbs against the Cummings Company. To a judgment for plaintiff, defendant brings exceptions. Exceptions sustained.

Whipple, Sears & Ogden and Henry Herlick Bond, for plaintiff. J. W. Spaulding, for defendant.

HAMMOND, J. This is an action of contract to recover salary for one year (less such sums as the plaintiff earned in other employment after his discharge), upon the following contract:

"Worcester, Mass., Jan. 5, 1907.

"Memorandum of agreement between Mr. Frederick A. Tubbs and the Cummings Co. Mr. Tubbs to sell goods for the Cummings Co., exclusively and under their direction in the states of Indiana, Illinois, Michigan and Wisconsin and such other territory as may be mutually agreed upon. The Cummings Co. agree to advance Mr. Tubbs the sum of \$75 to cover his first week's salary and legitimate traveling expenses beginning Jan. 5, 1907, and thereafter the sum of \$50 each week for such time as Mr. Tubbs shall be

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

traveling in their exclusive interest and under their direction.

"If Mr. Tubbs shall complete a full year's service in the exclusive interest of the Cummings Co., and his accepted orders shall have been filled and payment received by the Cummings Co., in excess of (\$48,000) forty-eight thousand dollars in that year, Mr. Tubbs shall be entitled to receive from the Cummings Co. an additional sum equal to five per cent. on whatever amount such orders shall exceed the sum of forty-eight thousand dollars.

"Frederick A. Tubbs.

"The Cummings Co.,

"Abdon S. Clement, Mgr."

The plaintiff began work under the contract on January 5, 1907, and was discharged January 24, 1907.

At the trial the presiding justice ruled that "the contract was a contract for one year." To this ruling the defendant excepted. The exception must be sustained. Upon its face the contract was a hiring by the week at the most, and not by the year or for a year. The payments were to be made weekly; and while this circumstance is of but little if any weight where there is other language in the contract expressly or impliedly describing the term of service to be longer than a week, yet in the absence of such other language it is of great weight. In the contract before us there is no language expressly naming one year as the term of employment. Nor is the language such as to imply that such is the understanding of the parties. The reference to a "full year's service" is not made as if such service was one of the settled and absolute features of the contract, but merely as if it were a possible contingency. By the first paragraph of the contract the plaintiff's weekly salary was fixed for the time he should work. By the second it was provided that in certain contingencies he should receive an additional compensation. Those contingencies were two, namely: First, that he shall have completed "a full year's service"; second, that his accepted orders "shall have been filled and payment received by [the defendant] in excess of \$48,000." One of these events was as contingent as the other. There is no fair implication that either was to be regarded as absolute. Such is the fair construction of the contract upon its face. The case differs materially from cases like Norton v. Cowell, 65 Md. 359, 4 Atl. 408, 57 Am. Rep. 331, Koehler v. Buhl, 94 Mich. 496, 54 N. W. 157, Kelley v. Carthage Wheel Co., 62 Ohio St. 598, 57 N. E. 984, Heminway v. Porter, 94 Ill. App. 609, and Babcock & Wilcox Co. v. Moore, 62 Md. 161, upon which the plaintiff relies. It more clearly resembles cases like Harper v. Hassard, 113 Mass. 187, although it is much stronger for the defendant than that case was. For a discussion of

the law on this subject see Maynard v. Royal Worcester Corset Co., 200 Mass. 1, 85 N. E. 877.

And this construction is confirmed by the circumstances under which the contract was made. The defendant was a manufacturer of boots and shoes at Worcester in this state. Before January 5, 1907, it advertised for a salesman for certain Western territory. The plaintiff saw the advertisement and applied for the position, furnishing references. After inquiries the defendant entered into the contract. The parties were strangers to each other. The plaintiff could not know that the defendant would be a reasonable or satisfactory employer, nor could the defendant know that the plaintiff would be an agreeable or successful salesman. Each might want to know more of the other before making a contract which would be binding for a long time. These circumstances point not so much to a contract for a year as to a contract in the way of a trial, on the part of the defendant, of the capacity of the plaintiff, and, on the part of the plaintiff, of the desirability of continuing in the employ of the defendant.

Moreover, the acts of the parties tend strongly to show that this view of the nature of the contract was plainly in accordance with their understanding. Within three weeks from the commencement of the service the defendant discharged the plaintiff, and the latter, while evidently feeling much aggrieved at the act as very unjust towards him, and while protesting that he had worked faithfully for the interests of the defendant, did not in any way claim at the time that the contract was for a year. On the contrary he seemed to accept his discharge as an act within the power of the defendant, and the chief wish he expressed was to get home.

It becomes unnecessary to consider the other exceptions.

Exceptions sustained.

(200 Mass. 566)

#### RALPH v. CAMBRIDGE ELECTRIC LIGHT CO. (two cases).

(Supreme Judicial Court of Massachusetts.  
Middlesex. Jan. 7, 1909.)

NEGLIGENCE (§ 122\*) — ACTIONS — BURDEN OF PROOF — CONTRIBUTORY NEGLIGENCE.

In an action to recover for the suffering and death of plaintiff's intestate, caused by the negligence of defendant, the burden of proof is on plaintiff to show absence of contributory negligence, although it be assumed that defendant was negligent.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 229; Dec. Dig. § 122.\*]

Two actions of tort were brought by one Ralph, administratrix, against the Cambridge Electric Light Company, to recover for the conscious suffering and death of plaintiff's in-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

testate. A verdict was directed in each case for defendant, and the cases were reported for determination of the Supreme Judicial Court. Judgment for defendant.

Arthur P. Stone, for plaintiff. John Lowell and James A. Lowell, for defendant.

**HAMMOND, J.** Even if it be assumed in behalf of the plaintiff that there was negligence of the defendant, still there is one fatal defect in each case. She has failed to show that the deceased was in the exercise of due care. From the time he began to ascend the ladder which led to the skylight in the roof until, about 10 minutes later, he was seen by the witness Long "squirring" around upon the roof with his hands over the defendant's wires, nothing is known of the care he exercised in his movements. No one saw him or heard him, nor is there any circumstance shown which throws the slightest light as to his care for himself during that interval. The manner in which the accident occurred is purely a matter of conjecture. The case is clearly distinguishable in this respect from *Saures v. Stevens Manuf. Co.*, 196 Mass. 543, 82 N. E. 694, and other similar cases cited by the plaintiff, and must stand in the class of which *Brodie v. Rockport Granite Co.*, 197 Mass. 147, 83 N. E. 321, is a type.

In each case the entry must be:  
Judgment for the defendant.

(201 Mass. 1)

**BUZZELL v. TOBIN.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 7, 1909.)

**1. BILLS AND NOTES (§ 338\*) — CHECKS — "HOLDER IN DUE COURSE."**

An indorsee of a check for value and in good faith, before it was overdue and without notice of any infirmity or that payment had been stopped, was a "holder in due course," with all the rights appertaining thereto, under Rev. Laws, c. 73, § 69.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 819; Dec. Dig. § 338.\*

For other definitions, see Words and Phrases, vol. 4, p. 3320.]

**2. BILLS AND NOTES (§ 366\*) — CHECKS — HOLDER IN DUE COURSE—ORIGINAL CIRCULATION.**

Rev. Laws, c. 73, § 33, provides that, where an instrument is in the hands of the holder in due course, a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed. *Held*, that where plaintiff was an indorsee of a check in due course, with all the rights appertaining to such title, it was no defense against him that the check had been unlawfully put in circulation by defendant's clerk without authority.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 366.\*]

Exceptions from Superior Court, Suffolk County.

Action by Eugene A. Buzzell against James W. Tobin. Judgment for plaintiff, and defendant brings exceptions. Overruled.

Keating & Brackett, for plaintiff. W. B. Grant and H. E. Whittemore, for defendant.

**BRALEY, J.** If the consideration of the check as between the defendant and the payee was the price of a pair of horses, which might have been found to have been unsound at the time of sale, yet the plaintiff as indorsee having taken it for value, and in good faith before it was overdue, and without notice of any infirmity, or that payment had been stopped at the bank, became a holder in due course, with all the rights appertaining to such a title. Rev. Laws, c. 73, § 69; *Wheeler v. Guild*, 20 Pick. 545, 552, 553, 32 Am. Dec. 231; *Shawmut National Bank v. Manson*, 188 Mass. 425, 47 N. E. 196; *Massachusetts National Bank v. Snow*, 187 Mass. 159, 72 N. E. 959. The defendant, while not expressly conceding this, rests his defense solely on the ground that, because his clerk had no express authority to deliver the check to the payee, it was unlawfully put in circulation, and the contract being incomplete, no title passed to the plaintiff by its subsequent negotiation. *Fearing v. Clark*, 16 Gray, 74, 77 Am. Dec. 394; *Hill v. Hall*, 191 Mass. 253, 265, 77 N. E. 831. But the check was in the hands of the plaintiff as a holder in due course, and as to him a valid delivery by the defendant was conclusively presumed, even if this defense would have been open as between the original parties. Rev. Laws, c. 73, § 33; *Massachusetts National Bank v. Snow*, 187 Mass. 159, 163, 72 N. E. 959. We are, therefore, not called upon to decide whether there was other evidence upon which, under suitable instructions, the jury could have found either actual or constructive delivery. It accordingly follows that the ruling requested could not properly have been given, and the case was rightly submitted to the jury.

Exceptions overruled.

(200 Mass. 441)

**WHITE v. NEW YORK, N. H. & H. R. CO.**

(Supreme Judicial Court of Massachusetts.  
Plymouth. Jan. 6, 1909.)

**1. RAILROADS (§ 312\*)—OPERATION—CROSSING ACCIDENTS—STATUTORY SIGNALS.**

Where a freight train, except a part of the caboose, had passed the crossing and stopped, and plaintiff was struck while standing on the crossing just behind the caboose, which was bumped back against him when the rest of the train was recoupled with it after switching. Rev. Laws, c. 111, § 188, requiring railroads to ring the bell or sound the whistle at least 80 rods from a highway crossing, and to continue to do so until the engine has crossed, did not apply.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 908, 999; Dec. Dig. § 312.\*]

**2. RAILROADS (§ 346\*)—CROSSING ACCIDENTS—ACTIONS—BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE.**

In an action on the common-law counts for negligence against a railroad for intestate's death by being struck on a public crossing, the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

burden was on plaintiff to show that intestate was free from negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1121; Dec. Dig. § 346.\*]

### 3. RAILROADS (§ 332\*)—CROSSING ACCIDENTS — CONTRIBUTORY NEGLIGENCE — INJURY NEAR STANDING TRAIN.

Where a train had passed a crossing and stopped to do some switching, leaving the caboose partly on the crossing, with a flagman there to guard the crossing, and decedent saw, or should have seen, the flagman, and was injured while standing on the track several feet from the caboose, with his back to the flagman, by the rest of the train backing up against the caboose to couple to it, he was negligent, so as to prevent a recovery.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1079; Dec. Dig. § 332.\*]

Exceptions from Superior Court, Plymouth County; Robt. O. Harris, Judge.

Action by J. Bartlette White, administrator, against the New York, New Haven & Hartford Railroad Company. Verdict for defendant, and plaintiff excepts. Exceptions overruled.

William J. Coughlan and Daniel R. Coughlan, for plaintiff. Fredk. S. Hall, for defendant.

**BRALEY, J.** This is an action of tort to recover either at common law, or under Rev. Laws, c. 111, § 188, now Acts 1906, p. 554, c. 463, part 2, § 146, for the conscious suffering of his intestate, and under Rev. Laws, c. 111, § 267, now Acts 1906, p. 506, c. 463, part 1, § 63, for his death by reason of the alleged gross negligence of the defendant's servants. The accident happened at a grade crossing, and the first question is whether the defendant's failure to sound the whistle or ring the bell on the locomotive was a violation of Rev. Laws, c. 111, § 188. It is the purpose of this section that the signal required should be given continuously for a distance of 80 rods above the crossing to warn approaching travelers upon the highway of the danger of attempting to cross until the train has passed. But at the time of the accident the freight train had passed with the exception of a part of the buggy, and stopped, while some of the cars had been switched, and when the engine with one car attached backed down from the freight house to be recoupled, there was no intention of again running the train over the crossing, nor in fact was this attempted. Under these circumstances the statute was inapplicable, and, there being no duty imposed, the failure to give the statutory warning affords no cause of action.

The plaintiff being left to the counts at common law, and for gross negligence had the burden of proving that his intestate was in the exercise of due care. It is abundantly manifest that as he approached, if he had taken any observation at all of the surrounding conditions which were plainly visible, he must have seen the flagman standing with

his flag in the street guarding the crossing, and the rear part of the freight train stopped with the buggy partially on the crossing. If usually to stand deliberately on a railroad track over which a train is likely at any moment to pass is considered inexcusable carelessness, the act of the defendant in remaining on the planking between the rails within a foot or two of the buggy, with his back to the flagman, and entering into conversation for several minutes with the conductor, when if he had taken any precaution he must have known that, as the train came together, there might be danger of his being struck by its running back, must be deemed such contributory negligence, as to preclude recovery. *Butterfield v. Western R. R.*, 10 Allen, 532, 87 Am. Dec. 678; *Barstow v. Old Colony R. R. Co.*, 143 Mass. 535, 537, 10 N. E. 255. See *Granger v. Boston & Albany R. R. Co.*, 146 Mass. 276, 15 N. E. 619; *Young v. Old Colony R. R. Co.*, 156 Mass. 178, 30 N. E. 590; *Hudson v. Lynn & Boston R. R. Co.*, 178 Mass. 64, 59 N. E. 647; *Raymond v. N. Y., N. H. & H. R. R. R.*, 182 Mass. 337, 65 N. E. 399; *Ellis v. Boston & Maine R. R.*, 169 Mass. 600, 48 N. E. 839; *Hamblin v. N. Y., N. H. & H. R. R. Co.*, 105 Mass. 555, 557, 81 N. E. 258.

Exceptions overruled.

(200 Mass. 428)

### HILL et al. v. RAUHAN ARRE et al.

(Supreme Judicial Court of Massachusetts.  
Worcester. Jan. 6, 1909.)

#### 1. ASSOCIATIONS (§ 17\*)—DISSOLUTION.

A by-law of an unincorporated society providing that if several motions are made regarding the same question, and no unanimous decision can be obtained, such question shall be voted on and the wish of the majority prevail, except in the purchase or sale of real estate, in which case a two-thirds majority shall be the settling vote, cannot be held, in the absence of any statement as to the purpose for which the society was organized, to authorize by a majority vote the transfer of the members of the society to another society to the extinguishment of the former, especially where a quorum of the former society seeks to maintain its existence.

[Ed. Note.—For other cases, see *Associations*, Cent. Dig. § 30; Dec. Dig. § 17.\*]

#### 2. ASSOCIATIONS (§ 17\*)—PROPERTY OF ASSOCIATION.

Nor can its property be transferred by such a proceeding.

[Ed. Note.—For other cases, see *Associations*, Cent. Dig. § 30; Dec. Dig. § 17.\*]

Case Reserved from Superior Court, Worcester County; George A. Sanderson, Judge.

Bill by John Hill and others against the Rauhan Arre and others. Case reserved for the Supreme Judicial Court. Decree for plaintiffs.

James A. Stiles and Joseph P. Carney, for plaintiffs. Geo. R. Warfield and David L. Walsh, for defendants.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

HAMMOND, J. The parties having waived certain questions arising under the pleadings have agreed that the sole question to be submitted to the court is "whether on the facts found by the master (subject to the preceding waiver) the vote of May 5, 1905, by which the Young People's Society Wainala voted to join the Workingmen's Society Imatri No. 3, and succeeding votes, were effective and operative against the objecting minority to combine said societies and to transfer said property described in the bill or the right to the said property to the said Workingmen's Society Imatri No. 3." And it is agreed that if the question be decided in the affirmative the bill shall be dismissed; if in the negative, then a decree is to be issued for the conveyance of the property to a trustee for the benefit of the Young People's Society Wainala.

The property in dispute consists mainly of an equitable interest in a certain undivided part of real estate paid for by the society, the legal title to the whole of which stands in the defendant, Rauhan Arre, a corporation established under the laws of this state. The Wainala was an unincorporated society, and the power of the majority to control the rights of the minority, or the action of the minority, was determined by the constitution and by-laws. *McFadden v. Murphy*, 149 Mass. 341, 21 N. E. 868; *Kane v. Shields*, 167 Mass. 392, 45 N. E. 758. In any case not thus provided for no action could be taken binding all unless assented to by all.

The votes in question provided in substance that the Society Wainala should be annexed to the Workingmen's Society and the property of the former should be transferred to the latter. The purpose for which the Wainala was organized does not clearly appear in the record, nor are its laws set forth as a whole. So far as appears by the record, the defendants rely upon the following, to wit: "if several motions are made regarding the same question and no unanimous decision can be obtained, said question will be voted on, and the wish of the majority shall prevail, except in the purchase or the sale of real estate, in which case two-thirds majority must be the settling vote. Votes can be cast in any way which may seem best for the occasion." But in the absence of any statement as to the purpose for which the society was organized, this by-law cannot be held to authorize by a majority vote the transfer of the members of the society bodily to another society, to the extinguishment of the former society, especially when, as in the present case, a quorum of the old society seeks to maintain its existence. Much less can the property be transferred by such a proceeding.

The case is settled by the principle laid down in the cases cited above, and the following language of the court in *McFadden v. Murphy*, the first of them, is peculiarly appropriate to the present case: "The right to

the possession of the property in question was in the original association and its members, and the majority could not transfer it with themselves to another association without violating the trusts upon which it was held and the rights of the minority who remained members."

Decree for the plaintiffs.

(200 Mass. 474)

# WYETH v. THOMAS et al.

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 7, 1909.)

## 1. CONSTITUTIONAL LAW (§ 88\*)—LIBERTY—CONSTITUTIONAL GUARANTY—"LIFE, LIBERTY, AND PURSUIT OF HAPPINESS."

The right to "life, liberty, and the pursuit of happiness," secured to every one under the state and federal Constitutions, includes the right to pursue any proper vocation to obtain a livelihood.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 164, 165; Dec. Dig. § 88.\*]

For other definitions, see Words and Phrases, vol. 5, p. 4167.]

## 2. CONSTITUTIONAL LAW (§ 88\*)—LIBERTY—CONSTITUTIONAL GUARANTY—"LIFE, LIBERTY, AND PURSUIT OF HAPPINESS."

The refusal to permit one to engage in a business of an undertaker is a violation of a right to enjoy "life, liberty, and the pursuit of happiness," secured under the state and federal Constitutions, unless there is some good reason for the refusal; and the refusal to permit one to bury the dead body of a relative or friend, except under an unreasonable limitation, is an unlawful interference with a private right.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 164, 165; Dec. Dig. § 88.\*]

## 3. CONSTITUTIONAL LAW (§ 81\*)—POLICE POWER.

In the exercise of the police power, such kinds of business as require regulation in the interest of the public health, safety, or morals, and perhaps in a strict sense in the interest of the public welfare, may be regulated by the state; but no other interference of the public to the detriment of an individual is permissible.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.\*]

## 4. HEALTH (§ 20\*)—BURIAL OF DEAD—REGULATIONS—VALIDITY.

The Legislature has power to exercise complete control of the burials of the dead, so far as is necessary for the protection of the public health, the promotion of the public safety, and the detection of crimes resulting in death, within the police power, as is done in Rev. Laws, c. 78, §§ 37-44, and chapter 29, §§ 6, 8, 10, 11.

[Ed. Note.—For other cases, see Health, Dec. Dig. § 20.\*]

## 5. HEALTH (§ 21\*)—CONSTITUTIONAL PROVISIONS—POLICE POWER.

The mere assertion that a subject relates, though in a remote degree, to the public health, does not render an enactment on the subject valid; but the act must have a more direct relation as a means to an end, and the end itself must be appropriate and legitimate, before an act which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor is valid.

[Ed. Note.—For other cases, see Health, Dec. Dig. § 21.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

#### 6. HEALTH (§ 35\*)—BURIAL OF DEAD BODIES—REGULATIONS—VALIDITY.

The rule adopted by the board of registration in embalming, created by St. 1905, p. 483, c. 473, providing that no permits for burial shall be issued to any person who is not a registered embalmer, cannot be sustained on the theory that the regulation promotes the public health, on the ground that an embalmer is more likely to discover that a deceased person died of a contagious disease than an undertaker who is not an embalmer, especially since Rev. Laws, c. 29, §§ 1, 6, 10, 12, recognize ways of ascertaining whether death was from a contagious disease without employing an embalmer for that purpose.

[Ed. Note.—For other cases, see Health, Dec. Dig. § 35.\*]

#### 7. CONSTITUTIONAL LAW (§ 60\*)—DELEGATION OF LEGISLATIVE POWER.

The Legislature cannot delegate the power to make laws, conferred on it by the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 89; Dec. Dig. § 60.\*]

#### 8. CONSTITUTIONAL LAW (§ 63\*)—DELEGATION OF LEGISLATIVE POWER.

St. 1905, p. 483, c. 473, creating a board of registration in embalming, if construed to authorize the board to adopt a rule providing that no permits for burial shall be issued to any person who has not received a certificate from the board, is unconstitutional, because delegating general legislative power.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 63.\*]

#### 9. APPEAL AND ERROR (§ 320\*)—CASES CERTIFIED—NATURE OF PROCEEDINGS.

A petition for mandamus to compel the board of health of a city to grant petitioner a license as an undertaker is on the law side of the court, and only questions of law can be reported to the full court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 320.\*]

Report from Supreme Judicial Court, Suffolk County.

Mandamus by Benjamin F. Wyeth against Charles H. Thomas and others, as the Board of Health of the City of Cambridge, to compel the granting to petitioner of a license as an undertaker. The cause was reported for the consideration of the full court. Peremptory writ of mandamus awarded.

Arthur P. Stone, for petitioner. Gilbert A. A. Pevey, for respondents.

KNOWLTON, C. J. This is a petition for a writ of mandamus to compel the respondents, the board of health of the city of Cambridge, to grant the petitioner a license as an undertaker. Among the facts agreed are the following:

"Second. That the petitioner, Benjamin F. Wyeth, is an inhabitant of Cambridge, is an undertaker by trade, and has been for 46 years engaged in the trade of undertaker in various capacities, and has carried on for some years past the business of undertaking under the name of Benjamin F. Wyeth; that said undertaking business as conducted by the petitioner is a profitable one, and it is his support and the support of his family;

that the petitioner is the sexton of the First Church in Cambridge, and the members in attendance at that church and other residents of Cambridge and the vicinity have been accustomed from time to time to engage him to perform such services as may be required in connection with the burial of the dead.

"Third. That the petitioner, Benjamin F. Wyeth, is a competent undertaker and is well versed in the duties and practices of that trade or business, except in so far as he is ignorant of the processes of embalming.

"Fourth. That the petitioner, Benjamin F. Wyeth, does not hold himself out to the public as one skilled in the methods of embalming dead bodies, and has not, and never has had, and has not applied for, a certificate or license from the board of registration in embalming to enable him to engage in the business of embalming dead bodies.

"Fifth. That a large part of the petitioner's trade or business does not require a knowledge of embalming, and in many instances the petitioner is not required nor directed to embalm the bodies of the dead intrusted to his care.

"Sixth. That in all cases in which the said Benjamin F. Wyeth has had occasion to have the bodies of the dead embalmed, he has, since January 1, 1906, procured the services of an embalmer duly registered by the board of registration in embalming, or he has intrusted the work to some servant or agent in his employ who was duly registered as aforesaid.

"Seventh. That the respondents to this petition or their predecessors in office had, up to and including the 1st day of May, 1907, always given to the said Benjamin F. Wyeth a license to act as undertaker upon his application therefor."

From other facts in the case, and from the respondent's answer, it appears that the only reason for refusing to grant the petitioner's license as an undertaker is that he is not licensed as an embalmer. He cannot obtain a license as an embalmer without making application under rule 2, section 1, adopted by the board of registration in embalming, and complying with the requirements of the section, which is as follows:

"The applicant must have taken a regular course at a reputable school of embalming whose course of instruction is satisfactory to this board, and must have had not less than a year and a half of experience in active work with a practicing embalmer." The question of law presented by the report of the single justice is whether the respondent's refusal to grant a license, solely for this reason, is legal.

St. 1905, p. 483, c. 473 is "An act to establish a board of registration in embalming." Under section 6 the board is to adopt rules and regulations, not inconsistent with the provisions of this act and the statutes of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

commonwealth, governing the care and disposition of human dead bodies, and the business of embalming." Under the authority of this section the board has adopted rules and regulations whereby they assume to put the whole business of the management of funerals and the burial of the dead in the hands of persons holding a license as embalmers from this board. The first part of rule 9, § 2, is as follows: "No permits for removal, burial or disinterment shall be issued by boards of health, city or town clerks, selectmen of a town, or any other persons authorized to issue burial permits to any person or persons who have not been registered and received a certificate from the state board of registration in embalming." Under this rule no one can bury lawfully the dead body of a former member of his family unless the permit for burial is obtained by a licensee of this board. No one can perform the ordinary duties of an undertaker without first having procured a license as an embalmer. No one can obtain a permit for the disinterment of a dead body for any cause, at any time, however long after the burial, unless he is a licensed embalmer. Surely the fitness of a person to receive a permit for the disinterment of a dead body cannot depend upon his knowledge or ignorance of the process of embalming. The question is presented whether there is any warrant under the Constitution and the laws for this interference with the liberties of the people.

The respondents in their answer rest their defense largely upon the action of the board of registration in embalming, and adopt as their own the views upon which this action presumably was founded.

The right to enjoy life, liberty and the pursuit of happiness is secured to every one under the Constitution of Massachusetts. This includes the right to pursue any proper vocation to obtain a livelihood. Substantially the same right is secured also by the Constitution of the United States, which does not permit a state to deprive any person of life, liberty or property without due process of law. The nature of this right has been stated and illustrated in many cases. *Com. v. Strauss*, 191 Mass. 545, 78 N. E. 136, 11 L. B. A. (N. S.) 968; *Com. v. Perry*, 155 Mass. 117, 23 N. E. 1126, 14 L. R. A. 325, 31 Am. St. Rep. 533; *Winthrop v. New England Chocolate Company*, 180 Mass. 464, 62 N. E. 969; *Austin v. Murray*, 16 Pick. 121; *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937; *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455.

There is no doubt that the refusal to permit one to engage in the business of an undertaker is a violation of this right, unless there is some good reason for the refusal, and the refusal to permit one to bury the dead body of his relative or friend, except under an un-

reasonable limitation, is also an interference with a private right that is not allowable under the Constitution of the commonwealth or the Constitution of the United States.

In the exercise of the police power, such kinds of business as require regulation in the interest of the public health, the public safety or the public morals, and perhaps in a strict sense in the interest of the public welfare, may be regulated by the state, and no other interference of the public to the detriment of an individual is permissible.

The burial of the dead has such relations to the public health that it well may be regulated by law. In possible aspects of its regulation may be made in the interest of the public morals. For the detection of crimes which result in death there well may be regulation in the interest of the public safety. In the exercise of the police power the Legislature of this state has made elaborate provisions and strict regulations covering these subjects. Rev. Laws, c. 78, §§ 37 to 44, inclusive; chapter 29, §§ 6-8, 10-12, 15. Of its power to exercise complete control of burials of the dead, so far as is necessary for the protection of the public health and the promotion of the public safety, there is no question.

No argument has been addressed to us to show that the general embalming of dead bodies is necessary for the preservation of the public health, and we know of no facts that indicate such a necessity. Except in those cases where embalming is desired for a special reason, we know of nothing connected with the duties of an undertaker that calls for the work of a licensed embalmer. When such work is desired, a proper person can be procured to perform it. In cases generally it is not an essential part of the duties of an undertaker, and it has no relation to the public health.

The only particular in which the respondents have suggested, either in their answer or their argument, that performance of an undertaker's duties by a licensed embalmer would tend to promote the public health, is that an embalmer would be more likely to discover that a deceased person died of a contagious disease than an undertaker who is not an embalmer. To use the language of the agreed statement of facts: "In the opinion of the respondent board of health these rules for preserving and embalming human dead bodies have a tendency to and do increase, on the part of the undertaker, the knowledge of the nature of the disease from which the party deceased may have suffered, and which may have caused death." There is certainly a grave reason to doubt the correctness of this opinion. No evidence is furnished that, through his knowledge of the business of embalming, one can form an opinion which an ordinary undertaker of experience could not form of the cause of death of a person whose body is seen by him. But if there may be some slight increase of knowledge, from

this source, to one preparing a human body for burial, its relation to the public health, if any, is too remote to be made a foundation for legislation or regulation. As was said in the opinion in *Lochner v. New York*, 198 U. S. 45, 57, 25 Sup. Ct. 539, 543, 49 L. Ed. 937: "The mere assertion that the subject relates, though but in a remote degree, to the public health, does not render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person, and in his power to contract in relation to his own labor." From such a possibility no such benefit could come as to justify a requirement that all human bodies should be embalmed for such information in regard to the cause of death as can be acquired through the process of embalming, or a requirement that an embalmer should always be employed as undertaker for the chance of a valuable discovery from his observation, without his using the process of embalming. The law recognizes direct ways of ascertaining whether death was from a contagious disease, without employing an embalmer for that purpose. Rev. Laws, c. 29, §§ 1, 6, 10, 12. These ways seem a thousand-fold more important and reliable than any possible knowledge that an embalmer might have from his training in that business, beyond the knowledge of an undertaker of experience who was not an embalmer.

We can see no such connection between requiring all undertakers to be licensed embalmers and the promotion of the public health as to bring the making of this regulation by the board of registration in embalming, or the refusal of a license by the board of health on account of the regulation within the exercise of the police power by the state. If such a regulation had been made an act of the Legislature, with all the strong presumptions of constitutionality which attach to legislative action, we should hesitate to affirm the constitutionality of the act. But action by such a board, under mere general authority to make rules and regulations, does not carry with it these strong presumptions. We consider this action without foundation in law or reason, and in violation of the constitutional rights of our citizens.

A statute of New York, which provided, among other things, that no person should engage in the business of undertaking unless he had been duly licensed as an embalmer, was held unconstitutional by a unanimous decision in the Appellate Division of the Supreme Court of that state. *People v. Ringe*, 125 App. Div. (N. Y.) 592, 110 N. Y. Supp. 74.

From another point of view the rules and regulations of the board of registration in embalming, relied on by the respondents as

an important reason for their decision, are invalid. In *Brodbine v. Bevere*, 182 Mass. 598-600, 68 N. E. 607, 608, is this language: "It is well established in this commonwealth and elsewhere that the Legislature cannot delegate the power to make laws, conferred upon it by a Constitution like that of Massachusetts." Then follow numerous citations from different states, with the words: "This doctrine is held by the courts almost unanimously." None of the cases referred to later in the opinion, in which there was a delegation of legislative authority for a local or special purpose or in matters of administration, and none of the cases which have been decided since, and which are referred to in *Com. v. Kingsbury*, 199 Mass. 542, 85 N. E. 848, go far enough to legalize a delegation of authority to change a general law for all the people of the commonwealth, with no local or special reason for seeking the aid of an administrative board, as the rule about the issuing of permits and some of the other rules of this board purport to change the general laws on this subject for all the people in every city and town in the commonwealth. If the statute were construed to authorize the making of such rules, it would be held unconstitutional as assuming to delegate general legislative authority.

We decide that the refusal of the respondents to grant the petitioner a license as an undertaker, solely for the reason that he is not licensed as an embalmer, is unwarranted, improper and illegal. According to the report, upon this determination of the question of law, a writ of mandamus is to issue. The case being on the law side of the court, only questions of law could be reported to the full court, and by the terms of the report the question of discretion whether to grant the writ must be taken to have been decided in favor of the petitioner. The report is equivalent to a finding upon the answer and the facts agreed that the only reason for the respondent's refusal was that the petitioner was not licensed as an embalmer, and that except for this, the respondents, in the exercise of their judgment and discretion would have granted the license. Upon these facts nothing remains but to enter the order:

Peremptory writ of mandamus to issue.

(200 Mass. 510)

WHITE v. NEW YORK LIFE INS. CO.

(Supreme Judicial Court of Massachusetts.

Norfolk. Jan. 7, 1909.)

INSURANCE (§ 349\*)—LIFE INSURANCE—NOTE FOR PREMIUM.

At a time when a life policy would have been finally forfeited for nonpayment of premium, subject to a right which would have kept it in force for a time, but not till insured's death, he paid the company \$31.25 and gave it his note, due in eight months, and before his death, providing that the insurance should be continued in force till the due date of the note; that,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

If the note was paid on or before then, such payment, with the \$31.25, would then be accepted as payment of the premiums, and all rights under the policy should then be the same as though the premium had been paid when due; and that, if the note was not then paid, it should cease to be a claim against insured, and all rights against the company should be the same as though the cash had not been paid and the agreement in the note had not been made. *Held*, that the policy ceased to be in effect except as continued by the provision in the note.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 349.\*]

Exceptions from Superior Court, Norfolk County; Robert O. Harris, Judge.

Action by Sarah E. R. White against the New York Life Insurance Company. Verdict for defendant. Plaintiff excepted. Exceptions overruled.

H. T. Richardson and B. Y. Fitzgerald, for plaintiff. W. A. Morse and F. J. Geogan, for defendant.

**KNOWLTON, C. J.** All of the plaintiff's requests for rulings which were refused by the court relate to the effect, upon the rights of the parties, of the agreement contained in Exhibit C, which was made on August 19, 1906. The premium upon the policy of insurance on the life of the plaintiff's husband was payable annually on August 19th. The policy was issued on August 19, 1903, and the assured paid two annual premiums in cash. When the third premium became due, on August 19, 1905, he did not pay it in cash, but gave his note for the amount due, payable on August 19, 1906, and he paid the interest on it to that date. At the end of the year, on August 19, 1906, he did not pay the note, but paid interest on it in advance for another year. He did not pay the premium due on that date, and, if no other arrangement had been made, the policy by its terms would then have been finally forfeited for nonpayment of the premium, subject to the right of the assured to have the benefit of the excess of the reserve credited to the policy above the indebtedness of the assured, which reserve would keep the policy in force for eight months longer, so that there could have been a recovery under it if the assured had died at any time before April 19, 1907, but not if he died afterward. His death occurred on July 12, 1907, and the question is whether the further arrangement, made on August 19, 1906, kept the policy in force until the time of his death. This arrangement was a payment of \$31.25 in cash, and the giving of a note for \$94, due February 19, 1907, which is Exhibit C. Included in the note was this agreement in writing: "This note is accepted by said company at the request of the maker, together with \$31.25 in cash, on the following express agreement: That although no part of the premium due on the 19th day of August, 1906, under policy No. 3,476,346, issued by

said company on the life of Frank A. White, has been paid, the insurance thereunder shall be continued in force until midnight of the due date of said note; that if this note is paid on or before the date it becomes due, such payment, together with said cash, will then be accepted by said company as payment of said premium, and all rights under said policy shall thereupon be the same as if said premium had been paid when due; that if this note is not paid on or before the day it becomes due, it shall thereupon automatically cease to be a claim against the maker, and said company shall retain said cash as part compensation for the rights and privileges hereby granted, and all rights under said policy shall be the same as if said cash had not been paid, nor this agreement made; that said company has duly given every notice required by its rules or by the laws of any state in respect to said premium, and in further compensation for the rights and privileges hereby granted, the maker hereof has agreed to waive, and does hereby waive every other notice in respect to said premium or this note, it being well understood by said maker that said company would not have accepted this agreement if any notice of any kind were required as a condition to the full enforcement of all its terms." This agreement, signed by the assured, was binding upon him. The note was not paid, and for that reason, by virtue of the agreement, it ceased to be a claim against the maker. The \$31.25 in cash was treated as a consideration for the privilege which the assured had enjoyed, and the rights of both parties in reference to the policy were precisely the same as if this note had never been given, and the payment in cash had never been made. It is impossible to make the agreement plainer than it is by the written language contained in the note. The policy ceased to be in effect after August 19, 1906, except as it was continued by the term insurance already referred to. This extended it for eight months and no more.

Other cases resembling this, in which a like decision was made, are the following: *Holly v. Metropolitan Life Insurance Company*, 105 N. Y. 437, 11 N. E. 507; *Baker v. Union Mutual Life Insurance Company*, 43 N. Y. 283; *Bank of Commerce v. New York Life Insurance Company*, 125 Ga. 552, 54 S. E. 643.

Exceptions overruled.

(200 Mass. 453)

**MOFFATT et al. v. DAVITT et al.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 6, 1909.)

1. SALES (§ 377\*)—CONTRACT—BREACH—DAMAGES—DECLARATION.

An amended declaration, pleading a contract for the sale of pig iron and an alleged

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

breach, by defendant's unqualified refusal to accept and pay for the iron, stated a cause of action for damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1092; Dec. Dig. § 377.\*]

**2. EVIDENCE (§ 130\*)—RELEVANCY—RES INTER ALIOS ACTA.**

In an action for breach of a contract for the sale of pig iron, evidence of business dealings between plaintiff and the former owner of the foundry, who was originally joined as a defendant, was inadmissible after the action was discontinued as to him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 403; Dec. Dig. § 130.\*]

**3. APPEAL AND ERROR (§ 1053\*)—HARMLESS ERROR—RULINGS ON EVIDENCE—CURING ERROR.**

Where evidence was excluded on defendant's motion, and the jury was instructed to disregard it, exceptions previously taken to its admission became ineffective, in the absence of prejudice shown.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1053.\*]

**4. SALES (§ 382\*)—CONTRACT—REPUDIATION.**

Repudiation of a contract for the sale of pig iron could be shown by proof of defendant's delay in meeting payments and by letters of defendant's manager, from which it could be inferred that defendant's business was unprofitable and that she had decided not to perform the contract.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 382.\*]

**5. SALES (§ 372\*)—CONTRACT—BREACH—OFFER OF PERFORMANCE.**

Where defendant's conduct and correspondence were sufficient to warrant a finding that she had finally decided not to perform a contract for the purchase of pig iron, such evidence was not weakened by an offer to perform, tendered by her counsel in reply to plaintiff's demand for a settlement.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1089; Dec. Dig. § 372.\*]

**6. SALES (§ 384\*)—CONTRACT—REPUDIATION—DAMAGES.**

Where a contract for the sale of pig iron was entire, and the buyer repudiated it, no part of the purchase ever having been delivered, the seller's measure of damages was the difference between the market price of the entire amount at the time of repudiation and the price at which the iron had been sold, though it was to be delivered in installments and payment was to be made 30 days after arrival of each car.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098-1106; Dec. Dig. § 384.\*]

Exceptions from Superior Court, Suffolk County; William B. Stevens, Judge.

Action by Frank D. Moffatt and others against Hugh Davitt and others. Judgment for plaintiffs, and defendant Mary F. Davitt brings exceptions. Overruled.

H. L. Boutwell and W. H. Hastings, for plaintiffs. James E. Cotter, Conrad Reno, and Joseph P. Fagan, for defendant Mary F. Davitt.

**BRALEY, J.** The amended declaration having aptly set forth the contract, and alleged as a breach the defendant's unqualified refusal to accept and pay for the pig iron, a case was stated which if proved would en-

title the plaintiffs to recover damages. *Spiers v. Union Drop Forge Co.*, 180 Mass. 87, 61 N. E. 825; *National Machine & Tool Co. v. Standard Shoe Machinery Co.*, 181 Mass. 275, 63 N. E. 900; *Clark v. Gulesian*, 197 Mass. 492, 84 N. E. 94; *White v. Remick*, 198 Mass. 41, 84 N. E. 113. If evidence of the business dealings between the plaintiffs and the former owner of the foundry, who originally had been joined as a party, was competent, until the amendment discontinuing the action as to him, and the amended declaration, had been allowed, it then became inadmissible against the defendant. But at the close of all the evidence, this testimony having been excluded on her motion, and the jury fully instructed to disregard it, the exception previously taken to its admission is no longer open, as the defendant fails to show she has been prejudiced. The defendant became the owner of the foundry under an agreement to assume and pay the outstanding merchandise indebtedness of the vendor, which included bills due or to become due to the plaintiffs; for iron already delivered or to be furnished in the future. The plaintiffs do not contend that evidence of her failure to pay this indebtedness according to the terms of sale had any connection with the contract, for breach of which the present suit was brought, but claim that it was admissible on the issue of repudiation. Upon this question much evidence, including numerous letters between the parties, was introduced. If repudiation of the contract by one of the contracting parties may be shown by proof of an unqualified refusal of performance directly made to the other party, it also may be shown, by proof of such conduct on his part, as to leave no other reasonable inference. After the defendant purchased and carried on the foundry, proof of her delay in meeting payments of debts connected with the business, as well as the letters of her manager, from which it could have been inferred that the enterprise had turned out to be unprofitable, and she was contemplating an early sale of the plant, while constantly delaying, if not refusing, to accept delivery of any part of the 500 tons of iron, the market price of which had decreased, furnished evidence from which the jury would be warranted in finding that she finally had decided not to perform, and was seeking to get out of a bad bargain. *Earnshaw v. Whittemore*, 194 Mass. 187, 80 N. E. 520. The offer of performance, tendered by her counsel in reply to the plaintiffs' demand for a settlement, did not weaken the probative force of this testimony, for it easily could have been found to have been a possible makeshift, intended only to postpone a lawsuit. There having been no dispute that the plaintiffs, not only were ready and willing to perform, but tendered performance, it consequently follows that the defendant's re-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

quest for a ruling that upon the pleadings and the evidence the plaintiffs could not recover was rightly refused. *Morton v. Clark*, 184 Mass. 555, 557, 69 N. E. 309. Nor is the exception to the supplemental instruction on the measure of damages well taken. If the contract was found to have been wholly repudiated, then whether, after it had been made, there was a subsequent oral agreement for the delivery of the iron as it might be needed from time to time, or this was to be implied from the terms, "that we pay cash in 30 days from arrival of each car," when read in the light of the attendant circumstances, as claimed by the defendant, or whether delivery was to be within a reasonable time under the construction claimed by the plaintiffs, became an immaterial question. Whichever construction was adopted, the contract was entire, even if payments were to be made by installments, and, as no part of the purchase had ever been delivered, the measure of damages was correctly stated to be the difference between the market price of the entire amount at the time of repudiation and the price at which the iron had been sold. *Fullam v. Wright & Colton Wire Cloth Co.*, 196 Mass. 474, 82 N. E. 711; *McLean v. Richardson*, 127 Mass. 339; *Parker v. Russell*, 133 Mass. 74, 75; *Speirs v. Union Drop Forge Co.*, 180 Mass. 87, 61 N. E. 825; *Earnshaw v. Whittemore*, 194 Mass. 87, 80 N. E. 520.

Exceptions overruled.

(200 Mass. 495)

### BOARDMAN v. HESSELTINE.

(Supreme Judicial Court of Massachusetts.  
Middlesex. Jan. 6, 1909.)

#### WILLS (§ 355\*) — PROBATE — REVOCATION OF DECREE.

The probate court allowed a will and ordered it probated after issues as to execution of the will and soundness of testator's mind had been fully tried and regularly determined. Testator's wife, who had contested, appealed, but thereafter waived her appeal, and accepted payment of annuities under the will. Two years later she petitioned for revocation of the decree. *Held*, that the issues determined could not be opened simply on the ground that the decision was not in accordance with the law, but that petitioner was limited to showing the practice of fraud on the court, or some accident, mistake, or misunderstanding in the proceedings before the court, such as in justice should call for a revocation of its decree and a rehearing.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 814; Dec. Dig. § 855.\*]

Report from Supreme Judicial Court, Middlesex County.

Petition of Mary J. Boardman against Francis S. Hesseltine. The probate court dismissed the petition, and petitioner appealed to the Supreme Judicial Court, a single justice of which reported the case to the full bench. Affirmed.

Moran & Feeney and Edward F. Brady, for appellant. Francis S. Hesseltine, pro se.

KNOWLTON, C. J. The petitioner, who is the widow of George F. Boardman, brought this petition for a revocation of a decree of the probate court, ordering the probate and allowance of her husband's will. In her petition she averred that the will was not legally executed, and that her husband was not of sound mind when he signed it. Subsequently she filed an amendment to the petition, charging that the probate and allowance of the will were obtained by fraud of the person named in it as executor. The petition was dismissed by the probate court and the petitioner appealed.

At the hearing before a single justice of this court, he found, among others, the following facts: The petitioner appeared and contested the allowance of the will in the probate court and was duly heard. The will was allowed and she appealed. The appeal came on for hearing in the Supreme Judicial Court, after due notice to the petitioner and her counsel. A waiver of the appeal was filed by her counsel, and thereupon, after a hearing, the decree was affirmed and the case was remitted to the probate court. She took no steps to have this revoked until the filing of this petition, nearly two years after the final allowance of the will. She discharged the counsel who acted for her in the original proceedings and employed other counsel, and afterwards, acting either under advice or of her own motion, she decided not to waive the provisions of the will, and did not waive them. Through her counsel she received from the executor and trustee the annuity which was payable to her under the will, for herself and her children, and receipted for it. The executor did not intentionally and fraudulently conceal from the probate court, as alleged in the petition, the fact that George F. Boardman was not of sound mind at the time of the execution of the will, and did not know that the instrument had not been signed by said Boardman in the presence of three attesting witnesses, and did not perpetrate a fraud upon the court in offering the instrument for probate and in securing the allowance of it. All the persons whose depositions were annexed to the petition, in support of it, testified originally in the probate court, either for the proponent or the testator. The petitioner averred in her petition that she did not contest the will in the probate court, and introduced evidence tending to show that the instrument that she signed, which was a waiver of appeal, was not a waiver of the appeal, but a request for a continuance. The judge found against her on these points, and believed that when she signed the paper she knew it was a waiver of the appeal, and not a request for a continuance.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The judge ruled that the petitioner could introduce any evidence tending to show that a fraud was practiced upon the court in procuring the probate of the will, but declined to hear evidence that the testator was not of sound mind, except in connection with evidence which might tend to show knowledge of the testator's unsoundness of mind on the part of the executor, or which might tend to show fraud of the executor in procuring the probate of the will.

Upon these facts and findings it is plain that the petition was rightly dismissed. No reason is shown for revoking the decree allowing the will and trying the case again. The issues as to the execution of the will and the soundness of mind of the testator were fully tried and regularly determined. They cannot be opened, simply on the ground that the decision was not in accordance with the facts. The judge was right in excluding evidence on these issues, in the absence of testimony tending to show the practice of fraud upon the court, or some accident or mistake or misunderstanding in the proceedings before the court, such as, in justice, should call for a revocation of the decree and a rehearing of the case. *Waters v. Stickney*, 12 Allen, 1, 90 Am. Dec. 122; *Gale v. Nickerson*, 144 Mass. 415, 11 N. E. 714; *Tucker v. Fisk*, 154 Mass. 574, 28 N. E. 1051; *Crocker v. Crocker*, 198 Mass. 401, 84 N. E. 476.

Decree of probate court affirmed.

(200 Mass. 496)

### CASHMAN v. BANGS et al.

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 6, 1906.)

#### 1. WILLS (§ 869\*)—VESTED INTERESTS—CREATORS OF DEVISEE.

Testatrix devised land to O., in trust, to hold, manage, improve, and appropriate the net income to his own use for life, but on his death the land to become the property of testatrix's sons and their survivor, in equal shares, etc. *Held*, that a son other than O. took a vested interest in the property so devised, which was subject to sale for his debts, under Rev. Laws, c. 134, § 2, providing that, if a contingent remainder, executory devise, or other estate in expectancy is so granted or limited to a person that, in case of his death before the happening of the contingency, the estate descends to his heirs in fee, he may, before the happening of the contingency, sell or devise the land subject to the contingency.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2214; Dec. Dig. § 869.\*]

#### 2. EXECUTION (§ 45\*)—PROPERTY SUBJECT—PERSONAL RIGHTS.

Testatrix devised an undivided third of all her property, described in the previous article of her will, in trust to hold and manage, and to pay one-third of the income to B. for life, or to permit him to occupy and enjoy the use of the property in common with his brothers as he might prefer, and on his death to convey and transfer the property to the brothers or their survivor, but, should they predecease him, then to testatrix's heirs in equal shares, etc.

*Held*, that the right of occupancy was not intended as an incident to a complete life estate, but as an alternative privilege, to be exercised at B.'s option, and was therefore not subject to execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 141, 142; Dec. Dig. § 45.\*]

#### 3. WILLS (§ 684\*)—TRUST ESTATES—RIGHT TO INCOME.

Where land was devised in trust for B. for life, with the privilege of occupying the same instead of receiving the rents and profits, the income did not cease until the occupation privilege was exercised, nor was the choice of occupation, when once made, irrevocable.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 684.\*]

#### 4. FRAUDULENT CONVEYANCES (§ 154\*)—RE-TENTION OF POSSESSION—FAILURE TO RECORD INSTRUMENT.

An agreement, by a cestui que trust of a life interest, that if the property was sold his interest in the proceeds should be applied by the trustee on certain family notes and obligations of the cestui que trust, was not a "conveyance of an equitable interest in real property," which Rev. Laws, c. 127, § 4, and chapter 117, § 8, requires to be recorded in order to be valid as against attaching creditors, but was only an assignment of the proceeds of the sale when made, and was therefore valid as against creditors of the cestui que trust, though not recorded.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 154.\*]

#### 5. CREDITORS' SUIT (§ 59\*)—COSTS—RIGHTS OF TRUSTEE.

Rev. Laws, c. 189, § 67, provides that, if a person who is summoned as trustee appears and answers, he shall be allowed his costs for travel and term fees, and such further amount for counsel fees and other expenses as the court may allow. *Held*, that where a creditors' bill, analogous to the process of foreign attachment, was instituted, what sum, if any, should be allowed the trustee for disbursements, was within the discretion of the single trial justice.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. § 218; Dec. Dig. § 59.\*]

Report from Supreme Judicial court, Suffolk County.

Action by Mary A. Cashman against Edward A. Bangs and others. On report from the decision of a single justice, after decree in favor of plaintiff, for determination of the full court. *Affirmed*.

Plaintiff alleged: That on October 1, 1905, defendant Edward A. Bangs executed his demand note to plaintiff for \$3,500, giving as collateral a certificate of 35 shares of the preferred stock of the Milk Street Trust. That the note and certificate have always been, and still are, plaintiff's property, and that plaintiff is informed and believes that the collateral, if worth anything, is worth at most \$1 a share. At various times defendant Bangs paid plaintiff \$700 on the principal of the note, and paid interest to October 1, 1906, only, and that there was now due thereon \$2,800 and interest from that date, and plaintiff has been unable to discover property of defendant Bangs which

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

could be reached or applied in satisfaction of the debt; but that Bangs was a son of Annie Outram Bangs, who died leaving considerable estate and a will giving to defendant Bangs an interest in certain trust funds—the provisions of the will being as follows:

“Sixteenth. To my sons Outram and Francis Reginald, two undivided thirds of all my real estate in Plymouth Wood and in Wareham, Mass. (except the Little Herring River Cranberry Bog), with all the privileges and appurtenances thereto belonging, with all the furniture and other contents of the house and barn, and all the boats, live stock and other personal property of mine on said premises, and the oyster grant.

“Seventeenth. To my son Robert H. Gardiner the other undivided third of all property described in article 16 of this will, in trust for the following purposes: To hold and manage the same in common with the said Outram and Francis Reginald, and the net income from said one third to pay to my son Edward A. Bangs during his life, or to permit him to occupy and enjoy the use of said property in common with his brothers as he may prefer, and upon his death to convey and transfer the said property to said brothers or the survivor of them, but should they predecease him, then to my heirs at law in equal shares, the children of any deceased child of mine to take their parents share by right of representation.

“Eighteenth. The Little Herring River Cranberry Bog, which has been reclaimed from a state of nature, managed, cultivated and rendered valuable, together with the cranberry house and barn thereon and used in connection therewith, I give to said Outram, but in trust for the following purposes: To hold, manage, improve and carry on as he may think best, and the net income thereof to appropriate to his own uses during his life, but on his death said bog shall become the property of my sons and the survivors of them, in equal shares, the children of any deceased son, including Outram, to take their parents share by right of representation.”

That Robert H. Gardiner was appointed trustee under the seventeenth clause of the will, and that Outram Bangs was appointed trustee under the eighteenth clause, whereupon plaintiff prayed that defendant Bangs be ordered to pay plaintiff a sum of \$2,800 and interest, and that in default of such payment all the property, right, title and interest of the said Bangs, under the will of his mother, be sold, and so much of the proceeds thereof as might be necessary to be used to pay plaintiff's debt.

Defendant Edward Bangs denied that his interests under his mother's will were liable to be taken for his debts, and claimed that under the seventeenth article of the will the trustee had discretionary power either to pay to him one-third of the net income therein named or to permit him to occupy the

premises in common with his brothers, and for this reason defendant's said interest could not be reached by the bill; that defendant's interest, if any, under the eighteenth clause of the will, was of practically no value because extremely remote and contingent, etc.

It was stipulated: That the estate devised in the sixteenth and seventeenth clauses of the will consisted of 300 acres in Wareham, Mass., composed mainly of marshy wild land, covered with scrub wood and entirely uncultivated. That the estate borders on Buzzards Bay, affording ample opportunity for the erection of summer dwelling houses overlooking the bay, and that on the estate was the house occupied by Annie Outram Bangs during the summer, with two barns and a greenhouse adjacent thereto, and several acres of cleared land. There were at the time of the death of Mrs. Bangs four other houses on the property, one of which since her death had been put in repair by Outram Bangs, and was occupied by him, another being occupied by a caretaker, and the other two were of small value. That \$50 or \$100 rent a year could at some times be obtained from them, but that such sums were insufficient to pay the cost of the repairs and the taxes on the property. That such rents as had been received from these houses had been received by Francis Reginald Bangs, the owner of an undivided third interest in the share.

On December 27, 1905, as a part of the settlement of the testatrix's estate, it was agreed that the life interest of defendant Bangs in the property held in trust for him under the seventeenth clause of the will should remain so held, but that, if at any time any of the property should be sold, the value of the life interest of Bangs in the proceeds should be computed, and should be equitably paid or applied by Bangs or the trustee on certain notes executed by him to members of the family, or on any other obligation mentioned in the agreement, which notes and other obligations were still outstanding, and in amount exceeded any possible value of the interest of Bangs.

Robert S. Gorham and Roland Gray, for plaintiff. Francis L. Hayes for defendants Edward A. and Outram Bangs. Hill, Barlow & Homans and Fisher H. Nesmith, for defendant Robert H. Gardiner.

BRALEY, J. Upon proof of the debt, which does not appear to have been in dispute, the plaintiff was entitled to have applied to payment the vested interest of Edward A. Bangs in the contingent remainder devised to him by the eighteenth clause of the will of his mother, Annie Outram Bangs; and the interlocutory decree, so far as a sale was ordered of this portion of the debtor's estate, is not questioned by the respondents. Rev. Laws, c. 134, § 2; Trumbull v. Trumbull, 149 Mass. 200, 204, 21 N. E. 368, 4 L. R. A. 117. But the principal controver-

sy has been confined to the construction of the seventeenth clause, and, when the nature and extent of the debtor's estate has been defined, to determine whether the plaintiff's rights of attachment are subject to the agreement that, upon a sale of his interest, the proceeds are to be applied to the payment of certain of his promissory notes held by members of the family. By this clause he was given outright the net income for life of one-third, or, at his election, he was to be permitted to occupy and enjoy the use of the estate in common with his brothers, who were seised of two undivided thirds in fee. The equitable life tenant's right to the income is absolute, but the alternative provision is not expressed so broadly. The gift is not of a general right of occupancy in land, which confers upon the devisee or beneficiary the power to occupy by a tenant. *Rabbeth v. Squire*, 19 Beav. 70, 4 De G. & J. 406. But it is limited by the phrase "to permit him to occupy and enjoy the use of said property." Upon reference to the character and use of the property, which is described generally in the sixteenth clause, but more particularly in the agreed facts, very likely the testatrix had in mind a probability that, if she gave to him an alienable estate in the land, her other sons might be greatly annoyed in their enjoyment and management of the property by the intrusion of a stranger. But, however that may be, these words of limitation cannot be rejected, but must be accorded their ordinary meaning. *Towle v. Delano*, 144 Mass. 95, 99, 10 N. E. 769. When this is done, the right of occupation very plainly was not intended as merely an incident to a complete life estate, but only as an alternative privilege to be exercised at his option. This freedom of choice, being purely personal, is not assignable, and consequently cannot be taken on execution. But until exercised the income did not cease, and the choice of occupation, when once made, is not irrevocable by the terms of the will. The legatee might change back again to income if he desired, and, if it were not for the agreement, the plaintiff, under an appropriate decree, could reach and apply the entire income, whenever it accrued, in satisfaction of her debt. While not denying the right of this defendant to alienate the income, the plaintiff claims that the agreement is in the nature of a conveyance of an equitable interest in real property, which, under the provisions of Rev. Laws, c. 127, § 4, and chapter 117, § 3, not having been recorded and of which she had no notice, is not valid against attaching creditors. The answer, however, is that as the agreement does not purport to convey any interest in the realty, but only in the proceeds, if a sale takes place during his life the rights of creditors claiming under the instrument are superior, and the plaintiff can hold only what,

if anything, may remain after their demands are satisfied. *Putnam v. Story*, 132 Mass. 205, 211; *Hill v. Hill*, 196 Mass. 509, 516, 518, 82 N. E. 690. But if the plaintiff fails to show that the decree was erroneous, the defendant trustees ask for a reversal of the part which gave to them only taxable costs, and that costs may be taxed as between solicitor and client.

The suit is neither for instructions as to the construction of a will, even if that question is involved, nor a bill of interpleader to determine the title of claimants to a fund, nor for the benefit of all in the preservation of a fund in which many persons have a common interest, where usually costs are taxed as between solicitor and client, to be paid out of the fund. *Davis v. Bay State League*, 158 Mass. 434, 435, 33 N. E. 591, and cases cited. But it is a creditors' bill analogous to the process of foreign attachment under which, by Rev. Laws, c. 189, § 67, the trustee recovers only taxable costs, "and such further amount for counsel fees and other necessary expenses as the court may allow." What sum, if any, should be allowed for such disbursements was discretionary with the single justice, and although the report presents all questions which were before him, we see no sufficient reason to differ from his conclusion.

Decree affirmed.

(200 Mass. 537)

**LOCKWOOD v. BOSTON ELEVATED RY. CO.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 6, 1909.)

**1. CARRIERS (§ 247\*)—CARRIAGE OF PASSENGERS—ESTABLISHMENT OF RELATION.**

Where plaintiff and his companion, desiring to become passengers, signaled an open car, and the motorman having inclined his head, they started from the sidewalk and, on its being stopped, boarded the car with the conductor's knowledge, and plaintiff had reached and stood upon the running board on his way to a seat at the time of his injury, the relation of passenger and carrier had been established.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 989; Dec. Dig. § 247.\*]

**2. CARRIERS (§ 300\*)—CARRIAGE OF PASSENGERS—NEGLIGENCE.**

Where a street railway conductor saw plaintiff when he boarded the car, and noticed at the same time the proximity of the wagon passing along in the same direction parallel with the car, with which it shortly after came into collision, if he signaled to go ahead, or the motorman in the exercise of due diligence should have foreseen that it was dangerous to go ahead, and the car was started before plaintiff had a reasonable opportunity to reach a seat or position of safety, a finding that the railway company was negligent was warranted.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1211; Dec. Dig. § 300.\*]

**3. CARRIERS (§ 347\*)—CARRIAGE OF PASSENGERS—CONTRIBUTORY NEGLIGENCE.**

Failure by a person taking steps to become, or after he has been accepted as, a passenger by

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a street railway to consider whether, under the usual conditions of public travel, the car will be so operated as to come into contact with a team which has just passed going in the same direction, while a matter to be considered by the jury, affords no conclusive presumption of his carelessness.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1367, 1402; Dec. Dig. § 347.\*]

**4. CARRIERS (§ 328\*)—CARRIAGE OF PASSENGERS—CONTRIBUTORY NEGLIGENCE.**

A street railway passenger had the right to rely upon the assumption that, while getting on the car and passing to a seat, the car would not be started until all danger was removed of its running so near to a team which had just passed in the same direction as to injure him.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1367; Dec. Dig. § 328.\*]

**5. CARRIERS (§ 305\*)—CARRIAGE OF PASSENGERS—INJURIES—PROXIMATE CAUSE.**

Even if a street railway passenger's companion, with whom he had boarded the car, may have been first struck, while standing on the running board preparatory to taking a seat, by a team passing along in the same direction, and thrown against such passenger, forcing him against one of the stanchions, from which he was thrown to the street, that fact was not an independent intervening cause which would exonerate the street railway company; for, if the collision with the team had not occurred through its negligence, such passenger would not have been injured.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1245; Dec. Dig. § 305.\*]

**6. TRIAL (§ 260\*)—REQUESTED INSTRUCTIONS COVERED BY INSTRUCTIONS GIVEN.**

A request for instructions was properly refused, where the party had the benefit of such request, which was given in general terms.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.\*]

**7. CARRIERS (§ 247\*)—CARRIAGE OF PASSENGERS—ACCEPTANCE BY CARRIER.**

The principle that there must be an acceptance by the carrier before the person who offers himself becomes a passenger, as applied to those who offer themselves for transportation by railroads, whose trains stop only at fixed stations, at which only the carrier holds itself out as ready to receive as passengers those who present themselves in the usual way, is not applicable to a street railway, unless it has made a rule that passengers will not be taken on except at designated places.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 989; Dec. Dig. § 247.\*]

**8. CARRIERS (§ 247\*)—CARRIAGE OF PASSENGERS—ESTABLISHMENT OF RELATION.**

Where, after plaintiff and his companion had stepped on the running board of a moving car, the conductor, who saw them coming to get on the car and standing on the running board, did not order plaintiff not to get on, or make any objection, either verbally or by gesture, that he was unlawfully on the running board, a finding that the contract of carriage had been completed was warranted, so as to render the street railway company liable for injuries sustained through its negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 989; Dec. Dig. § 247.\*]

**9. TRIAL (§ 295\*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.**

A charge is to be considered as a whole in determining if it is correct.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 703; Dec. Dig. § 295.\*]

**10. CARRIERS (§ 321\*)—CARRIAGE OF PASSENGERS—ACTION FOR INJURIES—INSTRUCTIONS.**

Instructions in an action for injuries sustained by a street railway passenger, which, after stating the respective claims of plaintiff and defendant, continued by stating that if the servants of the company did not see plaintiff and his companion when they signaled the car, or did not know that they were intending to become passengers, and in no other way, directly or indirectly, either expressly or by implication, assented to their becoming passengers, then they were not passengers, and the company would not owe them the same degree of care it owed passengers, were explicit as to whether plaintiff and the company had entered into the relation of passenger and carrier, and the jury must have fully understood that plaintiff could not recover if he stepped and remained upon the running board without having been recognized by the servants of the company as a passenger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1326; Dec. Dig. § 321.\*]

**11. EVIDENCE (§ 555\*)—OPINION EVIDENCE—MEDICAL EXPERTS.**

Where, in a personal injury action, defendant's medical expert could not properly have been directly asked or permitted to testify that the nervous prostration from which he had found plaintiff to be suffering was due to his having a suit on hand to recover for his injuries, he could not, under the guise of reasons for the opinion, which he gave in reply to a proper question, indirectly introduce such evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2376; Dec. Dig. § 555.\*]

**12. WITNESSES (§ 388\*)—IMPEACHMENT—COMPETENCY OF IMPEACHING EVIDENCE.**

In an action for injuries sustained by a street railway passenger, a paper containing the written statement which, at the company's request, one of its witnesses made on a blank furnished by the company, was rightfully excluded, where there was no offer to show what the company expected to prove, or even that the witness, whom it apparently was intended to contradict, had made a different answer.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1239; Dec. Dig. § 388.\*]

Exceptions from Superior Court, Suffolk County; Robert F. Raymond, Judge.

Action for personal injuries by John E. Lockwood against the Boston Elevated Railway Company. Judgment for plaintiff, and defendant excepts. Exceptions overruled.

J. E. McConnell and J. W. McConnell, for plaintiff. Robert G. Dodge and Sanford H. E. Freund, for defendant.

**BRALEY, J.** The defendant's exceptions to the refusal to give the first, seventh, ninth, tenth, eleventh and twelfth requests must be overruled. It was within the province of the jury to find, upon conflicting evidence, that the plaintiff and his companion desiring to become passengers signalled an open car. In response, the motorman having inclined his head, they started from the sidewalk, and when it stopped boarded the car with the knowledge of the conductor, and the plaintiff had reached and stood upon the running board, on his way to a seat, at the time of the injury. If the jury so found, the relation of passenger and carrier had been

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

established, and the defendant owed to him the duty of taking every reasonable precaution which might be required for his safe transportation. *Millmore v. Boston Elev. Ry. Co.*, 194 Mass. 823, 80 N. E. 445, 11 L. R. A. (N. S.), 140, 120 Am. St. Rep. 558; *Rand v. Boston Elev. Ry. Co.*, 198 Mass. 569, 84 N. E. 841; *Marshall v. Boston & Worcester St. Ry. Co.*, 195 Mass. 284, 81 N. E. 195. The conductor, while claiming, in his testimony, that the car had not been stopped, nor the plaintiff recognized and accepted as a passenger, also stated that he saw him when he boarded the car, and noticed at the same time the proximity of the wagon passing along in the same direction parallel with the car, with which it shortly after came into collision. If under these circumstances the conductor gave the signal, or the motor-man in the exercise of due diligence should have foreseen that it was dangerous to go ahead, and the car was started before the plaintiff had a reasonable opportunity to reach a seat, or position of safety, this furnished evidence which would warrant a finding that the defendant was negligent. *Weeks v. Boston Elev. Ry. Co.*, 190 Mass. 563, 77 N. E. 654; *Rand v. Boston Elev. Ry. Co.*, 198 Mass. 569, 84 N. E. 841. Nor could it have been ruled, as matter of law, that the plaintiff was guilty of contributory negligence. If the plaintiff and his companion were believed, the team had passed them before they started from the sidewalk. Ordinarily the man of average prudence, neither in taking steps to become nor after he has been accepted as a passenger by a street railway, pauses deliberately to consider whether under the usual conditions of public travel the car will be so operated as to come into contact with a team which has just passed going in the same direction. A failure to take this precaution, while a matter to be considered by the jury, affords no conclusive presumption of carelessness. Apart from any knowledge he could have been found to have had of the closeness of the team to the running board owing to the crowded traffic, the plaintiff also had a right to rely upon the assumption that, while in the act of getting on and passing to a seat, the defendant's servants would not start the car until all danger of its running so near to the team as to injure him had passed. *Pomeroy v. Boston & Northern St. Ry. Co.*, 198 Mass. 507, 512, 79 N. E. 764. It is further contended that the efficient cause of the plaintiff's injury was the negligence of his companion with whom he had boarded the car, and who, having been first struck by the team while standing on the running board preparatory to taking a seat, was thrown against the plaintiff, forcing him against one of the stanchions from which he was thrown into the street. But even if the contact of his companion indirectly forced him off, this fact was not an independent intervening cause which would exonerate the defendant,

for if the collision had not occurred through the defendant's negligence, the plaintiff would not have been injured. *Doe v. Boston & Worcester St. Ry. Co.*, 195 Mass. 168, 172, 183, 80 N. E. 814. Besides, notwithstanding it is assumed to the contrary in argument, the defendant had the benefit of the eleventh request which was given in general terms.

It is the defendant's theory of the injury, upon the evidence which it introduced, that, without having been either recognized or accepted as a passenger, the plaintiff was injured while in the attempt to board a moving car, as it was passing between the signal posts. Undoubtedly there must be an acceptance by the carrier, before the person who offers himself becomes a passenger. But the principle as applied to those who offer themselves for transportation by railroads, whose trains stop only at fixed stations, where the carrier only holds itself out to receive and transport as passengers those who present themselves in the usual way, has not been held applicable to passengers upon street railways, unless at least it appears that the operating company makes a rule that passengers will not be taken on except at designated places. *Merrill v. Eastern Ry. Co.*, 189 Mass. 238, 1 N. E. 548, 52 Am. Rep. 705; *Webster v. Fitchburg R. R. Co.*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; *Corlin v. West End St. Ry. Co.*, 154 Mass. 197, 27 N. E. 1000. There was no evidence offered by the defendant that it had made, promulgated or enforced such a rule, or established such a custom. Nor did it appear that the plaintiff had any knowledge of such a regulation inferentially derived from his observation of the placing of signal posts, or of the manner in which its cars were generally operated. *McDonough v. Boston Elev. Ry. Co.*, 191 Mass. 509, 511, 78 N. E. 141. But even if the car had been boarded while moving slowly between the signal posts, after the plaintiff had stepped on the running board, the conductor, who testified that he saw the men coming to get on the car, and further said that he saw him there, gave no order to him not to get on, or made any objection or dissent, either verbally or by gesture, that he was unlawfully on board. To remain standing on the running board of an open street railway car while being transported is not ordinarily of itself wrongful, and under these conditions the contract of carriage could have been found by the jury to have been complete. *Briggs v. Union Street Ry. Co.*, 148 Mass. 72, 75, 19 N. E. 19, 12 Am. St. Rep. 518; *Pomeroy v. Boston & Northern St. Ry. Co.*, 198 Mass. 507, 511, 79 N. E. 764, and cases cited.

The exceptions to the instructions under which the case was submitted to the jury are also untenable. A charge is to be considered as a whole, in order to determine if it is legally correct, rather than tested by fragments, which may be open to deserved criticism.

In presenting the two theories of the relation of the parties, after having stated the plaintiff's and the defendant's respective claims, and instructed the jury as to each, the presiding judge continued: "If you should find that those circumstances did not exist, gentlemen, if you should find, for instance, that the servants of the defendant company did not see them when they signaled the car, or did not know that they were intending to come upon the car as passengers, and in no other way, directly or indirectly, either expressly or by implication, assented to their becoming passengers upon the car, then you could find that they were not passengers, in which case the company, the defendant company, would not owe them the same degree of care that it would owe to passengers. \* \* \* If you find he did not in any way, you would have the right to find that they were not passengers." It is urged the jury should have been told that, if they found no express or implied acceptance of the plaintiff as a passenger, they were bound to find for the defendant. The instructions, however, as to whether the plaintiff and the defendant had entered into this relation were explicit, and the jury must have fully understood that the plaintiff could not recover if he stepped and remained upon the running board, without having been recognized by the servants of the company as a passenger.

The remaining exceptions are to the exclusion of evidence. If the defendant's medical expert could not properly have been directly asked, nor permitted to testify, that the nervous prostration from which he had found the plaintiff to be suffering was due to his having a suit on hand to recover damages for personal injuries, he could not, under the guise of reasons for the opinion which he gave in reply to a proper question, indirectly introduce such evidence. Having done so, the ruling excluding this part of the answer was right. *Hunt v. Boston*, 152 Mass. 168, 171, 25 N. E. 82. The paper containing the written statement, which at the defendant's request one of its witnesses presumably made on a blank furnished by the company, was rightly excluded, as there was no offer to show what the defendant expected to prove, or even that the witness, whom it apparently intended to contradict, had made a different answer. *Magnolia Metal Co. v. Gale*, 191 Mass. 487, 78 N. E. 128.

Exceptions overruled.

(300 Mass. 599)

HASKELL v. MANSON et al.

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 7, 1906.)

**1. LIMITATION OF ACTIONS (§ 143\*) — ACKNOWLEDGMENT OR NEW PROMISE—AUTHORITY OF EXECUTOR OR ADMINISTRATOR.**

An executor or administrator may waive the bar of the statute of limitations against a

debt owing by decedent by an acknowledgment and new promise.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 582; Dec. Dig. § 143.\*]

**2. EXECUTORS AND ADMINISTRATORS (§ 124\*) — JOINT EXECUTORS — PAYMENT BY ONE—EFFECT.**

Generally payment by one of two or more joint executors has the effect of a payment by all.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 496; Dec. Dig. § 124.\*]

**3. EXECUTORS AND ADMINISTRATORS (§ 118\*) — STATUTE OF FRAUDS—DUTY TO PLEAD.**

An executor or administrator is liable for devastavit, if the estate suffers through his failure to plead the statute of frauds.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 118.\*]

**4. EXECUTORS AND ADMINISTRATORS (§ 96\*) — LIABILITIES AGAINST ESTATE — AUTHORITY TO CREATE.**

An executor has no right to create a liability against the estate by making a new and independent contract to pay an alleged debt.

[Ed. Note.—For other cases, see Executors and administrators, Cent. Dig. § 410; Dec. Dig. § 96.\*]

**5. LIMITATION OF ACTIONS (§ 143\*) — PART PAYMENT BY EXECUTRIX TO SELF.**

Joint payment by plaintiff and her daughter, as two of her husband's three executors, to herself as her son's administratrix on notes given by the father to his son, and a joint acknowledgment by them of the notes as existing debts, made to avoid limitations on the notes, are voidable by any one interested in the estate.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 582; Dec. Dig. § 143.\*]

**6. EXECUTORS AND ADMINISTRATORS (§ 265\*) — PAYMENT OF DEBT TO SELF.**

Payment by an executor or administrator of a debt to himself is always reviewable by the court.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 265.\*]

**7. EXECUTORS AND ADMINISTRATORS (§ 124\*) — JOINT EXECUTORS—DIFFERENT PLEAS.**

When joint executors make different pleas to a claim against the estate, a court will proceed upon the plea most favorable to the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 124.\*]

**8. LIMITATION OF ACTIONS (§ 197\*) — PART PAYMENT—EVIDENCE.**

Evidence held to sustain a finding that no payments were made on testator's notes in his lifetime, so as to avoid the bar of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 197.\*]

Appeal from Superior Court, Suffolk County; J. Fox, Judge.

Bill by Adeline L. Haskell, administratrix, against Albert C. Manson and others. From a decree dismissing the bill, plaintiff and certain defendants appeal. Affirmed.

G. C. Abbott, for plaintiff. Alfred Hemenway, C. B. Barnes, Jr., and J. W. Farley, for defendants.

KNOWLTON, C. J. This is a bill in equity to recover the amount of five nonnegotiable promissory notes, called in the bill evidences of indebtedness, which were signed

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by Jacob M. Haskell and made payable to his son Waldo C. Haskell, with interest at 7 per cent. The son died on February 1, 1906, and the father died on the 4th day of November in the same year. The father left a will in which his partner Albert C. Manson, his wife Adeline L. Haskell, and his daughter Adeline M. Haskell, were named as executors. The first of these notes, which was more than 13 times as much in amount as all the others together, was barred by the statute of limitations nearly 7 years before the son's death, and the last was so barred nearly 4 years before his death. The will of Jacob M. Haskell was made after the death of his son Waldo, and by its terms his widow was to have the income of all his property for her life, and after her death the principal is to be divided equally between his son Edward M. and his daughter Adeline M. After the probate of the will and the appointment of the three executors named in it, the widow was appointed administratrix of the estate of her son Waldo, and sought to collect these notes. They amounted to \$15,575, as principal, with interest on nearly the whole amount for about 15 years, at the time of the commencement of this suit. Her son Waldo left no debts, and one half of this amount, if collected, would go to her absolutely as one of his heirs at law, and the other half would go back to her husband's estate. Her co-executor Manson was unwilling to pay these notes, because, among other reasons, he was advised that the statute of limitations had run against them and that he could not legally pay them. Thereupon she and her daughter joined in a written statement and admission that they, as executors of her husband's will, had made a payment of \$1, upon each of the notes, to Mr. Abbott, as attorney for Adeline L. Haskell, "as she is the administratrix of the estate of Waldo C. Haskell." The paper closed with a copy of the notes, and contained this recital: "The object of these payments is to avoid the general statute of limitations, which, in the absence of some evidence of payment, might be pleaded to some or all of said evidences of indebtedness. As such executors we do hereby admit the existence of the debts indicated by said evidences of indebtedness."

The principal question before us is whether this payment removed the bar of the statute of limitations, so that the other executor cannot rely upon it under his answer. The other two executors were defaulted and as against them the bill was taken for confessed.

It is the rule in this commonwealth, in England, and in most of the American states, that an executor or administrator is not bound to plead the general statute of limitations. *Scott v. Hancock*, 13 Mass. 164; *Baxter v. Penniman*, 8 Mass. 133; *Emerson v. Thompson*, 16 Mass. 429; *Slaterry v. Doyle*, 180 Mass. 27, 61 N. E. 264; *Field v. White*, L. R. 29 Ch. Div. 358; *Midgley v. Midgley* (1893) 3 Ch. 282; *Shreve v. Joyce*, 36 N. J.

Law, 44, 13 Am. Rep. 417; *Johnson v. Beardslee*, 15 Johns. (N. Y.) 3; *Hord v. Lee*, 4 T. B. Mon. (Ky.) 36. So, too, it is a general doctrine that payment by one of two or more joint executors will have the same effect as payment by all. Such is the usual effect of an authorized official act of an executor, so far as it relates to the property of the estate. But the rule that an executor or administrator is not bound to plead the statute of limitations is an exception to the general rule that it is his duty to protect the property and interests of the estate under his charge. It is universally agreed that it ought not to be extended. An executor or administrator is liable for a devastavit, if the estate suffers through his failure to plead the statute of frauds. *Field v. White*, L. R. 29 Ch. Div. 358. An executor has no right to create a liability against the estate by making a new and independent contract to pay an alleged debt.

The above-mentioned exception relative to the statute of limitations is founded upon the theory that an acknowledgment and new promise does not create a new liability, but continues in force an old one that otherwise might not be enforceable. There is some ground for holding that, where a debt has been barred by the statute before the death of the debtor, an administrator or executor should not be permitted to revive it, by a partial payment, or a new promise or acknowledgment of any kind. Although the distinction has not been established in this commonwealth between the effect of a payment and acknowledgment by an executor or administrator of a debt which was not barred at the time of his appointment, and the payment of a debt that was barred in the lifetime of the debtor; and although theoretically the nature of such a new undertaking by the original debtor may have been treated as the same in reference to a debt already barred as in reference to a debt against which the time of limitation has not expired, it is a significant fact that, in every case that we have found in Massachusetts in which a payment or acknowledgment by an executor or administrator was held to have extended the time, the debt was not barred in the lifetime of the debtor. The executor or administrator was simply continuing in force a debt which was collectible from him after his appointment. In *Pole v. Simmons*, 49 Md. 14-22, a promise by an executor, after the statute had fully run in the lifetime of the debtor, was treated as a new promise, made without authority, and insufficient to create a liability. See, also, *Peck v. Botsford*, 7 Conn. 172, 18 Am. Dec. 92; *Cayuga County Bank v. Bennett*, 5 Hill (N. Y.) 236. In many of the states of this country, either under statutes or the decisions of the courts, a debt which was barred in the lifetime of the debtor cannot be revived by his representative after his death. *McLaren v. McMartin*, 36 N. Y. 88; *Fritz v. Thomas*, 1 Whart. (Pa.) 66, 21

Am. Dec. 39; *Unknown Heirs of Langworthy v. Baker*, 23 Ill. 484; *Patterson v. Cobb*, 4 Fla. 481; *Etchas v. Orena*, 127 Cal. 588-592, 60 Pac. 45; *Van Winkle v. Blackford*, 83 W. Va. 573, 11 S. E. 26; *Smith v. Pattie*, 81 Va. 654; *Bambrick v. Bambrick*, 157 Mo. 423, 58 S. W. 8; *O'Keefe v. Foster*, 5 Wyo. 344, 40 Pac. 525; *Jones v. Powning*, 25 Nev. 399, 60 Pac. 833; *In re Moullierat's Estate*, 14 Mont. 245, 36 Pac. 185; *Rector v. Conway*, 20 Ark. 79; *Moore v. Hardison*, 10 Tex. 467.

It has never been decided in Massachusetts that a payment made by one of two executors against the objection of his coexecutor, upon a note which was barred by the statute in the lifetime of the testator, would revive the note, nor has it been so decided in England. The Lords Justices of the Court of Appeal, in a late case, preferred to leave this subject open for future consideration. *Midgley v. Midgley* (1893) 8 Ch. 282.

But if we assume, without deciding, that these doubtful questions might be answered in favor of the plaintiff, she has another difficulty in her way. The payment was the joint act of the mother and daughter, and was made to the mother as the administrator of her son's estate, entirely for her personal benefit as one of his two heirs at law. In her trust relation to the estate of her husband, she could not make a payment to herself in a different relation, especially when she would be the only beneficiary, and thereby bind her husband's estate, so as to put it in a pecuniary condition less favorable than it would have been in under a decision by the court. Such an act is voidable by any one interested in her husband's estate. This is no less so that her daughter was induced to join her in making the payment. There was no separate and independent action by the daughter. The payment was a single act, and the declaration in writing was a single statement and acknowledgment in which they both joined. Because the mother was the other party to the transaction, with an adverse interest, it is voidable. The principle was applied in *Richmond*, Petitioner, 2 Pick. 567, of which the headnote is in part: "An administrator cannot revive a debt due to himself from the intestate, which at the time of the intestate's decease was barred by the statute of limitations." Chief Justice Parker said: "The petitioner cannot avoid the presumption of payment, except by showing a renewal of the promise, and he cannot show that, being himself the administrator." The same doctrine was again applied in *Grinnell v. Baxter*, 17 Pick. 383.

If these two executors had jointly paid to the mother the whole amount of the notes, and had sought to have the payment allowed in their account in the probate court, the other executor might have objected, and set up the contention that the notes were bar-

red, and not a proper charge against the estate. As the payment by an executor or administrator of a debt to himself is always reviewable by the court, and as the court will, when different joint executors make different pleas to a claim against an estate, proceed upon the plea which is most favorable to the estate (2 *Williams on Executors* [8th Ed.] 1953; *Midgley v. Midgley*, [1893] 3 Ch. 282), the court would feel obliged to sustain the objection. A court of equity will not give to the joint payment and acknowledgment of these executors an effect that the probate court could not give to it, if the question arose there upon an objection of the defendant Manson that the claim could not be allowed against the estate.

The presiding justice rightly found that there were no payments upon these notes in the lifetime of the testator. His son Waldo was 48 years of age at the time of his death. He had been an invalid all his life, and had lived all the time in his father's family. Only 2 years of the time did he do anything to earn an income. He had been a member of an expensive social club, and at different times had been obliged to have surgical treatment in hospitals. His father had paid all his bills, and had furnished him money whenever he wanted it, without ever making any charge against him or keeping any account of it.

In the same way he had provided support and paid money for his daughter Adeline. The relations of the parties and their dealings together tend to show that no payment was ever made upon either of these notes. So far as it appears, they were never referred to between the parties.

Decree affirmed.

(200 Mass. 543)

# HARDY et al. v. MARTIN et al.

(Supreme Judicial Court of Massachusetts.  
Essex. Jan. 6, 1909.)

## WILLS (§ 54\*)—TESTATRIX'S SANITY—EVIDENCE—SCOPE.

In a will contest, involving an issue as to whether testatrix had congenital insanity, it was not error to limit evidence of insanity to conduct of testatrix within six years before the will was made.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 131; Dec. Dig. § 54.\*]

Exceptions from Supreme Judicial Court, Essex County; Henry N. Sheldon, Judge.

Annie S. W. Martin and others contested Sarah E. Wells' will, offered by Walter P. Hardy and another, and appeal from a decree allowing the will to the Supreme Judicial Court, where certain issues were submitted to a jury. Verdict for executors; and contestants except. Exceptions overruled.

L. C. Southard, V. C. Lawrence, and D. J. O'Connell, for appellants. J. P. Sweeney and L. S. Cox, for appellees.

**HAMMOND, J.** The will was executed October 20, 1906, and the testatrix died May 17, 1907. After formal proof of the will counsel for the appellants in his opening stated "that it was the intention of the appellants to show that the said Sarah E. Wells was insane at the time of the making of the alleged will, and that she had congenital insanity, and that it was their intention to show her congenital insane mind by a long series of acts and conduct on the part of the testatrix beginning with her early childhood and continuing up to within a few years of her decease, such as stealing from stores, relatives and others, cruel and abusive treatment of her mother, and declarations and acts showing a morbid and abnormal love for money, these acts being so numerous and of such a character as to establish the fact of her being a kleptomaniac; that many times prior to the date of her mother's death she deprived her mother of the necessary comforts of life; that she abused her physically and that prior to 1900 she committed many acts and made many declarations showing a lack of moral sense and obligation, and that she was unbalanced and insane on the subject of money, all indicating congenital unsoundness of mind."

After counsel for the appellants finished his opening, the presiding justice said that in view of the statements made by counsel for the appellants he should rule that the appellants might put in evidence as to insanity on the part of the ancestors of the testatrix, but with reference to her own conduct he did not think he should allow counsel for the appellants to open all her, the alleged testatrix's, life; that the question of her own unsoundness of mind at the time of the execution of this will, and her conduct or indications of sanity or insanity within a reasonable period before that would be competent, but that he should impose some limit of time, and he did not think that the matters that took place between her and her deceased father in 1894 should be gone into; that as the will in question was made in 1906, he thought if he allowed both sides on any question as to the conduct of the testatrix to go back to the year 1900, he was "dealing more liberally than in strictness he should."

Thereafter in the course of the trial the presiding justice ruled in accordance with his intention and excluded all evidence before 1900. It is now contended by the appellants that evidence offered by them having a very material bearing upon the question of congenital insanity was wrongfully excluded. An examination of the record shows that much of this evidence was entirely incompetent, and also that much of it, even if it related to a point subsequent to 1900, was of such a character as that it might properly have been excluded at the discretion of the court, upon the ground that it involved a

trial of collateral facts having too remote a causal relation to the issues on trial.

But without reference to these considerations we think that the exceptions must be overruled. Obviously there must be some limit of time on an inquiry into the mental condition of a testator, and the rule is stated by Allen, J., in *Howes v. Colburn*, 165 Mass. 385, 387, 43 N. E. 125. In that case the court limited the introduction of evidence of specific acts of unsoundness of mind on the part of the testator to a period "from about 8 years before the date of the will to about 2½ years after its date," and the following remarks of Allen, J., in that case are peculiarly applicable to this: "This was within the power of the court to do, and its power in this respect was not taken away by the fact that expert witnesses for the contestants thought a better judgment as to the testator's soundness of mind could be formed if these limits were extended. It has been declared heretofore that such testimony must be sufficiently near in point of time to aid in determining the testator's condition at the time of making the will, and that this is a matter for the court to decide. *White v. Graves*, 107 Mass. 325, 9 Am. Rep. 88; *Shaller v. Bumstead*, 99 Mass. 112, 130; *Commonwealth v. Pomeroy*, 117 Mass. 143, 148; *Lane v. Moore*, 151 Mass. 87, 90, 23 N. E. 828, 21 Am. St. Rep. 430; *Dumangue v. Daniels*, 154 Mass. 483, 486, 28 N. E. 900. In the present case, the trial was a long one, the period fixed appears to have been sufficiently liberal, and but for the limitation put upon the introduction of evidence the trial might have consumed an unreasonable length of time. No exception can be sustained to the exclusion of the testimony relating to times outside of the limits so fixed." See, also, *Davis v. Davis*, 123 Mass. 590.

Exceptions overruled.

(200 Mass. 367)

## LARSSON v. METROPOLITAN STOCK EXCH.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 5, 1909.)

### 1. RELEASE (§ 17\*)—VALIDITY—FRAUD.

One who signs a release of a right of action, relying on false representations made by the party liable that it is only a receipt for money paid, can avoid it on the ground of fraud.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. § 32; Dec. Dig. § 17.\*]

### 2. RELEASE (§ 17\*)—FRAUD.

Fraud in procuring a release, so as to warrant avoidance, may be proved by the acts and conduct of a party.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. § 32; Dec. Dig. § 17.\*]

### 3. RELEASE (§ 53\*)—FRAUD—QUESTIONS FOR JURY.

Whether a release of a right of action, under Rev. Laws, c. 99, §§ 4-6, for money paid as margins on purchases and sales of stocks,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was procured by fraud, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Release, Cent. Dec. § 114; Dec. Dig. § 53.\*]

Exceptions from Superior Court, Suffolk County; Robert R. Bishop, Judge.

Action by John Larsson against the Metropolitan Stock Exchange. Verdict for plaintiff, and defendant excepta. Exceptions overruled.

E. S. Crockett and Stebbins, Storer & Burbank, for plaintiff. I. R. Clark and G. F. Ordway, for defendant.

KNOWLTON, C. J. The only important question in this case is whether there was evidence to warrant the finding that the releases from the plaintiff, relied on by the defendant, were procured by fraud.

The action was brought, under Rev. Laws, c. 99, §§ 4-6, to recover money alleged to have been paid by the plaintiff to the defendant as margins upon purchases and sales of stocks. It is conceded that the plaintiff's case would be made out except for releases given by him to the defendant, covering the transactions relied on. The form of the releases is as follows:

"Boston, ———, 190—.

"Received of the Metropolitan Stock Exchange ——— dollars, in full of all demands under within contract, and I hereby release and discharge the Metropolitan Stock Exchange, its officers, agents and servants and each of them therefrom, and also from any and all right of action, claim or demand under or by virtue of chapter 99 of the Revised Laws of Massachusetts, or any amendment thereof, for any payment at any time heretofore made, or value or anything at any time heretofore delivered, either on within or any other contract or transaction whatever, and I covenant never to sue therefor, them or either or any of them.

"Witness my hand and seal the day and year above written.

"\$———. [L. S.]"

These releases were given in connection with the settlement of particular transactions between the parties.

The business of the parties was done under contracts on printed blanks issued by the defendant to the plaintiff, in one form of which the defendant offered to deliver to the plaintiff certain stock, at a stated price, and the plaintiff agreed to receive it, or, upon the surrender of the contract by mutual consent the defendant was to pay the plaintiff a sum equal to the then advance in the market price of the stock. There were stipulations as to deposits, and other terms of the contract, with columns for entries, headed "Margin," "Accountant's Signature," "Date of Deposit," and "Stock Order Limit." Another form of contract was similar, except that in it the defendant promised to receive

from the plaintiff certain stock at a stated price.

When the plaintiff desired to close the contract in one of these transactions the business was done in this way: The plaintiff applied to the cashier, who stood behind a small window with a little shelf 18 inches wide in front of it, and told him he wanted to close the contract. After figuring the amount due him from his deposit, increased or diminished by the rise or fall in the price of the stock, the cashier placed the contract on the shelf at the window, with a receipt in the form quoted above on the back, in which the amount due the plaintiff was plainly written after the words, "Received of the Metropolitan Stock Exchange," and the same amount was plainly expressed in figures at the bottom, opposite the space for the plaintiff's signature. The body of the release, comprising all but the date and amount, was stamped on the back of the contract with a rubber stamp, in quite fine print, portions of which were very dim, and almost if not quite illegible to persons whose sight was not very keen. This was put before the plaintiff on the shelf for him to sign, and, upon his signing it, the amount of money named in it was paid him and the paper was retained by the cashier. The plaintiff testified that he only had the paper before him a moment, to sign, and did not read the release, but "supposed he was signing it for the money he got." The rubber stamp was put on the contract after the plaintiff asked to close it. He testified that he had to wait a while before they were ready for his signature, sometimes as long as 10 minutes. He said that when he went to the window and wanted his money, the cashier would put the paper "out that way (illustrating by laying one of the contracts down on the shelf before him with his hand resting on it and covering part of the matter stamped thereon) for him to sign his name and he would get the money if he signed his name."

The court instructed the jury "that fraud is not mere misunderstanding, that it was not enough that a man should have signed one thing thinking it to be another, but that fraud is that circumvention, imposition and deceit, or getting around a man by words or acts fraudulent in their purpose, which operate as a deception upon his mind and entrap him; that a man is presumed to know the contents of what he signs; that fraud may be proved from acts and conduct as well as from declarations; and that deceit may take a negative form if it have the characteristics and effect of actual misrepresentation, and left it to the jury to say whether effectual fraud was practiced upon the plaintiff, and whether he signed the papers under such circumstances that he was induced to sign them under a belief that they were simply releases for the money he received, instead

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

of releases of the statute right of action." The evidence of fraud in this case is not strong. No untrue words were spoken to the plaintiff, and it is a question by no means free from difficulty whether there was evidence of conduct, intended to deceive the plaintiff, which would naturally tend to mislead him, whereby he was fraudulently induced to sign these papers in the belief that they were merely receipts for money due him. If the defendant had told him that they were only receipts and he had signed the releases relying upon the statements, there is no doubt that he could have avoided them on the ground of fraud. *Trambly v. Ricard*, 130 Mass. 259; *Freedley v. French*, 154 Mass. 339, 28 N. E. 272; *Bliss v. New York Central & Hudson River Railroad Company*, 160 Mass. 447, 36 N. E. 63, 39 Am. St. Rep. 504. In doing such business as this, where all the circumstances pointed only to the making of a receipt for the money paid, he would have been justified in taking the defendant's word, instead of waiting to attempt to decipher the dimly stamped words between the written statement of the amount at the beginning of the receipt and the figures giving the same amount at its end.

The first two cases cited above are applicable to facts like those now before us. Said Mr. Justice Colt in *Trambly v. Ricard*, at page 261 of 130 Mass.: "The jury may well have found that the production of the writing at that time was in itself an affirmation on the part of the defendants that its terms did not differ from the terms of the sale agreed on. Fraud may be proved from the acts and conduct of a party quite as effectively as from his declarations, \* \* \* and any act falsely intended to induce a party to believe in the existence of some other material fact, and having the effect to produce such a belief to his injury, is a fraud."

The transaction in which the parties were engaged when the paper was signed was one that called for the payment of money and the giving of a receipt. All that was said and done between the parties indicated that the paper to be given was a receipt and nothing more. At no time was there any reference to an arrangement or agreement which would justify the insertion of anything else than a receipt in the writing. The use of a stamp on the back of the contract might indicate to the plaintiff that he was signing a form of receipt which was regularly and properly used in all such transactions. The use of this stamp, taken in connection with the fact that the language impressed by it contained an important contract, about which nothing had been said and for which no consideration was given, and that the impression was difficult to read, might have another kind of significance. When we consider the manner in which the

paper was presented for signature, and the plaintiff's lack of opportunity to read it unless he took it out from under the cashier's hand on the shelf and interrupted the regular method of doing the business, we see how the jury might have found a purpose, on the part of the defendant, to obtain the plaintiff's signature, without his knowledge that he was signing a release. The plaintiff was a Swede about sixty years of age, who had been employed many years as a coachman. The jury saw and heard him, and his counsel contends that they might have found him to be inexperienced in business and easy to be deceived. There were a variety of circumstances in the manner in which the defendant did this business which the jury might find, which would naturally lead him to believe on each occasion that the defendant was presenting a mere receipt for his signature, which circumstances were a representation by conduct that the paper was nothing but a receipt. They well might find that the plaintiff signed the paper in reliance upon this willfully false representation.

We are of opinion that the case was properly submitted to the jury.

Exceptions overruled.

(200 Mass. 588)

#### ADAMS v. YOUNG et al.

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 7, 1909.)

#### 1. REFERENCE (§ 86\*)—REPORT OF MASTER—CONCLUSIONS OF LAW.

A master's ruling that plaintiff is entitled to no relief is a conclusion of law, and an exception thereto is well taken.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 132; Dec. Dig. § 86.\*]

#### 2. APPEAL AND ERROR (§ 1071\*)—REVIEW—HARMLESS ERROR—REPORT OF MASTER.

When all the facts are reported by the master, an exception to the master's ruling that plaintiff is entitled to no relief is immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1071.\*]

#### 3. SUBROGATION (§ 32\*)—FRAUDULENT GRANT OF MERCHANDISE IN BULK.

Though St. 1903, p. 389, c. 415, declares that the sale in bulk of a stock of merchandise, otherwise than in the regular course of trade, shall be fraudulent as against the seller's creditors, unless the seller and buyer make an inventory, etc., the good faith of the parties is not to be disregarded, since the buyer is to be charged only with such fraudulent intent as the failure to comply with the requirements of the statute implies, and he is not to be deprived of the right of subrogation to the securities held by creditors whose claims he has paid.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 92; Dec. Dig. § 32.\*]

#### 4. CHATTEL MORTGAGES (§ 209\*)—AFTER-ACQUIRED PROPERTY—RIGHTS OF CREDITORS.

A mortgage of a stock of merchandise covering goods thereafter to be purchased created a lien on after-acquired merchandise, and one who took an assignment of the mortgage and went into possession obtained title to goods

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which had been added to the stock after the execution of the mortgage.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Dec. Dig. § 200.\*]

**5. MARSHALING ASSETS AND SECURITIES (§ 6\*)  
—COMPELLING FRAUDULENT VENDEE TO RESORT TO OTHER SECURITIES.**

An insolvent corporation sold its stock of goods and the furniture and fixtures connected therewith. The seller and buyer acted in good faith, with no actual intent to defraud. The buyer paid and secured an assignment of a mortgage on the goods, furniture, and fixtures. The sale, as to the stock of goods, was fraudulent as to creditors under St. 1903, p. 389, c. 415, but valid as to the furniture and fixtures, and the buyer was entitled to subrogation to the rights of the mortgagee. *Held*, that the trustee in bankruptcy of the insolvent corporation could not compel the buyer to first resort to the furniture and fixtures.

[Ed. Note.—For other cases, see *Marshaling Assets and Securities*, Dec. Dig. § 6.\*]

**6. MARSHALING ASSETS AND SECURITIES (§ 6\*)  
—NATURE AND SCOPE OF REMEDY.**

The equitable rule of marshaling assets for the protection of a junior creditor, by compelling a senior creditor to resort first to a fund or security which the junior creditor cannot reach, is confined to cases where two or more persons are creditors of the same debtor and have successive liens on the same property, while the creditor prior in right has also other securities belonging to the same debtor not available to the holder of the junior lien.

[Ed. Note.—For other cases, see *Marshaling Assets and Securities*, Cent. Dig. § 7; Dec. Dig. § 6.\*]

Appeal from Superior Court, Suffolk County; J. Fox, Judge.

Suit by J. Frank Adams, trustee in bankruptcy of E. M. Wheeler & Co., against Henry G. Young and another, copartners as Young & Brown, for a decree establishing claims against defendants based on the fact that they had bought the merchandise of the bankrupt, while insolvent, without complying with the law. From a decree confirming the master's report, and dismissing the bill, with costs, plaintiff appeals. *Affirmed*.

Stebbins, Storer & Burbank for appellants. Elder & Whitman and Frank E. Bradbury, for appellees.

SHELDON, J. The plaintiff's first exception, to the master's ruling that the plaintiff was entitled to no relief against the defendants, was well taken as an abstract proposition. As stated in *Clark v. Seagraves*, 186 Mass. 430, 435, 71 N. E. 813, a master's duty is to find the facts, and it is for the court to say upon these facts whether any and what relief should be given. But as all the facts are reported by the master, and the only question now raised is as to the rights of the plaintiff upon these facts, this exception becomes really immaterial and need not be considered.

The sale made by the Wheeler Company to the defendants was doubtless as to the stock of goods sold, though not as to the furniture and fixtures, within the inhibition of St. 1903, p. 389, c. 415. If nothing more ap-

peared, the plaintiff would have the right to avoid that sale so far as it covered the stock in trade and to hold the defendants for the value of that stock. *Gallus v. Elmer*, 193 Mass. 106, 78 N. E. 772.

But we are not to disregard the master's finding that in making this sale both seller and purchasers acted in good faith and with no actual intent to defraud creditors, and that the purchasers are to be charged only with such fraud and such fraudulent intent as the failure to comply with the requirements of the statute necessarily implies. The effect of the statute is to make this non-compliance conclusive of fraud as to the creditors of the seller. *Kelly-Buckley Co. v. Cohen*, 195 Mass. 585, 81 N. E. 297. It creates a decisive badge of fraud, such as according to the decisions of some courts is found in the retention of possession by a seller after an absolute sale of property. Although the usual doctrine is that such retention of possession is merely an indication of an intent to defraud creditors, to be considered in connection with the other evidence, yet it has been held in some jurisdictions that the absence of a change of possession after a sale of personal property raises a conclusive presumption of fraud not to be overcome by evidence of the actual good faith of the parties. See, for example, *Hull v. Sigsworth*, 48 Conn. 258, 40 Am. Rep. 167; *Rozler v. Williams*, 92 Ill. 187; *Greenebaum v. Wheeler*, 90 Ill. 296, 298; *Foster v. Grigsby*, 1 Bush. (Ky.) 86; *Jarvis v. Davis*, 14 B. Mon. (Ky.) 529, 61 Am. Dec. 166; *Willson v. Hill*, 17 Nev. 401, 30 Pac. 1076; *Ziegler v. Handrick*, 106 Pa. 87; *Mason v. Bond*, 9 Leigh (Va.) 181, 33 Am. Dec. 243; *Weeks v. Prescott*, 53 Vt. 57; *Rothchild v. Rowe*, 44 Vt. 389. But one whose purchase of property has for that reason been avoided by the creditors of the seller, being himself free from any actual fraud, may stand in the place of creditors whose demands he has paid out of the property or in consideration of the transfer to himself. *Loos v. Wilkinson*, 118 N. Y. 485, 21 N. E. 392, 4 L. R. A. 353, 10 Am. St. Rep. 496; *Robinson v. Stewart*, 10 N. Y. 189; *Pond v. Comstock*, 20 Hun (N. Y.) 492; *Butler v. White*, 25 Minn. 432. Our own decision in *Crowninshield v. Kittridge*, 7 Metc. 520, accords with this principle. So if he has paid off debts which constituted liens or incumbrances upon the property, conveyed to him, he may for his protection and reimbursement take by subrogation the rights of the secured creditors whom he has thus paid. *Cole v. Malcolm*, 66 N. Y. 363; *Rhead v. Hounson*, 46 Mich. 243, 9 N. W. 267; *Merrell v. Johnson*, 96 Ill. 224; *Selleck v. Phelps*, 11 Wis. 380; *Tompkins v. Sprout*, 55 Cal. 81. If instead of a discharge he has taken an assignment of such a mortgage or other incumbrance it will not be treated as merged, but will be upheld in his

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
MASS. DEC. 83-87 N. E.—55

hands as a charge upon the property. *Crosby v. Taylor*, 15 Gray, 64, 77 Am. Dec. 352; *Mead v. Combs*, 19 N. J. Eq. 112; *Phillips v. Chamberlain*, 61 Miss. 740; *Fordyce v. Hicks*, 76 Iowa, 41, 40 N. W. 79; *Smith v. Grimes*, 43 Iowa, 356. So his bona fide purchase under a valid levy or other prior lien will give him a good title. *Lamb v. Smith*, 132 Mass. 574; *Arrington v. Arrington*, 102 N. C. 491, 9 S. E. 200. The merely constructive fraud of a purchaser will not prevent him from being protected in this manner, if he has not himself actively participated in the fraud. There are many cases to this effect. *Loos v. Wilkinson*, 113 N. Y. 485, 21 N. E. 392, 4 L. R. A. 353, 10 Am. St. Rep. 495; *Robinson v. Stewart*, 10 N. Y. 189; *King v. Wilcox*, 11 Paige (N. Y.) 589; *Levi v. Welsh*, 45 N. J. Eq. 867, 19 Atl. 620; *Newman v. Kirk*, 45 N. J. Eq. 677, 18 Atl. 224; *Sullivan v. Tinker*, 140 Pa. 35, 21 Atl. 247; *McCaskey v. Graff*, 23 Pa. 321, 62 Am. Dec. 386; *Jackson v. Summersville*, 13 Pa. 359; *Gilbert v. Hoffman*, 2 Watts (Pa.) 66, 26 Am. Dec. 103; *Williamson v. Goodwyn*, 9 Grat. (Va.) 503; *Wallace v. McBride*, 70 Mich. 596, 38 N. W. 592; *Burton v. Gibson*, 32 W. Va. 406, 9 S. E. 255; *Cook v. Berlin Woolen Mills*, 56 Wis. 643, 14 N. W. 808; *Grant v. Lloyd*, 12 Smedes & M. (Miss.) 191; *First Nat. Bank of Tuscaloosa v. Kennedy*, 91 Ala. 470, 8 South. 652; *Pritchett v. Jones*, 87 Ala. 317, 6 South. 75.

The application of these principles is fatal to the maintenance of this bill. The defendants have the right to rest upon the mortgage of which they took an assignment. If it were necessary to pass upon that question, it would not be easy to avoid saying that they could rest also upon the mortgage which was paid and discharged. It was their money that paid the mortgage debts. The fact that the money passed through the hands of the mortgagor and the form of the transfer which the defendants took cannot overcome the real effect of the transaction.

Nor can the plaintiff maintain his bill to recover for the value of that part of the stock in trade which consisted of goods acquired by the mortgagor after the execution of the mortgages. Apart from the fact that the bill sets out no such claim, the master has not found that the mortgagor made any additions to his stock before the sale to the defendants, and the plaintiff does not appear to have asked for any finding upon that question. Moreover, the mortgage which was assigned to the defendants purported to cover after-acquired property and the defendants took possession of everything immediately after their purchase, on June 10, 1904, more

than three months before the petition in bankruptcy was filed against the mortgagor. These facts gave them a good title to the after-acquired portion of the stock in trade, if there was any such portion. *Wasserman v. McDonnell*, 190 Mass. 326, 76 N. E. 959; *Chase v. Denny*, 180 Mass. 566; *Blanchard v. Cooke*, 144 Mass. 207, 225, 227, 11 N. E. 83; *Bliss v. Crosier*, 159 Mass. 496, 84 N. E. 1075.

The plaintiff has no equity to require the defendants to resort first for the payment of their mortgage to the furniture and fixtures, which are not available to the plaintiff. It does not appear what the value of the furniture and fixtures is; and the plaintiff could have no equitable rights until the mortgage debt due to the defendants was fully satisfied. *Quackenbush v. O'Hare*, 129 N. Y. 485, 29 N. E. 958; *Taylor's Appeal*, 81 Pa. 460. And this claim of the plaintiff rests upon the assumption that while the furniture and fixtures belong to the defendants, the stock in trade belongs in equity to the plaintiff. We do not think that in the absence of controlling equities the defendants could be required to resort first to their own property to obtain payment of an indebtedness which is secured also by property of the plaintiff. *Wilcox v. Fairhaven Bank*, 7 Allen, 270. It is the general doctrine that the equitable rule of marshaling assets for the protection of a junior creditor by compelling a senior creditor to resort first to a fund or security which the junior creditor cannot reach, will be confined to cases where two or more persons are creditors of the same debtor, and have successive liens upon the same property, while the creditor prior in right has also other securities belonging to the same debtor not available to the holder of the junior lien. It will not be enforced to the detriment of the prior creditor. *Carter v. Tanners' Leather Co.*, 106 Mass. 163, 81 N. E. 902, 12 L. R. A. (N. S.) 965; *Emmons v. Bradley*, 56 Me. 333; *Benedict v. Benedict*, 15 N. J. Eq. 150; *Lee v. Swepson*, 76 Va. 173; *Robinson v. Lehman*, 72 Ala. 401, 404; *Peery v. Elliott*, 101 Va. 709, 44 S. E. 919.

The plaintiff has not sought to redeem the property from the mortgages held by the defendants, and has not argued that he can maintain his bill for that purpose. We need not consider whether this could be done. *Bushnell v. Avery*, 121 Mass. 148.

The decree of the superior court overruling the plaintiff's exceptions to the master's report, confirming that report and dismissing the bill with costs, must be affirmed.

So ordered.

(300 Mass. 523)

## DOHERTY v. BOOTH.

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 6, 1909.)**1. MASTER AND SERVANT (§ 182\*)—INJURIES TO SERVANT—EMPLOYER'S LIABILITY ACT—PERSON INTRUSTED WITH SUPERINTENDENCE.**

The common-law rule that where a sufficient supply of proper temporary appliances has been provided from which employes may make a selection to replace those which have become unsuitable, if a choice is made of a defective appliance, whereby one of their number is injured, the master is not liable for such negligence of a fellow servant, is not, under Rev. Laws 1902, c. 106, § 71, applicable to a person intrusted by the master with superintendence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 371, 372; Dec. Dig. § 182.\*]

**2. MASTER AND SERVANT (§ 125\*)—DEFECTIVE APPLIANCES—LIABILITY FOR INJURY.**

A sling, furnished by an employer to be used in his business, must be considered, either at common law or under Rev. Laws 1902, c. 106, § 71, making an employer liable for injuries to an employé due to defective ways, works, and machinery, not as a temporary makeshift devised by the employes to aid them in the performance of their work, but as a part of the permanent instrumentalities provided by him for his employes, so as to render him liable, either at common law or under the statute, if he originally furnished a defective sling, or, having provided a sound sling, it became so weakened by age and wear as to be defective, if by the exercise of reasonable diligence he ought to have known of its condition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.\*]

**3. MASTER AND SERVANT (§ 125\*)—INJURIES TO SERVANT—SUPERINTENDENT—NEGLIGENCE.**

An employer is liable for injuries to an employé, due to the fall of a staging as it was being lowered from a ship's side, because of the parting of one of the slings by which suspended, if the person acting as superintendent knew or ought to have known of the condition of the sling before it was put in use, or, if then sound, whether it had become weakened and unsafe at the time of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 251; Dec. Dig. § 125.\*]

**4. NEGLIGENCE (§ 121\*)—EVIDENCE—RES IPSA LOQUITUR.**

Where a rope  $1\frac{1}{2}$  inches thick and which, if in proper condition, was of ample tensile strength to have sustained a load, parted when subjected to the ordinary strain for which designed, and nothing further appeared, the jury from their common experience could find that it would not have parted unless in some way it had become unsound.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 218; Dec. Dig. § 121.\*]

**5. MASTER AND SERVANT (§ 190\*)—INJURIES TO SERVANT—SUPERINTENDENT—NEGLIGENCE.**

Negligence of a superintendent may consist in a failure to take such precautions as a reasonably prudent man would take before subjecting himself or an employé to the chance of injury from imperfect or insecure appliances, as well as in giving improper orders or directing the performance of work under unsafe conditions.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 190.\*]

**6. MASTER AND SERVANT (§ 237\*)—INJURIES TO SERVANT—QUESTIONS FOR JURY.**

Whether, if a superintendent had used reasonable care, he should have known from inspection, when a sling was used, that it was unsuitable, or, when he directed a staging to be taken down, that it had become weakened by chafing to such an extent as to be unsafe, *held*, in an action for injuries to an employé due to the parting of the sling, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 237.\*]

**7. MASTER AND SERVANT (§ 272\*)—INJURIES TO SERVANT—EVIDENCE—ADMISSIBILITY.**

In an action for injuries to an employé by the fall of a staging as it was being lowered from a ship's side, owing to the parting of one of the slings by which it was suspended, evidence that the superintendent had made no examination of the sling before directing or permitting its use was admissible.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 272.\*]

**8. EVIDENCE (§ 507\*)—EXPERT TESTIMONY—MATTERS OF COMMON KNOWLEDGE.**

In an action for injuries to an employé by the fall of a staging as it was being lowered from a ship's side, owing to the parting of one of the slings by which it hung, the weakening effect upon the rope of the chafing caused by the movement of the ship, or that a physical examination would have shown the wear caused by former use, was within the common knowledge of the jury, without the aid of experts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2810; Dec. Dig. § 507.\*]

**9. EVIDENCE (§ 471\*)—OPINION EVIDENCE—STRENGTH OF ROPE.**

In an action for injuries to an employé by the fall of a staging as it was being lowered from a ship's side, owing to the parting of one of the slings by which it hung, evidence as to what strain or load a rope of like diameter would ordinarily carry was competent.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 471.\*]

Exceptions from Superior Court, Suffolk County; Wm. F. Dana, Judge.

Personal injury action by Michael Doherty against Edward S. Booth. Verdict for defendant, and plaintiff excepts. Exceptions sustained.

Harry F. R. Dolan and Thomas R. Bateman, for plaintiff. John Lowell and James A. Lowell, for defendant.

**BRALEY, J.** While on the wharf holding one of the trucks upon which it was to be received and wheeled away, the plaintiff was injured by the fall of a staging as it was being lowered from the ship's side, owing to the parting of one of the slings by which it had been suspended. It is not claimed that he was careless, and the only question is whether there was any evidence for the jury of the defendant's negligence. It is the defendant's first contention that, having provided a supply of suitable slings, he is not responsible, if the plaintiff's fellow servant, having been sent by the foreman to get eight slings, selected among others the one which broke, even if, after they had been brought, the foreman without examination directed or permitted it to be used. The

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

common-law rule, that where a sufficient supply of proper temporary appliances has been provided, from which his servants may make a selection to replace those which have become unsuitable, if a choice is made of a defective appliance whereby one of their number is injured, the master is not liable for the negligence of a fellow servant, is not under Rev. Laws, c. 106, § 71, applicable to a person intrusted by the master with superintendence. One of the purposes of the enactment of the statute was to take this defense away. The sling which broke, however, was an appliance furnished by the defendant to be used in his business, and must be considered, either at common law or under the statute, not a temporary makeshift devised by the men to aid them in the performance of their work, but as a part of the permanent instrumentalities which he had provided for his employes. *Feeney v. York Mfg. Co.*, 189 Mass. 336, 75 N. E. 733; *Donahue v. C. H. Buck & Co.*, 197 Mass. 550, 83 N. E. 1090. Accordingly, neither under the count at common law, nor under the statutory count for defective ways, works and machinery, was the defendant exonerated, if it could have been found that originally he had furnished a defective sling, or, having provided a sound sling, it had become so weakened by age and wear as to be defective, if by the exercise of reasonable diligence he ought to have known of its condition. *Rogers v. Ludlow Mfg. Co.*, 144 Mass. 198, 11 N. E. 77, 59 Am. Rep. 68; *Griffin v. Boston & Albany Railroad Co.*, 148 Mass. 143, 19 N. E. 166, 1 L. R. A. 698, 12 Am. St. Rep. 526. Nor could a verdict for the defendant have been ordered under the third count, if Taft, whom the jury could find acted as superintendent, knew or ought to have known of its condition after it had been brought, and before it was put in use, or, if sound then, whether it had not become weakened, and unsafe at the time of the accident. *McKinnon v. Norcross*, 148 Mass. 533, 20 N. E. 183, 3 L. R. A. 320; *Coleman v. Mechanics' Iron Foundry Co.*, 168 Mass. 254, 46 N. E. 1065; *Donahue v. C. H. Buck & Co.*, 197 Mass. 550, 83 N. E. 1090; *Ford v. Eastern Bridge & Structural Co.*, 193 Mass. 89, 78 N. E. 771; *Cushing v. C. W. & F. Smith Iron Co.*, 194 Mass. 310, 80 N. E. 596; *Morena v. Wilson*, 194 Mass. 378, 80 N. E. 473. The rope is described as an inch and a half thick, and all the witnesses agreed that, if in proper condition, it was of ample tensile strength to have sustained the load. If it parted when subjected to the ordinary strain for which it was designed, and nothing further appeared, the jury from their common experience could find that this would not have happened unless the rope in some way had become unsound. *Griffin v. Boston & Albany Railroad Co.*, 148 Mass. 143, 147, 19 N. E. 166, 1 L. R. A. 698, 12 Am. St. Rep. 526; *Graham v. Badger*, 164 Mass. 42, 41 N. E. 61; *Ryan v. Fall River*

*Iron Works Co.*, 200 Mass. 188, 192, 86 N. E. 310, and cases cited.

The placing of the stage in position on the ship, and its removal, were under the personal supervision of the acting superintendent. In the adjustment of the stage, a cleat on the underside held that end on the inside of the rail of the ship. After using the sling at 1 o'clock to hoist the stage into position it was unhooked from the falls, unroved, and as described by the witnesses, while the ends were thrown back on the deck, the rest of the rope was left hanging between the side of the ship, and the ship's rail underneath the stage, where it remained caught between the cleat and the rail, until lowered at 6 o'clock. During this time the ship rose and fell with the tide, and the oscillation caused the stage to move, or chafe, on the vessel and the rail. The appearance of the rope immediately after breaking was variously described as torn or unraveled, with each strand longer than the other, and as ragged and "kind of burned." The negligence of a superintendent, under such circumstances, may consist in a failure to take such precautions as a reasonably prudent man would take, before subjecting himself or his employé to the chance of injury from imperfect or insecure appliances, as well as in giving improper orders, or directing the performances of work under unsafe conditions. In the discharge of his duty it was for the jury to say if by using reasonable care he should have known from inspection, when the sling was used, that it was unsuitable, or when he directed the stage to be taken down, that it had become weakened by chafing to such an extent as to be unsafe. If they so found, then his failure to take those precautions, which might have averted the accident, was evidence of negligence in superintendence, for which the defendant would be responsible. *Crowley v. Cutting*, 165 Mass. 436, 43 N. E. 197; *Reynolds v. Barnard*, 168 Mass. 226, 46 N. E. 703; *Feeney v. York Mfg. Co.*, 189 Mass. 336, 75 N. E. 733; *Donahue v. C. H. Buck & Co.*, 197 Mass. 550, 83 N. E. 1090; *Connolly v. Booth*, 198 Mass. 577, 84 N. E. 799. The verdict directed for the defendant must be set aside, and a new trial ordered.

There remain the exceptions to the exclusion of evidence. If the lack of inspection could have been found to constitute negligence, evidence that the superintendent made no examination of the sling before directing or permitting its use was plainly admissible, and its exclusion erroneous. *Feeney v. York Mfg. Co.*, 189 Mass. 336, 75 N. E. 733. The weakening effect upon the rope of the chafing caused by the movement of the ship, or that a physical examination would have shown the wear caused by former use, were within the common knowledge of the jury without the aid of experts, but opinion evidence as to what strain or load a rope of like diameter would ordinarily

carry was clearly competent, and should have been admitted. *Meehan v. Holyoke Street Railway Co.*, 186 Mass. 511, 72 N. E. 61; *Prendible v. Connecticut River Mfg. Co.*, 160 Mass. 131, 35 N. E. 675.

Exceptions sustained.

(200 Mass. 396)

**ELECTRIC WELDING CO., Limited, v.  
PRINCE et al.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 5, 1909.)

**1. EVIDENCE (§ 37\*)—JUDICIAL NOTICE—LAW  
OF FOREIGN COUNTRY.**

The law of a foreign country will not be judicially recognized, but is a fact to be proved as any other fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 52; Dec. Dig. § 37.\*]

**2. EVIDENCE (§ 331\*)—DOCUMENTARY EVIDENCE—LAW OF FOREIGN COUNTRY—PROOF.**

The law of a foreign country may be proved by the introduction in evidence of its statutes and judicial decisions, or by the testimony of experts learned in the law, or by both.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1235, 1236; Dec. Dig. § 331.\*]

**3. TRIAL (§ 136\*)—QUESTIONS OF LAW OR  
FACT—FOREIGN LAW.**

Where the law of a foreign country is found in a single statute or decision, the language of which is not in dispute, its interpretation presents a question of law for the court; but where the law is to be determined by considering numerous decisions, more or less conflicting, or only bearing upon the subject collaterally or by analogy, and where inferences may be drawn from them, the question is one of fact for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 327; Dec. Dig. § 136.\*]

**4. CORPORATIONS (§ 271\*) — LIABILITY OF  
MEMBERS—ACTIONS—DIRECTION OF VERDICT.**

Where, upon the whole evidence, in an action to enforce a liability under the companies act (St. 25 & 26 Vict. c. 89), providing that every person agreeing to become a member of a company and whose name is entered on the registry shall be deemed a member, it might well have been found that there was no ground for charging defendants under the law of England, it was error to direct a verdict against them, and the question should have been submitted to the jury.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 271.\*]

**5. CORPORATIONS (§ 269\*) — LIABILITY OF  
MEMBERS — ACTIONS — EVIDENCE — ADMIS-  
SIBILITY.**

In an action to enforce a liability under the companies act (St. 25 & 26 Vict. c. 89), providing that every person agreeing to become a member of a company and whose name is entered on the registry shall be deemed a member, the opinion of the Supreme Judicial Court on appeal from a former trial was not evidence of the law of England and was rightly rejected, where it was only that the question of liability should have been submitted to the jury.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 269.\*]

**6. APPEAL AND ERROR (§ 987\*) — REPORT OF  
CASE FOR CONSIDERATION BY APPELLATE  
COURT—JURISDICTION OF APPELLATE COURT.**

Under Rev. Laws, c. 173, § 105, providing that a justice of the Supreme Judicial Court or

of the superior court, after verdict or a finding of facts by the court, may report the case for determination by the full court, and chapter 156, § 7, providing for the reservation of questions of law only for the full court, and section 6 of the same chapter, providing that questions of law arising upon exceptions or report or appeal, cases stated, or special verdicts shall be determined by the full court, the full court, as an appellate tribunal, on its law side has jurisdiction only of questions of law, and is without jurisdiction to determine, even with the consent of the parties, what verdict the jury should have rendered if the case had been submitted to it.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 987.\*]

Report from Superior Court, Suffolk County; Francis A. Gaskill, Judge.

Seventeen separate actions by the Electric Welding Company, Limited, against Fred H. Prince and against certain other defendants. On report from the Superior Court. Verdicts set aside, and new trials granted.

Edward F. McClennen, for plaintiff. C. A. Hight, G. S. Selfridge, and P. E. Coyle, for defendants.

KNOWLTON, C. J. These 17 cases, brought to enforce the same kind of a liability against different defendants, were tried together in the superior court and reported, by agreement of the parties, for our consideration. They have been before us previously, and the report of them may be found in 195 Mass. 242. 81 N. E. 306. At the first trial verdicts for the defendants were ordered, and the cases were reported to this court on questions of law.

There were three counts in the declaration in each case. The verdict was treated as a separate verdict on each count, and the result of the hearing in this court was to leave the verdict to stand upon the first and third counts, and to set it aside on the second count in all the cases. The order in each rescript was "Case to stand for trial on the second count." This left the cases pending on the second count only. After the close of the evidence at the last trial an amendment to the declaration was allowed, which introduced a fourth count that rests upon the same general grounds as the second count, but seemingly was designed to meet the defendant's contention that there was a variance between the averments and the proof. The principal facts appear in the report of the former decision of this court.

Besides the evidence taken at the first trial, which consisted of an auditor's report, answers to interrogatories and decisions, there was additional evidence at the last trial, consisting of a deposition, testimony of some of the defendants, and particularly the oral testimony of a very eminent English barrister, Mr. Hamilton, who has written a text-book of authority known as "Hamilton's Company Law" and has often argued important cases of company law before the

highest courts of England. He was called by the defendants and testified at great length, discussing and expounding most if not all of the numerous English decisions bearing upon the questions of law at issue in these cases. All of these decisions were put in evidence, many of them by the plaintiff, so that the court had before it a large body of English law contained in many decisions of the courts, together with the opinion of this expert in regard to these decisions and the act of Parliament in question. The statute is the "Companies Act" (St. 25 & 26 Vict. c. 89), and the language on which the plaintiff sought particularly to hold the defendants is the last clause of section 23, as follows: "And every other person who has agreed to become a member of the company under this act and whose name is entered on the registry of members, shall be deemed to be a member of the company." The plaintiff's contention is that the defendants, by virtue of their several agreements with a promoter to underwrite certain amounts of the stock of the plaintiff corporation at its organization, and of the entry of their names as stockholders upon the registry of the corporation about 16 months later, without their knowledge, followed by notice of the registration and their omission to take any action in regard to it, became bound to pay to the corporation the par value of the stock allotted to them. At the close of the evidence the presiding judge ordered verdicts for the plaintiff against the defendants Prince and Pope, each of whom had made a payment after the registration, and also verdicts for all the other defendants, and reported the cases.

The first questions that arise under the report are whether these orders were right as a matter of law. The principal contention between the parties was in regard to the law of England by which their rights are governed. The law of a foreign country is not judicially recognized by our courts, but is a fact to be proved like any other fact in a case. *Ufford v. Spaulding*, 156 Mass. 65, 30 N. E. 360; *Hazeltine v. Valentine*, 113 Mass. 472, 478. Said Mr. Justice Endicott in *Ames v. McCamber*, 124 Mass. 85-91: "When the law of another state is in dispute, it is to be determined as a question of fact by the court or jury trying the case. \* \* \* If the evidence was conflicting as the plaintiff contends, we have no authority to revise the finding, although the judge has reported the evidence." The proof of the law of a foreign country may be by the introduction in evidence of its statutes and judicial decisions, or by the testimony of experts learned in the law, or by both. If the law is found in a single statute or in a single decision, the construction of it, like that of any other writing, is a question of law for the court. As was said in *Wylie v. Cotter*, 170 Mass. 356, 49 N. E. 746, 64 Am. St. Rep. 305: "The

law of another state is a fact to be proved like any other fact, by evidence. Where the evidence is a single statute or a decision of a court, the language of which is not in dispute, the interpretation of it presents a question of law for the court, but where the law is to be determined by considering numerous decisions which may be more or less conflicting, or which bear upon the subject only collaterally, or by way of analogy, and where inferences may be drawn from them, the question to be determined is one of fact and not of law." Questions of the latter kind must be decided by the jury and not by the judge.

In the present case, if the jury followed the opinion of the expert they would decide that there was no liability on the part of those defendants who made no payment after the registration. We are of opinion that there was evidence in his testimony, taken in connection with inferences that might have been drawn from other evidence, which would have warranted them in reaching the same result, as to the defendants Prince and Pope, against whom verdicts were ordered. The counsel on both sides have been able to make strong arguments in favor of their respective contentions. A tribunal of fact well might find upon the whole evidence that there was no ground for charging the defendants under the law of England. On the other hand, all the decisions were in evidence on which this court, in the former opinion, held that there was evidence which should have been submitted to the jury on which the defendants might have been found liable. These decisions would warrant a tribunal of fact in returning verdicts for the plaintiff. In its facts this case differs materially from any decided by the English courts, and such a tribunal might think that the expert witness was wrong in his application of the principles of law to the evidence. Then, too, in connection with the determination of what the law of England is, comes the question what inferences shall be drawn from the findings of the auditor and the other evidence, considered in connection with the English statute as interpreted by the English courts. We are of opinion that all or nearly all the important questions in dispute were questions of fact, upon which the judge could not properly rule as matter of law, and that all the verdicts must be set aside.

The plaintiff's offer of the former opinion of this court as evidence was rightly rejected. The opinion was not evidence of the law of England. Our decision as to that part of the cases which was left open was only that the cases should have been submitted to the jury on the second count. In dealing with the law of England as a fact, the court held that the decisions put in evidence at the trial would warrant the jury in finding for the plaintiff.

(201 Mass. 15)

In making his report the judge, with the consent of the parties, has undertaken to present to this court the question what verdicts the jury should have rendered, if the cases had been submitted to them. The power of a judge to report a case after verdict on the law side of the court, is found in Rev. Laws, c. 173, § 105, which is in part as follows: "A justice of the Supreme Judicial Court, or of the superior court after verdict or after a finding of facts by the court, \* \* \* may report the case for determination by the full court." Under this language the facts must first be found either by a jury or by a judge, and the case may then be reported. This means the case upon the facts found, or, in other words, the questions of law. The full court as an appellate tribunal, on its law side, has jurisdiction only of questions of law. In Rev. Laws, c. 156, § 7, the power of justices of the Supreme Judicial Court to reserve questions for the full court, includes only questions of law. Under section 6 of the same chapter, the jurisdiction that is given in the classes of cases therein mentioned is only of questions of law. Questions of discretion or questions of fact of any other kind cannot be carried to the full court, either by report or by exception or appeal. Said Chief Justice Gray in *Churchill v. Palmer*, 115 Mass. 310-313: "The authority given by statute to make reports to this court extends only to questions of law. A report, like a bill of exceptions, should be so framed by the presiding judge, or by the counsel with his approval, as to state the nature of the case, and the questions of law intended to be reserved, and so much only of the facts or the evidence as may be necessary to present those questions to this court. The decision of the jury or the court below upon questions of fact, or the weight of evidence, is not open to revision here." See, also, *Sheffield v. Otis*, 107 Mass. 282. In equity the rule is different. Questions of discretion and other questions of fact are open upon an appeal or a reservation.

Under this part of the report we have no authority to take upon ourselves the duties of a tribunal of fact, and to determine what verdicts should have been rendered by the jury. No judgment could legally be founded upon such action by this court. Not even an agreement of the parties can give us jurisdiction so to act in a judicial capacity. Action of this kind at the request of the parties would be merely that of a number of arbitrators proceeding without statutory authority. Convenient and helpful as it might be to the litigants to have these cases finally decided without further litigation, we must decline to act extrajudicially in a matter that comes before us sitting as a court. In each of the cases the entry must be

Verdicts set aside and new trial granted.

## COE v. HILL et al.

(Supreme Judicial Court of Massachusetts, Middlesex. Jan. 11, 1909.)

## 1. MARRIAGE (§ 1\*)—DEFINITION.

Marriage is a social institution or status, in which, because the foundations of the family and the domestic relations rest upon it, the commonwealth has a deep interest to see that its integrity is not put in jeopardy, but maintained.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4390-4398; vol. 8, p. 7717.]

## 2. WILLS (§ 647\*)—VALIDITY OF CONDITIONS—CONDITIONS INTENDED TO BEING ABOUT SEPARATION OF HUSBAND AND WIFE.

Testator directed that upon the death of his wife his residuary estate should be divided equally among his children, except that the share that would be paid to a certain daughter should be held in trust for her and her heirs, she to receive the net income, or such portion thereof and of the principal sum as should be deemed for the best interest of herself and her children, and at the death of her husband, or upon permanent and legal separation from him, to receive the whole principal sum and income then remaining, free from any trust. *Held*, that the gift to the daughter upon the death of her husband or her permanent and legal separation from him was not founded upon a condition precedent intended to bring about her separation from him, so as to render it invalid.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1538; Dec. Dig. § 647.\*]

## 3. HUSBAND AND WIFE (§ 279\*)—AGREEMENT FOR SEPARATION—VALIDITY—WHAT LAW DETERMINES.

A deed of separation between husband and wife must be construed, and its legal effect ascertained, by the law of their domicile.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 279.\*]

## 4. TRIAL (§ 136\*)—QUESTION FOR JURY—FOREIGN LAWS.

The existence and effect of foreign laws is a question of fact.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 327; Dec. Dig. § 136.\*]

## 5. WILLS (§ 686\*)—CONSTRUCTION.

A voluntary separation by testator's daughter from her husband is not within a provision of his will terminating a trust in her favor and entitling her to receive the then remaining principal sum and income upon her permanent and legal separation from her husband.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1634; Dec. Dig. § 686.\*]

Appeal from Supreme Judicial Court, Middlesex County.

Petition by Oscalena Arville Coe against Arthur D. Hill and others, trustees, to determine a trust established by the will of Timothy E. Stewart, deceased, for the benefit of petitioner. Decree for defendants, and petitioner appeals. Affirmed.

Warren, Hoague, James & Bigelow, for appellant. Jesse W. Morton, for respondents.

BRALEY, J. By the fifth clause of his will, after having given and devised to his son, Ronald, and to his daughter, Velnah, each two undivided sevenths, free from any trust, Timothy E. Stewart devised and be-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

queathed the remaining three-sevenths of the rest and residue of his estate in trust, "to hold, manage, invest and care for in a prudent and careful manner and to collect all the income therefrom and pay all proper legal expenses thereon and pay the net income of two-thirds of said three-sevenths (or two-sevenths of said rest and residue) to my said wife Sarah for and during her life at such times, quarterly, semiannually or yearly as my said trustees may find convenient and for her best interest and at her decease to divide the principle sum so held in trust for her equally among my children or their heirs except that the portion that would be paid to my daughter Lena A. Coe shall be held in trust for her and her heirs in the same manner and for the same purposes as that portion of my estate herein specially designated and left to be held in trust for her and her heirs, and to pay the net income of one-third of said three-sevenths (or one-seventh of said rest and residue) or such portion of the net income and principal sum as they shall in the exercise of sound discretion deem for the best interest of her and her children to my said daughter Lena A., and at the decease of her husband Frank E. Coe or upon her payment and legal separation from him to pay the whole principal sum and income then remaining to my said daughter Lena free from any trust. If the said Lena A. Coe should die before her said husband or before said legal separation from him, I direct my said trustees to hold the sum held in trust for her upon the same trust for her children during their minority and to pay to said children their respective shares thereof as they respectively become of age; and if the said Lena dies as aforesaid leaving no issue, I direct that the sum held in trust for her be divided equally among my remaining children and their heirs by right of representation." By the phrase "my daughter Lena A. Coe" the testator referred to and meant the petitioner.

It is commonly said that marriage is a civil contract, requiring only the free consent of parties capable of contracting, but if this means that the law no longer regards marriage in its inception as a religious rite, after the relation of husband and wife has been entered upon, each spouse assumes toward the other, and toward society in general, certain duties and responsibilities, which cease to be mere private regulations, but are matters which deeply concern the public welfare. The contract is for life, and cannot be repudiated or terminated at the pleasure of the parties, but can only be dissolved by the state itself. It follows that, after fulfillment of the contract, marriage is a social institution, or status, in which, because the foundations of the family and the domestic relations rest upon it, the commonwealth has a deep interest to see that its integrity is not put in jeopardy, but maintained. *Smith v. Smith*, 13 Gray, 209; *Peck*

*v. Peck*, 155 Mass. 479, 80 N. E. 74; *Nolin v. Pearson*, 191 Mass. 283, 286, 287, 77 N. E. 890, 4 L. R. A. (N. S.) 643, 114 Am. St. Rep. 605; *Adams v. Palmer*, 51 Me. 480; *Ditson v. Ditson*, 4 R. I. 87; *Livingstone v. Livingstone*, 173 N. Y. 377, 66 N. E. 123, 61 L. R. A. 800, 93 Am. St. Rep. 600; *Randall v. Krieger*, 23 Wall. 137, 23 L. Ed. 121; *Maynard v. Hill*, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654; *United States v. Grimley*, 137 U. S. 157, 11 Sup. Ct. 54, 34 L. Ed. 636; *Sottomayor v. De Barros*, 5 P. D. 94. In its conservation, the law has steadily refused to sanction the validity of testamentary provisions founded upon conditions precedent to their enjoyment by the legatee which are intended to bring about the separation of husband and wife. If the testator's purpose was to induce a future separation or divorce of his daughter from her husband, upon the happening of which the fund with accrued income would immediately become payable to her, the condition for this reason would be void. *Cowley v. Twombly*, 173 Mass. 393, 397, 53 N. E. 886, 46 L. R. A. 164; *Brown v. Peck*, 1 Eden, 140; *Wren v. Bradley*, 2 De Gex & Smale, 40, 49; *Cartwright v. Cartwright*, 3 De Gex, M. & G. 982; *H. v. W.*, 3 K. & J. 382; *Wilkinson v. Wilkinson*, L. R. 12 Eq. 604; *Conrad v. Long*, 33 Mich. 78.

But while the testator's intention is the only test, the language he employed is to be construed in the ordinary sense, and for this purpose the condition, which is made dependent upon either one of two contingencies, is to be treated as a whole. If this is done, then upon either the death of the husband, or upon a divorce between them whether obtained by her or by him, the fund vests in possession but it would be a plain perversion of words to say that the testator meant, or intended, that in order to accelerate the enjoyment of the property the petitioner should procure either her husband's death or a divorce. The testator refers only to a separation, which under the laws of his domicile, whose provisions he may be presumed to have had in mind, could be grounded by her only on the husband's misconduct. He speaks of its permanency, in the sense that the marriage status was to be ended, not by a breach of marital obligations, but by an irrevocable decree for an absolute divorce. It is as if, in making provision for her future welfare, he had said, "If my daughter becomes a widow, or because of her husband's marital misconduct she lawfully obtains an absolute divorce, then the trust as to her is to be terminated, and she is to have her share of the property." The voluntary exercise by a legatee of a right which the law confers is not against public policy, and does not avoid a testamentary gift, the language of which may show the testator had in mind that such a contingency might arise. *Cowley v. Twombly*, 173 Mass. 393, 53 N. E. 886, 46 L. R. A. 164; *Thayer v. Spear*, 58 Vt. 327, 2 Atl. 161; *Born v.*

Horstmann, 80 Cal. 452, 457, 459, 22 Pac. 169, 338, 5 L. R. A. 577.

But while the trust is valid, the petitioner asks that it may be terminated upon the ground that she has been permanently separated from her husband. The deed of separation between the spouses was a lawful and binding agreement under the law of their foreign domicile, by which it must be construed, and its legal effect ascertained. *Poison v. Stewart*, 167 Mass. 211, 45 N. E. 737, 36 L. R. A. 771, 57 Am. St. Rep. 452; *Electric Welding Co. v. Prince*, 86 N. E. 947. It can there be upheld and enforced, even if no circumstances existed when the deed was executed which would support either a decree for a dissolution of the marriage, or for a judicial separation. *Hart v. Hart*, 18 Ch. Div. 670. But the existence and effect of foreign laws is a question of fact, and, under the finding of the single justice, neither the terms of the agreement nor the provisions of the domiciliary law as to the marital rights of parties thus separated severed the bonds of matrimony. If they chose, it was within their power to resume at any time conjugal relations, and upon reconciliation the deed would become a mere nullity. *Bateman v. Ross*, 1 Dow. 235. A voluntary separation not being within the terms of the will, the decree of the probate court must be affirmed.

Decree accordingly.

(200 Mass. 468)

#### DUNHAM v. CITY OF LOWELL.

(Supreme Judicial Court of Massachusetts.  
Middlesex. Jan. 6, 1909.)

#### 1. TAXATION (§ 83\*)—MODE OF ASSESSMENT—OWNERSHIP OF PROPERTY—TRUST ESTATE.

Land held in trust is properly assessed in the name of the trustee.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 172; Dec. Dig. § 83.\*]

#### 2. TAXATION (§ 501\*)—LIEN—MODE OF COLLECTION.

In the absence of statute there is no lien on real estate for taxes, and the taxes are primarily a charge on the owner, and the only manner of collecting them is by demand, distress, or arrest.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 931; Dec. Dig. § 501.\*]

#### 3. TAXATION (§ 499\*)—ABATEMENT—PERSONS ENTITLED.

Since an assessment for taxes is not primarily a lien on the land, but a personal liability against the person assessed, one becoming the owner of land after it was assessed cannot have the tax abated under Rev. Laws, c. 12, § 73, permitting one aggrieved by the taxes assessed upon him to apply for an abatement.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 499.\*]

Exceptions from Superior Court, Middlesex County; Daniel W. Bond, Judge.

Proceedings between Harrison Dunham and the City of Lowell to abate taxes. Verdict

for the city and Dunham excepts. Exceptions overruled.

Harrison Dunham & Son, for complainant.  
J. Gilbert Hill, City Sol., for respondent.

HAMMOND, J. 1. The tax was properly assessed to Brown. He held the legal title as trustee, at least so far as respected the question of taxation. *Brown v. Wright*, 194 Mass. 540, 80 N. E. 612. It was therefore a valid lien upon the land.

2. The right to abatement is solely a creature of statute. Rev. Laws, c. 12, § 73, upon which the petitioner bases his right to apply for an abatement, provides that "a person aggrieved by the taxes assessed upon him" may make such application; and the question is whether within the meaning of the statute the petitioner is a person upon whom the tax was assessed. He was not the owner of the land on May 1, 1907, as of which time the tax was assessed, and the tax could not have been legally assessed to him. He contends however, that it is primarily a charge upon the land, and that, inasmuch as he has since become the owner of the land, he is interested in the amount of the tax, which is excessive, and that in this way he is aggrieved by the assessment made as he says upon it; or, more briefly stated, the assessment for which the land may be held is an assessment upon him within the meaning of the statute.

The trouble with this contention is that, while in a certain sense and as between certain persons a tax may be regarded as primarily a charge upon the land (*Swan v. Emerson*, 129 Mass. 289, 291), yet it is not so as between the assessor or collector and the person assessed. As between them the tax is primarily a pecuniary imposition upon the latter, and the lien on the land is to be regarded simply as security of which the collector may avail himself in case of the default of the person assessed. Indeed there never is any lien upon real estate for taxes unless given by statute (see the cases cited in *Cooley on Taxation* [3d Ed.] p. 865, note 6), and our earlier tax acts contained no provision for such a lien except possibly in the case of nonresidents. See, as examples, St. 1780, p. 84, c. 43; St. 1781, p. 503, c. 16. A provision for such a lien as to real estate in Boston, however, appears in the tax act approved February 23, 1822, being St. 1821, c. 107, as found in 2 Laws Mass. p. 577. It is stated in the note by the commissioners to this statute that this feature never had appeared before in a tax act. In the tax act of 1824 the principle was extended for the first time to all taxes on real estate throughout the commonwealth, and ever since it has been one of the features of our tax system. *Hayden v. Foster*, 13 Pick. 492; St. 1830, c. 151, § 9. At first there does not seem to have been any limit of time expressly given to the exist-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ence of the lien, but by Rev. St. 1836, c. 8, § 18, the time with certain exceptions was reduced to two years. See *Hayden v. Foster*, *ubi supra*, for an instructive discussion upon this subject.

The tax, as we have said, was primarily upon the person assessed and before the existence of the lien the only manner of collecting it was by demand, distress or arrest. The very earliest directions for collecting the tax in case it was not paid on demand were as follows: "The officer shall distrain goods or cattle, if they may be had, and if no goods then land and houses, if neither goods nor lands can be had within the town where such distress is to be taken, then to attach the body." Anc. Ch. 71.

From a study of the history of our general method of taxation both as to remedies against the person assessed and as to the tax lien upon land, it clearly appears that as between the authority assessing the tax and the person assessed the latter is the person primarily liable, and that the assessment is made upon him as the land owner and not upon the land as such. Within the fair interpretation of the statute the subsequent land owner does not become upon his purchase the person assessed. The person assessed in this case was Mr. Brown and none other. The petitioner has no standing for an abatement. The case of *Hough v. North Adams*, 196 Mass. 290, 82 N. E. 46, upon which the petitioner somewhat relies, contains nothing inconsistent with this result.

Exceptions overruled.

(200 Mass. 332)

#### THAYER v. KITCHEN et al.

(Supreme Judicial Court of Massachusetts.  
Middlesex. Jan. 5, 1909.)

#### 1. TROVER AND CONVERSION (§ 82\*)—ACTIONS—DECLARATION—SUFFICIENCY.

A declaration which contains no description of specific property, but merely a general and wholly indefinite reference to classes of personal property, and which is inadequate to show the vesting of any title in plaintiff at any time, does not state a cause of action in trover.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 184, 197; Dec. Dig. § 82.\*]

#### 2. COURTS (§ 472\*)—JURISDICTION—PROBATE COURTS.

The probate court has exclusive original jurisdiction of all matters pertaining to proof of wills, and proceedings pertaining to wills belong there in the first instance, and its decrees touching those subjects are binding on all other tribunals.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 1204; Dec. Dig. § 472.\*]

#### 3. WILLS (§ 293\*)—LOST WILL—REMEDY OF LEGATEE—ESTABLISHMENT.

The probate court has authority in proper cases to allow the proof of a lost will by any competent evidence of its contents.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 672; Dec. Dig. § 293.\*]

#### 4. ACTION (§ 35\*)—STATUTORY REMEDIES—EXCLUSIVE REMEDIES.

Rev. Laws, c. 135, §§ 14, 15, requiring any person having the custody of the will of a decedent to seasonably deliver it to the probate court having jurisdiction, subjecting one failing in this duty unreasonably, after being cited into court for the purpose, to a penalty, and conferring full power as to examination under oath of any suspected person, provide a clear, ample, and expeditious remedy to one injured by the concealment or destruction by another of the will of a decedent, and he cannot sue at law for the injuries sustained.

[Ed. Note.—For other cases, see *Action*, Dec. Dig. § 35.\*]

#### 5. ACTION (§ 85\*)—STATUTORY REMEDIES—EXCLUSIVE REMEDIES.

A statutory remedy, which is clear, ample, and expeditious, is exclusive.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. § 273; Dec. Dig. § 85.\*]

Appeal from Superior Court, Middlesex County; J. Fox, Judge.

Action by Mary M. Thayer against Florence Kitchen and others. From a judgment for defendants, sustaining a demurrer to the declaration, plaintiff appeals. Affirmed.

H. N. Allin, for appellant. Blodgett, Jones & Burnham, for appellees.

RUGG, J. This is an action of tort. The defendants' demurrer to the declaration was sustained. Judgment was thereupon entered for the defendants, from which the plaintiff appealed. The allegations of the declaration are voluminous. There are some floating statements, which, it is argued, amount to an averment that one Roland gave to the plaintiff certain stocks, bonds and other securities, which the defendants have taken and secreted. But the pleading falls far short of any sufficient allegation of conversion, and indeed does not appear to be directed to any such end. That form of declaration is familiar, and its material averments are brief and lucid. If that was the kind of action intended, the declaration was plainly open to objection as composed of ambiguous, multifarious and irrelevant matter and not being a concise and substantially certain statement of the substantive and necessary facts. If, however, from the mass of language employed there is excerpted all that looks toward trover, it is plainly insufficient. There is no description of specific property, but merely a general reference to certain classes of personal property, which is utterly devoid of definiteness. It is also extremely doubtful if there is any averment of ownership, save as an alleged inference from other circumstances, which in themselves are inadequate to show any title vesting in the plaintiff at any time.

The declaration is obviously framed with another purpose. It is not necessary to recite its substance further than to say that it avers that one Roland executed and left unrevoked at his death a will, in which the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(200 Mass. 563)

plaintiff was named as beneficiary to a large sum, and that the defendants immediately after the decease of said Roland took possession of this will, and have concealed or destroyed it, and denied its existence, so that the plaintiff has failed of her legacy. The only question is whether this constitutes a cause of action at law.

Under the law and practice in this commonwealth, the probate court has exclusive original jurisdiction of all matters pertaining to proof of wills. Speaking generally, the probate courts are established for the purpose of passing upon all probate matters. Hence such proceedings pertaining to wills, in the first instance, belong there, and its decrees touching those subjects are binding upon all other tribunals. The subject has been discussed in *Waters v. Stickney*, 12 Allen, 1, 90 Am. Dec. 122, *Gale v. Nickerson*, 144 Mass. 415, 11 N. E. 714, and *Crocker v. Crocker*, 198 Mass. 401, 84 N. E. 476, and it is not necessary now to traverse the ground anew. The probate court has full authority in proper cases to allow the proof of a lost will by any competent evidence of its contents. *Tarbell v. Forbes*, 177 Mass. 238, 58 N. E. 873. Express provision is made in detail by Rev. Laws, c. 135, §§ 14, 15, requiring any person having the custody of the will of a deceased person to seasonably deliver it to the probate court having jurisdiction, with a heavy penalty upon one, who falls in this duty unreasonably, after being duly cited into court for the purpose, and conferring full power as to examination under oath of any suspected person. This court has never had occasion to consider what relief apart from statute might be open to persons injured by concealment or destruction of wills. The subject has been regulated by statute at least since St. 1692-93, p. 45, c. 14, § 2. *Hill v. Davis*, 4 Mass. 137. Decisions in other jurisdictions, where a different practice prevails, and where relief in chancery or otherwise has sometimes been afforded, need not be reviewed. It is possible that apart from the statute the probate court would be the only tribunal clothed with power in the premises. *Stebbins v. Lathrop*, 4 Pick. 33. But however this may be, the subject is one of difficulty, and precisely what relief might be given and in what court is not clear, and has never been settled in this commonwealth. Under these circumstances the statute has provided a clear, ample and expeditious remedy. By numerous decisions of this court, when the Legislature provides such a remedy, it has been held to be exclusive. Other relief will be refused where plain and adequate statutory redress is available. *Atty. Gen. v. N. Y., N. H. & H. R. R. Co.*, 197 Mass. 194, 83 N. E. 408, and cases there cited.

Judgment affirmed.

### CRONIN v. BARRY.

(Supreme Judicial Court of Massachusetts.  
Plymouth. Jan. 6, 1900.)

#### 1. REPLEVIN (§ 102\*)—JUDGMENT—FORM—ACTION—MAINTENANCE AS TO PART OF PROPERTY.

If a plaintiff in replevin maintains his action as to all the property claimed, he is entitled to judgment as to all. But, if he show his right to only part of it, two judgments should be rendered, one for plaintiff for the portion he is entitled to, and one for defendant for the rest; the case being dealt with as if there were two counts, and each party being entitled to prevail on one, though all the articles are declared for in one count.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. § 391; Dec. Dig. § 102.\*]

#### 2. APPEAL AND ERROR (§ 839\*)—JUDGMENT FOR PART OF PROPERTY—APPEAL.

If a judgment of the police court in replevin were rendered for each party for part of the property in question, an appeal by plaintiff to the superior court from the judgment for defendant would raise only the question of the correctness of that judgment; but where the judgment merely gave part of the property to defendant, and contained no express determination as to the rest, an appeal by plaintiff carried up the whole case, on the ground that a judgment in proper form had not been entered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3294; Dec. Dig. § 839.\*]

#### 3. APPEAL AND ERROR (§ 662\*) — RECORD — CONSTRUCTION.

In replevin for a terrier bitch and four pups, plaintiff claimed a trial by jury in the superior court; but the only question submitted to them seems to have been whether "the pup in question belonged to the plaintiff," to which they answered, "No." There was no record of any general verdict either for plaintiff or defendant, or that the jury dealt with the case so far as respected the bitch and other three pups; but the record contained a "finding" that judgment was to be entered for plaintiff for a bitch and three pups, and for the defendant for the return of one bitch pup. There was an appeal from the "finding and entry of judgment." *Held*, that the most consistent construction of the record would be that, upon the jury's answer to the question, the parties submitted all other questions to the court, which, either upon evidence or statements of the parties, found that the four dogs other than the one whose ownership was found by the jury belonged to plaintiff, and ordered judgment for plaintiff on that finding, and for defendant on the finding of the jury.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2850; Dec. Dig. § 662.\*]

Appeal from Superior Court, Plymouth County; King, Judge.

Action by Dennis F. Cronin against Philip Barry. From a judgment of the superior court on plaintiff's appeal from a police court, defendant appeals. Affirmed.

Nutter & King, for appellant. McCarty & Wilbur, for appellee.

HAMMOND, J. This is an action of replevin, brought in the police court of Brockton, to recover one Boston terrier bitch and four pups. The answer contains a general denial and an allegation that one of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pups is the property of Ryan and Snyder. Upon these pleadings the case was tried in that court and continued for judgment. The record shows that thereafter the following entry was made: "Judgment for defendant for return of young bitch pup with costs, \$7.48," followed by a description of the pup for purposes of identification. The record shows no other judgment. From the judgment rendered the plaintiff appealed to the superior court and there claimed a trial by jury. The record of that court shows simply that in answer to the question, "Did the pup in question belong to the plaintiff, Cronin?" the jury said, "No;" and there is no record of any general verdict either for the plaintiff or the defendant, or that the jury dealt with the case so far as respected the bitch and the three other pups. Apparently the only thing the jury were asked to do was to answer the question whether that one pup belonged to the plaintiff. The record continues as follows: "Finding. In Cronin v. Barry judgment is to be entered for the plaintiff for one Boston terrier bitch and three pups, with costs; and judgment for defendant for return of one bitch pup with costs." Then follows a description of the last-named pup, substantially like the description given in the police court. The defendant appealed from this "finding and order of entry of judgment," and the case is before us on this appeal.

The contention of the defendant, as stated by himself in his brief, is "that the question of title to the Boston terrier bitch and three pups was not before the superior court and that the order of the judge of that court was erroneous in so far as he undertook to include them in the judgment."

The record of each court is peculiar, especially that of the police court. Before the lower court the question was whether the plaintiff could maintain his action as to the five dogs which had been taken on the writ. If he maintained his action as to all, then he was entitled to judgment as to all; if only as to a part of them, then judgment as to that part. In the latter event there were two judgments to be rendered, one for the plaintiff as to the dogs he owned, and one for the defendant as to the rest of them. In such a case, although all the articles are declared for in one count, the case is dealt with as if there were two counts and each party is entitled to prevail on one. Each party is an actor, and each may have judgment and costs. *Vinal v. Spofford*, 139 Mass. 126, 29 N. E. 288, and cases cited. If, therefore, the judge of the lower court had found for the plaintiff as to four of the dogs and against him as to the fifth, he should have entered an order in the nature of two judgments, one for the plaintiff and one for the defendant; and, if that had been done, then the appeal by the plaintiff from the judg-

ment in favor of the defendant would have carried to the appellate court only the question as to the dog given to the defendant. *Vinal v. Spofford*, *ubi supra*.

But the judgment contained no express determination as to the dogs not given to the defendant, and in that respect was imperfect. The plaintiff therefore may well have appealed from the judgment upon the ground, not only that one of the dogs was given to the defendant, but upon the further ground that none was given to the plaintiff; or, in other words, that the court had failed to enter a judgment in proper form. Such an appeal from such a judgment would carry the whole case to the superior court, and we are of opinion that under the peculiar circumstances it must be held that the appeal of the plaintiff carried the whole of this case to the superior court.

In that court, as before stated, the plaintiff claimed a trial by jury; but the only question submitted to them seems to have been the one above described, namely, whether "the pup in question" belonged to the plaintiff. We cannot look beyond the record, but we must interpret it as best we can. The order of the court is entitled a "finding," and is consistent with the theory that upon the answer of the jury the parties were content to submit all other questions to the court rather than to the jury, and that upon such submission the court either upon evidence or statements of the parties found that the four dogs other than the one whose ownership was passed upon by the jury were the property of the plaintiff, and having so found ordered judgment for the plaintiff on such finding and for the defendant on the finding of the jury. This construction of the record seems to be the most consistent. The record as it stands must govern the rights of the parties on this appeal, and we are bound by it. If expressly or by fair implication the construction of it be not in accordance with the actual truth, the remedy of the aggrieved party is to be found elsewhere than by appeal.

Judgment affirmed.

(200 Mass. 569)

### HIRSH v. BEARD.

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 6, 1909.)

PLEADING (§ 236\*)—AMENDMENT OF ANSWER—DISCRETION OF COURT.

It is within the discretion of the court to allow a motion to amend an answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. § 236.\*]

Appeal from Superior Court, Suffolk County; J. B. Richardson, Judge.

Action by William Hirsh against Daniel B. Beard. Judgment for plaintiff, and defendant appeals. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Wm. Hirsh, pro sa Daniel B. Beard,  
pro se.

**HAMMOND, J.** All the material questions raised in this case are settled in *Lane v. Holcomb*, 132 Mass. 360, 65 N. E. 794. The fact that there was a declaration in set-off is immaterial. It was within the discretion of the court to allow or disallow the motion to amend the answer and the order for judgment was correct.

Judgment affirmed, with double costs.

(200 Mass. 428)

**JENKINS v. WESTON et al.**

(Supreme Judicial Court of Massachusetts.  
Suffolk. Jan. 6, 1909.)

**1. WILLS (§ 54\*)—MENTAL CAPACITY—EVIDENCE—DECLARATIONS OF TESTATOR.**

Where, in a will contest, the court fixed a limit of time within which evidence of testamentary capacity would be received, telegrams sent by testator within such time, bearing on his mental capacity, were not objectionable as too remote.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 131; Dec. Dig. § 54.\*]

**2. APPEAL AND ERROR (§ 970\*)—RULINGS ON EVIDENCE—REMOTENESS—DISCRETION.**

Whether evidence is too remote is a matter of discretion, the exercise of which will not be reversed, unless manifestly unfounded.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2849; Dec. Dig. § 970.\*]

**3. WILLS (§ 53\*)—MENTAL CAPACITY—CONDITION PRIOR TO MAKING OF WILL.**

On the issue of mental capacity to make a will in May, 1905, the opinion of testator's attending physician that testator was of unsound mind early in 1901, and the grounds for such opinion, were competent.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 117; Dec. Dig. § 53.\*]

**4. EVIDENCE (§ 478\*)—MENTAL CAPACITY—NONEXPERT OPINION.**

Where a nonexpert witness as to testator's mental capacity testified to his observations and facts of which he had personal knowledge, it was not material that the testimony in some measure involved his opinion as to matters which could not be reproduced or described precisely as they appeared to the witness.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2242; Dec. Dig. § 478.\*]

**5. WILLS (§ 321\*)—JOINT TESTAMENT—CLOSING ARGUMENT—RIGHT TO MAKE.**

Where two will contestants left the active management of the contest to P.'s counsel, who substantially conducted the whole trial on their behalf, the court properly allowed him to make the closing argument to the jury.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 761; Dec. Dig. § 321.\*]

**6. WILLS (§ 329\*)—INSTRUCTIONS—APPLICABILITY TO ISSUES.**

Where the only issue submitted in a will contest was whether the testator was of sound mind, the court properly refused certain requests, not bearing on such issue, which could have had no other effect than to distract the jury's attention from the issue submitted.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 778; Dec. Dig. § 329.\*]

Exceptions from Supreme Judicial Court, Suffolk County.

Petition by Lawrence W. Jenkins for the allowance of the will of William H. Weston, deceased, to which Henry E. Weston and others filed objections. From a decree of the probate court, disallowing the will, petitioner appealed to the Supreme Judicial Court, where testator was again found not to have testamentary capacity, and plaintiff brings exceptions. Overruled.

There were two contestants to the will upon the record: Henry E. Weston, a brother of the testator, and Marland L. Pratt, of Boston, a creditor. Copies of papers in the case are made a part hereof.

At the trial before the jury Henry E. Weston was represented by Mr. Berenson as his attorney, who called no witnesses, relying upon evidence introduced by others, and took no part in the trial except to ask a question of two of the witnesses for the petitioner, and to assist in the preparation, and, by conference with other counsel, in the trial, of the case. Marland L. Pratt was represented by Mr. Brandeis and Mr. Wilkie as attorneys, and caused to be taken and read the depositions of Dr. MacDonald and W. E. Heakes, and caused to be called all the witnesses who were examined on behalf of the contestants, and his counsel, in his behalf, made the opening and closing address to the jury. Said counsel, in opening, said to the jury that he appeared for Mr. Pratt, who contested as a creditor.

It appeared that the will was executed in Boston, April 25, 1905, and that the testator died at Lake George, N. Y., upon May 20, 1905, aged 43 years, and leaving his brother Henry as his only next of kin.

It was contended by the respondents that the testator was of unsound mind as the result of general paresis and alcoholism and cigarette smoking. The court fixed January 1, 1901, as the reasonable limit of time as to which evidence of the condition of the testator could be introduced.

The petitioner introduced the testimony of the witnesses to the will, who severally testified to its execution, and that in their opinion the testator, at the time of the execution of the will, was of sound mind. Neither of these witnesses had had any prior acquaintance with the testator, and had never seen him at any other time or place than the place and time of the execution of the will.

The contestant Pratt testified in his own behalf that he lived in Boston all his life, and first knew the testator about 1887, and saw him frequently before he went to Nova Scotia in 1895, and first had business relations with him in 1897; that in 1897 he made a loan of \$25,000, and an agreement was signed by the testator and his brother Henry; that at the same time a will was

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

executed by the testator and placed in the hands of the witness' counsel, Mr. Champlin; that later he, Pratt, advanced \$5,000 more upon a supplemental agreement; that from 1897 to 1900 he saw the testator three or four times a year, either in Nova Scotia or in Boston, and about the same number of times per year to October, 1902, when testator came to Boston, and after that saw him quite a little in Boston; that he never received any part of the \$25,000, but did receive some \$2,000 in interest; and that he recovered a judgment January 6, 1904, against the testator and his brother Henry, for \$40,183.66, which had not been paid in any part, and that no defense was made to the suit.

The witness identified four telegrams. Witness first saw the telegrams about January 5, 1901, and later talked with the testator about them. The telegrams were then offered in evidence as statements bearing on testator's mental condition at that time, and subject to the defendant's objection as too remote, and to his exception, were admitted to prove a progressive disease of general paresis.

The witness further testified as to alleged changes in testator's speech and personal appearance, and identified many letters from the testator, which were read in evidence.

The contestant Pratt called several witnesses, who testified, in substance, to their acquaintance with the testator for periods of from 5 to 12 years before his death, to his mental and physical condition during their early acquaintance, and to alleged changes in his physical appearance, personal habits, memory, manner of conversation, and mental condition, and also called Drs. Lane and Putnam, medical experts, who testified as to the character and causes of general paresis, and the symptoms tending to show its existence.

Dr. Lane, in reply to the hypothetical question of Pratt's counsel, testified that in his opinion testator was not of sound and disposing mind; but upon cross-examination upon questions repeating to him each specific clause in the will, testified as to each clause that in his opinion testator did have sufficient intelligence, memory, recollection, and understanding to know and appreciate that he was making a will, to recall and know the persons named in the clause, and to realize and understand that he was giving his property to them respectively.

Dr. Putnam testified that he examined the testator as to his mental condition in 1901, by arrangement with the contestant Pratt and Mr. Cogswell, of the petitioner's counsel; that he made no note of any parietic condition, and did say he could go back to his work, but did not recall telling Mr. Cogswell that there was no unsoundness of mind.

The deposition of S. R. Heakes, taken on behalf of said Pratt, was read, from which it appeared that the deponent was 29 years of age, and his address was 60 Wall street, New York, and his occupation a mining man;

that he knew testator from 1901 until he left Nova Scotia; that he knew the contestant Pratt, and had known him as his employer in Nova Scotia from some time in 1901; that he knew the habits and manner of living of testator, and saw him daily when he was at the mines, during a period of his service under Mr. Pratt; that he noticed changes, during the time he knew him, in his intelligence and understanding and physical condition; and these changes were gradually giving himself over to extreme dissipation; that he noticed peculiarities in his speech and conduct—giving orders to workmen and afterwards apparently sincerely denying it, claiming to have no recollection of the matter. In answer to the interrogatory, "Did you observe in your association with said William H. Weston any incoherence in the talk and conversation of said Weston?" he answered "Yes," and to the interrogatory, "If so, please state as many instances of such as you can recall," subject to the petitioner's exception, he answered, "Sometimes in consulting him on matters which he tried to superintend it was impossible to get any intelligent information; he seemed to want to do it, but could not concentrate his thoughts." To the interrogatory, "If within your knowledge he used any of these [intoxicants, drugs, or tobacco], please state which, to what extent, and whether his use of such articles, or any of them, increased or decreased during the time of your association with the said Weston," the answer was, "From the time I first saw Weston until he left Nova Scotia he was addicted to the use of liquor. These habits never changed, but seemed rather to have a fuller mastery." The plaintiff objected to the last words of the answer, "but seemed rather to have a fuller mastery," but the same were admitted subject to his exception.

"Int. 18. Please state whether or not, within the time you knew him intimately, said Weston failed mentally or physically. Ans. Yes; both.

"Int. 19. If so, please state, as far as you remember, any particular instances or details from which said knowledge has been acquired. Ans. On one occasion the placing of a large order for general mining supplies with Mr. Percy Austin, of Halifax, afterwards denying it, supplies being returned to shipper. The deliberate act of scaring horses driven by me in the middle of the night, causing me the slight inconvenience of a broken arm and a few broken ribs. Although Weston was present at the scene which followed, it was not until the following day that he came to say he had just heard of my accident."

To the last paragraph of this answer, beginning with "deliberate act of scaring horses," the plaintiff objected, and the same was admitted subject to his exception.

The contestant Pratt also offered the deposition of W. Huntley MacDonald, of Anti-

gonish, N. S., taken by the contestant, from which it appeared that deponent's name was W. Huntley MacDonald, his address was Antigonish, N. S., and that his occupation was physician; that he obtained his medical education at the Harvard Medical School at Boston and had been practicing for 12 years; that he knew William H. Weston, professionally, at Antigonish, from January 8 to February 19, 1901; that he rendered the said Weston medical attendance; that he was acquainted with his habits and manner of living; that his habits were irregular; that he was a hard drinker of alcoholic liquors; that he was an inveterate cigarette smoker; that in his opinion the continuation of such habits would render him a physical and mental wreck. To the ninth interrogatory and answer the petitioner objected as too remote, and the same were admitted subject to his exception:

"Int. 9. At the time you knew him did you consider Mr. Weston to be of sound and disposing mind and memory? Ans. At the time I knew Mr. Weston I did not consider Mr. Weston to be of sound mind."

The tenth interrogatory and answer were admitted subject to the petitioner's exception as too remote:

"Int. 10. If not, please state concisely, briefly, and in particular the circumstances, if any, upon which you base your opinion to interrogatory 9. Ans. He was not apparently aware of his physical and mental condition, and I could not impress upon him the necessity of his giving up his habits of living. He did not give intelligent answers to all my questions, and seemed reckless as to the state of physical or mental health he might attain, and seemed dull in both comprehending and answering questions I asked him, and seemed to have an inane and silly manner in understanding and answering questions. He was also a sufferer from alcoholic neuritis."

Many witnesses were called in rebuttal by the petitioner, who severally testified in substance as to the length of their acquaintance with the testator, and to their knowledge of his mental and physical condition during the periods of several years before his death, and that there was no change in his mental condition, memory, power of speech, or intelligence, and no change in his physical condition except that arising from tuberculosis of the lungs, from which he was apparently suffering.

A medical expert, called by the petitioner, in reply to the hypothetical question of counsel, testified that in his opinion testator was of sound mind at the time of the making of the will. Two other physicians testified, one that he met and made a physical examination of the testator upon April 30th and May 7th, previous to his death, and, in his opinion, he was of sound mind, and the other, that he had known testator several years, met him a number of times in the few years immedi-

ately preceding his death, spent the afternoon with testator 36 hours before his death, and that, in his opinion, he was of sound mind.

There was also evidence that testator was about 42 years old when he died; that he had studied at Harvard College and Heidelberg, and graduated from the Institute of Technology; that from October 3, 1904, until May 5, 1905, when he left Boston for Lake George, he was in the employ of Prof. Richards, of the Institute of Technology, engaged in work which was practically preparing lectures for the classes, and requiring research and original investigation, and preparing articles which required the examination of French and German periodicals, and rewriting the same in English, and that he took with him, upon leaving Boston, manuscript to revise.

There was other evidence tending to show unsoundness of the mind of the testator at the time of the execution of the instrument purporting to be his last will.

At the close of the testimony the petitioner asked the court to rule and instruct the jury as follows:

"(1) Upon all the evidence the respondent Marland L. Pratt has no standing to object to the allowance of the will of May 2, 1905.

"(2) The allowance of the will in question, dated May 2, 1905, will not affect the rights of Marland L. Pratt adversely.

"(3) A written contract to make a will in favor of a certain person is binding, and gives the party with whom contract is made the rights of a creditor in case contract is not kept."

The said rulings and instructions were refused by the court, and as to each request the petitioner duly excepted.

Counsel for Pratt argued to the jury in closing his case, among other matters, that the execution of the will in question was a great fraud upon the contestant Pratt, and in direct violation of the testator's agreement to make the earlier will. He was not interrupted in argument by counsel for executors, nor was the court's attention called to the argument by opposing counsel, nor was any request for ruling based on that incident or argument presented to the court at the time or subsequently.

The court did not instruct the jury as to the legal effect of the will by the donee of a power upon the property affected thereby in reference to the rights of creditors, nor give any instructions as to the rights of creditors of the donee of a power in the event of its exercise by will, nor upon any of the matters covered by said requests, but no exception was taken thereto except as above noted.

Adequate instructions were given as to all other issues raised to which no exception was taken. Except as hereinbefore set forth, no objection was at any time made to the participation in the trial by Pratt and his counsel, nor was any such objection made until after the close of the evidence.

The jury answered the issue in the negative, and the petitioner, being aggrieved by the refusals to rule, above set forth, prays that his exceptions may be allowed.

H. R. Bailey and W. C. Cogswell, for petitioner. Berenson & Berenson, for respondent Weston. Rand, Vinton & Wakefield, for respondent Pratt.

**SHELDON, J.** 1. The petitioner's exceptions to the admission of testimony cannot be sustained.

The telegrams admitted were objected to only as being too remote. But each one of them was within the limit of time which previously had been fixed by the court, so far as appears without objection by either party. Three of these telegrams, those sent by the alleged testator, come within in the general doctrine that the appearance, acts, conduct and declarations of one whose mental condition is in issue may be put in evidence, if they are of such a character as to throw light upon that question, and if they are not too remote in time. And whether they are too remote in time is a question which must be determined in the discretion of the justice who presides at the trial and hears the evidence, and his conclusion is not to be reversed unless it was manifestly unfounded. *Hagar v. Norton*, 188 Mass. 47, 52, 73 N. E. 1073; *McCoy v. Jordan*, 184 Mass. 575, 576, 577, 69 N. E. 358; *Lane v. Moore*, 151 Mass. 87, 90, 23 N. E. 828, 21 Am. St. Rep. 430; *Commonwealth v. Pomeroy*, 117 Mass. 143, 148; *Shailer v. Bumstead*, 99 Mass. 112, 130. We find nothing to indicate that this discretion was not rightly exercised in the case at bar. And for the same reason the testimony of Dr. MacDonald to his opinion that the alleged testator was of unsound mind early in 1901, and to the grounds of this opinion, was competent. It was not claimed that Dr. MacDonald, who had been an attending physician to the deceased, was not qualified under our rules to express an opinion.

The testimony of Heakes was not incompetent as including statements of his mere opinion. He testified to the things which he himself had observed. His testimony cannot be said to have been irresponsible. It does not appear to have gone beyond his personal knowledge. It comes fairly within the rule that a witness may state the results of his observation, even though this does in some measure involve his opinion or judgment as to matters which cannot be exactly reproduced or described to the jury precisely as they appeared to the witness. So far as they include opinions, these are rather conclusions in the nature of facts which have become a part of the knowledge of the witness than mere opinions. They are received ex necessitate, because of the impossibility of reproducing the numerous particular facts upon which they are founded. This is the general doctrine of our decisions. *Partelow v. Newton & Boston Street*

*Railway*, 196 Mass. 24, 31, 81 N. E. 894; *McCoy v. Jordan*, 184 Mass. 575, 578, 69 N. E. 358; *O'Neill v. Hanscom*, 175 Mass. 313, 56 N. E. 587; *Commonwealth v. Sturtivant*, 117 Mass. 122, 123, 19 Am. Rep. 401; *Barker v. Comins*, 110 Mass. 477; *Parker v. Boston & Hingham Steamboat Co.*, 109 Mass. 449. This doctrine was fully discussed, with abundant citation of authorities by Rugg, J., in *Gorham v. Moor*, 197 Mass. 522, 84 N. E. 436.

2. The question whether Pratt had any standing to object to the allowance of the will is not open upon these exceptions. The jury were not to determine whether the will should be allowed, but simply to pass upon the issue whether the alleged testator was of sound and disposing mind and memory. No question was raised when the case was opened to the jury or while the evidence was going in, of the right of Pratt as well as of Henry E. Weston to participate in the trial. Apparently by arrangement between these two as contestants, the active management of the contest against the will was left mainly to Pratt's counsel. It was he who called all the witnesses for the contestants, who had procured and who put in the depositions taken in their behalf, who cross-examined the petitioner's witnesses except for "a question or two" put by the other counsel, and who substantially conducted the whole trial, and manifestly was relied upon by both contestants to make the concluding argument to the jury. All this had been done with the concurrence of the other contestant, and without any hint of objection by the petitioner. Under this state of facts, the justice had a perfect right to allow Pratt's counsel to make the closing argument to the jury, if indeed he was not bound to do so. It could not be material whether the counsel in making that argument was to be regarded as acting for the one or the other contestant. It was the weight of his arguments and not his representative capacity that was to be considered. If that argument contained anything objectionable, yet the petitioner did not care to make the objection or to ask for any rulings with reference thereto. And the justice might well refuse to give to the jury either of the three instructions asked for. None of them had any bearing upon the only issue which was to be submitted to the jury, and upon which alone it was the duty of the justice to instruct them; and the giving of them could have had no other effect than to distract the attention of the jury from that issue. Accordingly, we need not consider the very interesting question whether Pratt, by reason of the appointment made in a former will in his favor, had any right to object to the allowance of this will, or whether any of his rights would have been injuriously affected by such allowance. If, now that it has been settled by the verdict of the jury that William H. Weston was of unsound mind when he executed this alleged will

(Busiere v. Reilly, 189 Mass. 518, 520, 75 N. E. 958; Crocker v. Crocker, 188 Mass. 16, 73 N. E. 1068), the petitioner cares to raise the question of Pratt's right to be heard in opposition to its allowance, we need not consider whether he can do so at the hearing which will be had before a single justice to determine what decree shall be entered.

The bill of exceptions stated that adequate instructions, to which no exceptions were taken, were given as to all issues other than those referred to in the three requests for rulings. This was all that was called for.

Exceptions overruled.

(171 Ind. 574)

WARRUM et al. v. WHITE. (No. 21,170.)

(Supreme Court of Indiana. Jan. 15, 1909.)

1. CONTRACTS (§ 147\*)—CONSTRUCTION—INTENT OF PARTIES.

The leading purpose in construing contracts is to ascertain the parties' intent, which must be determined from the whole contract, if possible, and, while the words are to be taken in their ordinary popular sense, they will not be so construed if the parties' intention, as manifested by the contract, shows that they were used in a different sense.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.\*]

2. EXECUTORS AND ADMINISTRATORS (§ 329\*)—SALES OF ESTATE—PROPERTY SUBJECT TO SALE—"REVERT."

A mother, who had inherited from her husband an undivided one-third of a farm in fee simple, contracted with her children and grandchildren, who had inherited an undivided two-thirds of the farm, the children to give the mother their interest during her life, or as long as she remained a widow, she to have the profits for her support and the improvement of the farm, and to pay all demands that might come against the estate, taxes, etc., and at her death or remarriage the farm, together with its appurtenances, was to "revert" to the legal heirs equally. *Held*, that inasmuch as the two-thirds interest of the children and grandchildren was theirs in fee simple, subject to the mother's life interest under the contract, the word "revert," if used solely in connection with that portion, would be unnecessary, and the parties' intention was that the farm as a whole should revert to the legal heirs equally, the word "revert" being used in the sense of "go" or "pass," and hence the mother's one-third interest could not after her death be sold to pay debts of her estate.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 329.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6213, 6214.]

3. EXECUTORS AND ADMINISTRATORS (§ 336\*)—SALE OF LAND TO PAY DEBTS—PETITION—NECESSARY ALLEGATIONS—STATUTORY PROVISIONS.

An amended petition by an administratrix to sell land to pay decedent's debts was demurrable, where it did not contain the allegations required by Burns' Ann. St. 1908, § 2854, prescribing certain allegations as to decedent's real and personal property, amount of claims against the estate, etc.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 336.\*]

Appeal from Circuit Court, Hancock County; R. L. Mason, Judge.

Proceeding by Victoria L. White, administratrix of Polly Lineback, against Matilda Warrum and others, to sell real property to pay indebtedness of the estate. From a judgment ordering the sale, defendants appeal. Reversed, with instructions.

Henry Warrum, Wm. W. Cook, and Chas. H. Cook, for appellants. Felt & Binford, for appellee.

MONKS, J. This proceeding was brought by the administratrix of the estate of Polly Lineback, deceased, to sell the undivided one-third of certain real estate to pay the indebtedness of said estate. Such proceedings were had that the court ordered the sale of the real estate as asked for in the petition.

The errors assigned call in question the action of the court, in overruling the demurrer for want of facts to the amended petition, and in sustaining appellee's demurrer for want of facts to the second paragraph of answer, and appellee's demurrer for want of facts to the amended cross-complaint. The second paragraph of the answer and the cross-complaint are founded upon a written contract and are substantially the same. It appears therefrom that Jonathan Lineback died intestate in 1874, the owner in fee simple of 70 acres of land described in the petition. After his death, Polly Lineback, his widow, who inherited the undivided one-third of said land in fee simple, and their children and grandchildren, who inherited the undivided two-thirds thereof in fee simple, executed a contract in writing, by which said children gave their undivided two-thirds of said land during her life, or such a portion thereof as she remained a widow, "she to have all the profits and proceeds of said farm or such portion thereof as is necessary to support her during her widowhood, and the remainder, if any, to be spent in improving the farm," in consideration of which said Polly Lineback covenanted and agreed that "she would pay all the demands that may come against said estate that have not been liquidated, and keep the taxes paid on said real estate, to properly till the cultivated lands and harvest the crops from the same or to have such done at her expense, and to pay only a reasonable hire for the same, and further to take proper care of the appurtenances of said farm, and to keep said farm in good condition and at the death of said Polly Lineback or her remarriage, said farm, together with its appurtenances, shall revert to the legal heirs equally." Said Polly Lineback took possession of said real estate under said agreement and occupied and controlled the same from the date of said agreement, in 1874, until her death in February, 1907, and received and appropriated to her own use and benefit the rents and profits of said real estate. Said children and grand-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

children of said Jonathan and Polly Lineback living at the time of the death of said Polly, and the descendants of those who were then deceased, took possession of said real estate after her death and claimed "to own the same in fee simple, not only the undivided two-thirds as the heirs of Jonathan Lineback, but also, under and by virtue of said contract, the undivided one-third thereof which said Polly Lineback inherited from her said husband, and that said Polly had no interest in said real estate, and the same was not liable to be sold to make assets to pay the indebtedness of her estate." Appellees insist: "That said contract is not such an instrument as will carry title from one party to another, nor is it a contract for the sale of real estate; that the clause in the contract 'that at the death of Polly Lineback the farm, together with its appurtenances, shall revert to the legal heirs equally,' could only apply to two-thirds, the use of which had been granted to said Polly during her lifetime or widowhood, for the term 'revert' necessarily implies that the one to whom the property reverts has previously owned the same and has granted some interest therein upon certain conditions, upon the happening of which the interest granted reverts to the person who had formerly granted their interest."

The leading purpose in the construction of contracts is to ascertain the intent of the parties. In ascertaining this intent, the court will, if necessary, consider the contract in the light of the position and surroundings of the parties attending its execution. 17 Am. & Eng. Ency. of Law (2d Ed.) 21-23; Barney v. Indiana, etc., R. Co., 157 Ind. 228, 231, 232, 61 N. E. 194; Ransdel v. Moore, 153 Ind. 393, 401, 53 N. E. 767, 53 L. R. A. 753, and authorities cited; Howard v. Adkins, 167 Ind. 184, 78 N. E. 665, and authorities cited. The intent is to be determined from the whole contract, and every clause, and even every word therein, when possible, should have assigned to it some meaning. While the words are to be taken in their ordinary and popular sense, they will not be so construed if the intention of the parties, as manifested by the contract, shows that they are used in a different sense. Cyc. 578 (3), 579 (5), 582 (2), 585 (10); 17 Am. & Eng. Ency. of Law (2d Ed.) 19; Bishop on Cont. (2d Ed.) §§ 380, 382, 383, 384, 404; Evansville, etc., R. Co. v. Meeds, 11 Ind. 273; Durland v. Pitcairn, 51 Ind. 426, 443; Beard v. Lofton, 102 Ind. 408, 411, 2 N. E. 129; Russell v. Merrifield, 131 Ind. 148, 30 N. E. 957; Kennedy v. Kennedy, 150 Ind. 636, 50 N. E. 756.

To entitle the "legal heirs" of Jonathan and Polly Lineback to take possession of and

own the undivided two-thirds of said real estate at her death, it was not necessary to provide that the same should revert to them, because the life estate granted by said heirs to her terminated at her death, and they, as the owners of the fee of said undivided two-thirds, were entitled to the possession thereof at that time without any provision that the same revert to them. The use of the word "revert" was therefore wholly unnecessary, if held only to apply to the undivided two-thirds of said real estate already owned in fee simple by said "legal heirs." The provision, however, is not that the undivided two-thirds of said farm shall revert to said legal heirs, but that "the farm, together with its appurtenances, shall revert to the legal heirs equally." It is clear that it was the intention of the parties that the entire farm "revert" to said legal heirs, for that is the provision in the contract. Applying the rules of construction heretofore stated, and giving effect to every word and clause in said contract, it is evident that it was the intention of the parties that the undivided one-third of said real estate inherited by said Polly Lineback from her husband should be the property of the "legal heirs" under said contract, and that the word "revert" was used in the sense of "go or pass." Doren v. Gillum, 136 Ind. 184, 136-139, 35 N. E. 1101, and cases cited; 2 Sharswood & Budds Leading Cases, etc., p. 273; Beatty v. Trustees, 39 N. J. Eq. 452, 462, 463; Johnson v. Askey, 190 Ill. 58, 60 N. E. 76; Blackmore v. Blackmore, 187 Ill. 107, 58 N. E. 410; Bennett's Estate, 134 Cal. 320, 66 Pac. 370; Halstead v. Hall, 60 Md. 209, 213, 214. See, also, Taylor v. Stephens, 165 Ind. 200, 205, 206, 74 N. E. 980, and cases cited; Borgner v. Brown, 133 Ind. 391, 33 N. E. 92.

It follows that under the allegations of the second paragraph of the answer and the amended cross-complaint the undivided one-third of said real estate described in the petition was not "liable to be made assets for the payment" of the indebtedness of said estate. The court therefore erred in sustaining the demurrer to the second paragraph of appellant's answer and in sustaining the demurrer to the amended cross-complaint. The court also erred in overruling appellant's demurrer to the amended petition because it did not contain the allegations required by section 2354, Burns' Ann. St. 1908; section 2491, Burns' Ann. St. 1901.

Judgment reversed, with instructions to sustain appellant's demurrer to the petition and to overrule the demurrer to the second paragraph of answer and the amended cross-complaint and for further proceedings not inconsistent with this opinion.

(171 Ind. 579)

**THOMPSON et al. v. BEATTY et al.**  
(No. 21,297.)

(Supreme Court of Indiana. Jan. 15, 1909.)

**1. APPEAL AND ERROR (§ 1012\*) — REVIEW — SUFFICIENCY OF EVIDENCE.**

If the judgment is supported in every material respect, though the evidence may seem weak and unsatisfactory, there is no error of law justifying a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8990; Dec. Dig. § 1012.\*]

**2. HIGHWAYS (§ 77\*) — PROCEEDINGS TO VACATE—EVIDENCE.**

In a proceeding to vacate a highway, evidence held sufficient to sustain a judgment for petitioners.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 267; Dec. Dig. § 77.\*]

**3. APPEAL AND ERROR (§ 1011\*) — REVIEW — WEIGHT OF EVIDENCE.**

The Supreme Court will not weigh conflicting oral testimony to determine its preponderance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3983; Dec. Dig. § 1011.\*]

Appeal from Circuit Court, Dubois County; E. A. Ely, Judge.

Proceeding by George W. Beatty and others against Henry G. Thompson and others to vacate a public highway. Judgment for petitioners, and remonstrants appeal. Affirmed.

Bretz & McFall and Cox & Hunter, for appellants. W. A. Traylor and Bomar Traylor, for appellees.

**MONTGOMERY, J.** This is a proceeding to vacate a public highway, instituted before the board of commissioners of the county of Dubois. A trial in the circuit court, upon appeal, resulted in a finding and judgment in favor of the petitioners. Appellants' motion for a new trial, upon the ground that the decision of the court is not sustained by sufficient evidence and is contrary to law, was overruled, and that ruling is assigned as error. The only question presented therefore is whether there is any evidence in support of the decision of the trial court. If the judgment below is supported in every material respect, although the evidence may seem to us weak and unsatisfactory, no error of law will be presented justifying a reversal. *Speck v. Kenoyer*, 164 Ind. 431, 73 N. E. 896; *Republic Iron & Steel Co. v. Berkes*, 162 Ind. 517, 70 N. E. 815; *Mead v. Burk*, 158 Ind. 577, 60 N. E. 338; *Heath v. Sheets*, 164 Ind. 605, 74 N. E. 505; *Chicago, etc., R. Co. v. Vandenberg*, 164 Ind. 470, 73 N. E. 990.

It appears from the evidence of appellees' witnesses: That the road in controversy has been established for more than 15 years, but has never been worked, and was regarded by the road supervisor as dead; that the route is hilly from end to end and passes over one unusually high and steep hill; that a

part of the road has never been traveled with a wagon, and the entire roadway was full of ditches and gullies from two to three feet in width and depth, and overgrown with weeds, briars, and bushes; that it would cost \$400 to \$500 to make the road passable and a great amount to put it in good condition; and that there are other available roads in the neighborhood, in better condition. This evidence was clearly sufficient to sustain the decision of the trial court. We need not examine appellants' evidence, as the rule is firmly settled that this court cannot, and will not attempt to, weigh conflicting oral testimony for the purpose of determining its preponderance. *Alerding v. Allison* (Ind.) 83 N. E. 1006; *Hudelson v. Hudelson*, 164 Ind. 694, 74 N. E. 504; *Parkison v. Thompson*, 164 Ind. 609, 73 N. E. 109; *Diamond, etc., Coal Co. v. Cuthbertson*, 166 Ind. 290, 76 N. E. 1060; *Chicago, etc., R. Co. v. Wysor Land Co.*, 163 Ind. 288, 69 N. E. 546; *White v. Redenbaugh*, 41 Ind. App. 580, 82 N. E. 110; *Union Tr. Co. v. Buckland*, 34 Ind. App. 420, 72 N. E. 158; *Morgan v. Jackson*, 32 Ind. App. 189, 69 N. E. 410.

We are unable to say that the court erred in overruling appellants' motion for a new trial, and the judgment is therefore affirmed.

(171 Ind. 554)

**BUTT et al. v. IFFERT et al.** (No. 21,118.)  
(Supreme Court of Indiana. Jan. 12, 1909.)**1. HIGHWAYS (§ 77\*)—PROCEEDINGS TO VACATE—STATUTORY PROVISIONS.**

Proceedings commenced prior to the enactment of Highway Act 1905 (Acts 1905, p. 521, c. 167), are governed by the highway laws in force at the commencement of the proceeding, and not by the act of 1905, section 123 (page 579), providing that the act shall not affect any pending litigation, but that it shall be concluded as if the act had not been passed.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 77.\*]

**2. APPEAL AND ERROR (§ 1042\*) — REVIEW — HARMLESS ERROR — STRIKING OUT PLEADING.**

The overruling of a motion to strike out a part or all of a pleading, though erroneous, would not be reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4112, 4113; Dec. Dig. § 1042.\*]

**3. APPEAL AND ERROR (§ 525\*)—RECORD—INSTRUCTIONS—STATUTORY PROVISIONS.**

Under the express provisions of Acts 1903, p. 338, c. 193, § 1, all instructions requested as provided therein, whether given or refused, are a part of the record without bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2376; Dec. Dig. § 525.\*]

**4. APPEAL AND ERROR (§ 701\*)—REVIEW—REFUSAL OF INSTRUCTION—NECESSITY FOR EVIDENCE IN RECORD.**

Refusal of an instruction may be reviewed, though the evidence is not in the record, where the record shows that the refusal was not on the ground that it was not applicable to the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2933-2935; Dec. Dig. § 701.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

# 5. HIGHWAYS (§ 77\*)—PROCEEDINGS TO VACATE—ISSUES.

In a proceeding to vacate a highway, where there was a remonstrance on the ground that the vacation would not be of public utility, if the jury, on appeal to the circuit court, found that the road proposed to be vacated was not of public utility, petitioners were entitled to recover.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 272; Dec. Dig. § 77.\*]

Appeal from Circuit Court, Elkhart County; Lemuel N. Royse, Special Judge.

Proceeding by Henry W. Butt and others against John M. Iffert and others to vacate a highway. The board of county commissioners ordered the road vacated, and remonstrants appealed to the circuit court, which rendered judgment for remonstrants, and petitioners appeal. Reversed, with instructions to sustain petitioners' motion for a new trial.

Lou W. Vail, for appellants. D. J. Troyer and Miller, Drake & Hubbell, for appellees.

MONKES, J. Appellants brought this proceeding before the board of commissioners of Elkhart county in 1904 to vacate a public highway. The first viewers reported that the vacation of said highway would be of public utility. Appellees filed a remonstrance against the vacation of said highway, on the ground that the same would not be of public utility. John M. Iffert, one of the appellees, filed a remonstrance for damages. The re-viewers reported that said vacation would be of public utility, and for \$100 damages. The board ordered that the road be vacated, and that said damages be paid by the petitioners. Appellees appealed to the court below, where the same was tried in October, 1906, the trial resulting in a verdict that the vacation of said highway would not be of public utility, upon which final judgment was rendered in favor of appellees. Under the provision of section 123, Highway Act 1905 (Acts 1905, p. 579, c. 167), this case is governed by the highway laws in force when the proceeding was commenced, and not by said act of 1905. The errors assigned call in question the action of the court in overruling appellant's motion to strike out the remonstrance for damages and the motion for a new trial.

It has been uniformly held by this court that, even if the action of the court in overruling a motion to strike out a part or all of a pleading were erroneous, it would not constitute reversible error. *Rowe v. Major*, 92 Ind. 206, 209; *Crawford v. Anderson*, 129 Ind. 117, 118, 28 N. E. 314; *Pittsburgh, etc., R. Co. v. Beck*, 152 Ind. 421, 424, 53 N. E. 439; *Elliott's App. Proc.* § 639. Upon the question attempted to be presented by said assignment of errors, see sections 6746, 6747, *Burns' Ann. St.* 1901; *Lewis on Em. Dom.* (2d Ed.) § 134; *Elliott's Roads and Streets*,

§ 878, and cases cited in note 4, p. 962; 4 *Sutherland on Damages* (3d Ed.) § 1061; 21 *Am. & Eng. Ency. of Law* (2d Ed.) 714-716; *Cummins v. City of Seymour*, 79 Ind. 491, 501, 502, 41 *Am. Rep.* 618; *Powell v. Bunger*, 91 Ind. 64, 68, 69; *Indiana, etc., R. Co. v. Eberle*, 110 Ind. 542, 11 N. E. 467, 59 *Am. Rep.* 225; *Sunderland v. Martin*, 113 Ind. 411, 415, 15 N. E. 689, and cases cited; *Dantzer v. Indianapolis, etc., Co.*, 141 Ind. 604, 39 N. E. 223, 34 L. R. A. 769, 50 *Am. St. Rep.* 343; *Pittsburgh, etc., R. Co. v. Noffsger*, 148 Ind. 101, 47 N. E. 332; *Martin v. Marks*, 154 Ind. 549, 57 N. E. 249; *Brandenburg v. Hittel*, 16 Ind. App. 224, 45 N. E. 45; *Bubl v. Fort St., etc., Co.*, 98 Mich. 598, 57 N. W. 829, 23 L. R. A. 392; *Gram v. Laconia*, 71 N. H. 41, 51 Atl. 635, 57 L. R. A. 282; *Seldon v. City of Jacksonville*, 28 Fla. 558, 10 South. 457, 14 L. R. A. 370, 29 *Am. St. Rep.* 278, and note; *Davis v. Hampshire County*, 153 Mass. 218, 26 N. E. 848, 11 L. R. A. 750; *Willard v. City of Cambridge*, 85 Mass. 574; *Hyde v. Fall River*, 189 Mass. 439, 75 N. E. 953, 2 L. R. A. (N. S.) 269, and note; *Stetson v. Faxon*, 19 Pick. (Mass.) 147, 31 *Am. Dec.* 123, and note.

At the proper time appellants requested the court to instruct the jury, in effect, that, if they found that the road proposed to be vacated was not of public utility, they should find for the petitioners, upon that issue. The court refused to give said instruction, and also another instruction requested by appellants. It is shown by a bill of exceptions in the record that appellants at the time excepted to the refusal to give each of said instructions. They challenged the refusal to give said instructions severally, and not jointly, as claimed by appellees. All the instructions given by the court to the jury, and all the instructions refused by the court, were made a part of the record, under section 1, Acts 1903 (Acts 1903, pp. 338, 339, c. 193). Appellees insist that no question is presented as to the instructions refused because the evidence is not in the record. It is true that it has been held in a number of cases that without the evidence the court cannot say that the instructions refused were applicable to the evidence in the case, and that was correct in those cases, and the court, therefore, held that it did not appear that the trial court erred in refusing to give said instructions. But as the record shows that the trial court did not refuse to give said instruction in regard to the issue of public utility because it was not applicable to the evidence, said rule does not apply to this case. In *Cook v. Quick*, 127 Ind. 477, 26 N. E. 1007, a proceeding to vacate a public highway, where there was a remonstrance on the ground that "the vacation of said highway will not be of public utility," the court held that the question to try was whether or not the highway proposed to be

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

vacated was of public utility. It is evident that the court erred in refusing to instruct the jury as requested in said instruction.

Other grounds for reversal are urged by appellants, but there is a contention as to whether or not the same are presented by the record, and as they may not arise on another trial, they are not considered.

Judgment reversed, with instructions to sustain appellants' motion for a new trial, and for further proceedings not inconsistent with this opinion.

(172 Ind. 140)

**MIEDREICH v. LAUENSTEIN.<sup>1</sup>**  
(No. 21,137.)

(Supreme Court of Indiana. Jan. 15, 1909.)

**1. JUDGMENT (§ 420\*)—SETTING ASIDE—FALSE RETURN OF PROCESS.**

A complaint, in an action to set aside a foreclosure sale on the ground that it was procured as against a nonresident infant, by the false return of service of summons by the sheriff on such infant, thus imposing on the judge by such fraudulent return, may be maintained as a direct attack on the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 795; Dec. Dig. § 420.\*]

**2. JUDGMENT (§ 460\*)—SETTING ASIDE—FALSE RETURN—ABSENCE OF FRAUD—PLEADING.**

Where a complaint for relief against a judgment in foreclosure by a nonresident infant by reason of a false return on him does not allege fraud in procuring the process or the judgment, it must aver what the record shows as to notice on the infant, in order to state a cause of action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 883; Dec. Dig. § 460.\*]

**3. INFANTS (§ 110\*)—JUDGMENT—SUFFICIENCY OF PROCESS—FALSE RETURN.**

If, without any fraud or any act on the part of plaintiff in an action to foreclose a mortgage, or his attorney, a return is made by a sheriff showing service of summons regular on its face, on a nonresident infant, without knowledge of the plaintiff that there was in fact no service, and no act is done or thing said to mislead the sheriff, the infant is bound by the judgment obtained and cannot maintain an action to set it aside; his remedy being against the sheriff for false return, though the sheriff's bond might not in all cases be adequate, and that being a legislative rather than a judicial question.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 110.\*]

**4. APPEAL AND ERROR (§ 1005\*)—REVIEW—NEW TRIAL—QUESTIONS OF FACT—CONFLICTING EVIDENCE.**

A denial of a motion for new trial, based on the insufficiency of the evidence, will not be disturbed on appeal, where the evidence is conflicting.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8948-8954; Dec. Dig. § 1005.\*]

Appeal from Superior Court, Vanderburgh County; Alexander Gilchrist, Judge.

Action by Frances A. Miedreich against Constanze Lauenstein to set aside a judgment in foreclosure. From a judgment sustaining a demurrer to a paragraph of the complaint, plaintiff appeals. Affirmed.

Wm. P. Miedreich and John Brownlee, for appellant. Peter Maier, for appellee.

**MYERS, J.** This was an action by appellant against appellee in the Vanderburgh superior court to vacate a judgment of foreclosure of a mortgage and sale of her property, and for an accounting for rents, and to be permitted to redeem, on the ground that she had no notice of the original action, and that her property had been taken without any notice, or opportunity to be heard. Both parties have treated this action as one arising under the provisions of article 14 of the federal Constitution, as presenting the question of due process of law, and rights guaranteed by the state and federal Constitutions.

A demurrer by appellee was sustained to the fourth paragraph of complaint for want of facts to constitute a cause of action, an exception was reserved, and that ruling is assigned as error here. The fourth paragraph of complaint, so far as the grounds of relief thereby sought are considered, is predicated on the alleged facts: That when the original foreclosure proceedings were had, under which sale of her property was made, appellant was 12 years of age, and not a resident of Vanderburgh county where the actions were brought, but a resident of Gibson county, and had been for many years; that she was not summoned to appear and defend her interests in said action; that she had no knowledge of the pendency of the action, did not waive service of process, nor did any one for her, or in her behalf, or by her consent, enter any appearance for her; that she was not amenable to the jurisdiction of the sheriff of Vanderburgh county, but, notwithstanding the fact that she was not served with process, the sheriff of Vanderburgh county made a false return of a pretended summons, and the court was wrongfully imposed upon by such false return, and being thus falsely advised, at the instance of attorneys for the plaintiff in the cause, appointed a guardian ad litem for her, who filed an answer for her; that a decree was thereupon rendered, her property sold, bid in by the plaintiff in the action; and showing direct privity between the original plaintiff, and the appellee here, and timely application for relief. It is settled in this jurisdiction that such an action may be maintained as a direct attack upon the judgment, certainly so if it can be said to amount to a charge of fraud in procuring notice, or obtaining the judgment. *Frankel v. Garrard*, 160 Ind. 209, 66 N. E. 687; *State v. Hindman*, 159 Ind. 586, 65 N. E. 911; *Cotterell v. Koon*, 151 Ind. 182, 51 N. E. 235; *Asbury v. Frisz*, 148 Ind. 513, 47 N. E. 328; *Kirby v. Kirby*, 142 Ind. 419, 41 N. E. 809; *Thompson v. McCorkle*, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334; *Dobbins v. McNamara*, 113 Ind. 54, 14 N. E. 887, 3 Am. St. Rep. 626. The paragraph is silent as to what the record shows on the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup> Rehearing denied, 87 N. E. 1023.

question of notice to appellant, which, in case the complaint could not be said to aver fraud in procuring the process or judgment, would present a different question, for in such case there must be an averment as to what the record shows on the question of notice. *Chicago, etc., Co. v. Grantham*, 165 Ind. 279, 75 N. E. 265; *Layman v. Hughes*, 152 Ind. 484, 51 N. E. 1068; *Runner, Assignee, v. Scott*, 150 Ind. 441, 50 N. E. 479; *Bailby v. Rinker*, 146 Ind. 129, 45 N. E. 38. The allegations do not present a question of fraudulent conduct on the part of the appellee's predecessor in title, or of his attorneys in procuring a false return, or participation in a fraud upon the court, which is an acknowledged ground of interference of a court of equity. *Frankel v. Garrard*, 160 Ind. 209, 66 N. E. 687; *Brown v. Eaton*, 98 Ind. 591; *Cavanaugh v. Smith*, 84 Ind. 380.

The question is then presented whether the allegations that appellant was a minor, was not a resident of Vanderburgh county, was a resident of Gibson county, and had been for many years, that no summons was served on her, that she had no knowledge of the proceedings, did not waive service, nor did any one for her, or in her behalf, or with her consent, enter appearance for her, that she was not amenable to the jurisdiction of the sheriff of Vanderburgh county, that, notwithstanding that she was not served with process, the sheriff of Vanderburgh county made a false return of a pretended summons, and the court was wrongfully imposed upon by such false return, and, being thus falsely advised at the instance of plaintiff's attorneys, appointed a guardian ad litem for her, constitute a charge of fraud. The return was regular upon its face. The court had jurisdiction of the subject-matter, and apparently jurisdiction of the person of appellant. The false return was not procured by the fraud, collusion, or imposition of the plaintiff or his attorneys. It is not alleged that either knew of the facts alleged as to there not having been service on appellant. The allegations practically amount to this: If, without any fraud, or any act on the part of a party to an action or his attorney, a return is made by a sheriff showing service regular on its face, without knowledge of the party that there was in fact no service, and no act is done or thing said to mislead the sheriff, is it an imposition or fraud upon the court to present such summons and return and obtain a judgment upon it, and is it a charge of fraud or imposition upon the court to allege that the court was wrongfully imposed upon by such false return, and was thus falsely advised? The whole allegation must be taken together, and the scope and theory of the paragraph, as we construe it, is that the court was misled by a false return of the sheriff. The court had a right to rely and act upon the return. It imports verity to the court. The

sheriff assumes the responsibility, in taking the office, of seeing to it that he does make the right service. *State v. Leach*, 10 Ind. 308; *State v. Lines*, 4 Ind. 351. If this were not true, no litigant could ever know when his rights were adjudicated and set at rest, and, to the end that the party may be made whole, an action for a false return will lie. *Splahn v. Gillespie*, 48 Ind. 397; *Rowell v. Klein*, 44 Ind. 291, 15 Am. Rep. 235. If it be said that the amount of bond a sheriff is required to give might not cover the damage in any or every case, it is sufficient to say that that is a legislative matter, and not a judicial one. Whilst courts should be, and are, tenacious of the rights of minors, yet they must proceed within recognized rules of equity, as well as of law. We do not think that the court erred in sustaining a demurrer to the fourth paragraph.

The cause went to trial on two other paragraphs of complaint explicitly charging fraud on the part of plaintiffs and their attorneys in the original cause in procuring service to be made upon some person whose name and identity is to appellant unknown, by fraudulently representing to the sheriff that such person was the appellant, and thus procured a false return to be made, by which the court was imposed upon and the judgment rendered. The only other error assigned is upon the overruling of the motion for a new trial, in which the causes, properly assigned, are that the decision is not sustained by sufficient evidence, and is contrary to law. The sole question presented upon that motion was as to whether appellant had been served with summons in the original cause. The evidence was conflicting, and the court found against appellant on the evidence on the only question in the cause, and there was legal evidence supporting the finding. We cannot disturb the decision upon the weight of the evidence in this character of action any more than in any other kind of adversary action. *Murrer v. Security Co.*, 131 Ind. 35, 30 N. E. 879, and cases cited.

The judgment is affirmed.

(71 Ind. 557)

Ex parte FITZPATRICK. (No. 21383.)

(Supreme Court of Indiana. Jan. 12, 1909.)

1. CLERKS OF COURTS (§ 35\*)—FEES—OWNERSHIP.

All fees taxed by the clerk of the Supreme Court are the property of the state, under the express provisions of Burns' Ann. St. 1908, § 9389.

[Ed. Note.—For other cases, see *Clerks of Courts*, Cent. Dig. § 62; Dec. Dig. § 35.\*]

2. STATES (§ 215\*)—ACTIONS—COSTS—TAXATION AGAINST STATE.

Burns' Ann. St. 1908, § 620, provides that, when actions are brought on the relation of the state, the relator shall be liable for costs, except where a state officer or prosecuting attorney by virtue of his office is relator, when he shall not be liable. Prior to the enactment of section

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

620, a state officer as relator was primarily liable for costs, though under the express provisions of section 9186, in actions directed by the Governor on official bonds, upon his relation the costs taxed against him as relator are to be paid by the state. *Held*, that the express provisions of the statute, as well as the policy of the law, are against the taxation of costs to the state.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 203; Dec. Dig. § 215.\*]

**3. STATES (§ 215\*)—ACTIONS AGAINST STATE OFFICERS—TAXATION OF COSTS.**

An action against an officer of the state, in which the state has no pecuniary interest or substantive right to protect, is not an action against the state, and hence, by analogy, requiring one of the state boards to pay costs of opinions of the Supreme and Appellate Courts is not requiring the state to pay in the ordinary sense, even though the board pays from a fund derived from the state.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 203; Dec. Dig. § 215.\*]

**4. CLERKS OF COURTS (§ 23\*)—CLERK OF SUPREME COURT—DUTY TO FURNISH FREE COPIES OF OPINIONS TO STATE BOARDS.**

In the absence of a specific statute providing otherwise, the clerk of the Supreme Court is not required to furnish, without charge, unauthenticated carbon copies of opinions of the Supreme and Appellate Courts to state boards, commissions, or departments of government.

[Ed. Note.—For other cases, see *Clerks of Courts*, Dec. Dig. § 23.\*]

Application by Edward V. Fitzpatrick, Clerk of the Supreme Court, for direction of the court as to whether boards or commissions appointed or created by the Legislature are entitled to unauthenticated carbon copies of the decisions of the Supreme and Appellate Courts without cost for official use. Clerk directed to require the statutory fee for all copies furnished any person, firm, or corporation unless a specific statute provides otherwise.

James Bingham, Atty. Gen., W. H. Thompson, E. M. White, and A. G. Cairns, for petitioner.

MYERS, J. This is an application by the clerk of the Supreme Court by verified petition, setting forth the fact that various boards or commissions appointed or created under legislative enactment, claim the right to have furnished them, gratis, on request, for official use, unauthenticated carbon copies of the decisions of the Supreme and Appellate Courts, upon the theory that, being agencies of the government, they have a right to demand them upon the ground that the state should pay no costs or fees in the absence of an express provision therefor, and praying the direction of this court in the matter. The statute governing the taxation of fees for copies of the opinions of the Supreme and Appellate Courts is section 9389, Burns' Ann. St. 1908. That section provides the fee to be charged to "any firm, person, or corporation" for unauthenticated carbon copies of the opinions of the Supreme and Appellate Courts. These fees, as well as all other

fees taxed by the clerk, are the property of the state. Section 9389, Burns' Ann. St. 1908. The provisions of our statute with respect to actions brought on relation of the state require the costs to be taxed against the failing relators, except in cases when a state officer, or prosecuting attorney, by virtue of his office, is relator. Section 620, Burns' Ann. St. 1908. Prior to the amendment of 1885 (Acts 1885, p. 239, c. 102), a state officer as relator was primarily liable for costs, although by another statute, in actions directed by the Governor on official bonds, then and yet in force, whilst the relator was and is primarily liable for costs, such costs are to be paid by the state. Section 9186, Burns' Ann. St. 1908; *Henderson v. State ex rel. Baldwin*, Attorney General, 96 Ind. 437, 448. The policy of the law and the express provision of the statute are against the taxation of costs to the state. The provision in section 9389, supra, enables the copying of opinions of the two courts by the proprietors of newspapers, and the making of abstracts of the opinions for publication, so that it is clear that no question arises as to the rights of various boards or departments of the state government to take copies, but the question is: Is the clerk required to furnish them without charge?

It is quite clear that, if every agency of the state government can call upon the clerk for copies at his or its pleasure, for such copies an immense amount of labor may be imposed upon the office; and, whilst that duty might be imposed upon the office by the Legislature, the Legislature has not done so, and the way, once open, would lead to much confusion, for the establishment of a hard and fast rule upon the subject as to who should be served as agents of the state seems difficult, if not impossible, and cannot be imposed upon the clerk, or at least has not been. It might be expedient in many cases, and wholly unnecessary in others, and the difficulty of drawing the line of separation is at once apparent. For example, what is to deter the trial judges and prosecuting attorneys from demanding copies of all opinions, or township trustees, and road supervisors, as well? Even if it be said that the requirement that the agencies of government shall pay for such copies is in effect taxing the expense to the state—that is, requiring the state at last to furnish the copies—and would be a mere matter of bookkeeping, it still remains true that the right to demand them must arise from some statute, and is not the taxation of costs to the state, for the reason that the officers are not the state, and the taxation of costs, in any event, strictly arises with respect to legal or judicial proceedings. An analogy is presented under the fee and salary act, under which the officer is required to turn into the treasury in the first instance fees earned by him,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

though the county immediately pays them back; but, where there is no provision for the state furnishing such copies, the board or officer takes the office cum onere, and must itself, or himself, provide, at its or his own expense, any desired copies. It is well settled that not every suit against an officer of the state is a suit against the state. A suit against an officer in which the state has no pecuniary interest, or substantive right to protect, is not a suit against the state. *Reagan v. Farmers', etc., Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 88 L. Ed. 1014; *Burke v. Snively*, 208 Ill. 323, 70 N. E. 327, 328; *Morrell v. American, etc., Co. (C. C.)* 151 Fed. 305; *Galveston, etc., Co. v. Davidson* (Tex. Civ. App.) 93 S. W. 436; *Illinois, etc., Co. v. Prewitt*, 123 Ky. 36, 98 S. W. 633; *Mississippi, etc., Co. v. Illinois, etc., Co.*, 203 U. S. 335, 27 Sup. Ct. 90, 51 L. Ed. 209.

It must follow that requiring one of the boards of the state to pay costs of opinions of the courts is not requiring the state to pay, in the ordinary sense, even though the board pays from a fund derived from the state, any more than under our prior statutes, where the Attorney General was relator, costs were held taxable to him, though the state reimbursed him. *Henderson v. State*, supra; *Briscoe v. McMillan*, 117 Tenn. 115, 100 S. W. 111; *Mississippi, etc., v. Illinois, etc., Co.*, 203 U. S. 335, 27 Sup. Ct. 90, 51 L. Ed. 209; *Prout v. Starr*, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. Ed. 584. The state cannot be required, as of course, to furnish files of its offices to its officers, or departments, and, in the absence of a statute or statutes requiring one branch, or office, to furnish copies of its files to another, it cannot be demanded. We have been unable to find any statute requiring the clerk to furnish copies to any of the departments or agencies of the state. The courts, as well as all public officials, are presumed to know the law; but we know of no requirement that the clerk shall promulgate the decisions, either upon his own motion, or the request of any official, or department of the state government. It is not a question of taxing costs against the state, but whether one department, in the absence of legislative direction, shall be required to furnish another copies of opinions, and, if so, why not to all arms of the state government? We do not conceive the rule as to the state not being liable for costs in judicial or legal proceedings as furnishing a principle applicable here. The true rule, as we conceive it to be, is: That, in the absence of legislative direction, no department can demand of the clerk to furnish such copies as are indicated in the petition, to any branch of the public service; the fact that the department may pay it out of the fund provided by the state does not change the principle—and we think that public policy demands that such should

be the rule. To hold otherwise would, in effect, be to hold that the duty and service the clerk owes the state, in his time and attention, would be diverted, and his services extended to the assistance of other departments.

The clerk is therefore instructed and directed to require the statutory fee for all copies requested and furnished any person, firm, or corporation, or the agencies of the state, unless a specific statute provides otherwise.

(171 Ind. 569)

**INDIANAPOLIS & W. RY. CO. v. RAGAN.**  
(No. 21,159.)

(Supreme Court of Indiana. Jan. 14, 1909.)

**1. APPEAL AND ERROR (§ 525\*)—RECORD—TRANSCRIPT—SHOWING FILING OF INSTRUCTIONS—STATUTES.**

Under Burns' Ann. St. 1908, § 558, subd. 6, providing that all instructions given must be signed by the judge and filed as a part of the record, and Act 1903, p. 338, c. 193, § 1, providing that all instructions given on motion of the court shall be filed with the clerk of the court at the close of the instructions to the jury, a transcript, reciting that "all the instructions given and those requested by plaintiff and refused by the court, \* \* \* are by the court ordered filed and made a part of the record in this case," is insufficient to show a compliance with the statute as to actual filing, and hence the instructions are not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 525.\*]

**2. APPEAL AND ERROR (§ 602\*)—RECORD—QUESTIONS PRESENTED.**

An assignment, in a motion for new trial, that the court erred in overruling plaintiff's objections to questions asked a witness, without stating what answers were given, or that any evidence was given by the witness in response thereto, is insufficient to present the objections for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2905-2909; Dec. Dig. § 602.\*]

Appeal from Circuit Court, Hendricks County; T. J. Cofer, Special Judge.

Condemnation proceedings by the Indianapolis & Western Railway Company against Lilly Ragan. From the judgment, plaintiff appeals. Affirmed.

Otis E. Guiley, W. H. Latta, and L. H. Oberreich, for appellant. Brill & Harvey, for appellee.

**JORDAN, C. J.** This case arises out of the same condemnation proceedings instituted by appellant for its right of way as did the appeals of the Indianapolis & Western Railway Co. v. Hill (No. 21,160) 86 N. E. 414, and the same company v. Branson (No. 21,161, decided at this term) 86 N. E. 834. The only question herein involved relates to the damages assessed by a jury in the lower court in favor of appellee, upon which, over appellant's motion for a new trial, judgment was rendered. The questions discussed and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

relied upon by counsel for appellant for reversal relate to the giving and refusal to give certain instructions and to the admission of certain evidence in favor of appellee.

At the very threshold appellee's counsel raise the question, and insist, that the instructions given and refused are not in the record for the reason that there is no affirmative showing that they were filed with the clerk of the lower court, as required by the statute. Counsel therefore insist that the rulings of the lower court on the giving and refusing of instructions cannot be considered or reviewed in this appeal. An examination of the transcript discloses the following therein in respect to the instructions: "And now before the beginning of the argument plaintiff requests the court to instruct the jury in writing only and to give the jury each of the following instructions, numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15." Here are set out in full the aforesaid instructions requested by plaintiff which request is signed by its attorneys. The transcript then recites: "The above instructions (setting forth the numbers from 1 to 15, inclusive) requested by plaintiff are refused by the court, to which refusal to give each separate instruction plaintiff at the time excepts separately and severally. [Signed] Thomas J. Cofer, Special Judge." After this is the following: "And now the argument of counsel is commenced and concluded, and now the court instructs the jury in writing and gives to the jury instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, and 9, prepared and given to the jury on the court's own motion." Here is set out each of the last aforesaid instructions. It is then stated that: "To the giving by the court to the jury of each of the above instructions numbered (setting forth the numbers) on its own motion separately and severally, the plaintiff, at the time, excepts to the giving of each separate instruction. [Signed] Thomas J. Cofer, Special Judge." It is further recited that said instructions are the only instructions given by the court to the jury. After this is the following: "And now all the instructions given and those requested by plaintiff and refused by the court, together with all the exceptions thereto, are by the court ordered filed and made a part of the record in this case, without a bill of exceptions."

By subdivision 6 of section 558, Burns' Ann. St. 1908, it is provided that "all the instructions given by the court must be signed by the judge and filed, together with those asked for by the parties, as a part of the record." Section 1 of an act concerning proceedings in civil procedure, approved March 9, 1903 (Acts 1903, p. 338, c. 193), and in force at the time of the trial of this cause, also provides that "all instructions requested, whether given or refused, and all instructions given by the court of its own motion shall be filed with the clerk of the court at the close of the instructions to the jury."

In Ohio, etc., *R. Co. v. Dunn*, 138 Ind. 18, 36 N. E. 702, 37 N. E. 546, this court said: "Under the Code and the recognized practice of this state, there are three methods of making instructions a part of the record: First, by an order of court; second, by special exceptions written upon the margin or following each instruction and signed by the judge; and, third, by a general bill of exceptions. In the first and second methods the instructions receive identification from the filing required by the Code." In *Hadley v. Atkinson*, 84 Ind. 64, this court said: "The record nowhere shows that these instructions were filed as a part of the record. Without this safeguard, instructions might get into the record without having been given by the court." In *Elrod v. Purlee*, 165 Ind. 239, 73 N. E. 589, 74 N. E. 1085, a question similar to the one herein involved was considered. In that case there was an order book entry made upon the conclusion of the trial which was as follows: "All of the instructions given by the court herein are ordered filed." This court in that appeal after considering the requirements of the statute, held that "the entry of the court should have shown that the instructions were filed," and, as this did not appear by the record, it was held that the instructions therein involved had not been made a part of the record. In support of this holding, the court, on page 242 of 165 Ind., page 589 of 73 N. E., and page 1085 of 74 N. E., cited numerous decisions of this court. In *Thompson v. Thompson*, 156 Ind. 276, 59 N. E. 845, the court said: "It is settled that in order to make the instructions a part of the record in a civil case, without a bill of exceptions, they must be filed in open court, and the record must affirmatively show they were so filed."

Aside from the order of the court directing that the instructions given and refused be filed, there is nothing whatever to show that this order was complied with, or that the instructions given and refused were actually filed with the clerk of the lower court. It therefore follows, for the reasons stated, that the instructions given and refused are not a part of the record. Consequently, we are precluded from reviewing any questions raised by appellant relative thereto.

Counsel argue that the court erred in overruling appellant's objections to a certain question propounded by appellee, on cross-examination, to a witness, Albert Worrell. In its motion for a new trial, this ruling of the court is assigned as a reason as follows: "Because of error of law occurring at the trial of said cause, in this, that the court erred in overruling plaintiff's objection to the following question asked Albert Worrell, a witness produced on behalf of plaintiff, on cross-examination." Here is set out merely the question as propounded to said witness, but the motion for a new trial is entirely silent in respect to any answer which was

elicited from the witness by the question, or as to any evidence given by said witness in response thereto. It is also contended that the court erred in overruling plaintiff's objection to a question propounded to appellee by her counsel, when she was testifying in her own behalf, inquiring of her as to what in her judgment would be the value of the residue of the real estate after the construction of the railroad. The ruling of the court upon this question is assigned in the motion for a new trial substantially the same as the preceding assignment in respect to the ruling upon the question propounded to the witness Worrell. The mere assignment that the court erred in overruling plaintiff's objection to the question, standing alone in the motion, without the latter in any manner stating or showing that the witness answered the question propounded, and what, if any, evidence was elicited from him in response thereto, certainly cannot be said to reveal any error arising out of the alleged ruling of the court. If no evidence was elicited from the witness by the question, the error, if any, in merely propounding it, would, to say the least, be harmless to appellant. So far as the motion for a new trial discloses, no error is predicated on the ruling of the court in permitting the witness to give any evidence which was not proper or legitimate, but the alleged error is based wholly upon the action of the trial court in overruling appellant's objections to the question. It has been repeatedly affirmed and held by this court that in the reasons assigned for a new trial, because of the improper admission or rejection of evidence, the motion must point out with reasonable certainty what evidence was improperly admitted or excluded, or, in other words, the motion should name the witness and disclose what particular evidence was admitted or rejected. *Coryell v. Stone*, 62 Ind. 307; *McClain v. Jessup*, 76 Ind. 120, and cases there cited; *Ohio, etc., R. Co. v. Stein*, 133 Ind. 243, 31 N. E. 180, 32 N. E. 881, 19 L. R. A. 733; *Dunn v. State*, 162 Ind. 174, 70 N. E. 521, and cases there cited; *Conrad v. Hausen* (Ind.) 85 N. E. 710, and cases there cited. In *Coryell v. Stone*, supra, the assignment in the motion for a new trial was as follows: "Because the court erred in allowing the defendants to ask Jerry Dugan, a witness called by the defendants, whether or not the testator gave to witness instructions to enable him to make the survey." In regard to this assignment, the court in that appeal said: "This seems to us too uncertain to inform the court of what the appellants really complained, and does not refer to anything to make it more certain. It does not inform us what the question objected to was, nor what the objection to it was, nor what the answer to the question was, nor, indeed, whether it elicited any

answer or not, nor in what way the survey mentioned was connected with the case."

Guided by the well-settled rule to which we have referred, and the assignments in question must be held insufficient to present any question upon the admission of evidence.

There being no available error disclosed by the record, the judgment is affirmed.

HADLEY, J., did not participate.

(43 Ind. A. 39)

INDIANAPOLIS & E. RY. CO. v. GOAR.  
(No. 6,309.)

(Appellate Court of Indiana, Division No. 1.  
Jan. 14, 1909.)

1. RAILROADS (§ 411\*)—CARE REQUIRED AS TO  
TRESPASSING ANIMALS.

A railroad company owes no duty to the owner of animals trespassing on its right of way, when the same is properly fenced, and is not liable for injury to them, unless its employees have been guilty of wanton and reckless misconduct in the operation of cars.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1412; Dec. Dig. § 411.\*]

2. RAILROADS (§ 415\*)—INJURY TO ANIMALS—  
LOOKOUTS.

A railroad company need not keep a lookout for animals at places where its tracks are properly fenced.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1490; Dec. Dig. § 415.\*]

Appeal from Circuit Court, Henry County;  
John M. Morris, Judge.

Action by Roll Goar against the Indianapolis & Eastern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Wm. A. Brown and W. H. Latta, for appellant.  
Horace G. Yergin, for appellee.

WATSON, C. J. This was an action in two paragraphs by appellee for the killing of his horses by appellant. The first paragraph charged the appellant, through its servants, with negligently running its interurban car at a high and dangerous rate of speed over its right of way, and carelessly and negligently running its car against and upon appellee's horses, thereby killing them, when said horses had strayed away and were upon appellant's track without any fault of appellee. The second paragraph charges that, without any fault of appellee, the horses entered upon appellant's right of way over an inferior and poorly constructed cattle guard which was located thereon, and that said right of way was not properly fenced at this cattle guard so as to prevent horses from entering upon the right of way. The error assigned in this court is the overruling of the motion for judgment on the interrogatories. The jury returned a general verdict for appellee in the sum of \$325, together with interrogatories. It is so well settled in this state, when the general verdict controls as against the inter

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

rogatories, that we deem it unnecessary to discuss the same or cite authorities thereon.

The jury returned, among other interrogatories, the following: "No. 5. Did the plaintiff's horses escape from his barn upon a public highway and pass along said public highway, thence over a cattle guard at the crossing of said public highway with the defendant's right of way? Ans. Yes. No. 10. Did the defendant carelessly and negligently run said car against said horses and thereby kill them? Ans. Yes. No. 11. If you answer the foregoing interrogatory 'Yes,' did said negligence consist in running said car at a high rate of speed? Ans. No. No. 12. Did the motorman of said car know that said horses were on the right of way in time to have avoided striking said horses? Ans. No. No. 13. Could said motorman have known that said horses were on the right of way or track in time to have avoided striking said horses? Ans. Yes. No. 13½. Was said motorman negligent in failing to see said horses in time to have avoided striking them? Ans. Yes. No. 14. Was said cattle guard over which said horses passed upon said private right of way of the standard construction adopted and generally used on interurban railways throughout the United States? Ans. Yes. No. 15. Was said cattle guard in any respect out of repair? Ans. No. No. 23. In what respect, if any at all, was said cattle guard out of repair or improperly constructed? Ans. In no respect. No. 27. Was this cattle guard in question the best-known possible to construction, all of its necessary uses considered? Ans. Yes."

The answers to Nos. 11 and 12 show that the car was not run at a high rate of speed, nor did the motorman know of the horses in time to avoid the injury, nor do they show any wanton or reckless conduct of the motorman in running the car at the time the horses were killed. The answers to the above interrogatories and those not set out show that the right of way was properly fenced and the cattle guard properly constructed. The horses were trespassing upon the right of way of appellant, and for this reason, under the decisions of the Supreme Court of this state, the company owed no duty to the owner; nor is the company required to keep a lookout for animals on its right of way when the same is properly fenced, and will not be liable for injury to them unless the employes were guilty of wanton and reckless misconduct in the operation of the car. *Dennis v. Louisville, etc., R. Co.*, 116 Ind. 42, 18 N. E. 179, 1 L. R. A. 448; *Chicago, etc., R. Co. v. Ramsey*, 168 Ind. 390, 81 N. E. 79, 120 Am. St. Rep. 379.

The evidence is not in the record. We therefore believe that justice will be best served by directing a new trial herein.

This judgment is reversed, and a new trial ordered in this cause.

(43 Ind. A. 83)

## McNEW et al. v. VERT. (No. 6,322.)

(Appellate Court of Indiana, Division No. 2  
Jan. 13, 1909.)

## 1. APPEAL AND ERROR (§ 721\*)—JOINT ASSIGNMENTS OF ERROR.

Where appellants are husband and wife, they may join in assignments of error to review exceptions severally reserved to the conclusions of law and to rulings on separate motions for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2985; Dec. Dig. § 721.\*]

## 2. TRUSTS (§ 118\*)—CONSTRUCTION OF TRUST DEED—EVIDENCE.

In the construction of a trust deed, the purpose and intention of the parties must control, and such purpose is to be determined from the terms of the instrument itself, if it is plain and unambiguous; otherwise, it may be arrived at by considering the circumstances under which the deed was executed.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 118.\*]

## 3. TRUSTS (§ 191\*)—CONSTRUCTION OF DEED—POWER OF TRUSTEE TO SELL.

A deed conveyed property to a trustee for the support of the grantor during life, gave the trustee power to sell the property or any necessary part thereof to carry out the purpose of the deed, and provided that if any of the property or proceeds thereof should remain on the death of the grantor, after deducting reasonable compensation for the trustee, the remainder should go to and become the property of a person named. *Held*, that the power of the trustee to sell did not cease on the death of the grantor, but a sale by him after that time for the payment of his compensation and expenses conveyed the title to the property.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 191.\*]

## 4. TRUSTS (§ 193\*)—SUPPORT OF GRANTOR—GOOD FAITH OF TRUSTEE.

The trustee, invested with power to sell such property as in his judgment is necessary to pay the expenses incident to the support of the grantor and his own compensation pursuant to the purpose of the trust, is bound to exercise perfect good faith toward the person entitled to the property remaining after the termination of the trust by the death of the grantor creating it.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 193.\*]

Appeal from Circuit Court, Tipton County; J. F. Elliott, Judge.

Action by Anna Rebecca Vert against Dora McNew and others. From a judgment for plaintiff, defendants appeal. Reversed, and new trial directed.

Oglebay & Oglebay, for appellants. F. R. Bonfield and Theo. J. Moll, for appellee.

RABB, J. This action was brought by the appellee to quiet her title in and to a certain 10 acres of land in Tipton county. The appellant May McNew was admitted as a party defendant on her petition, and filed a cross-complaint seeking to quiet title in her for the same premises. Issues were formed, a trial had, special findings of fact rendered, and conclusions of law stated thereon. Exceptions were severally reserved by each ap-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pellant to each conclusion of law stated. Each appellant separately moved the court for a new trial, which motion was overruled, and judgment rendered on the special findings in favor of the appellee. Appellants join in the assignment of errors in this court, and the errors assigned and relied upon for a reversal are that the court erred in its conclusions of law upon the facts.

The point is made by appellee that the exceptions to the conclusions of law stated by the court being several, and appellants' motion for a new trial being several, the joint assignment of errors here presents no question in this court. The pleadings and the special findings disclose that appellants are husband and wife. Hence the rule invoked by the appellee has no application. *Stewart v. Babbs*, 120 Ind. 568, 22 N. E. 770; *Magel v. Milligan*, 150 Ind. 582, 50 N. E. 564, 65 Am. St. Rep. 382.

The appellee claims title to the premises in dispute under a trust deed executed by Anna S. Price to one Philander F. Scudder. Appellant May McNew claims title under a deed executed to her by Scudder, the trustee, subsequent to the death of Anna S. Price, the grantor in the trust deed, and the decision of the case turns on the proper construction to be given the trust deed. The terms of this deed, so far as they are necessary to a decision of the question involved, are as follows: "This indenture witnesseth: That Anna S. Price, unmarried, and over twenty-one years of age, \* \* \* conveys and warrants to Philander F. Scudder, \* \* \* in trust, subject to and for the payment of two mortgages heretofore executed by the grantor and payable to the common school fund and William R. Oglebay, respectively, and for the support of the grantor, giving to the grantee herein full power to sell and dispose of the same, or so much thereof as may be necessary, in his judgment, to carry out the same, or to renew the mortgages thereon, giving him full power to sell and convey the same by deed, or to renew by mortgage, to carry out the purposes, and at the death of said Anna S. Price, if any of said real estate, or the proceeds thereof remain, then after deducting reasonable compensation for the grantee herein, the remainder to go and become the property of Anna Rebecca Nifong."

The appellee is the same person named in the deed as Anna Rebecca Nifong; she having subsequently intermarried with one Vert. The court finds, among other things, that there was still due the trustee for his services as such, at the time of the death of the said Anna S. Price, the sum of \$200, no part of which had been paid. There is also a finding that there was due to the appellants, at the time of the death of the grantor, the sum of \$80, for services rendered in taking care of her in her last illness. The land was sold by the trustee, and conveyed to the appellant May McNew, subsequent to the death

of Anna S. Price, to pay the \$200 due him as compensation, and the appellants for the sum due them for taking care of the said Anna S. Price during her last sickness, and the sum of \$70, funeral expenses of the said Anna S. Price, which were paid by the trustee. Appellee contends that the deed of Anna S. Price conveyed the remainder in fee in said land to her, subject only to be divested by a sale by the trustee during the life of the grantor, for the purpose of carrying out the trust created by the deed, but that upon the death of the grantor the contingency by which her title might be divested was extinguished, and she became the absolute and unconditional owner of the fee-simple estate in the land, and the trustee's power to sell, conveyed by the deed, expired, and that his deed subsequently made for the premises to appellant May McNew was consequently void. Appellant contends that the deed of Anna S. Price conferred a power on the trustee to sell the entire estate and title in the premises for the certain named purposes, and that the deed coupled this power with an interest, to wit, the title, which he was thus empowered to sell, and that, the power to sell being thus coupled with an interest, it was not revoked by the death of the grantor, but might still be exercised by him for the purposes of carrying out the trust.

In the construction of any instrument the purpose and intention of the parties making the contract must control. That purpose and intent is to be arrived at from the terms used in the instrument, if it is plain and unambiguous; otherwise it may be arrived at by considering the circumstances under which the instrument was executed. And, in determining the effect that is to be given to the deed of Anna S. Price, it is important that the court should determine the purpose and intention of the maker in its execution. It seems entirely clear from its terms that the main purpose of Anna S. Price, in the execution of this deed, was to dedicate the land conveyed thereby to her support and maintenance. She very evidently designed that the entire title and estate in the land, if necessary, should be used by the trustee in her support. It was not her purpose to convey to the appellee the absolute fee-simple estate in the land, reserving to herself and her trustee but an estate therein for life, to be applied by the trustee to her support. It was manifestly not the grantor's intention that the appellee should have any interest or estate either in the lands or its proceeds, except what remained after her support and the reasonable compensation to the trustee for his services had been taken out. The trust created by the deed fully empowered the trustee to incur whatever expense was necessary for the comfortable support and maintenance of the grantor in the land, and it was the purpose and intention that whatever expenses were incident to her care and support should be charged upon the land,

and the absolute title to the land was placed in the hands of the trustee to sell for the purpose of defraying these expenses, including also his compensation for his services as such trustee. The power to sell the land for this purpose was coupled with the estate and interest which the deed conveyed to him, and whether the power to sell was exercised before the expense was incurred, or after it was incurred, could make no difference. It was the intention that the land should pay these expenses. The power which the trustee had thus invested in him to sell the land for the purpose of the trust being coupled with the absolute title to the premises, it followed that the death of the grantor did not destroy the power created. *Jeffersonville Ass'n v. Fisher*, 7 Ind. 899; *Rowe v. Beckett et al.*, 30 Ind. 154, 95 Am. Dec. 676; *Rowe v. Lewis*, 30 Ind. 163; *Hawley, Adm'r, v. Smith*, 45 Ind. 183.

The court having found that there was \$200 due the trustee for his services, and the deed very evidently contemplating that these services should be paid from the land, and investing the trustee with the power to sell the land, and with the title to the land, we think it follows that the sale made by the trustee after the death of Anna S. Price was not void. The case in this respect, we think, is not dissimilar in principle from that of a deed made by a debtor to a trustee for the benefit of his creditors, wherein the trustee is authorized to sell the land and pay the debts. The death of the grantor would clearly have no effect upon the power of the trustee to act. The land was set apart by the deed to the payment of the debts, and the creditors had the right to have it so applied. In this case the land is here set apart by this deed and dedicated by the grantor to the payment, among other things, of the compensation of the trustee, and until that compensation was paid the trust was not fulfilled.

The special finding of facts discloses that the land was sold by the trustee for an express consideration of \$800, but that the real consideration was the payment to the trustee of \$200, as his compensation for his services as trustee, \$70 for funeral expenses paid by him for Anna S. Price, and the services of the appellants in caring for the deceased during her last sickness, which the court finds was of the value of \$80. While the trustee was invested with power to sell the land to pay the expenses incident to the support of the grantor, and his compensation, he was bound to exercise perfect good faith toward the appellee in respect to the sale. The deed creating the trust makes him the trustee, not only for Anna S. Price, but for the appellee, and in selling the land he was bound to exercise that power in the interest of appellee. The fact that, in fixing the consideration for the land, he allowed to

the appellants, as compensation for caring for the deceased, a sum grossly in excess of what was justly due them, raises a strong inference of bad faith on his part. The question of the bona fides of the sale made to the appellants seems not to have been involved in the controversy.

The judgment of the court below is reversed, and we think the ends of justice will be subserved by directing a new trial.

(43 Ind. A. 546)

WRIGHT et al. v. FLOYD et al. (No. 6,242).<sup>1</sup>

(Appellate Court of Indiana, Division No. 1. Jan. 14, 1909.)

1. CORPORATIONS (§ 293\*)—OFFICERS—AUTHORITY—DIRECTORS.

A corporation acts by a majority of its board of directors or trustees, or at least a majority of a quorum present at a meeting regularly called, and one or more members less than such majority cannot bind the corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1302-1309; Dec. Dig. § 298.\*]

2. CORPORATIONS (§ 206\*)—MEMBERS AND STOCKHOLDERS—SUING ON BEHALF OF CORPORATION—RIGHT TO SUE.

Shareholders or stockholders in a corporation, or interested members, may sue on its behalf to protect its interests, and incidentally their own interest; but in doing so they must show their interest, and that a demand has been made on the corporation to sue and a refusal so to do, or that such demand would be unavailing.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 791-796; Dec. Dig. § 206.\*]

3. CORPORATIONS (§ 282\*)—OFFICERS—ELECTIONS—ELIGIBILITY.

In the absence of a statute or rule of the corporation, a member of its board of directors or trustees need not be a member or a shareholder of the corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1189-1194; Dec. Dig. § 282.\*]

4. CORPORATIONS (§ 211\*)—MEMBERS AND STOCKHOLDERS—SUING ON BEHALF OF CORPORATION—PLEADING.

A complaint, in a suit on behalf of a corporation by a minority of its board of trustees, which does not aver any statute or rule requiring the trustees to be members of the corporation, and merely avers that plaintiffs are members of the board, does not show that they have sufficient interest to prosecute the suit.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 211.\*]

Appeal from Circuit Court, Wabash County; A. H. Plummer, Judge.

Action by Milton Wright and others against Halleck W. Floyd and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

M. L. Spencer, W. A. Branyan, and C. W. Watkins, for appellants. S. M. Sayler and Lesh & Lesh, for appellees.

HADLEY, J. Appellants sued appellees to set aside a judgment against the United Brethren Publishing Establishment, a corporation, and in favor of the Local Endow-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup> Rehearing denied. Transfer denied.

ment Board for Central Church of the United Brethren in Christ of Rohrerstown, Md., which, it is averred, was based upon a fraudulent claim and a fraudulent confession of judgment, all to the knowledge of all of the parties interested. It is averred: "That appellants, together with appellees Floyd, Barnaby, Tharp, and Montgomery, constitute the board of trustees of the appellee, the United Brethren Publishing Establishment, and have the management of its affairs; that said above-named appellees constitute the majority of the board of trustees of said corporation, and over the protests of appellants did and performed the acts complained of, and appellants bring said action for the use and benefit of said publishing establishment. It is nowhere averred that appellants are members either of the corporation or of the church, for whose benefit the printing establishment was operated, or that they have any interest whatever in the controversy either as shareholder, stockholder, member, or beneficiary. Moreover, it is apparent from the averments of the complaint that appellants seek to bring the action as minority trustees and in their trust capacity for the benefit of the corporation.

The question we are called upon to decide is whether they thereby show sufficient interest to prosecute this suit. It cannot be said that the corporation is prosecuting the suit, since the corporation only acts by a majority of its board of trustees, or at least a majority of a quorum present. *Price v. Railroad Co.*, 18 Ind. 58; *Cook on Corp.* § 712. And it is well settled that one or more members and less than such majority of a board cannot bind the corporation to any action. *Cook on Corp.*, supra; *Noblesville, etc., Co. v. Loehr*, 124 Ind. 79, 24 N. E. 579; *Allemon et al. v. Simmons et al.*, 124 Ind. 199, 23 N. E. 768. In *Cook on Corporations*, supra, the learned author says: "All contracts of a corporation are to be made by or under the direction of its board of directors. The board of directors make corporate contracts by a regular vote of the board. \* \* \* The board of directors have the widest of powers. All of the various acts and contracts which a corporation may enter into are entered into by and through the board of directors. The board of directors make or authorize the making of the notes, bills, mortgages, sales, deeds, liens, and contracts generally of the corporation. They appoint the agents, direct the business, and govern the policy and plans of the corporation. \* \* \* They institute, prosecute, compromise, or appeal suits at law and in equity which the corporation brings or has brought against it. But there are limitations on their powers. If the board of directors attempt to do an act or make a contract which the corporate charter does not give the corporation the power to do or enter into, then any stockholder may enjoin that act or contract.

Moreover, the directors can contract and act only as a board, duly notified and assembled. The members of the board cannot agree separately and outside of the meeting and thereby bind the corporation. Nor can a minority of the board meet and bind the board. A majority must be present, and then a majority of that majority binds the corporation. A single director has no power to contract for the corporation." Neither can it be said that they are bringing it as interested members, since there is no averment of their being such. It does not appear that they have any personal interest in the controversy.

It is well settled that shareholders or stockholders in a corporation, or an interested member, may bring suit on behalf of the corporation to protect the interest of the corporation and incidentally the interest of the members; but, in doing so, their interest must be shown, and it also must be shown that a demand has been made upon the corporation to protect such interest, and a refusal so to do, or such facts be exhibited as show that such demand would be unavailing. *Carter v. Glass Co.*, 85 Ind. 180; *Sheridan Brick Works v. Marion Trust Co.*, 157 Ind. 292, 61 N. E. 686, 87 Am. St. Rep. 207; *Teviss v. Hammersmith*, 31 Ind. App. 281, 66 N. E. 79, 912; *Wayne Pike Co. v. Hammons*, 129 Ind. 368, 27 N. E. 487; *Cook on Corp.* § 750. But we have made diligent search and have been unable to find any authority warranting a member of the board of trustees or directors to bring such a suit in his trust capacity, or in his personal capacity, solely by reason of his interest on account of such membership, since such membership gives him no personal interest. In the absence of a statute or rule of the corporation, a member of a board of directors or trustees does not necessarily have to be a member or shareholder of such corporation. *Cook on Corp.* § 11.

The complaint does not show under what statute the appellee printing establishment was organized, neither does it aver any rule requiring the trustees of such corporation to be a member, and under such circumstances the mere averment of plaintiff that he is a member of the board of trustees is not sufficient to show such interest as to authorize the prosecution of suits of this character. It is clear that where a suit is prosecuted, as this is prosecuted on behalf of the corporation by minority members of the board of trustees, a determination of such cause would not be an adjudication of the rights of the corporation in the controversy, since the corporation does not prosecute the action. Nor would it be an adjudication of the right of a member or shareholder to prosecute such an action in the name of the corporation, since it does not appear that such member or shareholder has so prosecuted the same.

Judgment affirmed.

(43 Ind. A. 91)

**REMM v. LANDON. (No. 6313.)**(Appellate Court of Indiana, Division No. 2.  
Jan. 14, 1909.)**1. REFORMATION OF INSTRUMENTS (§ 1\*)—JURISDICTION OF EQUITY.**

Equity has power to reform and correct written instruments.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 1; Dec. Dig. § 1.\*]

**2. REFORMATION OF INSTRUMENTS (§ 28\*) — SUBSEQUENT PURCHASERS—NOTICE OF MISTAKE.**

Reformation of an instrument entitling a party to an interest in land may be made as against a subsequent purchaser with notice of a mistake therein.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 111; Dec. Dig. § 28.\*]

**3. LANDLORD AND TENANT (§ 90\*)—HOLDING OVER WITH CONSENT—IMPLICATION OF NEW LEASE.**

The holding over by a tenant, either with the express or implied consent of the landlord, creates by implication a new lease for another term of equal duration, and on the same conditions as the original tenancy.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 284; Dec. Dig. § 90.\*]

**4. FRAUDS, STATUTE OF (§ 58\*)—RENEWAL OF LEASE—EXERCISE OF OPTION—WRITTEN NOTICE—NECESSITY.**

Though Burns' Ann. St. 1908, § 7462, declares that a lease for more than three years must be in writing, and section 8054 that general tenancies are from year to year, where a lessee, at the expiration of his term, under a lease giving him an option to extend it for seven years, verbally notified the lessor of his intention to exercise the option reserved, and such notice was accepted, and the lessee continued in possession, paying rent as agreed, he was entitled to the full extended term, and he did not become a tenant from year to year, as in the case of a tenant holding over.

[Ed. Note.—For other cases, see Frauds, Statute of, Dec. Dig. § 58.\*]

**5. VENDOR AND PURCHASER (§ 228\*) — SALE SUBJECT TO LEASE—BONA FIDE PURCHASER.**

One who bought with full knowledge of a tenant's rights and subject to them, is not, as against the rights of such tenant, a good-faith purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 228.\*]

Appeal from Circuit Court, Whitley County; Jos. W. Adair, Judge.

Action by John B. Remm against Edward Landon. From a judgment for defendant, plaintiff appeals. Affirmed.

Walter Olds and Andrew A. Adams, for appellant. W. F. McNagny, B. E. Gates, and D. V. Whiteleather, for appellee.

COMSTOCK, P. J. Appellant, plaintiff below, sued the appellee, Edward Landon, to obtain possession of real estate described in the complaint, after giving three months' notice to appellee to yield possession at the end of the current year of his tenancy. In July, 1905, the appellant purchased the property from Charles Meyer and wife, and while appellee was in possession as tenant. The

complaint is in the ordinary form of action between landlord and tenant. The appellee filed his amended cross-complaint, averring that he was appellant's tenant under a written lease, made to him by his appellant's grantor, which entitled him to possession of the premises until the year 1912; that said lease contained certain errors and mistakes, which he asks to have corrected, and upon such correction being made, he prays for decree of specific performance of said lease and for an injunction restraining appellant from interfering with his right under said lease. Appellee also filed an answer, averring the same facts as set out in the cross-complaint, but in addition thereto set out various matters of estoppel against appellant. The court overruled a demurrer for want of facts to said amended cross-complaint, to said answer and counterclaim, respectively, and, appellant refusing to plead further, a decree was rendered correcting and reforming the lease set up in the amended cross-complaint and a decree of specific performance of said lease by appellant, and enjoining him from interfering with the rights of said appellee under said lease and for costs. The averments of defendant's answer are substantially the same as in the cross-complaint and if the cross-complaint is sufficient to withstand a demurrer, the judgment must be affirmed. It is the claim of appellant that the lease held by Landon described property in another part of Columbia City. The lease between Landon and Meyer provided: "This lease shall end and terminate on the 24th day of February, 1905, unless upon the option of said Landon, it shall be extended to the 24th day of February, 1912." Appellant contends that as appellee did not give his lessor any written notice of his election to hold for the additional term of seven years, the same expired by limitation on the 24th day of February, 1905, and at the time of the purchase he was a tenant from year to year, having held over after his lease expired. Appellee in his cross-complaint admitted his tenancy, but he denied that it was a tenancy from year to year, and alleged that he held the premises under a written lease, which had heretofore been executed by appellant's grantor, Meyer.

In part is it averred, in substance, that for many years prior to the execution of said lease said Meyer had occupied the demised premises for a saloon and salesroom, and that said premises had become generally known as "Meyer's saloon." That said Meyer had built up a large and prosperous business in said premises, which were located upon the principal street in Columbia City, Ind. That said Meyer at the date of said lease was the owner of the demised premises, and proposed to sell his stock of goods and merchandise to the appellee for an adequate consideration, and as an inducement

\*For other cases see same topic and section NUMBER in Dec. &amp; Am. Digs. 1907 to date, &amp; Reporter Indexes

to said sale proposed to execute to the appellee a written lease of said premises running until February 24, 1905, at a monthly rental of \$50, which lease should provide that the appellee should have the option to extend it to the 24th day of February, 1912. That the appellee purchased from the said Meyer his stock of goods and furniture. That appellee paid \$3,000 more for the stock of goods purchased than he otherwise would in consideration of said lease to him. That in writing said lease, which said Meyer afterward duly executed, there was a mistake in describing the leased premises, which occurred through the mutual error, mistake, and inadvertence of the parties to said lease. Said erroneous description consisted in locating said premises upon lot 7 in block 6 in the original plat of the town of Columbia, now called the city of Columbia City, instead of upon lot 6 in the same block, said lot 7 lying immediately east and adjoining said lot 6, but that the appellee took actual possession of the right premises with the full knowledge and consent of his lessor, and expended large sums of money in adapting said premises to his wants and use, making repairs thereon, both temporary and permanent in their character. That one of the principal inducements to appellee to purchase said stock of goods and to enter into said lease was the fact that under the provisions of said lease he could occupy said premises for a long period of time, and use the furniture and fixtures therein in the places for which they had been especially made, and to which they were especially adapted, and that he would by said purchase acquire the good will of the business theretofore conducted by said Meyer in said premises. That subsequently to the execution of said lease said Meyer and his wife conveyed the leased premises to the appellant. That the leased premises consisted of a two-story brick building, and that at the date of the lease there was no building upon said lot 7 in block 6 which corresponded to the building so leased to the appellee. That the conveyance to appellant was made on July 25, 1905. That prior to his purchase appellant knew that appellee was occupying said premises in good faith under said lease. That they were located upon said lot 6. That the appellee fully informed appellant that he had a lease for said premises executed by said Charles Meyer, the owner thereof, and that under said lease the appellee was entitled to hold and occupy said premises until the 24th day of February, 1912. That he had exercised his option contained in said lease to so hold said premises until said date. That before he took said conveyance the appellant was expressly and directly notified by his grantors that he must take the same subject to the rights of the appellee under said lease, and that when appellee purchased the stock of goods, furniture, fixtures, and good will of the saloon of said Charles Meyer, the said

Meyer had agreed with the appellee, as part of the consideration for said purchase, that appellee should remain in possession of said premises until February 24, 1912, if he chose so to do. That the first three years of the lease had expired on February 24, 1905, but that the appellee had remained in possession of said premises and paid rent therefor, in accordance with the terms of said lease, until the time of the conveyance to appellant. That when appellant took his said conveyance for said premises, he then knew that his grantors honestly believed that the description in said lease to appellee covered the building which the appellant was about to purchase, and that the appellee was in good faith occupying said premises under said lease believing that they were accurately described therein. That at the expiration of three years from the date of said lease, the appellee exercised his option given therein to continue to occupy said premises until February 24, 1912, and that he gave his lessors notice that he would continue his occupancy until said date. That he did not know of the said mistake in the description until long after the plaintiff had received his conveyance. That with full knowledge of all said facts the appellant ratified and confirmed said lease, and that thereunder he received from the appellee the rental stipulated in said lease from the date of his purchase in July, 1905, up until February 24, 1906. That the appellant took his conveyance for said leased premises expressly subject to the rights of the appellee under said lease. That he then knew that appellee had exercised his option to extend said lease until February 24, 1912. That, in consideration of the existence of said lease and of the rights and interests of the appellee thereunder, the appellant purchased the leased premises for \$1,000 less than he would have otherwise been compelled to pay therefor, and on account of said reduction in price, appellant expressly agreed with his grantors to permit the appellee to occupy said premises under said lease until February 24, 1912. That when the appellee paid his said rentals to the appellant, the appellant knew that the appellee was making said payments in good faith, relying upon said lease, and honestly believing that he was making said payments in full compliance with the terms and requirements of said lease. That when appellant took said rentals from appellee, he did not notify or hint to appellee that he regarded him as his tenant from year to year, or was receiving said rentals for any such tenancy. That when the first three years of the tenancy under said lease expired, to wit, on February 24, 1905, the then owners of the leased premises expressly waived any written notice from the appellee that he would or intended to exercise the option reserved to him in said lease to continue his tenancy until February 24, 1912, and received his verbal notice to that effect as being

a good and sufficient exercise of said option, etc., etc. Here follows statement of facts sufficient to warrant an injunction against plaintiff restraining him from interfering with appellee's possession of the leased premises.

Equity has power to reform and correct written instruments. *Pomeroy, Equity Jur.* §§ 871, 1376, 1377, and cases cited in footnotes; *Monroe v. Skelton*, 36 Ind. 302; *Jones v. Sweet*, 77 Ind. 187. Reformation may be made as against a subsequent purchaser with notice of mistake. *Weaver v. Shipley*, 127 Ind. 526, 27 N. E. 146. Appellant concedes that the holding over by a tenant, either with the express or implied consent of the landlord, creates by implication a new lease for another term of equal duration, and upon the same conditions as the original tenancy, but contends that this rule is limited to cases where the fixed period of the lease is for less than one year, and that where this period of the tenancy is for a year or more, such holding over creates a new tenancy from year to year, and not for the same period as the old; that a lease for more than three years cannot be created by parol nor arise by implication of law. In this connection section 7462, *Burns' Ann. St.* 1908 and section 6629, *Burns' Ann. St.* 1901, that a lease for more than three years must be in writing, section 8054, *Burns' Ann. St.* 1908, and section 7089, *Burns' Ann. St.* 1901, that general tenancies are from year to year, *Kleespies v. McKenzie*, 12 Ind. App. 404, 40 N. E. 648, *Falley v. Giles*, 29 Ind. 114, *Spangler v. Rogers*, 123 Iowa, 723, 99 N. W. 580, *Andrew v. Marshall*, 118 Iowa, 595, 92 N. W. 706, 60 L. R. A. 399, 96 Am. St. Rep. 412, and *Thiebaud v. Bank*, 42 Ind. 212, are cited. The case first above cited, supports, as to the facts there involved, appellant's position. But in the lease the lessee was not granted the option to hold longer than 10 years the time for which the property had been leased. In *Falley v. Giles*, supra, it was held that, where a lease for two years provided that the lessee might hold the premises for the additional term of 1, 2, or 3 years at his election upon the same terms it was held, first, that there could be but one election, which could be for the further term of 1, 2, or 3 years, but that, if the election was for one of the shorter periods, the election could not be so exercised as for another period; that the mere continuance in possession after sufficient notice of election and renewal for 1 year was not sufficient notice for a longer term. In *Spangler v. Rogers*, supra, and *Andrew v. Marshall*, supra, it was held that merely holding over after the expiration of a term, under a lease which provided for a renewal upon the same terms, is not sufficient to show an affirmative election to renew the lease for an additional term, and that notice must be given. *Andrew v. Marshall*, supra, distinguishes between the privilege for extension and the privilege of renewal, and the opinion contains the follow-

ing statement: "There seems to be no doubt under the authorities that, where a lease provides that the tenant may have, at his option, an extension for a specified time after the expiration of the term agreed upon in the lease, or may occupy for an extended term including the term specified, the mere holding over after the expiration of the specified term will constitute an election to hold for the additional or extended term." The decision of the trial court is sustained in *Terstegge v. First German Mut. Benev. Soc.*, 92 Ind. 82, 47 Am. Rep. 135. The portion of the lease which gave rise to the controversy reads as follows: "The said party of the first part hereby rents and leases for the period of five years from January 1, 1874, with the privilege of five years more with the right to a revaluation as to rent at the end of five years to said party of the second part." The society entered into possession of the premises on the 1st day of January, 1874, and occupied the same until the 1st day of January, 1879. When the 5 years expired on the 1st day of January, 1879, the lessee did not surrender the premises, but elected to hold the same for the further term at the same rent, and still holds and occupies the same under and by virtue of the lease. It was accordingly held that no notice by the lessee of his intention to continue was required, but a holding over after the expiration of the first period is an extension of the demise for the additional term. In the course of opinion reference is made to the case of *Thiebaud v. Bank*, supra. In that case the bank rented certain real estate for a term of 5 years. In the lease was the following provision: "It is agreed between the parties that said bank is to have the privilege of renting said premises for another term of five years, at the same rate of rent as specified for the first term of five years payable in the same manner as above set forth." From the opinion the following quotation is made: "The part of the instrument in question is not in itself a lease for the second term of 5 years, nor is the whole instrument a lease for 10 years, with the privilege to the tenant to quit at the end of the first term of 5 years. It is a lease for 5 years, containing a covenant on the part of the lessor that the lessee may have 'the privilege of renting the premises for another term,' etc., and a summary as follows: "It was accordingly held that the portion of the lease above set out contained a covenant to renew; that in such cases notice must be given, and that the simple holding over without notice constituted the lessee a tenant from year to year, and nothing different." After making said quotation and summary, the court proceeds: "The case at bar is more similar, if not exactly similar, to *Montgomery v. Hamilton*, 76 Ind. 362, 40 Am. Rep. 250. In that case the lease describing the duration of the term was as follows: 'For the term of three years, \* \* \* with the privilege of five years at the same rate. at the option of the said board of commis-

sioners.' The board of commissioners held over with other notice, and the question was whether so holding over amounted to an election to hold for the 5 years. In speaking of the lease it was said: "The term did not necessarily terminate at the expiration of 3 years. Its termination depended upon the option of the appellee [the board of commissioners]. If the option was exercised, the term continued for 5 years. There was to be no renewal, nor was there to be more than one term. That term was for either 3 or 5 years. Its duration depended upon the appellee. Until its termination there could be no tenancy from year to year. If the option was exercised, the term did not terminate at the end of 3 years. How was the option to be exercised? Simply by retaining possession," etc. In *Wood, Landlord and Tenant* (p. 678) it is said: "When the tenant by the terms of the lease has an option to remain for a longer period, such additional term is not a new demise, but a continuation of the old one. If the lease does not provide that notice shall be given by the tenant of his election, merely remaining in possession after his term has expired is sufficient, and binds both him and the landlord for the additional term." In *Taylor, Landlord and Tenant* (7th Ed.) p. 278, the author says: "Sometimes, instead of a covenant for a renewal, it is agreed that the tenant may have the privilege or option for a further term. In this case, if notice is stipulated for, it must be given; but, if not stipulated for, the tenant's mere continuance in possession and paying rent, though with no express notice of his desire for the further term, entitles and binds him thereto." *Kramer v. Cook*, 78 Mass. 550; *Peehl v. Bumbalek*, 99 Wis. 62, 74 N. W. 545; *Harding v. Seeley*, 148 Pa. 20, 23 Atl. 1118; *Mershon v. Williams*, 62 N. J. Law, 779, 42 Atl. 778; *Clarke v. Merrill*, 51 N. H. 415; *Delashman v. Berry*, 20 Mich. 292, 4 Am. Rep. 392.

Upon the foregoing expressions from various jurisdictions and from approved text-writers, and especially upon the authority of *Terstegge v. First, etc., Society*, supra, we hold that the facts set out in the cross-complaint fully justified the action of the trial court. Appellant bought with full knowledge of the appellee's rights, and subject to them. He is not a good-faith purchaser. *Smith v. Schweigerer*, 129 Ind. 363, 28 N. E. 606.

Judgment affirmed.

(43 Ind. App. 120)

STATE ex rel. DARK v. MANN et al.  
(No. 6,482.)

(Appellate Court of Indiana. Jan. 15, 1909.)

1. INTOXICATING LIQUORS (§ 306\*)—REGULATIONS—SALE TO DRUNKARDS — NOTICE — PLEADING.

Burns' Ann. St. 1908, § 2485, provides that whoever furnishes intoxicating liquor to any

person in the habit of becoming intoxicated, after notice given him in writing that such person is in the habit of becoming intoxicated, shall be fined not less than 50, and not more than 100, dollars. Section 8355 provides that every person who shall furnish intoxicating liquors in violation of any of the "provisions of this act" shall be personally liable, and also liable on his bond to any person who shall sustain any damage to his person or property or means of support on account of the use of such intoxicating liquors so furnished. *Held*, that a complaint against a saloon keeper and his bondsmen, which states that the notice was given orally, and that the saloon keeper waived his right to receive a written notice, was not subject to demurrer even by the bondsmen.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 306.\*]

2. INTOXICATING LIQUORS (§ 306\*)—SALE TO INTOXICATED PERSONS — DAMAGES FROM SALE—ACTIONS—PLEADING.

In an action against a saloon keeper and his bondsmen, the complaint stated that plaintiff's husband was addicted to the excessive use of intoxicating liquors, and had become an habitual drunkard; that he was a constant visitor at the saloon of defendant; that plaintiff called upon defendant, and notified him not to sell or give any more intoxicating liquors to her husband; that defendant had continued, from the time of said notice until the bringing of the suit, in deliberately selling and giving on Sundays, as well as week days, to her husband, as aforesaid, all the intoxicating liquor that he desired, and as a result her husband had been intoxicated continuously. *Held*, that the facts pleaded showed that the recovery sought was for damages caused by the unlawful sales specified.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 441; Dec. Dig. § 306.\*]

Comstock, P. J., dissenting.

Appeal from Superior Court, Marion County; J. L. McMaster, Judge.

Action by State ex rel. Elizabeth Dark against James M. Mann and others. Demurrers were sustained to the complaint, and plaintiff appeals. Reversed.

W. P. Herod, for appellant. J. E. Bell, for appellees.

ROBY, J. Sult by appellant against appellees, on a bond executed by James M. Mann, as principal, and by the Terre Haute Brewing Company and Maurice Donnelly, under the statute authorizing the sale of intoxicating liquors. Demurrers were sustained to the complaint, and the sufficiency of that pleading is the sole question for consideration. It is averred therein, in substance that plaintiff's husband, Stephen O. Dark, an architect who had built up an extensive and profitable business, and who for several years had been addicted to the excessive use of intoxicating liquors, had, within the last 8 or 10 months, become an habitual drunkard; that he was a constant visitor at the saloon of defendant Mann; that plaintiff called upon said Mann, informed him that she was the wife of Dark, whom Mann and his bartenders well knew, and notified him not to sell or give any more whisky or other

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

intoxicating liquors to her husband; that she requested Mann to say whether she should put her notice not to sell her husband any more liquor in writing, and that he informed her that she need not go to the trouble of putting the notice in writing—that the parol notice would be all that he would require—and that her husband, Stephen C. Dark should not have another drink of intoxicating liquor in his saloon, whereupon plaintiff again by parol notified said Mann and his bartenders never again to sell or give her husband intoxicating liquor; that Mann has continued, from the time of said notice to the bringing of the suit, in deliberately selling and giving, by himself and his bartenders, on Sundays as well as week days, to said Dark, husband, as aforesaid, all the intoxicating liquors that he desired, and as a result said Dark has been continuously beastly drunk, and that while in that condition he commits disgusting acts, etc.

The condition of appellee's bond (following the form of section 4, c. 18, p. 53, Sp. Acts 1875 [section 8319, Burns' Ann. St. 1908]), is as follows: "If the said James M. Mann shall keep an orderly and peaceable house and shall pay all judgments for civil damages growing out of unlawful sales that may be assessed against (him) as provided for in such acts, then this obligation is null and void, else to remain in full force and virtue in law." Section 10 of the act approved March 17, 1875 (Sp. Acts 1875, p. 57, c. 13 [section 2485, Burns' Ann. St. 1908]), is as follows: "Whoever, directly or indirectly, sells, barter or gives away any spirituous, vinous, malt or other intoxicating liquor to any person who is in the habit of becoming intoxicated, after notice shall have been given to him, in writing, by any citizen of the township or ward wherein such person resides, that such person is in the habit of becoming intoxicated, shall, on conviction, be fined not less than fifty dollars nor more than one hundred dollars, to which may be added imprisonment in the county jail or workhouse not less than thirty days nor more than one year, and such person may be disfranchised and rendered incapable of holding any office of trust or profit for any determinate period." Section 20 of the same act (section 8355, Burns' Ann. St. 1908), is as follows: "Every person who shall sell, barter or give away any intoxicating liquors, in violation of any of the provisions of this act, shall be personally liable, and also liable on his bond filed in the auditor's office, as required by section 4 of this act, to any person who shall sustain any injury or damage to his person or property or means of support on account of the use of such intoxicating liquors, so sold aforesaid, to be enforced by appropriate action in any court of competent jurisdiction." Appellees urge that "The complainant cannot avoid giving written notice by attempting to show it was waived, because the parts of a criminal statute neces-

sary to constitute the offense cannot be waived," and that "The attempt of Mann to waive the giving of written notice would not bind either him or his sureties." This is an action to enforce a civil, not a criminal, liability. "A party may waive a right in his favor created by statute, the same as any other." *Tombs v. Rochester, etc., R. Co.*, 18 Barb. (N. Y.) 585; *Beecher v. Dacey*, 45 Mich. 92, 7 N. W. 689; *Phyfe v. Elmer*, 45 N. Y. 104. The appellee Mann has expressly waived the rights given by the statute for his benefit and protection—to have the notice given in writing—and he cannot be permitted to raise the objection that it was not in writing. "If he may, he is allowed to avail himself of what is substantially a fraud. Parties to suits at law may assert their rights to the fullest extent, but neither a plaintiff nor a defendant is at liberty to deceive, either actively or passively, his adversary, and a court whose province is to administer justice will take care that on the trial of every cause neither party shall reap any advantage from his own fraud." *Shutte v. Thompson*, 15 Wall. 159, 21 L. Ed. 123. If the judgment were recovered against Mann alone, and an action then brought on the bond, the engagement of the surety being "to pay all judgments for civil damages growing out of unlawful sales," etc., they would of course be liable. The fact that the action is brought against both in the first instance does not change the legal liability of either.

The complaint alleged the continued drunkenness of the husband, the sale or gift to him of intoxicating liquors while drunk, and the sale or gift on Sunday, and the permitting him to be in the saloon on Sunday. These sales or gifts were unlawful (sections 2484, 2492, 8326, Burns' Ann. St. 1908), and are admitted by the demurrers. The claim that appellant has, by the theory of her case, excluded considerations of unlawful sales made to appellant's husband while intoxicated and on Sunday is groundless. The facts pleaded show the recovery to be sought for damages caused by the unlawful sales specified. The prohibition of sales to an intoxicated person is made by section 15 of the original license act (section 2484, supra), and that a violation thereof gives a right of action to the aggrieved party is unquestioned. *State ex rel. v. Terheide*, 166 Ind. 690, 78 N. E. 195; *State ex rel. v. Soale*, 36 Ind. App. 73, 74 N. E. 1111.

The judgment is reversed, with instructions to overrule the demurrers.

WATSON, O. J., and HADLEY, J., concur.

RABB, J. (concurring). This action is based upon that provision of the temperance law providing that any person who shall sell intoxicating liquor, in violation of any of the provisions of this act, shall be personally liable, and also liable on his bond to any per-

son who shall sustain injury or damage to his person or property or means of support. Among a great many redundant matters, it is averred that the relatrix's husband was a person in the habit of becoming intoxicated; that appellee Mann was a licensed saloon keeper, engaged in retailing intoxicating liquors at a certain designated place, and the other appellees the sureties on his bond as such saloon keeper; that relatrix notified appellee Mann that her husband was in the habit of becoming intoxicated, and requested him not to sell her said husband intoxicating liquors; that said appellee thereupon told relatrix that she need not go to the trouble of giving him notice in writing, and assured her that he would sell her husband no more liquor. It is also averred in the complaint that, since September 18, 1904, her said husband has been continuously drunk on liquor procured at Mann's saloon, and that after said notice was given, up to the time the suit was brought, appellee Mann had continued to sell and give to her said husband intoxicating liquor; that in consequence of such sales and gifts of liquor, her husband had become so affected by the drink that he neglected his business, and neglected to supply relatrix with the necessaries and comforts of life. I cannot concur in the view that the complaint in this case is sufficient as charging a sale of liquor in violation of that provision of the statute making it unlawful to sell or give liquor to a person in the habit of becoming intoxicated, after notice in writing has been given the saloon keeper, as provided in the statute. The statute giving this right of action is in derogation of the common law. It imposes upon defendant an obligation not existing at common law, and must be strictly construed. *Burns v. Grand Rapids, etc.*, 113 Ind. 169, 15 N. E. 230; *Hamilton v. Jones*, 125 Ind. 176, 25 N. E. 192; *Board, etc., v. Jarnecke*, 164 Ind. 664, 74 N. E. 520; *Chicago, etc., v. Sturgis*, 44 Mich. 538, 7 N. W. 213; *Detroit, etc., v. Putnam*, 45 Mich. 285, 7 N. W. 815; *Detroit, etc., v. Chaffee*, 70 Mich. 80, 37 N. W. 882; *Matter of Hollister Bank*, 27 N. Y. 393, 84 Am. Dec. 292; *Lane's Appeal*, 105 Pa. 49, 51 Am. Rep. 166; *O'Reilly v. Bard*, 105 Pa. 569; *Cohn v. Neeves*, 40 Wis. 393. A liability might have been imposed by the lawmaking power for selling or giving intoxicating liquor to a person in the habit of becoming intoxicated, without reference to whether such sale was unlawful or not, but they have not chosen to do so. It is only for violations of the provisions of this act that liability follows. This court cannot write into the statute words that are not there, and therefore there can be no liability unless the sale is illegal. 6 Ency. of Law, p. 42; *Myers v. Conway*, 55 Iowa, 166, 7 N. W. 481; *Peacock v. Oaks*, 85 Mich. 578, 48 N. W. 1082; *Baker v. Beckwith*, 29 Ohio St. 314; *Sibila v. Bahney*, 34 Ohio St. 399; *Granger v. Knipper*, 2 Cin. R. 490; *Russell*

*v. Tippin*, 12 Ohio Cir. Ct. 52; *Stanton v. Simpson*, 48 Vt. 628.

It cannot be successfully contended that a criminal prosecution for a violation of this provision of the law will lie against the principal defendant upon the facts stated in the complaint. It is essential that an indictment, predicated upon the sale of intoxicating liquor to a person in the habit of becoming intoxicated, shall include the averment that the sale was made after notice in writing, given by some inhabitant of the township. *Geraghty v. State*, 110 Ind. 103, 11 N. E. 1; *State v. Smith*, 122 Ind. 178, 23 N. E. 714. The notice in writing is not only a necessary ingredient in a criminal charge, but it is an essential element in a civil action predicated upon a violation of this provision of the law. It is not a question of the waiver of benefits, but a question as to whether or not all of the elemental facts authorizing a statutory right of recovery are shown in the complaint. But it does not follow that the complaint is insufficient because no violation of this particular provision of the law is shown; nor is the averment of the complaint "that by reason of the violation of said notice relatrix has suffered great loss" of controlling influence in determining the character of the plea. The action is predicated upon injuries alleged to have resulted to relatrix from the continued sale of intoxicating liquor to her husband, whereby he became incapacitated to follow his business and provide for the support of the relatrix; and, if the facts averred in the complaint show that the sales charged to have produced this effect were in violation of any of the provisions of the law, the complaint is sufficient to withstand a demurrer, even though relatrix may have been mistaken as to what particular provisions of the law were violated by these sales.

It is directly averred that the husband was drunk continuously from the time he began to patronize the appellee Mann's saloon up to the time the suit was brought. The word "drunk" and the phrase "in a state of intoxication" are synonymous—they both mean the same thing—and the appellees were bound to know from the allegations of the complaint, that the relatrix was charging that appellee had sold to her husband, continuously for the period of time named, intoxicating liquor when he, the husband, was in a state of intoxication, and that he was thereby kept continuously in a state of intoxication, destroying his power and ability to carry on his business and provide for his family. To sell, barter, or give away intoxicating liquor to a person in a state of intoxication, knowing him to be in such state, is a violation of one of the provisions of the law, giving relatrix her right of action, and we think that the violation of this provision of the law is sufficiently shown by the averments of the complaint. It has been held that, in a criminal indictment for selling or

giving intoxicating liquor to a person in a state of intoxication, it was not necessary to charge that the sale or gift of the liquor was made with a knowledge, on the part of the defendant, that the person to whom the liquor was sold or given was in a state of intoxication (*Werneke v. State*, 50 Ind. 23, and *Brow v. State*, 103 Ind. 133, 2 N. E. 296), and greater strictness in civil pleadings is not required.

For this reason I concur in the reversal of the judgment of the court below.

MYERS, J., concurs.

COMSTOCK, P. J. (dissenting). Action brought by appellant against appellees, on a bond given by appellees Mann, as principal, and the Terre Haute Brewing Company and Maurice Donnelly, as sureties, under the statutes authorizing the sale of intoxicating liquors. Separate and joint demurrers for want of facts were sustained to the complaint, and judgment was rendered thereon against appellant for costs. The action of the court is assigned as error.

The complaint alleges that the relatrix was the wife of Stephen C. Dark; that for the past 8 or 10 months he has become, and is now, an habitual drunkard; that said Mann has been, since the 29th day of April, 1904, the proprietor of a saloon of which her husband has been a constant visitor and patron; that said relatrix informed said Mann that she was the wife of said Dark, who said Mann well knew, and notified said Mann, as well as his barkeeper and other persons in charge of his said bar, not to sell or give, directly or indirectly, to her said husband any more whisky or other intoxicating liquors, and she then requested said defendant Mann to say whether relatrix should put her notice not to sell her husband any more liquors in writing, and then and there defendant Mann informed said relatrix that relatrix need not go to the trouble of putting her notice not to sell her husband any more intoxicating liquors of any kind in writing; that the parol notice would be all that he would require, and said relatrix thereupon, again by parol, notified said Mann never again to sell or give, directly or indirectly, to relatrix's husband any more intoxicating liquor of any kind; that said Mann then and there informed said relatrix that said notice was sufficient, and that he would not require it to be in writing, and then and there assured said relatrix that said Stephen C. Dark, the relatrix's said husband, should not have another drink or drop of any of the intoxicating liquors in his place; that said defendant Mann, at all times since said relatrix and her husband lived in said neighborhood, knew that said Stephen C. Dark was an habitual drunkard; that notwithstanding said notice and said defendant Mann's promise that said Dark should not have any

more liquor of any kind at said Mann's place, said defendant Mann has continued, from the time of said notice down to the bringing of this suit, in deliberately selling and giving, by himself, his barkeeper, and another person by the name of Escott, who is interested in some way in said saloon, to said Dark, husband, as aforesaid, all the intoxicating liquor he desired, and as a result said Dark had been continuously beastly drunk, and by reason of the violation of said notice, as aforesaid, said relatrix has suffered great loss in money, etc. The complaint seeks to recover upon the bond of appellee \* \* \* for the sale of liquor to her husband, who was a person in the habit of becoming intoxicated.

The sections of the statute upon which the action is based are section 10, c. 13, p. 57, Sp. Acts 1875, approved March 17, 1875 (section 2485, Burns' Ann. St. 1908), which reads as follows: "Whoever directly or indirectly sells, barter or gives away any spirituous, vinous, malt or other intoxicating liquors to any person who is in the habit of becoming intoxicated, after notice has been given to him in writing by any citizen of the township or ward wherein such person resides, that such person is in the habit of becoming intoxicated," etc., and section 20, c. 13, p. 59, Sp. Acts 1875 (section 8355, Burns' Ann. St. 1908) reads: "Every person who shall sell, barter or give away any intoxicating liquor in violation of any of the provisions of this act shall be personally liable and also liable on his bond filed in the auditor's office," etc. The offense, under this section of the statute, is the sale to a person in the habit of becoming intoxicated after notice in writing. The complaint affirmatively states that the written notice was not given. The offense defined is not the selling to a person in the habit of becoming intoxicated, but in selling to such person after notice has been given in writing of such habit. *Geraghty v. State*, 110 Ind. 105, 11 N. E. 1; *State v. Smith*, 122 Ind. 178, 23 N. E. 714. The theory upon which the complaint is based is clear beyond question. It expressly avers that, "by reason of the violation of the said notice, as aforesaid, relatrix has suffered great loss in money," etc. A party cannot seek relief on one theory by the pleadings, and then ask to have relief given on another. It is the settled rule of pleading and practice in this state that a complaint must proceed upon some definite theory, and that it must be good on the theory adopted. This rule has been recently emphasized in *Oolitic Stone Co. v. Ridge*, 169 Ind. 639, 83 N. E. 246, in which case appellee insisted that the amended complaint, which was in one paragraph, stated a good cause of action at common law, as well as under the employer's liability act, in favor of appellee against appellant, and that therefore the cause should not be reversed even if said act was unconstitutional as applied to appellant. But the Supreme

Court reversed the judgment for the reason that the complaint was not sufficient upon the theory upon which it was framed, and in support of the ruling makes the following, among other, citations: Elliott, App. Proc. § 655, p. 587, and cases cited; Ewhank's Manual, § 288; Dyer v. Woods, 166 Ind. 44, 51, 52, 76 N. E. 624; Carmel, etc., Co. v. Small, 150 Ind. 427, 431, 47 N. E. 11, 50 N. E. 476; Terre Haute, etc., R. Co. v. McCorkle, 140 Ind. 613, 622, 623, 40 N. E. 62, and cases cited; Copeland v. Summers, 138 Ind. 219, 226, 35 N. E. 514, 37 N. E. 971; Aetna, etc., Co. v. Hildebrand, 137 Ind. 462, 473, 37 N. E. 136, 45 Am. St. Rep. 104; Balue v. Taylor, 136 Ind. 368, 373, 36 N. E. 269; Comegys v. Emerick, 134 Ind. 143, 152, 153, 33 N. E. 899, 39 Am. St. Rep. 245; Pearson v. Pearson, 125 Ind. 341, 344, 25 N. E. 342; Feder v. Field, 117 Ind. 386, 391, 20 N. E. 129; Manifold v. Jones, 117 Ind. 212, 217, 20 N. E. 124; Gregory v. Cleveland, etc., R. Co., 112 Ind. 385, 387, 883, 14 N. E. 228; Louisville, etc., R. Co. v. Godman, 104 Ind. 490, 494, 4 N. E. 163; Chicago, etc., R. Co. v. Bills, 104 Ind. 13, 16, 3 N. E. 611; Leeds v. City of Richmond, 102 Ind. 372, 385, 1 N. E. 711; Bremmerman v. Jennings, 101 Ind. 253, 256, 257; Sims v. Smith, 99 Ind. 469, 477, 50 Am. Rep. 99; Cottrell v. Aetna, etc., Co., 97 Ind. 311, 313; Western, etc., Co. v. Reed, 96 Ind. 195, 198, and cases cited; Western, etc., Co. v. Young, 93 Ind. 118, 119, and cases cited; Union, etc., Co. v. Adler, 38 Ind. App. 530, 536, 73 N. E. 835, 75 N. E. 1088; Rietman v. Bangert, 26 Ind. App. 463, 471, 59 N. E. 1089; Tibbet v. Zurbuch, 22 Ind. App. 354, 361, 362, 52 N. E. 815; Cleveland, etc., R. Co. v. Dugan, 18 Ind. App. 435, 438, 43 N. E. 233, and cases cited; Sanders v. Hartge, 17 Ind. App. 243, 250-252, 46 N. E. 604; Miller v. Miller, 17 Ind. App. 605-608, 47 N. E. 338; Calloway v. Mellett, 15 Ind. App. 366, 367-369, 44 N. E. 198, 57 Am. St. Rep. 238; Cleveland, etc., R. Co. v. De Bolt, 10 Ind. App. 174, 176, 37 N. E. 737. It is possible that "the theory" rule has in some cases been refined beyond accuracy and that it should be modified, but this court is without authority in that behalf. If it is to be relaxed, it would seem, inasmuch as sureties are favorites of the law, that they should not be made the first victims of the change. The complaint does not show a violation of the section in question, which could affect appellee's bondsmen. The notice in writing specified is in a large measure intended for the benefit of the party charged with the sale of intoxicating liquor. This requirement may be waived by the principal for himself, but not for his bondsmen.

It is the opinion of the writer that the judgment should be affirmed as to appellees, the Terre Haute Brewing Company and Maurice Donnelly, and reversed as to appellee, Mann.

**PITSER v. McCREERY.** (No. 6,663.)<sup>1</sup>  
(Appellate Court of Indiana. Jan. 13, 1909.)

Appeal from Circuit Court, Delaware County; J. W. Macy, Judge.

Action between Samuel P. Pitser and John W. McCreery. From the judgment rendered, Pitser appeals. Transferred to the Supreme Court under the act of 1907 (Laws 1907, p. 238, c. 148, § 2).

Geo. H. Koons and Walter L. Ball, for appellant. Orr & Orr, for appellee.

**PER CURIAM.** Transferred to the Supreme Court under the act of 1907 (Laws 1907, p. 238, c. 148, § 2).

(194 N. Y. 49)

**KELLY v. BEERS et al.**

(Court of Appeals of New York. Jan. 5, 1909.)

1. **APPEAL AND ERROR (§ 1094\*)—APPEAL FROM APPELLATE DIVISION BY DIVIDED COURT—REVIEW—BURDEN OF PROOF.**

A plaintiff, appealing from a judgment of the Appellate Division, affirming by divided court a judgment of the Supreme Court dismissing the complaint on the merits on a question of fact, has the burden on the appeal of establishing his theory and claim as a matter of law, and beyond any question of fact.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1094.\*]

2. **BANKS AND BANKING (§ 129\*)—DEPOSITS—TITLE TO DEPOSITS—JOINT ACCOUNTS.**

A bank account may be so fixed that two persons shall be joint owners thereof during their mutual lives, and the survivor take on the death of the other.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 129.\*]

3. **GIFTS (§ 30\*)—INTER VIVOS—BANK DEPOSITS.**

A deposit in a savings bank by one person of her money in her name and the name of another, her daughter, or the survivor of them, imports on its face joint ownership by the depositor and her daughter, with final sole ownership by survivorship; but it is not sufficient to establish the intent of the depositor to give to the daughter joint interest in, or ownership of, the deposit.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 52-57; Dec. Dig. § 30.\*]

4. **GIFTS (§ 30\*)—INTER VIVOS—BANK DEPOSITS.**

One deposited money in a savings bank in her own name. Subsequently she changed the account so as to make the deposit stand in her own name and the name of another, her daughter, or the survivor of them. The change was made for the purpose of enabling the daughter to get the deposit on the depositor's death. After the change had been made, the depositor frequently stated that she had fixed her bank account so that either she or her daughter could draw the money out at any time, and that in the event of her death the daughter would have the deposit. The passbook was taken by the daughter and placed in the joint and equal custody of both. The depositor was capable of taking care of herself, and of her affairs, so that there was no necessity for conferring on the daughter the power to draw money as a matter of convenience. *Held* to show that the depositor intended to give the daughter joint interest in, and ownership of, the deposit, authorizing the daughter to claim the deposit on the depositor's death, though the depositor had prior to the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
\* Transferred to Supreme Court, 33 N. E. 303. Rehearing denied, 33 N. E. 317.

changing of the account made a will disposing of her deposits.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 52-57; Dec. Dig. § 30.\*]

5. GIFTS (§ 15\*)—INTER VIVOS—EVIDENCE.

Where the acts constituting a gift inter vivos by a parent to a child are not of doubtful or uncertain character, the fact that the child, on the gift being upheld, will receive a greater share of the parent's estate than another child will receive on the distribution of the estate under the parent's will executed prior to the gift, cannot be considered in determining the intent of the parent to make the gift.

[Ed. Note.—For other cases, see Gifts, Dec. Dig. § 15.\*]

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Sarah E. Kelly against Franklin B. Beers and others, executors of Kate V. Beers, deceased, and another. From a judgment of the Appellate Division (108 N. Y. Supp. 1138), affirming by divided court a judgment of the Supreme Court, dismissing the complaint on the merits, plaintiff appeals. Reversed, and new trial granted.

The action was brought to establish plaintiff's ownership of a deposit in the defendant Home Savings Bank payable to her or the deceased, Kate V. Beers, or the survivor, and the following facts, amongst others, were established beyond dispute, most of them being found by the trial court:

The deceased and the plaintiff were mother and daughter, part of the time at least residing together, and the only other child was a son, Franklin. For some time prior to September 30, 1901, Mrs. Beers was the sole owner, in her individual name, of a deposit in the defendant bank amounting to \$1,829.34. Several weeks before said date she asked one of the bank officials if she could not have her account fixed so that either she or her daughter could draw the money at any time, and so that if anything should happen to her the daughter could get the money without any further trouble, and he told her to bring in her daughter and he would "fix it up." On the date mentioned she came to the bank with her daughter, whom she introduced to the treasurer, telling him that she had come to have the book fixed up as previously talked about between them, and the treasurer told her that he would close out the old account and open a new one and put it in the name of Kate V. Beers or Sarah E. Kelly, her daughter, or the survivor of them, and that would fix it as she wished. He then filled out a check for the old account as it stood in the name of Mrs. Beers, who signed it and with it surrendered her old passbook. The treasurer then said to the two: "This fixes the account so that either one can draw the money out at any time, and in the event of the death of either the survivor is absolute owner. The will, executors, administrator, or either has no control whatever over the

book." He then called his assistant to take the signatures of the mother and daughter in the depositors' signature book and filled out a new passbook, headed as follows: "The Home Savings Bank of Albany, N. Y., in account with Kate V. Beers or Sarah E. Kelly, her daughter, or the survivor of them," and in this passbook he credited the sum of \$1,829.34 passed from the old account. After making her signature and seeing her daughter do likewise, Mrs. Beers asked the assistant "if the money was fixed so that in case anything should happen to her plaintiff could get it without any trouble," and also if plaintiff should go to the bank "could she draw the money at any time," and the assistant, in answer to both questions, said, "Yes." The deceased took the new bank book and handed it to plaintiff.

Substantially similar transactions occurred at other banks in which Mrs. Beers had accounts originally standing in her sole individual name. In the case of the Albany Savings Bank, where she had an account aggregating \$3,000, after asking and being advised "how she could arrange her book so her daughter could draw the money the same as herself," in the presence of her daughter she signed and delivered a written order, filled out and explained to her, reading as follows: "The treasurer of the Albany Savings Bank will please add the name of my daughter Sarah E. Kelly as owner and creditor with me of all moneys heretofore or which may hereafter be deposited in said bank under this account No. 112,093, together with all the interest which has been or may hereafter be credited to the said account, with full authority for each or either of us or the survivor of us to draw out of said bank the whole or any part of such moneys or such interest." After executing this order her former passbook and the books of the bank were so changed as to make the account read: "Albany Savings Bank in account with Mrs. Kate V. Beers or Sarah E. Kelly, her daughter, or survivor." In the case of the Albany Trust Company, Mrs. Beers executed and delivered to the bank an order similar in all respects to that last above set forth, and thereupon her passbook and the books of the bank were changed so as to read: "Albany Trust Company in account with Kate V. Beers, or Mrs. Sarah E. Kelly, payable to either, or survivor of either." In the case of the National Savings Bank she caused her account to be so changed as to make it "in trust for Sarah E. Kelly, her daughter."

The deceased at various times in 1897, 1902, and 1903 talked with various witnesses, apparently disinterested and credible, about her bank accounts, and to each one of them in substance said that she intended to have, or had had, the money in the banks fixed so that the plaintiff could draw it out

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

at any time during her life and would have it upon her death. She also upon one or more occasions spoke of the difference in the provisions for the plaintiff and her son respectively, and explained that the more favorable one in behalf of the former was due to the fact that she had no means, while the latter was in good circumstances. The pass-books for all these accounts were kept locked up in a receptacle to which each party had a key. The mother died in 1903, and prior to such decease the account involved in this action had been increased to about \$2,400. No withdrawals were made from it, and none appear to have been made on any of the accounts except of interest, and on two or three occasions such withdrawals were made by the plaintiff in her own name, and it does not appear that such moneys were by her turned over to her mother. By will executed in December, 1889, the deceased gave a legacy of \$5,000 to plaintiff and also to her brother. In 1895 she revoked this will and made another one giving legacies of \$4,000 and \$3,000, respectively, to plaintiff and her brother. June 20, 1900, she made a codicil to the last will, whereby she revoked the legacy to her daughter of \$4,000, and in lieu thereof gave her "all and whatever money I shall at the time of my decease have on deposit in the Albany Savings Bank." In December, 1900, she made another will revoking former ones, whereby she gave her son a specific legacy of certain property amounting on its face to \$8,350, and gave to plaintiff "subject to the payment of my funeral expenses therefrom all and whatever money I shall have on deposit in any of the savings banks or other banks in the city of Albany, N. Y., at the time of my death, which amount I intend shall be about \$7,000," further providing, however, that in case there should not be \$7,000 on deposit in said banks said sum should be made up from other moneys coming into the hands of the executors. The total bank deposits standing in the name of deceased and plaintiff as above stated on the death of the former amounted to \$9,878, and her estate and the aggregate of said accounts amounted to about \$24,000. The deceased, while quite aged at the time of her death, was active physically and in full possession of her mental faculties. The trial court found that, when the change in the form of the account herein involved was made, the deceased did not intend to create a joint ownership in herself and plaintiff or transfer the title or part with the right to control said account by will.

Andrew J. Nellis, for appellant. William P. Rudd, for respondents.

HISCOCK, J. (after stating the facts as above). The appellant claims that she is the owner of moneys originally belonging to and deposited in the sole name of her mother, the deceased, but later and at the time of

the latter's death deposited in an account payable to "Kate V. Beers or Sarah E. Kelly, her daughter, or the survivor of them." Her entire theory is that she was joint owner with her mother of these moneys during the latter's life and upon her death became entitled to the whole thereof as survivor. The trial court has found against her on the crucial question of the mother's intent in making and continuing the later deposit, and therefore she assumes the burden on this appeal of establishing her theory and claim as matter of law and beyond any question of fact. I think she has successfully borne this burden. The possibility of so fixing a bank account that two persons shall be joint owners thereof during their mutual lives, and the survivor take upon the death of the other, is so well established that we may assume and need not discuss it. I think, also, it is so apparent that it must be conceded that the account in question on its face imports such joint ownership by appellant and the deceased with final sole ownership by survivorship. It has been written, however, in various decisions, that the mere form of the account in such a case as this will not be regarded as sufficiently establishing the intent of the person making it to create a trust in behalf of another or to give to such another joint interest in or ownership of the deposit. *Beaver v. Beaver*, 117 N. Y. 421, 430, 22 N. E. 940, 6 L. R. A. 408, 15 Am. St. Rep. 531; *Matter of Bolin*, 136 N. Y. 177, 179, 32 N. E. 626; *Matter of Totten*, 179 N. Y. 112, 125, 71 N. E. 748, 70 L. R. A. 711. Therefore it becomes proper to make brief reference to facts already stated in full which tend to establish that the deceased did intend to give to her daughter the interest claimed by the latter, and that this intent was consummated in the deposit which was made and aptly and faithfully expressed in the title and form of that account.

Such facts show: The deceased frequently stating to outsiders that she desired to have her bank deposits fixed so that her daughter might have or draw them at any time during her life and have them at her death. Then explicitly and formally asking an official of the defendant bank "if she couldn't have her bank account fixed so that either she or her daughter could draw the money at any time, and that if anything should happen to her that her daughter could get the money without any trouble." Then, in accordance with his instructions, going with her daughter to the bank to have this arrangement perfected, and, under the instructions of the official, closing up the old account and opening the new one in the form stated, for the purpose of accomplishing her intent, being told as and after she performed the necessary acts that "this fixes the account so that either one can draw the money out at any time, and in the event of the death of either the survivor is absolute owner. The will, executor, or administrator or

either has no control whatever over the book," and that "the money was fixed so that in case anything should happen to her plaintiff could get it without any trouble, and \* \* \* could draw the money at any time" if she "should come there to the bank." And after the signatures of both as depositors had been entered in the proper bank book, the passbook was taken by the daughter and placed in the joint and equal custody of both, and from that time to her death the deceased never did a thing which threw any shadow on her intent in making the new deposit, or indicated the slightest change in or abandonment or revocation of such intent. And, further, and as illustrating the extent and absoluteness of the interest which she intended to give to her daughter in the bank accounts, we find that in the case of deposits in other banks by formal writing she made the daughter "owner and creditor" with her of all moneys deposited and authorized each or either of them or the survivor of them to draw out the whole of said deposits.

It seems to me that all of these facts demonstrate the purpose of the deceased to give to the appellant the interest which she claims with a clearness and force beyond that required by the authorities. *Mack v. Mechanics' & Farmers' Sav. Bank*, 50 Hun, 477, 3 N. Y. Supp. 441; *Farrelly v. Emigrant Industrial Sav. Bank*, 92 App. Div. 529, 87 N. Y. Supp. 54; *Mable v. Bailey*, 95 N. Y. 206; *Beaver v. Beaver*, *supra*, 431; *Matter of Totten*, *supra*; *Augsbury v. Shurtliff*, 180 N. Y. 138, 141, 72 N. E. 927; *Id.*, 114 App. Div. 626, 99 N. Y. Supp. 989, affirmed 190 N. Y. 507, 83 N. E. 1122; *West v. McCullough* (decided without opinion, January 5, 1909), 115 N. Y. Supp. —. It is true that some of the foregoing cases simply decided that the evidence there presented authorized a finding as matter of fact of a gift such as is claimed here; that being the only question presented. But principles necessarily involved or enunciated sustain the interpretation now placed on them as applied to the facts which have been discussed.

It remains to consider the respondents' argument that the foregoing view is incorrect, or at least that there is other evidence which, taken in connection with that especially referred to, permits inferences sustaining the findings in their behalf. Before passing to a consideration and analysis of this, reference may be made to one finding of fact which is almost in favor of appellant. It is found: "That the change in the account in the Home Savings Bank of the city of Albany on the 30th day of September, 1901, was made by said Kate V. Beers merely as a matter of convenience in drawing the moneys from the bank, and also to vest the title to the fund remaining at the time of the death of Mrs. Beers, in her daughter, if she survived her." Inasmuch as the only legal method by which the deceased could vest the title to the fund remaining at the time of her

death in her daughter was by making her a present joint owner in the account, and inasmuch as the form of the account payable to either was found by the trial judge, it is argued that this finding established appellant's case and entitles her to a reversal. I prefer, however, to assume that the findings on the question of intent, etc., are adverse to the appellant, and to consider the case with reference to the question whether there is any evidence to sustain such findings.

While the counsel for respondents, in disputing that the deposit was made with the intent and for the purpose claimed by Mrs. Kelly, says that, on the other hand, it was made and the power to draw moneys given as a matter of convenience, he very frankly admits that he does not mean any mere physical convenience. This element was not involved, for Mrs. Beers was so capable of taking care of herself and of her affairs that there was no necessity for conferring upon the daughter the power to draw money as a matter of convenience to her mother. This term of "convenience" seems rather to have been used by the court and counsel as a form of stating that the mother did not intend joint ownership, but did intend something else.

In the first place, it is said that Mrs. Kelly at the time of her mother's death made an admission to one of the defendants contradicting her present claim. Without quoting this admission, it may be stated that it has been analyzed, and that I see nothing in it which contradicts the present claim. It does not give a full history of all that was done, as actually found by the trial court; but, so far as it does go, it does not raise any issue with the other testimony.

In the second place, it is urged that the various wills and codicils made by the deceased are indicative of an intent on the part of Mrs. Beers to maintain her ownership and control of the bank accounts and therefore are contradictory of that which is claimed by appellant. There appear to be several answers to this proposition. If the deceased, having an intent to give joint and surviving ownership to her daughter, consummated that intent by the performance of the necessary acts, I suppose that the original nature and effect of these acts would not be affected or destroyed, even if subsequently her views changed; such mental change not being carried into any legal or effective revocation of that which had been done. In the *Mable Case*, cited *supra*, the person making a deposit in trust which was the subject of litigation subsequently withdrew the same, and it was claimed that this indicated that he did not intend to create a trust, but Judge Andrews said, at page 211: "The fact that the deposits for the plaintiff and others were subsequently \* \* \* drawn out by Dr. Bailey is not legitimate evidence that he did not intend when the deposits were made to create a beneficial trust for the benefi-

claries named. If the withdrawal was with intent on his part to ignore the trust and to convert the money to his own use, it might be competent evidence of a change of purpose, but it throws no light on the original transaction." See, also, *Scheps v. Bowery Savings Bank*, 97 App. Div. 434, 90 N. Y. Supp. 28.

But further than this, if it should be assumed that there was anything in the wills when executed which could be regarded as sufficient to negative the idea or counteract an intent of Mrs. Beers to create a joint ownership in a bank deposit, I do not think that it would affect this case. All of the wills and codicils admitted in evidence as bearing on this question were executed before the deposit involved in this action was changed into its present form. Those instruments, of course, if they bore on the subject at all, indicated the testator's intent at the respective dates when they were executed. Therefore, if this deposit subsequently made was at variance with any provisions in them, it, and not they, must be controlling. Even though it be assumed that the deceased originally intended to dispose of her bank deposits by will, that would not interfere with or destroy a purpose subsequently formed and executed to dispose of them through the form of the deposits themselves as was done.

Lastly, in somewhat general terms it is insisted: That the deceased did not inquire about joint ownership or transfer of title; there was no idea or suggestion of a present gift or transfer; she did not part with the control of the title or intend to create a new kind of ownership or intend to give Mrs. Kelly the right to have an equal share of the income or by means of the transfer obtain an absolute, immediate ownership of one-half of the fund; did not intend Mrs. Kelly should draw the moneys during her life. It seems to me that these assertions are the expression of a theory unjustifiably evolved from assumptions, rather than the statement of conclusions legitimately drawn from the evidence. It has been held so many times that courts will be controlled by the substance of a transaction, rather than by the name given to it, that it is a matter of no importance that the particular terms "joint ownership" and "joint account" were not used by Mrs. Beers. The controlling question for us has been, and is, whether she intentionally and intelligently created a condition embracing the essential elements of joint ownership and survivorship. If she did, that was sufficient, even though she did not use any particular formula in doing it. Her acts and repeated declarations indicate

that she did intend to do just that which is denied, give to her daughter joint ownership in and control over this account. It is true that her daughter did not draw any checks on it during the life of the mother, but it is also true that the mother herself did not draw any checks on it during the same time. It is true that the mother did retain control over the account in that she had the right at any time to check out all of the moneys and destroy the account, but so did the daughter. For the sake of the argument we might assume that the primary purpose of the mother in creating the account was to pass the money on her death to her daughter, and that she did not expect under ordinary circumstances that the daughter would draw out the money during her life any more than that she herself would draw it out; but, if we assume all of this, such assumption would simply go to the expected exercise by the daughter of her legal rights rather than to the existence itself of those rights. In short, starting with the performance by Mrs. Beers deliberately and advisedly of certain acts legally calculated and sufficient to accomplish certain purposes, and charging her not only as we must as a matter of law, but as we ought to as a matter of fact, with appreciation of the significance and consequences of what she did, we are unable to discover in this record any evidence of an intent not to effect that legal result which her acts naturally and presumptively did accomplish.

Some reference was made to the equities of the division of the mother's estate between the appellant and her brother, if the former's claim to these deposits should prevail. While such considerations might be helpful under some circumstances in helping us to decipher the obscure or uncertain intent of a deceased person, I do not think they are of consequence in this case in dealing with well-established acts which are not of doubtful or uncertain character. Moreover, it is possible that on the settlement of the estate of the deceased under her will such disparity as is now claimed between the provisions for the two children respectively will be avoided or be found not to exist.

The judgment appealed from should be reversed, and a new trial granted, with costs to abide event.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. CHASE, J., not sitting.

Judgment reversed, etc.

(194 N. Y. 60)

**KELLY v. BEERS et al.**

(Court of Appeals of New York. Jan. 5, 1909.)

**GIFTS (§ 30\*)—INTER VIVOS—BANK DEPOSITS.**

A depositor in a savings bank changed the deposit standing in her own name so as to make it payable to herself or another, her daughter, or survivor. The change was made under the depositor's written direction to the bank to add the name of the daughter as "owner and creditor" of all moneys deposited under the account. Subsequently thereto the depositor made a will disposing of her savings bank deposit and giving it to her daughter. *Held*, that the daughter was a joint owner of the deposit, and the depositor's disposition of the deposit by will did not destroy the daughter's rights.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 52-57; Dec. Dig. § 30.\*]

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Sarah E. Kelly against Franklin B. Beers and another, as executors of Kate V. Beers, deceased, and another. From a judgment of the Appellate Division (108 N. Y. Supp. 1137), affirming a judgment of the Supreme Court, dismissing the complaint, plaintiff appeals. Reversed, and new trial granted.

Andrew J. Nellis, for appellant. William P. Rudd, for respondents.

**HISCOCK, J.** It was practically assumed on the argument that our decision in this case would be governed by the conclusions which we might reach in the Home Savings Bank Case (decided at this term) 86 N. E. 980, and we think that this assumption was proper. There seem to be only two particulars of any importance in which the evidence in this case differs from that produced in the other one. In this case the form of the deposit, which originally stood in the name of Mrs. Beers alone, was on or about May 4, 1897, changed by adding words to the heading of the passbook and to the title upon the bank-books making the account payable to Mrs. Beers, "or Sarah E. Kelly, her daughter, or survivor." This was done under a written direction to the bank to "add the name of my daughter, Sarah E. Kelly, as owner and creditor with me of all moneys heretofore or which may hereafter be deposited in said bank under this account, No. 112,086, together with all the interest which has been or which may hereafter be credited to the said account, with full authority for each or either of us, or the survivor of us, to draw out from the said bank the whole or any part of such moneys or such interest." After this change was made a new codicil to a former will and a new will were made and executed by Mrs. Beers, both of which referred to her savings bank deposits, the first one revoking a former legacy to her daughter, and in lieu thereof giving her "all and whatever money I shall at the time of my decease have on deposit in the Albany Savings Bank." It appeared

that the deposit in suit was the only one which the testatrix then or thereafter had in said bank.

It does not seem to us that these differences are sufficient to warrant any different result than that reached in the other case. The circumstances under which the change in the form of the deposit was made seem to be a little more favorable to the appellant in this case than in that, for here the order directing the change expressly and specifically requests that the appellant shall be made "owner" and "creditor" (as against the bank) of all moneys then or thereafter deposited. This, with the form of the account, seems to make the appellant a joint owner almost beyond the chance for debate. The codicil especially referred to was executed in 1900, after the deposit involved in this action was made, and, while in that respect and in respect to the mention of deposits in the Albany Savings Bank it is a little more favorable to the respondents than were the wills and codicils as involved in the Home Savings Bank Case, we do not think that it has the effect to destroy or impair the intent actuating the deceased when she made the deposit, or to revoke the acts then performed in consummation of such intent. The mere fact that the mother assumed by her wills to accomplish the same purpose in giving this deposit to her daughter at her death, which had already been accomplished by the form of the savings bank deposit, does not of itself contradict her intent in making the deposit, but in fact supplements it in one respect.

The further fact that she disposes of moneys as those which she may have on deposit in the defendant bank at the time of her decease, it appearing that she did not have any deposit other than that claimed by appellant, is not in my opinion sufficient to raise an issue of fact in respect to her intent in making such latter deposit. In the first place, such testamentary provision might be drafted as a matter of precaution to cover any new deposit which she might make before death, or as a matter of precaution to secure her purpose of having the daughter take the moneys at her death in case the arrangement at the bank should fail. Various motives might influence her, and I do not think that any such subsequent indeterminate act is enough to cloud a purpose or offset acts so clearly, deliberately, and completely formed and executed as were those of deceased in respect to the bank deposit; but if we should assume that, when the testator made these provisions, she did have in mind this deposit and did intend to treat it as still so far subject to her control as to be a matter of testamentary disposition, in my opinion such attitude would not be enough to revoke her prior intention and acts already consummated in a legal and effective form, especially in view of the fact that no attempt was made directly

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to revoke them down to the time of her death. I see no difference in this respect between a case of consummated gift of a deposit and one of a trust in and of such a deposit, as protected from subsequent declarations and acts. *Mable v. Bailey*, 95 N. Y. 206; *Scheps v. Bowery Sav. Bank*, 97 App. Div. 434, 90 N. Y. Supp. 26; *Robinson v. Appleby*, 69 App. Div. 509, 75 N. Y. Supp. 1, affirmed, 173 N. Y. 626, 66 N. E. 1115.

The judgment should be reversed, and a new trial granted, with costs to abide event.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. CHASE, J., not sitting.

Judgment reversed, etc.

(194 N. Y. 145)

PEOPLE ex rel. WILLIAMS ENGINEERING & CONTRACTING CO. v. METZ, Comptroller.

(Court of Appeals of New York. Jan. 12, 1909.)

MASTER AND SERVANT (§ 13\*)—REGULATION OF HOURS OF WORK—STATUTES.

Laws 1907, p. 1076, c. 506, amending Pen. Code, § 384h, and providing that if any contractor with a municipal corporation require more than eight hours for a day's labor, upon conviction therefor, in addition to the fine prescribed by the same section, the contract shall be forfeited at the option of the municipal corporation, did not affect Laws 1906, p. 1395, c. 506, § 3, limiting a day's work on work for municipal corporations to eight hours, and prohibiting municipal officers from paying for work done in violation of the statute; the two statutes being independent and providing concurrent remedies, one civil in character for the benefit of the city, and the other penal and authorizing a forfeiture incidental to the penalty.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 13.\*]

On motion for reargument. Motion denied.

For former opinion, see, 193 N. Y. 148, 85 N. E. 1070.

VANN, J. The relator moves for a reargument of the appeal herein upon the ground that a statute, claimed to be in pari materia with the one passed upon by the court, was not brought to its attention through the inadvertence of counsel.

Upon the argument the main question discussed was whether the labor law of 1906 (Laws 1906, p. 1395, c. 506), is in conflict with either the state or the federal Constitution, and we held that it is not, in so far as it limits the hours of labor on public work and prohibits any state or municipal officer from paying for work done in violation of these provisions. *People ex rel. Williams Engineering & Contracting Co. v. Metz*, 193 N. Y. 148, 85 N. E. 1070. We expressed

no opinion as to the effect on the contract of the failure to comply with the provision requiring certain stipulations to be inserted therein, nor did we hold that the contract was either valid or void. We did not decide that the statute was valid in every respect or void in any respect, but simply that the limitation and prohibition above named were valid, and that they justified the comptroller in refusing to pay for work done in violation of the statute in the respects named. In dismissing the proceeding, we expressly directed that it be without prejudice to an application for an alternative writ of mandamus, or to the commencement of an action to recover the amount of the claim in question. While many questions were presented by the record that we might have decided, we passed upon those only that were essential to the disposition of the case, and we so stated in our opinion, giving our reasons for such conservative action.

The statute which the counsel for the relator did not mention in his brief or argument, and which he now wishes us to consider, is chapter 506, p. 1076, of the Laws of 1907. It amends section 384h of the Penal Code by providing, among other things not now material, that "If any contractor with the state or a municipal corporation shall require more than eight hours for a day's labor, upon conviction therefor in addition to such fine (imposed in an earlier part of the section), the contract shall be forfeited at the option of the municipal corporation." That act, although not called to our attention by counsel, was considered by us, and the reason we did not allude to it in our opinion is that we thought it had no bearing on the questions that we decided. We regarded the civil act as independent of the penal act, and that the latter neither amended nor affected the former, so far as the questions passed upon were concerned. The acts provide for concurrent and cumulative remedies, the one civil in character, for the benefit of the city, and the other, penal in nature, for the benefit of the state, and incidentally authorizing a forfeiture as part of the penalty. It is not unusual in repressive legislation to provide one remedy by civil action to redress the wrong done to the person or corporation injured, and another by criminal prosecution to redress the wrong done to the state and to vindicate its dignity.

The motion should be denied, with \$10 costs.

CULLEN, C. J., and EDWARD T. BARTLETT, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

Motion for reargument denied.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(79 Oh. St. 243)

## CINCINNATI NORTHERN TRACTION CO.

v. PITTSBURG, C., C. &amp; ST. L. RY. CO.

SAME v. CINCINNATI, H. &amp; D. RY. CO.

(Supreme Court of Ohio. Dec. 22, 1908.)

1. RAILROADS (§ 91\*)—CROSSING OTHER ROADS  
—GRADE—EXPENSE.

In a proceeding under section 3333-1, Rev. St. 1908, where a junior and senior railroad company are not able to agree as to a method of crossing, to procure an order of the court in that behalf, the court should equitably apportion between the roads only the cost of such a grade of approach as will be practicable. If the junior road desires a lesser grade, it may, with propriety, be charged with the entire additional expense of such construction.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 91.\*]

2. RAILROADS (§ 91\*)—CROSSING OTHER ROADS  
—GRADE—EXPENSE.

The statute requires that not only the costs of constructing such crossing as the court may order, but also the cost of maintaining it, shall be equitably distributed between the companies.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 91.\*]

3. RAILROADS (§ 91\*)—CROSSING OF OTHER  
ROAD—DOUBLE TRACK.

When, in such case, the junior road has projected and is engaged in constructing a double-track road, the cost of a crossing sufficient in width to carry a double track should be equitably apportioned between the companies.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 91.\*]

(Syllabus by the Court.)

Error to Circuit Court, Butler County.

Applications by the Cincinnati Northern Traction Company to fix the mode by which it should construct its crossing over the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company and the Cincinnati, Hamilton & Dayton Railway Company. From an order of the court of common pleas, affirmed by the circuit court on appeal, the Cincinnati Northern Traction Company brings error. Modified.

W. C. Shepherd and George H. Warrington, for plaintiff in error. Charles Darlington and Rowe, Shuey, Matthews & James, for defendant in error Pittsburg, C., C. & St. L. Ry. Co. Shotts & Millikin, for defendant in error Cincinnati, H. & D. Ry. Co.

PER CURIAM. These were applications made under section 3333-1, Rev. St. 1908, asking the court of common pleas to fix the mode and manner, by which a junior railroad company should construct its way at a crossing of the senior company; the companies not being able to agree. The cases, having been decided in the court of common pleas, were appealed to the circuit court, where a final order was made fixing the mode and manner of crossing and apportioning certain of the costs and expenses thereof. In general, the view taken of the subject in the circuit court was entirely consistent with the view of the subject taken by this court in the case of Toledo Ry. & Terminal Co. v.

Lima & Toledo Traction Co., 86 N. E. 515. The present cases, however, present three questions that were not disposed of in that case.

First. The circuit court found in the present cases that a 3 per cent. grade for the approach to the overhead crossing, which it ordered, was practicable, and therefore it ordered that one-half of the cost of constructing the approach at a 3 per cent. grade should be paid by each company, but that, if the junior company desired a 2 per cent. grade to reach the overhead crossing, at the required height, it should pay the additional cost of construction at that grade. We perceive no reason for differing from the conclusion of the circuit court in that respect. Its finding that a 3 per cent. grade was practicable was based upon very substantial evidence, and a practicable crossing would seem to be all that was in the contemplation of the statute.

Second. While the circuit court ordered an overhead crossing to carry the cars of the junior road, and ordered that one-half of the cost of constructing such overhead crossing should be paid by each of the roads, it ordered that the cost of maintenance should be borne wholly by the junior company. In that respect the order of the circuit court is entirely inconsistent with the statute, which provides, in express terms, that both the cost of construction and the expense of maintenance shall be equitably apportioned among the parties.

Third. The court ordered that the bridge by which the junior road should carry its track over the senior road should be wide enough for a single track, and the cost thereof apportioned equally between the companies, but that, if the junior road desired a bridge wide enough for a double track, it should pay the additional cost of constructing a bridge of that width. In that respect we think the order of the circuit court is not in accordance with the spirit and purpose of the statute. It will be consistent with that spirit and purpose, and with public policy, if the number of tracks upon which both the senior and junior roads shall operate are determined by themselves as a matter of railroad operation, rather than by the courts as a matter of law. In a proceeding of this character it will be quite as clearly within the authority of the court, for the purpose of diminishing the cost of the overhead structure, to order the senior road to reduce the number of its tracks in order that the structure may thereby be shortened, as to provide that the structure should be narrower than the wants of the junior road in order that the cost of construction may in that manner be reduced. It would hardly comport with the obvious policy of the statute to require a section of single track in a double track railroad.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The judgment of the circuit court will be in all respects affirmed, except as to propositions 2 and 3 above, as to which its judgment will be modified in accordance with the views here expressed. The modified judgment will be entered in this court and remanded to the circuit court for execution.

Judgments modified.

PRICE, C. J., and SHAUCK, CREW, SUMMERS, SPEAR, and DAVIS, JJ., concur.

(79 Oh. St. 231)

SANDERS et al. v. PENNEY et al.

(Supreme Court of Ohio. Dec. 22, 1908.)

VENDOR AND PURCHASER (§ 239\*)—BONA FIDE PURCHASER—RIGHTS.

The provisions of section 4275, Rev. St. 1908, relate only to money lost at gambling, and it is nowhere provided that one who loses money in a bucket shop may have a lien for the amount of his loss on the premises where the business is carried on, which he may assert against a purchaser of the premises for value; the purchase being made before a suit to subject the premises is instituted and without notice of the claim.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 239.\*]

(Syllabus by the Court.)

Error to Circuit Court, Union County.

Action by F. O. Penney and others against John M. Sanders and others. Judgment for defendants was reversed by the circuit court, and they bring error. Judgment of the circuit court reversed, and that of the common pleas affirmed.

On February 26, 1906, F. O. Penney filed his second amended petition in the court of common pleas (the original petition having been filed July 1, 1905) against the plaintiffs in error and others, to subject certain real estate described therein to the satisfaction of a lien, which he claimed to have thereon by virtue of the facts alleged by him. Issues having been joined, the case was tried in the court of common pleas, where the facts were found and a judgment rendered in favor of the plaintiffs in error dismissing the petition. On petition in error the circuit court reversed the judgment of the court of common pleas and rendered a final judgment in accordance with the prayer of the amended petition. The following facts appear from the untraversed allegations of the pleadings and the findings of the court of common pleas: On and prior to May 25, 1905, John M. Sanders, Percy H. Sanders, and Jesse S. Kagay were the owners of the premises described. In a room in a building thereon from November 11, 1904, to December 6, 1904, inclusive, one George A. Baker carried on a bucket shop with the knowledge of said owners, though not as their lessee, but as a sublessee from one Carl Algower,

who was their lessee. May 3, 1905, Penney recovered a judgment against Baker in a proceeding against him alone (the owners of the property not being joined) for \$778.25, money which he had lost in the bucket shop carried on by Baker. On the 25th of May, 1905, the said owners conveyed said premises to the plaintiffs in error, who purchased the same for value, and without knowledge of the claim of Penney. On July 1, 1905, Penney brought the present suit and then, for the first time, joined the owners of the premises as defendants.

J. L. Cameron and Mouser & Quigley, for plaintiffs in error. Hoopes & Robinson and S. W. Van Winkle, for defendant in error Sarah S. Penney.

SHAUCK, J. (after stating the facts as above). The opinion of the circuit court is before us, and it shows that there was much reluctance in reaching the conclusion that upon the facts stated Penney had a lien upon the premises which was entitled to prevail against the title of purchasers for value without actual or constructive notice of his claim. From brief and opinion it appears that the judgment of the circuit court is thought to be justified by the provisions of section 4275, Rev. St. 1908. That section and section 6934a-5 contain the only provisions for liens upon premises in which gambling or bucket shops are carried on; the former section containing the only provisions for liens to secure claims for money lost upon which, according to the settled principles of the common law, there could not even be a recovery because arising out of transactions in which both parties are acting unlawfully. The lien created by section 6934a-5 is a security for the fine prescribed for permitting premises to be used as a bucket shop, and it is a lien for no other purpose. The act prohibiting bucket shops and dealing in margins is a part of title 1, c. 8, of the Revised Statutes of 1908, which regards offenses against public policy. Section 4275 is a part of title 5, c. 5, of the Revised Statutes of 1908. Not only by its connection, but by its express term, it relates only to judgments recovered "under this chapter." Some confusion was introduced into the case by the allegation of the petition that the plaintiff's claim was for money lost at gambling but the finding of the court is explicit that he had lost the money in a bucket shop venture, and thus the case is excluded from the operation of section 4275. In *Lester v. Buel et al.*, 49 Ohio St. 240, 30 N. E. 821, 84 Am. St. Rep. 556, it was held that section 4270, Rev. St. 1908, authorizes a recovery of money lost in a bucket shop which section 6934a denounces as a gambling contract; but this relates to a recovery against him by whom the unlawful business is carried on, and there is neither decision nor pro-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

vision of statute which gives to the loser in a bucket shop venture a lien upon the premises where the unlawful business is carried on until he brings a suit to subject.

The judgment of the circuit court is supposed to receive important support from *Binder v. Finkbone*, 25 Ohio St. 103; but that case is removed beyond supporting distance by two obvious differences: Firstly, it concerned a recovery under the chapter of which section 4275 is a part, and to which, by its terms, it does apply whatever may be its proper interpretation; and, secondly, it was the assertion of a lien against the property where the business was carried on while it remained in the ownership of him who had knowingly permitted its unlawful use, and not in the possession of his vendee for value who had no such knowledge. In both legislation and adjudication there is frequent recognition of the capacity of the General Assembly, in order to secure the effective exercise of the police power to charge one with the consequences of what transpires upon his own premises with his knowledge; but legislation to visit such consequences upon his vendee, without knowledge or an accessible source of knowledge, would promptly start inquiry as to its validity. In the most obvious sense the legislation here involved is in derogation of the common law, and therefore to be followed by such consequences only as it plainly defines.

Judgment of the circuit court reversed; that of the common pleas affirmed.

PRICE, C. J., and SUMMERS, SPEAR, and DAVIS, JJ., concur.

(79 Oh. St. 208)

**MCGILL v. CLEVELAND & S. W. TRACTION CO.**

(Supreme Court of Ohio. Dec. 22, 1909.)

**1. MASTER AND SERVANT (§ 221\*)—INJURY TO SERVANT — DEFECTIVE TOOLS — ASSUMED RISK.**

The rule that a direction by the master to continue the use of a defective instrument or tool, coupled with a promise to replace it with one not defective, relieves the servant from the doctrine of assumed risk, if injured during such continued use and because of the defect, does not apply to cases of ordinary labor with a tool of simple construction, with which the servant is entirely familiar, and which he understands, and comprehends as fully as the master.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 638-647; Dec. Dig. § 221.\*]

**2. MASTER AND SERVANT (§ 221\*)—INJURY TO SERVANT—ASSUMPTION OF RISK.**

Where an employé, whose duties require him to use an ordinary stepladder, discovers and appreciates that the stepladder has become and is defective, dangerous, and "unfit for him to use in connection with his said work," and he notifies the master, who promises to furnish another, but before doing so the employé in using

such defective stepladder is injured, the master under such circumstances is not liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 638-647; Dec. Dig. § 221.\*]

(Syllabus by the Court.)

Error to Circuit Court, Lorain county.

Action by David B. McGill against the Cleveland & Southwestern Traction Company. Judgment for defendant was affirmed by the circuit court, and plaintiff brings error. Affirmed.

On January 31, 1907, the plaintiff in error, David B. McGill, commenced an action in the court of common pleas of Lorain county, Ohio, against the defendant in error, the Cleveland & Southwestern Traction Company, to recover damages for personal injuries received by him on October 23, 1906, while in the employ of said defendant company. The petition filed by him, omitting caption and verification, was in the words and figures following: "Now comes the plaintiff, David B. McGill, and says that the defendant, the Cleveland & Southwestern Traction Company, is now, and was on the 23d day of October, 1906, a corporation duly organized under the laws of the state of Ohio, and as such corporation owned, operated, and controlled a line of electric railway extending from the city of Cleveland, in the county of Cuyahoga, to the village of Wellington, county of Lorain, and elsewhere; that in said village of Wellington at said time, near the public square, defendant maintained a certain side track, and other equipment used by the defendant in the operation and maintenance of its said line of railway; avers that on and prior to the 23d day of October, 1906, plaintiff was in the employ of the defendant company, in the capacity of helper to one Mike Gibbons, who was then in the employ of the defendant company in Wellington, Ohio, as car inspector. Plaintiff avers that he controlled no person, and was subject to the orders, direction, and control of his said foreman or boss, Mike Gibbons; avers that at said time, defendant maintained, as aforesaid, a certain side track along the main street in said village of Wellington, where the defendant placed certain of its cars, from time to time, to be inspected, repaired and cleaned; avers that it was plaintiff's duty, among other things, at said time to assist, under the direction of said boss or foreman, in cleaning, washing, and repairing the cars of defendant company; that it became and was necessary in cleaning and washing said cars of defendant company, and particularly the windows and window frames on the outside of said cars, for this plaintiff to use a certain stepladder about seven feet high; said ladder being furnished by defendant company for that purpose in the performance of his work; avers that some days prior to the 23d day of October,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1906, plaintiff discovered that said ladder, which defendant had furnished him to be used while performing his duties, as aforesaid, had become old, worn, and defective to such an extent that the same was unfit for plaintiff to use in connection with his said work, in that the steps of said ladder were loose and worn, and the iron braces holding said steps to the side pieces of said ladder were loose, broken, and defective; avers that a few days prior to the 23d day of October, 1906, this plaintiff complained to his said foreman, Mike Gibbons, of the defective and dangerous condition of said ladder, and plaintiff avers that said defendant through its foreman assured and promised plaintiff that he would have said ladder repaired with a new, proper, and sufficient one, so that plaintiff could safely perform his work. Plaintiff avers that about a week or 10 days prior to the 23d day of October, 1906, he further complained to the master mechanic of defendant company, Fred Strall, of the defective and dangerous condition of said ladder, and that said master mechanic then and there promised and assured plaintiff that he would be furnished with a new, sufficient, and proper ladder with which to perform his work as soon as the same could be made, and that he should use said ladder until a new ladder was furnished; that plaintiff relied upon defendant's fulfilling its said promises and assurance, and he continued to perform his labor as directed by said foreman, Mike Gibbons, until the 23d day of October, 1906, when plaintiff was injured in the direct line of his duty and without fault or negligence upon his part, as hereinafter set forth. Plaintiff avers that on said 23d day of October, 1906, he was ordered by defendant's foreman, Mike Gibbons, to clean the windows on the outside of the vestibule on the west end of one of defendant's cars placed on said side track in said village, and in order to properly perform his work it became and was necessary for plaintiff to use said ladder furnished by the defendant company, and that, while attempting so to do, the steps of said ladder and braces thereof gave way, by reason of its old, defective, and dangerous condition, and plaintiff was thrown upon and across the bumper on the west end of said car, and was precipitated to the fender of said car, bruising plaintiff and inflicting serious and permanent injuries, as hereinafter set forth. Plaintiff avers that the defendant was guilty of negligence and carelessness in permitting and allowing said ladder to be and remain in said defective, worn out, and dangerous condition, and in ordering said plaintiff to work with the same at said time. That the defendant was guilty of carelessness and negligence in not furnishing plaintiff with a new, proper, and sufficient ladder, in accordance with the promises and assurance of defendant. Plaintiff avers that his injuries were caused solely by reason of the fault and negligence of

the defendant, as aforesaid, and without any fault or negligence upon his part; that by reason of the negligence of the defendant aforesaid, plaintiff was thrown upon the iron bumper of said car, thereby suffering a fracture of two ribs on his right side; that his right arm and shoulder were severely sprained and bruised; that he is unable to use said right arm and shoulder as he formerly did, and he believes he never will have the proper use of said arm and shoulder; avers that the same gives him constant pain; that he sustained a severe injury to his head and neck; that his head causes him constant pain, and that he suffers from dizziness; that he received a severe bruise to his right hip; that he further received a severe injury and shock to his entire nervous system; that he suffers from sleeplessness as a result of the injury to his head; avers that by reason of the fracture of the ribs on his right side his right lung has become affected, the exact nature and extent of which plaintiff is unable at this time to determine; that he was confined to his bed for a period of about two weeks; that prior to said injury he was able to perform, and did perform, manual labor; that since said injury, he has not been able to perform any manual labor, and believes he will be incapacitated from performing the same as he formerly did; avers that his injuries are permanent, all to his damage in the sum of \$10,000. Wherefore plaintiff prays judgment against said defendant for his damages so sustained, as aforesaid, in the sum of \$10,000." A general demurrer to this petition was sustained by the court of common pleas, and, the plaintiff not desiring to amend or to further plead, his petition was dismissed, and judgment rendered against him for costs. On error this judgment was affirmed by the circuit court. A reversal of both of said judgments is here asked by the plaintiff in error.

Skiles, Green & Skiles and Stroup & Fauver, for plaintiff in error. E. G., H. C. & T. C. Johnson, for defendant in error.

CREW, J. (after stating the facts as above). In support of the claim that the averments of the petition in this case sufficiently allege and show a liability on the part of the traction company to plaintiff for the injuries alleged to have been sustained by him through the negligence of said traction company, reliance is had upon the general rule that, where the servant notifies the master of a defect in machinery or in his place of work, and the master promises to repair the same or to obviate and remove the danger, and the servant, reasonably relying upon such promise, remains in the service, the master thereby assumes the risk of injury to the servant, and is liable to him in damages for an injury resulting to him from such defect pending the making of the repair promised. While such doubtless is the general rule applied in cases where the

servant is engaged in working with machinery or appliances of which he has but a limited and imperfect knowledge, and in cases where some measure of skill and experience is necessary to enable the servant to know and appreciate the particular defect and the danger incident thereto, yet that this rule was never designed or intended to apply to cases of common and ordinary labor, such as requires in its performance the use only of some simple implement, instrumentality, or tool with which the employé is himself entirely familiar, is, we think, clearly and abundantly established by the overwhelming weight of authorities.

Judge Bailey in his work on Personal Injuries (volume 2, at section 3108) in speaking of this rule and its limitations, says: "A master is not liable to a servant of mature years and ordinary mental capacity who is injured in his employ by reason of a defect in a ladder of which he was aware, though the servant had notified the master of such defect, and was told to use the ladder until another was furnished. The rule exempting an employé from an assumption of the risk in case of a promise to remedy the defect is designed for the benefit of employés engaged in work where machinery and materials are used of which they can have little knowledge, and not for those engaged in ordinary labor which only requires the use of implements with which they are entirely familiar."

In the case of *Meador v. Lake Shore & Michigan Southern Railway Co.*, 138 Ind. 290, 37 N. E. 721, 46 Am. St. Rep. 384, which was an action to recover for a personal injury occasioned by a defective ladder used by a watchman in lighting and extinguishing lamps at street crossings, the court, in discussing this rule said: "In cases, however, where persons are employed in the performance of ordinary labor, in which no machinery is used, and no materials are furnished the use of which requires the exercise of great care and skill, it can be scarcely claimed that a defective instrument or tool furnished by the master, of which the employé has full knowledge and comprehension, can be regarded as making out a case of liability within the rule laid down. A common laborer who uses agricultural implements while at work upon a farm or in a garden, or one who is employed in any service not requiring great skill and judgment, and who uses the ordinary tools employed in such work, to which he is accustomed, and in regard to which he has complete knowledge, cannot be said to have a claim against his employer for negligence, if, in using an utensil which he knows to be defective, he is accidentally injured. \* \* \* The fact that he notified the master of the defect, and asked for another implement, and the master promised to furnish it, in such a case does not render the master responsible if an accident occurs. A rule imposing a liability under such circumstances would be

far-reaching in its consequences, and would extend the rule of respondeat superior to many of the vocations in life for which it was never intended. It is a just and salutary rule, designed for the benefit of employés engaged in work where machinery and materials are used of which they can have little knowledge, and not for those engaged in ordinary labor, which only requires the use of implements with which they are entirely familiar. The plaintiff, in the case at bar, was of the latter class of laborers, and the work in which he was engaged was not of a character which would entitle him to the protection of the principle referred to, as applied to the use of complicated machinery."

In *Marsh v. Chickering et al.*, 101 N. Y. 396, 5 N. E. 56, in the opinion of the court by Miller, J., it is said: "As a general rule, it is to be supposed that the master who employs a servant has a better and more comprehensive knowledge as to the machinery and materials to be used than the employé, who has claims upon his protection against the use of defective or improper materials or appliances while engaged in the performance of the service required of him. The rule stated, however, is not applicable in all cases; and, where the servant has equal knowledge with the master as to the machinery used, or the means employed in the performance of the work devolving upon him, and a full knowledge of existing defects, it does not necessarily follow that the master is liable for injuries sustained by reason of the use thereof. In considering the application of the rule just stated due regard must be had to the limited knowledge of the employé as to the machinery and structure on which he is employed and to his capacity and intelligence, and to the fact that the servant has a right to rely upon the master to protect him from danger and injury, and in selecting the agent from which it may arise. *Powers v. N. Y., L. E. & W. R. R. Co.*, 98 N. Y. 274, 280. In cases, however, where persons are employed in the performance of ordinary labor, in which no machinery is used, and no materials furnished, the use of which requires the exercise of great skill and care, it can scarcely be claimed that a defective instrument or tool furnished by the master, of which the employé has full knowledge and comprehension, can be regarded as making out a case of liability within the rule laid down. \* \* \* It does not rest with the servant to say that the master has superior knowledge, and has thereby imposed upon him. He fully comprehends that the instrument which he employs is not perfect, and if he is thereby injured, it is by reason of his own fault and negligence. The fact that he notified the master of the defect and asked for another instrument, and the master promised to furnish the same, in such a case does not render the master responsible if an accident occurs."

In *Gunning System v. Lapointe*, 212 Ill.

274, 72 N. E. 393, a comparatively recent case, it is said: "It is not in all cases that the servant may relieve himself from the assumption of the risk incident to defects and dangers of which he has full knowledge by exacting from the master a promise to repair. The cases where the rule of assumed risk is suspended, and the servant exempted from its application under a promise from the master to repair or cure the defect complained of, are those in which particular skill and experience are necessary to know and appreciate the defect and the danger incident thereto, or where machinery and materials are used of which the servant can have little knowledge, and not those cases where the servant is engaged in ordinary labor, or the tools used are only those of simple construction, with which the servant is as familiar and as fully understands as the master."

In *Vanderpool v. Partridge*, decided by the Supreme Court of Nebraska, May 24, 1907, and reported in 112 N. W. 318, 13 L. R. A. (N. S.) 668, the first two paragraphs of the syllabus are as follows: "(1) The law requires masters to exercise ordinary care to provide reasonably safe tools and appliances for their servants. (2) But the foregoing rule has no application where the servant possesses ordinary intelligence and knowledge, and the tools and appliances furnished are of a simple nature, easily understood, and in which defects can be readily observed by such servant." The rule as announced by the foregoing authorities has found recognition, and has been declared in many other cases, among which are *Bowen v. Chicago & Northwestern Railroad Co.*, 117 Ill. App. 9; *Corcoran v. Milwaukee Gaslight Co.*, 81 Wis. 191, 51 N. W. 328; *Jenney Electric Light & Power Co. v. Murphy*, 115 Ind. 566, 18 N. E. 30; *Webster Manufacturing Co. v. Nisbett*, 205 Ill. 273, 68 N. E. 936; *Conley v. American Express Co.*, 87 Me. 352, 32 Atl. 965; *Railway Co. v. Kelton*, 55 Ark. 483, 18 S. W. 933; *Gowen v. Harley*, 56 Fed. 973, 6 C. C. A. 190; *International Packing Co. v. Kretowicz*, 119 Ill. App. 488; *Erdman v. Illinois Steel Co.*, 95 Wis. 6, 69 N. W. 993, 60 Am. St. Rep. 66; *Railway Co. v. Brentford*, 79 Tex. 619, 15 S. W. 561, 23 Am. St. Rep. 377.

Tested, then, by this apparently now well-settled rule, we are of opinion that the allegations of plaintiff's petition in the present case do not state a cause of action. In his petition plaintiff avers: "That some days prior to the 23d day of October, 1906, plaintiff discovered that said ladder which defendant had furnished him to be used while performing his duties, as aforesaid, had become old, worn, and defective to such an extent that the same was unfit for plaintiff to use in connection with his said work, in

that the steps of said ladder were loose and worn and the iron braces holding said steps to the side pieces of said ladder were loose, broken, and defective; avers that a few days prior to the 23d day of October, 1906, this plaintiff complained to his said foreman, Mike Gibbons, of the defective and dangerous condition of said ladder, and plaintiff avers that said defendant through its foreman assured and promised plaintiff that he would have said ladder repaired with a new, proper, and sufficient one, so that plaintiff could safely perform his work. Plaintiff avers that about a week or 10 days prior to the 23d day of October, 1906, he further complained to the master mechanic of defendant company, Fred Strall, of the defective and dangerous condition of said ladder, and that said master mechanic then and there promised and assured plaintiff that he would be furnished with a new, sufficient, and proper ladder with which to perform his work as soon as the same could be made, and that he should use said ladder until a new ladder was furnished." It sufficiently and affirmatively appears from the foregoing allegations that the unfit and unsafe condition of this stepladder, on and prior to October 23, 1906, was fully known to and understood by the plaintiff. He knew, as he alleges, "that the same was unfit for plaintiff to use in connection with his said work." He was familiar with and appreciated its condition and defects, all of which were alike open to his observation and within his comprehension, and it would seem from the averments of his petition that he was so impressed by this defective and unsafe condition that he not only complained of the same to his foreman, but to the master mechanic as well. Plaintiff knew as well as the foreman, master mechanic, or master that said stepladder in its then condition could not be used with any assurance of safety, and, having such knowledge he must be held to have assumed the risk of its use. To hold the master liable to an employé, under such circumstances, for injuries resulting to the latter from the use of so simple an implement or tool as an ordinary stepladder would be to extend the rule of respondeat superior beyond its reasonable limit and to apply it as never intended. The case of *Manufacturing Co. v. Morrissey*, 40 Ohio St. 148, 48 Am. Rep. 669, cited by counsel for plaintiff in error as supporting their contention in the present case, is not in point; that being a case where the injury to the employé was caused by a complicated machine, and not by a simple instrumentality or appliance such as the stepladder in the case at bar.

Judgment affirmed.

PRICE, C. J., and SHAUCK, SUMMERS, SPEAR, and DAVIS, JJ., concur.

(171 Ind. 562)

## STATE v. FERRIS. (No. 21,214.)

(Supreme Court of Indiana. Jan. 13, 1909.)

## 1. FALSE PRETENSES (§ 31\*)—INDICTMENT—SUFFICIENCY.

An indictment for obtaining property by false pretenses charged that defendant gave the prosecuting witness his post-dated check for \$100, in payment of merchandise, and at the time said that he had \$80 or \$90 in the bank, and would increase his deposit to \$100, when as a matter of fact he had no money in the bank, and that the payee in the check relied on defendant's statements was insufficient, where it did not positively allege that the prosecutor was induced to give defendant time for payment by reason of his believing that the defendant had on deposit \$80 or \$90, since the transaction as alleged merely amounted to a promise to pay for the merchandise at a future date, upon nonperformance of which false pretenses could not be predicated.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 38; Dec. Dig. § 31.\*]

## 2. FALSE PRETENSES (§ 7\*)—NATURE AND ELEMENTS — NONPERFORMANCE OF FUTURE PROMISE.

False pretenses cannot be predicated upon the nonperformance of a future promise, but must be based upon some existing fact.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 12; Dec. Dig. § 7.\*]

Appeal from Circuit Court, St. Joseph County; W. A. Funk, Judge.

William D. Ferris was indicted for obtaining property by false pretenses. From a judgment sustaining demurrers to the indictment, the state appeals. Affirmed.

James Bingham, A. G. Cavins, E. M. White, H. M. Dowling, and J. E. Talbott, for the State. Seebirt & Schurtz, for appellee.

HADLEY, J. Appellee was indicted in two counts for obtaining property under false pretenses. It was held that both counts were bad for failure to state a public offense, and the state appeals.

There is no material difference in the counts, and both are alike subject to the infirmities, to which we will direct attention. The first count, omitting formal parts and some surplus matter, is as follows: " \* \* \* That one William D. Ferris, late of said county, on the 17th day of June, 1907, at said county and state aforesaid, did then and there unlawfully, feloniously, and with the intent of inducing one Horace G. Zimmerman to part with the possession of, sell, and deliver to said William D. Ferris, certain merchandise, to wit, \* \* \* of the value then and there of \$100, and of the personal property of said Horace G. Zimmerman, did then and there falsely pretend and state to said Horace G. Zimmerman that he, the said William D. Ferris, had at that time on deposit at the American Trust Company the sum of \$80 or \$90, and that he would be able in a day or so, to deposit sufficient money, in addition to said \$80 or \$90 to amount to \$100, and thereupon offered and delivered to said Horace G. Zimmerman, in exchange

of and payment for said merchandise, a certain check on said American Trust Company, in words and figures following, to wit: 'South Bend, Ind., June 19, 1907. No. ———. American Trust Company. Pay to the order of H. G. Zimmerman \$100.00 one hundred dollars. W. D. Ferris.' That by means of such false pretenses, so feloniously and fraudulently made by said William D. Ferris, with the intent of exchanging said check for said merchandise, and for the purpose of inducing said Horace G. Zimmerman to deliver said property to said William D. Ferris in exchange for said check, and to accept said check as payment therefor, and he, the said Horace G. Zimmerman, relying upon and believing the said false statements to be true, said William D. Ferris did then and there unlawfully, feloniously, and designedly obtain of and from said Horace G. Zimmerman the aforesaid personal property, to wit, \* \* \* of the value, then and there, of \$100, and of the property of said Horace G. Zimmerman, whereas, in truth and in fact, said William D. Ferris did not have on deposit at said American Trust Company the sum of \$80 or \$90, and did not, at said time, nor for a long time prior thereto, have on deposit in the American Trust Company any money or funds out of which said check could be paid, or against which said William D. Ferris was entitled to issue any check whatever, as he, the said William D. Ferris, then and there well knew, contrary to the form of the statutes," etc. The charge, in substance, comes to this: The defendant proposed to and did give the prosecuting witness his post-dated check on a bank for \$100, for certain goods of the value of \$100, and, to induce the prosecuting witness to accept such check for the goods, falsely pretended and stated that he had at that time, June 17th, on deposit in said bank, \$80 or \$90, and that he would be able in a day or so to increase the deposit to \$100; that the prosecuting witness relied upon and believed the statement, and sold and delivered said goods to the defendant for said check; that the defendant, when he made the statement and pretense, did not have any money whatever on deposit in said bank. It is shown that the check offered and exchanged by the defendant for the goods was not drawn against his pretended, present, bank account, but against what he promised his deposit should be made on or before June 19th; and it is not positively alleged that the prosecutor was induced to give the defendant time for payment by reason of his believing that the defendant then had on deposit \$80 or \$90. The check bearing the post date was not presentable to the bank for payment before the day of its date. The drawee was not directed to pay the check before June 19th, and the defendant made no promise to pay for the goods in any other way, or at any

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

other time. There was no fraud or deception in the date of the check. The prosecutor knew it bore a future date, and that the defendant had no right to draw a check on the trust company for \$100 at the time the check was executed. He further knew that the trust company would not pay the check for \$100, or at least would be under no duty to pay it at any time, unless the defendant increased his deposit, as he promised to do, by the time the check became presentable. We are unable to distinguish the transaction from a sale of goods, on a promise to pay for the same at a future date. The check was but written evidence of the promise to pay \$100 for the goods on June 19th. It is the law of this state that a false pretense, within the meaning of our criminal law, cannot be predicated upon the nonperformance of a future promise. *Brown v. State*, 166 Ind. 85, 78 N. E. 881, and authorities cited. A false pretense, to constitute a crime within our statutes, must rest upon some existing fact. A distinguished author on criminal law thus states the rule: "Both in the nature of things and actual adjudication, the doctrine is that no representation of a future event, whether in the form of a promise or not, can be a pretense within the statute, for it must relate either to the past or to the present." 2 Bishop, *Crim. Law* (7th Ed.) § 420.

Judgment affirmed.

(171 Ind. 565)

**WARD v. STATE.** (No. 21,276.)

(Supreme Court of Indiana. Jan. 13, 1909.)

**1. CONSTITUTIONAL LAW (§ 269\*)—DUE PROCESS OF LAW—CRIMINAL PROSECUTION—NEW TRIAL OR REVIEW OF PROCEEDINGS.**

No imperative and mandatory duty or requirement rests on the state to provide a mode of obtaining a new trial or review of the proceedings in favor of one convicted by a proper judicial tribunal, and the granting of such a right is not a necessary element of due process of law, but such privilege may be wholly withheld or may be granted on prescribed terms in the Legislature's discretion.

[Ed. Note.—For other cases, see *Constitutional Law*, Dec. Dig. § 269.\*]

**2. CRIMINAL LAW (§ 951\*)—NEW TRIAL—TIME FOR MOTION—AUTHORITY TO EXTEND.**

A statutory tribunal of limited powers is not authorized to extend the time for moving for a new trial beyond that definitely fixed by the Legislature.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 951.\*]

**3. CRIMINAL LAW (§ 951\*)—NEW TRIAL—TIME FOR MOTION—LIMITATIONS.**

Where a convicted defendant voluntarily withdraws from the files a motion for a new trial, and thereby takes it out of the record, and files a subsequent motion after 30 days from the date of verdict, as limited by Burns' Ann. St. 1908, § 2158, it must be regarded as an original motion not filed in time, no matter by what name the paper is designated.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 951.\*]

**4. CRIMINAL LAW (§ 951\*)—APPEAL AND ERROR—PRESERVATION OF OBJECTIONS FOR REVIEW—DELAY IN MOVING FOR NEW TRIAL.**

A motion for a new trial, on which a convicted defendant relies for a reversal, not filed within 30 days from the date of the verdict, as prescribed by the statute, is unauthorized, and presents no question for review.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 951.\*]

Appeal from Criminal Court, Marion County; Jas. A. Pritchard, Judge.

Charles Ward was convicted of murder, and he appeals. Affirmed.

L. Ert Slack, for appellant. James Bingham, A. G. Cavins, Ed. M. White, and W. H. Thompson, for the State.

MONTGOMERY, J. Appellant was convicted of murder in the second degree, and upon this appeal alleges that the court erred in overruling (1) his motion for a new trial, (2) his substituted motion for a new trial, and (3) his second substituted motion for a new trial. The state has filed a cross-assignment of error, charging that the court erred in admitting the second substituted motion for a new trial to be filed over the objection of the state. The verdict of the jury was returned on the 12th day of October, 1907, and on November 2d appellant filed his motion and reasons for a new trial. This motion was withdrawn on November 26th, and another entitled "Substituted Motion for a New Trial" filed. On December 14, 1907, appellant filed a motion asking leave to withdraw this substituted motion, to which the prosecuting attorney on behalf of the state objected; but such objection was overruled, and leave granted to withdraw the substituted motion for a new trial. Thereupon appellant filed a second substituted motion for a new trial. The first and second motions for a new trial, having been properly withdrawn, were taken out of the record, and have not been included in the transcript. We are not advised, therefore, as to their contents. The motion for a new trial embraced in the record was filed 63 days after the verdict of the jury was returned, and the Attorney General insists that, since this motion was not filed within 30 days from the date of the verdict, it was unauthorized, and cannot be considered, and hence no question is presented for review.

Appellant's right to apply for a new trial is founded upon the following statute: "The court shall grant a new trial to the defendant for the following causes, or any of them: [Nine causes are then enumerated.] The motion for a new trial and the causes therefor shall be in writing and must be filed within thirty days from the date of the verdict or finding; and any such cause not disclosed in the record shall be sustained by affidavit. The motion must be filed in open court; if the court be then in session; otherwise it

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

shall be filed with the clerk of the court." Section 2158, Burns' Ann. St. 1908. No imperative and mandatory duty or requirement rests upon the state to provide a mode of obtaining a new trial or review of the proceedings in favor of one convicted of a criminal charge by a proper judicial tribunal. The granting of such a right is not a necessary element of due process of law, but such privilege may be wholly withheld or granted on prescribed terms in the discretion of the legislative department of the government. In most, if not all, enlightened states, a desire to secure the fullest attainable justice has prompted provisions for a new trial when substantial and prejudicial error in the former trial has been seasonably shown by the defendant. The interests of the accused and the welfare of the state demand promptness in the hearing and final disposition of criminal charges. Such cases must at some time be effectually and finally terminated in the courts, and thereafter remain at rest. The statute above quoted authorizes new trials for specified causes, provided the application therefor be made in writing within the prescribed time. The Legislature manifestly regarded 30 days from the return of the verdict reasonable and ample time for the preparation and filing of the motion. The Marion criminal court is a statutory tribunal of limited powers, and plainly without authority to extend the time so definitely fixed by the Legislature, nor in truth did the court pretend or attempt to extend the statutory time. Appellant did not request or obtain leave to amend the motion which was filed within the proper period or to supplement the same by adding causes discovered for the first time since the filing of his original motion, but, as the transcript shows, voluntarily withdrew this motion from the files and thereby took it out of the record. If a pleading or other paper in a cause be lost or withheld by any person, the court may authorize a copy thereof to be substituted and used instead of the original, but the paper denominated a second substituted motion for a new trial was not filed under such circumstances. The filing of this motion was an independent act, the paper is complete within itself, and by whatever name designated must be regarded as an original motion. It may be true that in withdrawing motions previously filed counsel entertained an intention to file a new motion in lieu thereof, but the record does not contain or disclose any such mental purpose, and we express no opinion as to the validity and efficiency of such procedure even though it were made fully to appear. The motion for a new trial upon which appellant relies for a reversal of the judgment was not filed within 30 days from the date of the verdict, and was therefore unauthorized, and presents no question for review by this court. *Willis v. State*, 62 Ind. 391; *Sturm v. State*, 74 Ind.

278; *Miller v. State*, 165 Ind. 566, 76 N. E. 245; *People v. Swartz*, 118 Mich. 292, 76 N. W. 491; *State v. Cushing*, 11 R. I. 313; *State v. Mickle et al.*, 25 Utah, 179, 70 Pac. 856; *Branch v. State*, 1 Tex. App. 99; *State v. Rice*, 7 Idaho, 762, 66 Pac. 87; *State v. Davis*, 8 Idaho, 115, 66 Pac. 932; *McKinney v. State*, 3 Wyo. 719, 30 Pac. 293, 16 L. R. A. 710

We deem it proper to add that counsel for appellant in this court did not participate in any of the proceedings of the trial court, prior to the taking of the appeal.

The judgment is affirmed.

(48 Ind. A. 100)

# CITY OF LAPORTE v. OSBORN.

(No. 6,326.)

(Appellate Court of Indiana, Division No. 2.  
Jan. 14, 1909.)

## 1. NEGLIGENCE (§ 1\*)—ESSENTIAL ELEMENTS.

Negligence is dependent on a duty owing by defendant to protect plaintiff, failure to perform such duty, and a resulting injury to plaintiff.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 1; Dec. Dig. § 1.\*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

## 2. MUNICIPAL CORPORATIONS (§ 816\*) — OBSTRUCTIONS IN STREET—ACTION FOR INJURIES—PLEADING.

A complaint for injuries, which plainly and directly avers that the place where plaintiff was injured was a public street, and that plaintiff was a traveler thereon, sufficiently shows the duty owed by the city to plaintiff.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1712; Dec. Dig. § 816.\*]

## 3. MUNICIPAL CORPORATIONS (§ 764\*)—SAFETY OF STREETS—DUTY TO PUBLIC GENERALLY.

It is the duty of a city, owed to the public generally, to keep its public streets in a reasonably safe condition for travel.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1616; Dec. Dig. § 764.\*]

## 4. PLEADING (§ 17\*)—DIRECTNESS—RECITALS—USE OF TERM "WITHOUT"—"NOT BEING."

The term "without," as used in an averment that building material was suffered to remain in a street after night "without" being guarded, is a direct averment that no guards or lights were placed around the obstruction, and the pleading did not merely recite such facts; the word "without" being synonymous with "not being."

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 38; Dec. Dig. § 17.\*

For other definitions, see *Words and Phrases*, vol. 8, pp. 7504-7505.]

## 5. PLEADING (§ 48\*) — REQUISITES OF COMPLAINT.

All that the statute requires as to a complaint is that it shall be couched in such plain and concise language as to enable a person of common understanding to know what is intended.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 105, 106; Dec. Dig. § 48.\*]

**6. PLEADING (§ 17\*)—DIRECTNESS—RECITALS—USE OF THE TERM "WITHOUT."**

Where it was averred that while plaintiff was driving along the street, without knowledge of an obstruction, and without being able to see it, the horses ran against the same, the facts are directly averred, and the matters following the word "without" are not mere recitals.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 38; Dec. Dig. § 17.\*]

**7. PLEADING (§ 18\*)—ALLEGATION OF DARKNESS—CONCLUSION FROM FACTS ALLEGED.**

If the facts averred in a complaint show that an accident occurred in the nighttime, it is a sufficient averment of darkness, and it is unnecessary to aver that the night was dark.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 39; Dec. Dig. § 18.\*]

Appeal from Circuit Court, Laporte County; John C. Richter, Judge.

Action by Arthur Earl Osborn against the city of Laporte. From a judgment for plaintiff, defendant appeals. Affirmed.

H. Wirt Worden, for appellant. Osborn, McVey & Osborn, for appellee.

**RABB, J.** This was an action brought by the appellee to recover damages for a personal injury alleged to have been sustained by him through the negligence of the appellant in failing to discharge its duty in keeping its streets in a reasonably safe condition for travel. Appellant's demurrer to the complaint was overruled, issues were formed, and a trial had, resulting in a verdict and judgment in favor of appellee. The sole question presented by the appeal arises upon the action of the court below in overruling appellant's demurrer to appellee's complaint.

The substantive averments of the complaint are that Patton street is a public street within the corporate limits of the defendant city; that the city wrongfully and negligently authorized and suffered to be placed in and across said street a large quantity of building material; "that on the night of the 10th of June and morning of the 11th of June, 1904, and for a long time previous thereto, said defendant negligently and carelessly, and with full knowledge of the existence thereof, permitted the same to remain there 'without' placing around it or at the same, any safeguards, railing, or lights to give notice of such dirt, sand, etc., to prevent persons who might walk or drive upon said parts of the street from falling upon, over, and against said obstructions. \* \* \* This plaintiff upon the night of said June 10, 1904, to wit, at or about 2 a. m. of June 11th, was lawfully driving a pair of horses attached to a four-wheeled cab or hack over and along said Patton street, in the vicinity of said obstruction, and without any notice or knowledge thereof, and without being able to see the same, by reason of the darkness of the night, when without negligence, and in the use of all due care, on the plaintiff's part, and by

reason of the negligence and unlawful acts of the defendant as aforesaid, said pair of horses stumbled against and ran against, on, and over said obstructions, thereby breaking the tongue of said vehicle, injuring and frightening said horses so that in consequence thereof they became unmanageable and ran a distance of one block, when they made a sharp turn, and this plaintiff by means of the premises was hurled from the driver's seat of said hack to the roadway, and thereby then and there injured."

Appellant correctly states that there is involved in every action of negligence three essential elements: (1) The existence of a duty on the part of the defendant to protect the plaintiff; (2) the failure of the defendant to perform that duty; and (3) a resulting injury to plaintiff therefrom, and that the existence of each of these elements must appear by direct averment in order to make a complaint to recover damages for injuries alleged to have been suffered from an act of negligence on the part of the defendant sufficient, and the criticism urged against the complaint in this case is that it does not, except inferentially and by way of recital, sufficiently aver these elemental facts. The complaint in this case does plainly and directly aver that the place where appellee was injured was a public street of the city, and he at the time a traveler thereon. This sufficiently shows a duty owing by the appellant to the appellee. It was the duty of the city to keep its public streets in a reasonably safe condition for travel; a duty which it owed to the public generally. It does directly aver that the city wrongfully and negligently authorized and suffered large quantities of building material to be placed in the streets of the city, and to remain there after night, and the averments of the complaint are that this building material was suffered and permitted to remain in the street after night "without placing around it, or at the same, any safeguards, railings, or lights, to give notice of such dirt, sand," etc. It is the appellant's contention that the averments "without placing around it," etc., are mere recitals, and therefore are not to be considered in determining the sufficiency of the complaint. In this appellant is clearly mistaken. The term "without" is a direct averment that no guards or lights were placed around the obstruction. The statute only requires that a complaint shall be couched in plain and concise language, and in such manner as to enable a person of common understanding to know what is intended. No one of common understanding could have misunderstood or been misled by the statements in this complaint upon the subject of the guards and the lights. And the word "without" is a word of sufficiently positive negation to make the allegation of the same legal import and effect as though it had been stated that no

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

guards or lights were placed on or around the obstruction.

In the case of *Commonwealth v. Thompson*, 84 Mass. 507, the defendant was prosecuted for keeping a dog; such dog not being licensed. It was there held that the word "without" was a positive and direct averment that the dog in question was not licensed. To the common understanding the meaning of the word "without" and the phrase "not being" are synonymous. It thus appears that the defendant negligently failed to perform its duty to keep the street in a safe condition for travel. But it is contended that, except as a matter of inference and recital, it does not appear from the complaint that the obstructions and the negligence complained of in failing to keep a warning light upon the obstructions, or a guard around them, was the proximate cause of the appellee's injury. The averment in this respect is that while the plaintiff was driving a team of horses attached to a hack along the street at 2 o'clock in the morning, without knowledge of the obstructions, and without being able to see the same by reason of the darkness of the night, the horses ran against the obstruction. The criticism is that all that follows the word "without" is a mere recital, and that there is no direct averment that the night was dark and that it was on account of the darkness of the night that appellee's horses ran against the obstruction. What we have already said disposes of appellant's criticism with reference to the word "without." It is true that the averment that appellee was not able to see the obstruction by reason of the darkness of the night is not equivalent to a direct averment that the night was dark; but, excluding from the phrase the recital "by reason of the darkness of the night," the phrase still stands that the appellee was without knowledge of the obstructions and without being able to see the same, and without negligence on his part, and by reason of the negligence and unlawful acts of the defendant, as aforesaid, the horses stumbled against and ran over such obstructions. The facts averred in the complaint show that the accident occurred in the nighttime, and that was sufficient. It was unnecessary to aver that the night was dark.

In the case of *City of Goshen v. Alford*, 154 Ind. 58, 55 N. E. 27, it was held that a complaint alleging that the servants of the city opened and excavated a hole on the line of Washington street, and negligently left the same open, uncovered, and unguarded; that in the nighttime, while plaintiff was travelling on and over said street, exercising due care and having no knowledge of the existence of the hole, he without fault fell into the same, thereby injuring himself, was sufficient. This case presents practically the same question presented and decided by this court in the case of *City of Laporte v. Henry*, 41 Ind.

App. 197, 83 N. E. 655. It is therefore, we think, abundantly shown by direct averments of the complaint that the appellee's injuries were proximately caused by the negligence complained of.

The judgment is affirmed, with 5 per cent. damages.

(43 Ind. App. 421)

**HILL v. KERSTETTER et al.**<sup>1</sup> (No. 6,345.)  
(Appellate Court of Indiana, Division No. 2.  
Jan. 12, 1909.)

**1. REPLEVIN (§ 59\*)—ACTION FOR STOCK—COMPLAINT.**

The complaint in an action to recover 10 shares of stock of a bank, showing that defendants wrongfully procured to be transferred to them 10 shares of stock thereof belonging to plaintiff, is sufficient, without describing the particular certificate by which plaintiff claimed to hold such stock.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. § 215; Dec. Dig. § 59.\*]

**2. APPEAL AND ERROR (§ 193\*)—OBJECTIONS FOR FIRST TIME—SUFFICIENCY OF COMPLAINT.**

The complaint being sufficient to entitle plaintiff to recover certain shares of stock, it cannot, on appeal for the first time, be claimed to be insufficient to sustain the judgment for dividends on the stock received by defendant.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1226; Dec. Dig. § 193;\* *Pleading*, Cent. Dig. § 1355.]

**3. PLEDGES (§ 33\*)—CORPORATE STOCK—EVIDENCE OF AMOUNT.**

On the issue whether or not the transaction by which plaintiff's husband pledged her stock of a bank included her 300 shares or only 290 thereof, the statement of the husband to defendants at the time that it was essential that plaintiff retain 10 shares of the stock to enable her to remain a director of the bank and the fact that she did remain a director after the transaction are admissible.

[Ed. Note.—For other cases, see *Pledges*, Cent. Dig. § 89; Dec. Dig. § 33.\*]

**4. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR.**

Admission of incompetent evidence, so immaterial that it cannot be seen how it could have prejudiced, is not ground for reversal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4154; Dec. Dig. § 1050.\*]

**5. APPEAL AND ERROR (§ 1012\*)—WEIGHING EVIDENCE.**

There having been some evidence to authorize the finding, it cannot be disturbed as against the weight of evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3090; Dec. Dig. § 1012.\*]

**6. APPEAL AND ERROR (§ 221\*)—OBJECTION NOT MADE BELOW.**

In an action to recover certain shares of stock, the objection to a judgment for the dividends that there was no proof of demand of the money to authorize the finding thereon cannot be made on appeal for the first time.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1353; Dec. Dig. § 221.\*]

Appeal from Circuit Court, Elkhart County; Wm. J. Davis, Special Judge.

Action by Alice M. Kerstetter against Warren G. Hill and another. Judgment for plaintiff. Defendant Hill appeals. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup> Rehearing denied, 87 N. E. 695.

Jay & Zook, for appellant. Skinner & Wilder, for appellees.

RABB, J. This case involves a controversy between the appellant and appellee over the ownership of 10 shares of the capital stock of the Elkhart National Bank. The trial of the cause in the court below resulted in a finding and judgment in favor of appellee that she was the owner of the stock, and a money judgment for \$100 for dividends received by appellant thereon. The errors assigned are that the complaint does not state facts sufficient to constitute a cause of action, and that the court erred in overruling appellant's motion for a new trial.

The complaint is not as clear in statement as it might have been made, but is not vulnerable to attack for the first time in this court. It avers that the Elkhart National Bank went into liquidation on September 1, 1899, and that at that time appellee was the owner of 300 shares of stock therein, that afterwards the appellant Warren H. Hill wrongfully obtained possession of the certificates of stock, and without her authority, knowledge, or consent procured the bank to cancel said stock upon its books, and issue to him certificates for the same, and that appellant had theretofore wrongfully received as dividends on 10 shares of said stock the sum of \$100, which it was claimed rightfully belonged to the appellee. The complaint sets out a writing, the phraseology of which indicates it to be an inter partes contract, whereby one party designated as "I" sells and assigns to the appellant 290 shares of stock in the Elkhart National Bank, in consideration of which appellant agreed to do certain things. From other allegations in the complaint, notwithstanding its averments that appellee had never "sold, mortgaged, pledged, or hypothecated said stock," it is plainly to be inferred that she did authorize the sale or pledge of 290 shares of the 300 shares of her stock, but no more.

The point is made that the stock mentioned in the complaint is not sufficiently identified as being any part of the 300 shares of stock held by appellant. There is nothing in this point. If the facts averred in the complaint are true, the appellants wrongfully procured 10 shares of stock in the bank, belonging to appellee, to be transferred to them. It was not essential that appellee describe in her complaint the particular certificate by which she claimed to hold such stock.

It is also contended that the complaint is bad because no demand for the \$100 alleged to have been received by appellant as dividends on the stock in dispute was averred. If the complaint is good for any relief whatever, it was sufficient to withstand an attack for the first time in this court, and we think it was clearly sufficient to entitle the appellee to recover the stock. There is

evidence that the appellee was the owner of 300 shares of stock in the bank, of which her husband, Edmund R. Kerstetter, was the cashier; that the certificates for this stock were indorsed in blank, and left by her in the care of her husband, as her agent; that he applied to the appellant for a loan of \$7,000, and proposed to turn over to him, as security, 290 shares of the aforesaid stock; that appellant agreed to furnish the money, and did so, and at the time the money was turned over to her husband, and as a part of the transaction, the appellant signed and delivered to appellee's husband the following writing: "In consideration of the keeping and performing of the agreement herein made by Ovid C. Hill and Warren G. Hill, I hereby sell and assign to them two hundred and ninety shares of the stock of the Elkhart National Bank of Elkhart, Indiana, for which they have or are to pay me \$7,000.00, and it is agreed and promised by them that when they have received or been paid back the said amount of \$7,000.00, with all interest and expenses paid by them in the matter and \$750.00 besides, they are and agree to surrender to Edmund R. Kerstetter said stock or anything they or either of them may have obtained over and above the amount to pay them as stated above." Appellee's witness, her husband, testified that the certificates of stock were not at that time delivered to the appellants, and that they were never delivered to appellants by him, and he does not know how they acquired possession of them. This witness also testifies that in the negotiations regarding the matter he informed the appellants that his wife owned 300 shares of stock, but that it would be necessary that she retain 10 shares in order to be a director in the bank, and that it was essential that she should be. Appellant's motion for a new trial calls in question the admission in evidence of the conversations between appellee's husband and agent and appellants, regarding the sale or pledge of the 290 shares of appellee's stock in the bank, the writing signed by appellants, and evidence that after the transaction took place appellee continued to be a director in the bank. We think no error intervened in the admission of this evidence.

Appellee claims 10 shares of stock appearing on the books of the bank in the name of appellant, and the important question in the case, was whether or not the transaction between her husband and the appellants, by which her stock was sold or pledged to appellants, included 300 shares of the stock or but 290 shares, and the circumstances under which appellant acquired the right to the stock were of course relevant and material. The conversation between the witness Edmund R. Kerstetter and appellants, and the writing signed by appellants, all related directly to that transaction; and, while it was probably very slightly material, and would not be reversible error, in any event,

the witness Kerstetter having told appellants that it was essential that his wife retain 10 shares of the stock in order to enable her to retain her place on the board of directors, it was competent to admit evidence that she did so remain as a director after the transaction took place.

The witness Edmund R. Kerstetter was permitted to testify that his wife had not, subsequent to September 5, 1899, transferred any of the stock. This was incompetent, but it was so wholly immaterial that we are not able to see how it prejudiced appellant, and did not constitute reversible error.

We are asked to reverse the cause upon the evidence on the ground that the overwhelming preponderance of it shows that the entire 300 shares of stock owned by appellee was sold, and the certificates delivered to the appellants for a valuable consideration, and we are pointed to the gross improbability of the testimony of appellee's witness. If we were sitting as a trial court, we might well consider the appellants' argument upon this point, but we are not. There was evidence from which the court might conclude that there were but 290 shares of appellee's stock included in the transaction, by which appellants acquired the appellee's stock, and we cannot disturb the finding of the trial court on the evidence.

It is further contended that there was no allegation in the complaint, and no proof upon the trial, of a demand for the \$100, and that therefore the judgment should be reversed or modified. No objection was made in the court below to the finding of the court on this account, or to the form of the judgment rendered, and the question is therefore not presented by the record.

Judgment affirmed.

(43 Ind. A. 131)

#### AXTELL v. STATE. (No. 6,561.)

(Appellate Court of Indiana, Division No. 2.  
Jan. 15, 1909.)

#### 1. BAIL (§ 84\*)—RECOGNIZANCE—VALIDITY.

Where one charged with a felony gave a bond in the sum fixed by a general order, without raising the question that the amount fixed was not fair, and thereby obtained his discharge from custody, neither he nor his sureties could escape liability on the ground that the entry fixing the amount of bail was operative only for the term at which it was made, under Burns' Ann. St. 1908, § 1906, requiring that the order fixing the amount shall be made on the first day of each term.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 84.\*]

#### 2. TRIAL (§ 395\*)—FINDINGS BY COURT—EVIDENTIARY FACTS.

In an action on a forfeited recognizance, a finding of the making of a nunc pro tunc entry, showing the rendition of a judgment of forfeiture before the action was brought, accompanied by the order book entry, was not a finding of evidentiary facts only.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 931; Dec. Dig. § 395.\*]

#### 3. APPEAL AND ERROR (§ 918\*)—REVIEW—PRESUMPTIONS—AMENDMENT OF PLEADING.

Where the complaint, in an action on a forfeited recognizance, alleged that the bond sued on was given to secure the release of the principal therein, on a charge of assault and battery with intent to rape, and the finding showed that the principal was indicted for rape on a child under the age of 14, and that he gave the bond sued on, the complaint would be regarded in the Appellate Court as having been amended, as provided by Burns' Ann. St. 1908, § 700, and the judgment would not be reversed because of the variance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3710-3712; Dec. Dig. § 918.\*]

#### 4. BAIL (§ 89\*)—RECOGNIZANCE—ACTION—COMPLAINT.

A complaint, in an action on a forfeited recognizance, which shows that the bond in suit was executed to secure the release of the principal therein, who was held to answer to a charge of felony, that the amount of the bond was fixed by order of the court, that the principal failed to appear for trial, and that judgment of forfeiture was entered before the commencement of the action, is, when accompanied with a copy of the bond, sufficient on demurrer.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 89.\*]

Appeal from Circuit Court, Lawrence County; James B. Wilson, Judge.

Action by the State of Indiana against Harry A. Axtell. From a judgment for plaintiff, defendant appeals. Affirmed.

Robert G. Miller and Duncan & Batman, for appellant. Jas. A. Bingham, A. G. Cavins, W. H. Thompson, and Ed. M. White, for the State.

ROBY, J. This was a suit upon a forfeited recognizance. The court made a special finding, and stated conclusions of law thereon, in accordance with which judgment was rendered against appellant for \$1,000, the penalty of the bond.

The finding shows that Charles Hegwood was indicted by a grand jury of Monroe county for the crime of rape upon a child under the age of 14 years; that a warrant was issued, and said Hegwood arrested. That the sheriff of said county took him in custody July 8, 1905, and confined him in the county jail until July 25th. That an order had theretofore been made by the Monroe circuit court in 1903 in the matter of fixing bail for persons charged with crime, fixing the amount of bail, in charges of misdemeanors, at \$100 to \$300, and on charges of felony at \$500 to \$1,000. That on July 25th appellant and said Hegwood executed the bond in suit in the penal sum of \$1,000, conditioned upon the appearance of said Hegwood at the next term of court, and from day to day, to answer to said charge. The same was tendered to and accepted by the sheriff, and said Hegwood was released from custody. That a judgment of forfeiture was rendered on November 14, 1905, as shown by a nunc pro tunc entry made in May, 1906. That the sheriff did approve and accept said

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

bond, and filed the same with the clerk of the Monroe circuit court. That the consideration therefor was the release of Hegwood from jail until the trial. That the indictment against Hegwood is still pending. That on November 14, 1905, the cause was called for trial. That the defendant had absconded, and was absent without excuse. That he was three times called, and wholly made default. That appellant was thereupon three times called to bring the body of his said principal into court, and made default. It is objected that the entry fixing the amount of bail to be required was only operative for the term at which it was made, the statute requiring that the order be made on the first day of each term. Section 124, Act March 10, 1905 (Acts 1905, p. 613, c. 169; section 1905, Burns' Ann. St. 1908). This particular objection was made in *Carmody v. State*, 105 Ind. 546, 5 N. E. 679, and the rule laid down in that case governs this one. The exercise of a discriminating judgment was in no way invoked by appellant's principal, or by the appellant. No question was made but that the amount fixed in the order was moderate and fair. Had the bond required been challenged as excessive, it would then have become the duty of the judge of the circuit court to determine and fix the amount of bail, but one who secures liberty by accepting the amount fixed by such an order as is shown cannot, nor can his surety, escape liability on the ground stated.

The nunc pro tunc entry shows that a judgment of forfeiture was rendered before this suit was brought. The finding of the making of such order, accompanied by the order book entry, is not a finding of evidentiary facts only. The averment of the complaint is that the bond sued on was given to secure the release of Hegwood upon a charge of assault and battery with intent to commit rape. The complaint might have been amended, and will be regarded in this court as amended. Section 700, Burns' Ann. St. 1908.

A large number of objections are urged against the complaint: That pleading, with which a copy of the bond was filed, shows that the bond in suit was executed to secure the release of Hegwood, who was held to answer to a charge of felony; that the amount was fixed by order of court; that Hegwood failed to appear for trial; and that judgment of forfeiture was entered before the commencement of this action. It was substantially sufficient on demurrer. *Carmody v. State*, supra.

There is very little appearance of merit in this appeal. The principal in the recognizance was arrested, and was in jail and was released upon giving the bond in suit. The parties executing it "become bound thereby to the full extent contemplated by the law requiring such recognizance as a condition precedent to the release of the principal." *Bernhamer v. State*, 123 Ind.

577, 579, 24 N. E. 509; section 153, Act March 10, 1905 (Acts 1905, p. 618, c. 169; section 2024, Burns' Ann. St. 1908).

Judgment affirmed.

(43 Ind. A. 735)

**AXTELL v. STATE.** (No. 6,562.)

(Appellate Court of Indiana, Division No. 2  
Jan. 15, 1909.)

Appeal from Circuit Court, Lawrence County; James B. Wilson, Judge.

Action by the State of Indiana against Harry A. Axtell. From a judgment for plaintiff, defendant appeals. Affirmed.

Robert G. Miller and Duncan & Batman, for appellant. Jas. A. Bingham, A. G. Cavins, W. H. Thompson, and Ed. M. White, for appellee.

**ROBY, J.** This case is affirmed on the authority of *Axtell v. State* (No. 6,561) 86 N. E. 989. The records in the cases are identical, except that the recognizance bond in this case was to secure the appearance of Charles Hegwood to answer to a charge of rape on the person of Iva York Hegwood, on June 1, 1905, and the bond in No. 6,561 was to secure his appearance to answer to a charge of the same crime on the person of Bessie York Hegwood, on October —, 1904.

(43 Ind. A. 734)

**TRUELOVE et al. v. TRUELOVE et al.**<sup>1</sup>  
(No. 6,689.)

(Appellate Court of Indiana. Jan. 8, 1909.)

Appeal from Circuit Court, Owen County; Joseph W. Williams, Judge.

Action between Mary E. Truelove and another and Emeline Truelove and another. Judgment for the latter, and the former appeal. Case transferred to Supreme Court, on division of justices.

Willis Hickam, for appellants. Inman H. Fowler and John O. Robinson, for appellees.

**PER CURIAM.** This cause being submitted to the entire court, and four judges not concurring in the result, the case is hereby transferred to the Supreme Court, under section 15 of the act approved March 12, 1901. Acts 1901, p. 569, c. 247.

(43 Ind. A. 734)

**CLEVELAND, C. O. & ST. L. RY. CO. v. SWANGO.** (No. 6,608.)

(Appellate Court of Indiana, Division No. 2  
Jan. 8, 1909.)

Appeal from Circuit Court, Dearborn County; Geo. E. Downey, Judge.

Action by Lawrence Swango, by next friend, against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Thomas S. Cravens, for appellant. McMullen & McMullens, for appellee.

**COMSTOCK, P. J.** This is a turntable case. The questions presented by the record were passed upon in *Lewis v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* (Ind. App.) 84 N. E. 23, and the facts as shown by the answers to interrogatories are analogous to those alleged in the complaint in the last-named case.

A petition to transfer said *Lewis* case to the Supreme Court having been denied, this judgment is, upon the authority of that case, affirmed.

<sup>1</sup> Transferred to Supreme Court, 86 N. E. 1012. Rehearing denied. Mandate modified, 86 N. E. 512.

(48 Ind. A. 115)

**KELSO v. KELSO. (No. 6,250.)**

(Appellate Court of Indiana. Jan. 15, 1906.)

**1. HUSBAND AND WIFE (§ 335\*)—ENTICING AND ALIENATING—MALICE—QUESTIONS FOR JURY.**

In an action for alienation of a husband's affections, malice is a jury question of fact, and not one of law.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 335.\*]

**2. HUSBAND AND WIFE (§ 335\*)—ENTICING AND ALIENATING—ACTIONS—INSTRUCTIONS —“MALICE.”**

In an action for alienation of a husband's affections, an instruction that when it is necessary that an act be done maliciously to be actionable, it must be done intentionally and wrongfully, without just cause or legal excuse, or, in other words, that the doing of an act maliciously in cases of actionable tort is the doing of such act purposely, without just cause or legal excuse, was erroneous, since while the jury might have been warranted in inferring malice from proof of an act done purposely and without just cause or legal excuse, it was not necessarily compelled to do so; “malice” being defined by the *Standard Dictionary* as “A disposition or intent to injure another for the gratification of anger, jealousy, hatred, revenge or the like; active malevolence,” etc.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 335.\*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4298-4304; vol. 8, pp. 7712, 7713.]

**3. HUSBAND AND WIFE (§ 335\*)—ENTICING AND ALIENATING—ACTIONS—INSTRUCTIONS.**

In an action against a parent for alienation of a husband's affections, an instruction that the law presumes that the acts, persuasions, and influences of a parent relating to his child were made in good faith, and with sufficient cause, but that, if it be shown that such acts were without good cause or legal ground, etc., the parent will be liable, was erroneous, the mental attitude, design, or intention being wholly eliminated, and since, while absence of good cause or legal ground might warrant the jury in finding malice, it would not necessarily compel them to so find.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 335.\*]

Appeal from Circuit Court, Fayette County; Geo. L. Gray, Judge.

Action by Grace Kelso against Eliza Kelso. Judgment for plaintiff, and defendant appeals. Reversed, with instructions to grant a new trial.

Watson, Titsworth & Green, A. J. Ross, and Ruben Conner, for appellant. McKee, Little & Frost and Wickens & Osborn, for appellee.

**HADLEY, J.** Appellee sued appellant for damages for the alienation of the affections of appellee's husband, who was the son of appellant. The cause was tried by jury, and judgment rendered in favor of appellee in the sum of \$1,000.

The court on its own motion instructed the jury as follows: “When it is necessary that an act be done maliciously to be actionable in law for the recovery of damages therefor, such act must be done intentionally

and wrongfully, without just cause or legal excuse. In other words, the doing of an act maliciously in cases of actionable tort is the doing of such act or acts purposely, without just cause or legal excuse, to the injury and damage of another.” It is urged that this instruction seeks to instruct the jury, as a matter of law, what constitutes malice. That malice, in cases of this character, is a question of fact to be determined by jury, and not a question of law, is well established by the authorities. *Helwig v. Beckner*, 149 Ind. 131, 48 N. E. 644, 48 N. E. 788; *Newell v. Downs*, 8 Blackf. 523; *Wilkinson v. Arnold*, 11 Ind. 45; *Ammerman v. Crosby*, 28 Ind. 451; *Lawrence et al. v. Leathers*, 31 Ind. App. 414, 68 N. E. 179. But whether the instruction should be construed as appellant contends, or should be taken to be an attempt of the court to define malice for the information of the jury, is immaterial, as in either view it is deficient. Malice is defined as, “A disposition or intent to injure another for the gratification of anger, jealousy, hatred, revenge, or the like; active malevolence; a deliberate intention to do evil, with or without ill will, a willfully formed design to do another an injury.” *Standard Dict.* The jury might be fully warranted in inferring malice from proof of an act done purposely, and without just cause or legal excuse, to the injury of another; but it is not necessarily compelled to do so, since it is conceivable that an act done in such a manner might be entirely lacking in the malevolent animus towards the party injured. It might be true that by strict technical construction the term “legal excuse” could be said to cover every ingredient necessary to constitute malice in the particular case; but this is a construction entirely too subtle for the average juror, and would leave the instruction before us a definition sadly in need of defining.

The court also instructed the jury that the law presumes that the acts and persuasions and influences of a parent relating to his child, were made and exerted in good faith, and with sufficient cause and legal justification; but, if it be shown by evidence that such acts and persuasions were without good cause or legal ground, and injury results to an other, in such event such parent will be liable therefor in damages. This instruction is clearly erroneous. The mental attitude, design, or intention is wholly eliminated. In suits for malicious prosecutions which are analogous to the case at bar, it is necessary to support the action to show malice and want of probable cause, yet the rule has long been established in this state that proof of want of probable cause is not alone necessarily sufficient to establish malice and to sustain the action. *Helwig v. Beckner*, supra; *Newell v. Downs*, supra; *Wilkinson v. Arnold*, supra; *Ammerman v.*

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Crosby, supra; Lawrence et al. v. Leathers, supra. In the case of Newell v. Downs, supra, the court say: "On the trial the court, as to the prosecution alleged to have been malicious, instructed the jury that, 'though the plaintiff to sustain his case must prove both malice and want of probable cause, yet if the jury believed from the evidence under the charge of the court that Newell had no probable cause for commencing said prosecution, such want of probable cause was sufficient evidence of malice.' This instruction should not have been given in the unqualified terms in which it is stated, as it tended to mislead the jury. They might well have understood from it that from simple want of probable cause they were bound to infer malice, and hence find some damages in favor of the plaintiff. Such seems not to be the law." In the case of Wilkinson v. Arnold, supra, Arnold sued Wilkinson for malicious prosecution. Wilkinson's defense was that he caught Arnold pulling ears of corn from growing stalks in his field. He went to a justice of the peace and related the case. The justice made out an affidavit charging Arnold with a felony. He was tried and acquitted of the charge on the ground that the act of which he was accused was only a misdemeanor. Here was an entire lack of probable cause for the felony charge. The court, in passing upon the case, say: "In order to sustain the action, it is necessary that the prosecution should have been instituted without probable cause, and also that it should have been done maliciously. The want of probable cause is not sufficient without malice, nor will malice suffice where there was probable cause for the prosecution. Both malice and the want of probable cause must concur in order to lay the foundation for an action. 2 Greenl. Ev. § 453. Malice may be inferred from the want of probable cause, as a matter of fact, but no such inference arises in a matter of law. The jury may draw such inference if they see proper, and probably in most cases would, but they are not in law bound to do so. Newell v. Downs, 8 Blackf. 523. Any evidence having a tendency to show probable cause, or rebut any inference or proof of malice, is legitimate. \* \* \* If the prosecution was instituted for a felony instead of a misdemeanor, entirely through the mistake of the justice as to the legal character of the supposed offense, this might well be considered by the jury in determining the question of malice." So in this case absence of good cause or legal ground might warrant the jury in finding the existence of malice, but it would not necessarily compel them to do so.

The instruction also falls short of recognizing the distinction between the case at bar and ordinary actionable torts. The rules governing actions against the parent for

alienating the affections of his child from the husband or wife give due recognition to the parental relation, and malice is a necessary element of liability. As is quite pertinently expressed in the case of Workman v. Workman (Ind. App.) 85 N. E. 997, recently decided by this court: "When a father or mother is charged with the alienation of a husband's or wife's affection, the 'quo animo' is the important consideration. From what motive did the parent act? Was it malicious, or was it inspired by a proper regard for the welfare and happiness of the child? The reciprocal obligations of parent and child last through life, and the duty of discharging them does not cease by the marriage of the child. Tucker v. Tucker, 74 Miss. 93, 19 South. 955, 32 L. R. A. 623; Rice v. Rice, 104 Mich. 371, 62 N. W. 833." And in the case of Reed v. Reed, 6 Ind. App. 318, 33 N. E. 639, 51 Am. St. Rep. 310, the court, speaking of such cases, say: "When trouble and disagreements arise between the married pair, the most natural promptings of the child direct it to find solace and advice under the parental roof. All legitimate presumptions in such cases must be that the parent will act only for the best interests of the child. The law recognizes the right of the parent in such cases to advise the son or daughter, and when such advice is given in good faith, and results in a separation, the act does not give the injured party a right of action. In such a case the motives of the parent are presumed good until the contrary is made to appear." The rules herein laid down are restricted to suits like the present, where it is sought to recover damages from a parent for the alienation of the affections of a child from a wife or husband, and are not applicable to other classes of torts where other rules prevail.

The force and effect of all the instructions bearing upon this element of the case were the same, and in view of the relations of the parties and the contradictory character of the evidence, we cannot say such action was not prejudicial. Many other questions are presented, but, as they may not arise on a retrial, are not here considered.

Judgment reversed, with instructions to grant a new trial.

WATSON, C. J., and RABB, ROBY, and COMSTOCK, JJ., concur. MYERS, J., not participating.

(43 Ind. A. 70)

LAKE ERIE & W. R. CO. v. SEELEY.  
(No. 6301.)

(Appellate Court of Indiana, Division No. 2.  
Jan. 12, 1909.)

1. CARRIERS (§ 173\*)—CARRIAGE OF FREIGHT.  
A common carrier may bind itself by parol contract, express or implied, to carry goods be-

yond its own lines, and to be responsible for safe carriage from the point of reception to the destination.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 99, 743-746; Dec. Dig. § 173.\*]

**2. CARRIERS (§ 173\*)—CARRIAGE OF FREIGHT—CONTRACTS—LIABILITY—AUTHORITY OF AGENT.**

The agent of a common carrier, contracting to carry goods beyond its own lines and to be responsible for safe carriage from the shipping point to the destination, must be shown to have authority to make the contract in order for the shipper to recover thereon.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 173.\*]

**3. CARRIERS (§ 230\*)—CARRIAGE OF LIVE STOCK—INJURY TO SHIPMENT—JURY QUESTIONS.**

In an action against a railroad for negligently transporting hogs, whether defendant made a special limited liability contract, and whether its agent had authority to make the contract, were jury questions.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 230.\*]

**4. CARRIERS (§ 230\*)—CARRIAGE OF LIVE STOCK—INJURIES TO SHIPMENT—NEGLIGENCE—JURY QUESTIONS.**

In an action against a railroad for injuries to hogs during transportation, whether there was negligence on the part of defendant or its connecting lines was a jury question.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 962; Dec. Dig. § 230.\*]

**5. CARRIERS (§ 207\*)—CARRIAGE OF LIVE STOCK—INJURIES TO SHIPMENT.**

One shipping hogs under a parol contract had a right of action thereunder against the carrier for damages incurred prior to the subsequent execution of a written limited liability contract.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 207.\*]

**6. CARRIERS (§ 228\*)—CARRIAGE OF LIVE STOCK—NEGLIGENCE—EVIDENCE.**

Evidence that when a car load of hogs arrived at their destination the car was dry and dusty authorized the inference that the employees of the initial carrier, or of its connecting lines, were negligent in failing to properly flush the hogs with water while en route, or to properly care for them.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 228.\*]

Appeal from Circuit Court, Henry County; John M. Morris, Judge.

Action by Frank Seeley against the Lake Erie & Western Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John B. Cockrum, E. H. Bundy, and W. A. Brown, for appellant. Forkner & Forkner and Barnard & Jeffrey, for appellee.

COMSTOCK, P. J. Appellee, plaintiff below, recovered a judgment against appellant for \$225, damages for the alleged negligence of appellant in transporting a car load of hogs from Mt. Summit, Ind., to East Buffalo, N. Y. Of the errors assigned appellant discusses none but that the court erred in overruling appellant's motion for a new trial, and of the reasons for a new trial only the re-

fusal to give to the jury instruction No. 3, requested by appellant. Other alleged errors are waived. The complaint is in three paragraphs. Each alleges that on the 2d day of May, 1905, the defendant was, and for many years prior thereto, and ever since, has been, a corporation operating a system of railroads as a common carrier through the village of Mt. Summit, Henry county, Ind., to the city of Ft. Wayne, Ind., and there intersects with lines running to East Buffalo, N. Y.; that on said day plaintiff delivered to the defendant, at the village of Mt. Summit, a car load of hogs, to be carried from said village to said city of East Buffalo; that defendant neglected to deliver said hogs and carelessly transported the same; that 30 died; that plaintiff is damaged in the sum of \$300. The second alleges that the hogs were consigned to Ransom, Mansfield & Co., East Buffalo, N. Y., and were the property of this plaintiff, he being the sole owner thereof; that the weather was warm, and the hogs were fat, and by the unreasonable delay in transportation 30 hogs died. The third alleging that it was agreed for a reasonable compensation, to be paid by plaintiff, to carry said hogs within a reasonable time; that 30 hours was the reasonable and ordinary time required between said points, but that the defendant negligently delayed the delivery of said hogs for more than 15 hours at said city of East Buffalo than in the usual course of transportation; that by reason of such delay 30 hogs died, etc. Defendant answers in two paragraphs; the first a general denial, and the second as follows: "The defendant for second and further paragraph of answer to the plaintiff's complaint says it admits that the plaintiff loaded a car of hogs at the defendant's station at Mt. Summit, Ind., to be shipped from thence over the defendant's railroad and delivered to connecting lines of railroads to East Buffalo, N. Y., and at the time of the loading of said hogs in said defendant's car the plaintiff agreed with the defendant, which agreement was afterwards reduced to writing and signed by each party, which said written agreement is as follows: [setting out a limited liability live stock contract]."

Said instruction No. 3, to refusal of which an exception was taken, reads: "If the plaintiff shipped his live stock as alleged over the defendant's railroad and the rate of freight charged was lower, under the written contract set forth in the defendant's answer, than it would have been if plaintiff had shipped without such contract, and the plaintiff knew this, this would be a sufficient consideration for the execution of said contract, whether the same was executed before or after the stock were shipped." A common carrier may bind itself by contract to carry goods beyond its own lines, and be responsible for safe carriage from point received to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

point of destination. *Moore, Common Carriers*, § 13 et seq.; *Chicago, etc., R. Co. v. Woodward*, 164 Ind. 360, 72 N. E. 558, 73 N. E. 810, and cases cited. Such contracts may be made by parol, and may be express or implied. The agent making such special contract must be shown to have authority to make it. Such contract may be implied from the dealings between the shipper and carrier. The custom and usages of carrier in accepting goods for transportation; the connecting lines, and the extent to which it has held itself out to the public; the giving of a through bill of lading; the relation existing between initial carrier and connecting lines—are all competent evidence to be taken into consideration in determining whether or not there was an undertaking for through liability. And in the case at bar whether the shipper made a special contract and whether the agent had authority to make terms of contract; whether there was negligence on the part of appellant or its connecting lines—were questions to be determined by the jury. *Chicago, etc., R. Co. v. Woodward*, supra. In *Louisville, etc., R. Co. v. Craycraft*, 12 Ind. App. 208, 39 N. E. 523, a railroad received stock for shipment under a parol contract to carry them to a certain place, and the stock were injured by reason of a defect in the car. It was held that the fact that the parties, after the injury occurred, entered into a written contract of shipment did not destroy the right to recover damages for a prior breach of the parol contract, unless there was an express provision to that effect, and it devolved upon the railroad company to plead such provision in defense; that, the parol contract having been made and broken before the written contract was made, the parol contract was not merged in such a sense as to destroy the right of action accruing thereunder. See, also, cases cited in opinion. It is the theory of appellee that his stock was carried under a parol contract of the 2d day of May, 1905. If damages resulted to him before the signing of a written contract, he still had a right of action under the parol contract for damages incurred prior to the execution of the written contract. The court instructed the jury in harmony with said decision, and under said decision the charge requested was properly refused.

Appellant cited *Pittsburgh, C., etc., R. Co. v. Bryant*, 36 Ind. App. 340, 75 N. E. 829, in support of the proposition that a common carrier is not bound by the contract of the station agent for the transportation of goods to a point beyond its own lines, unless said agent was expressly or impliedly authorized from former dealings of the parties or the carrier, or held themselves out as common carrier to such point, and in which this court held that there was no evidence of the authority expressly given, nor any evidence

from which it could be inferred. The evidence shows a different state of facts in that case and in the case at bar. In the former the only transaction shown was the shipment of a barrel of household goods, and in the case at bar numerous shipments were shown, extending over a number of years, made without any agreement to limit liability, and without a written contract dated before or after such shipments were made. There is evidence to show that appellee, who was the owner of 85 head of hogs, on the 2d day of May, 1905, ordered a car from appellant's agent at Mt. Summit, Ind., for the transportation of said hogs from said point to East Buffalo, N. Y.; that in pursuance of said order said car was set in on said track of appellant at said place, and that said hogs were loaded therein; that appellee requested appellant to ship said hogs to him in care of Ransom, Mansfield & Co. at East Buffalo, N. Y., and that appellant undertook and agreed to ship said hogs as requested and billed the same as directed by appellee to him as aforesaid; that there was delay in making said shipment; that by the usual and reasonable course of making a shipment between said points said hogs should have arrived at their destination the morning of May 4, 1905, before the market for said day opened, whereas said hogs did not arrive at said destination until about 5 o'clock of the afternoon of said day and after the market had closed; that when said hogs arrived at their destination, the car which contained them was dry and dusty, from which the inference can be legitimately drawn that the employes of the appellant, or of the connecting lines of railroad, were guilty of negligence in failing to properly flush said hogs with water while en route, or to properly care for said hogs during said time. The agreement set up in answer was made after the damage had been suffered.

Judgment affirmed.

(79 Oh. St. 225)

#### LINGLER v. WESCO.

(Supreme Court of Ohio. Dec. 22, 1908.)

EXECUTORS AND ADMINISTRATORS (§ 155\*)—MORTGAGED CHATTELS—RIGHTS OF MORTGAGEE.

Where the mortgagor dies in possession of the goods and chattels covered by the mortgage, even after condition broken, and his administrator has taken possession of said goods and chattels in his trust capacity, the mortgagee cannot maintain replevin against such administrator for their possession. In such case, if the mortgage is valid, the interest of the mortgagee in the property under mortgage is transferred to the fund arising from the sale by the administrator.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 632, 633; Dec. Dig. § 155.\*]

(Syllabus by the Court.)

**Error to Circuit Court, Butler County.**

Action by one Lingler against one Wesco, as administrator, etc. Judgment for defendant was affirmed in the circuit court, and plaintiff brings error. Affirmed.

On the 15th day of April, 1904, the plaintiff in error filed a petition in the court of common pleas of Butler county against Florentine Kraft, as administratrix of the estate of Franz Kraft, deceased, to obtain possession of certain personal property then in the possession of defendant. The petition contains two causes of action. In the first it is alleged that on the 4th day of May, 1903, Franz Kraft, now deceased, executed and delivered to the plaintiff, Lingler, his 12 promissory notes, each for the sum of \$100 and payable in 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 months after the date thereof each to bear 6 per cent. interest from date, interest to be paid annually, and each note payable at the Second National Bank of Hamilton, Ohio. No part of said notes has been paid, and when the petition was filed the notes due in 6, 7, 8, 9, 10, and 11 months from date were then due, and the other notes were not then due. It is further alleged that on the 4th of May, 1903, in order to secure the payment of said notes, the said Franz Kraft executed and delivered to Lingler a chattel mortgage on "all bar fixtures, wines, liquors, cigars, chairs, tables, furnace, ice box, two billiard tables and all property now in the building known as the Bank Saloon No. 227 High street \* \* \* of the city of Hamilton and used by said mortgagor in the conduct of said saloon." The mortgage contained the condition that if said Kraft should pay, or cause to be paid when due, his 17 promissory notes of said date for the sum of \$100 each, with interest thereon, then the mortgage to be void; otherwise to be and remain in full force.

The plaintiff alleges that no part of said notes or mortgage has been paid, and that the mortgage has become absolute, and that the plaintiff has acquired special ownership or interest in and is entitled to the immediate possession of said goods and chattels, and that Florentine Kraft, administratrix of Franz Kraft, deceased, wrongfully detains in her possession said goods and chattels, and has so detained them from plaintiff for more than 30 days, to his damage in the sum of \$400. For a second cause of action plaintiff alleges that on the 7th day of May, 1903, said Franz Kraft executed and delivered to him his certain promissory note for the sum of \$2,500, payable one year after date with 6 per cent. interest from date; the interest payable annually. No part of said note has been paid. To secure the payment of this note, Kraft executed and delivered to Lingler a chattel mortgage on the same property covered by the first mortgage and already described. The latter mortgage con-

tained the condition that, if the note was paid when due, the mortgage should be void; otherwise to remain in full force. This mortgage, as was true of the first, was duly sworn to as required by law, and filed with the recorder of Butler county, and that each of said mortgages is a valid lien upon said property. The plaintiff alleges that said Kraft died in Butler county, Ohio, intestate, on the 7th day of March, 1904, and that plaintiff has acquired special ownership in and is entitled to immediate possession of said goods and chattels, and that said Florentine Kraft, administratrix of the estate of Franz Kraft, deceased, wrongfully detains said goods from the plaintiff, and has so detained them for 30 days to damage of plaintiff in the sum of \$400. The prayer is for a recovery of possession of the property and for damages in the sum of \$800.

An affidavit in replevin was filed with the petition, and the property mortgaged was taken on a writ of replevin and delivered to the plaintiff on his giving a proper bond. The property replevined was appraised at \$2,565.65. An answer to the petition and the reply thereto were withdrawn with consent of the court, and the defendant filed a general demurrer to the petition. The court sustained the demurrer, and on motion of the defendant proceeded to assess damages, and found as follows: "The court finding that said defendant, as administrator of Franz Kraft, at the time the property described in plaintiff's petition and replevined from her by said plaintiff, had the right of possession thereof for the purpose of administering the same according to law as administrator of said estate, and the court, being fully advised, does find that the value of the property described in the petition at the time it was replevined was \$2,565.65, and does assess the damages caused to the defendant by said plaintiff replevining said property from her at \$153.83." Judgment was rendered for the sum of \$2,719.48, and costs of the action. This judgment was affirmed by the circuit court. The case is here on error.

Andrews, Harlan & Andrews, for plaintiff in error. Aaron Wesco, Alex. F. Hume, and Edgar A. Belden, for defendant in error.

PRICE, O. J. (after stating the facts as above). There is nothing in the petition which was held bad on demurrer, to indicate that the chattel mortgage confers any special powers, such as power to sell or make other disposition of the mortgage property. As our statement of the case shows, the petition describes certain notes executed and delivered by Franz Kraft to the plaintiff, Lingler, and that, to secure their payment as each should become due, the mortgage was executed and delivered to the payee of the notes. It was properly verified and

filed in order to perfect the intended lien on the personal property described therein. In addition to the facts alleged as to creation of the lien by virtue of this mortgage, it is averred, "and that thereby the said property was conveyed to this plaintiff by said Franz Kraft." The other material provision of the mortgage is the written condition that, if said Kraft should pay or cause to be paid when due each of the several notes described in the mortgage, then it was to be void; otherwise to remain in full force. The second mortgage referred to in the petition, given at a later date to secure the payment of a note for \$2,500, covers the same property and contains similar conditions. It may be inferred from the language of the petition that Kraft paid some of the notes, but he died on the 7th day of March, 1904—less than a year from the date of the notes and mortgage, at which time notes due in 6, 7, 8, 9, 10, and 11 months, respectively, had matured. His wife Florentine Kraft, became administratrix of his estate, and on April 15, 1904, Lingler brought suit in replevin against the administratrix to recover possession of the mortgaged property, and, in pursuance of the provisions of the statute of which he availed himself, he obtained possession. As before stated, the petition discloses no condition upon which the mortgagee might take possession, save the averment that by the execution of the mortgage Kraft thereby conveyed the mortgaged property to Lingler, who thus acquired a special ownership therein. Evidently this personal property remained in the possession of the mortgagor and was in his possession at the time of his death. What change, if any, in the relation of the mortgagee to this property was wrought by the death of the mortgagor?

It is not claimed that death discharged or in any degree weakened the lien of Lingler, but he was not satisfied with holding his lien and permitting the administratrix to sell and administer upon the proceeds, and therefore asserted title under his mortgage and charged that the administratrix wrongfully and illegally detained the property from him. The lower court decided that he could not maintain replevin against the administratrix and assessed damages against him for the value of the goods replevied. Death soon or later is the certain fate of all men, and when a party accepts a mortgage upon chattels securing the payment of a series of notes, some of which will not mature for many months, as was the case here, such party must be held to take such security in contemplation of what the law may require if death prevents the mortgagor from complying with the terms of his contract. The value of mortgaged property might be far in excess of the debt, and the estate of the deceased mortgagor would in such case be largely interested in the proper and advan-

tageous disposition of the same, and it would seem unfair to the estate that a mortgagee should be permitted to arbitrarily take possession and keep or dispose of the property as he please. The petition discloses no duty on the part of the mortgagee in respect to such property. It does not appear that he was authorized by the mortgage to sell at either public or private sale, nor does it appear what shall be done with the proceeds in case a sale should be made. But aside from the lack of averment of what powers were conferred by the mortgage in question, we still have the question: What change occurs in the rights of a mortgagee on the death of the mortgagor? Not change in his contract lien, but change in the remedy to enforce it. Indeed, on the facts alleged in the petition in the present case, it cannot be fairly urged that the decision of the lower court tended to impair any of the contract rights of the mortgagee. He contracted for a lien to secure his notes. Death did not remove or impair the lien, but we think it did so change the relation of the parties that the remedy by replevin, which might have been enforced in the lifetime of the mortgagor, is not available when the mortgaged property passes into the custody of the administratrix. The new situation does not dissolve the contract relation or impair the contract, but cuts off one of the remedies that could have been pursued against the mortgagor. Hence it is not correct to say that, unless the mortgagee may take the property from the personal representative of the mortgagor, he does not enjoy the full measure of his contract rights. His rights as to the debt and its security may be one thing, and the remedy to enforce them may be another. The former may not be changed by the death of a party, while the other may necessarily be affected.

While the statute provides the method of obtaining a valid lien on personal property by mortgage, and one which was adopted by Lingler in this case, other provisions provide for the sale and distribution of personal property after the death of the owner. Section 4163, Rev. St. 1908, provides that: "When a person dies intestate and leaves any personal property, such personal property shall be distributed in the manner prescribed in section forty-one hundred and fifty-nine," etc. This section points out the course of descent and distribution. But there are still other provisions to be observed after the death of the owner of personal property. It is the subject of administration, and section 6006, Rev. St. 1908, requires a bond of the administrator, one of the conditions of which is "to make and return into court on oath within three months, a true inventory of all moneys, goods, chattels, rights and credits of the deceased which have or shall come to his possession or knowledge." The statute requires the administrator to administer according to law all the moneys, goods, and

chattels, etc.: These are some of the duties of an administrator as to personal property of the deceased which comes into his possession or of which he has knowledge, and these duties are primary, or first duties in discharge of the trust. Later is the duty and power to sell the personal estate and make due return of the same. In this case, some interest in the mortgaged property vested in the administrator, the extent of which depends upon its value as compared with the amount of valid liens, and the contract called the chattel mortgage "must be expounded according to the laws in force at the time they are made, and the parties are as much bound by a provision contained in the law, as if that provision had been inserted in, and formed part of, the contract." *Lindemann v. Ingham*, 36 Ohio St. 1. Applying this rule to the case at bar, we think the chattel mortgage and Lingler's rights under it must be expounded and determined with a proper recognition of the statutes regulating the settlement of estates of deceased persons, and that the mortgagee should not be allowed to supplant administration under the law, and take upon himself the administration on part of the estate. These provisions by statute for the administration of estates must be regarded as in contemplation of the parties who enter into such contracts, and they must be interpreted and enforced accordingly; and the mortgagee is not made to suffer by this method of procedure, for under sections 6090 and 6091, Rev. St. 1908, which prescribe the order in which the administrator shall pay debts, his lien is preserved and recognized, and, as said in section 6091: "Nothing in the preceding section shall affect or impair any lien, legal or equitable, which any creditor or other person shall have upon the personal estate of the deceased during his lifetime." Hence, to this extent at least, the administrator is a trustee for the benefit of the mortgagee as well as other creditors of the deceased.

In *Kilbourne et al. v. Fay, Ex'r, et al.*, 29 Ohio St. 264, 23 Am. Rep. 741, the relation which the administrator sustained to creditors was under consideration, although it was not the paramount question in the case. The syllabus indicates the nature of the controversy: "Where a chattel mortgage is declared void by the statute 'as against the creditors of the mortgagor,' and the mortgagor dies in possession of the mortgaged property, leaving an insolvent estate, such property becomes assets in the hands of the executor or administrator of the mortgagor, whose duty, as well as right, it is to defend his possession against the claim of the mortgagee, notwithstanding such mortgage was valid as against the mortgagor." It is not claimed that the mortgage in the present case is void as to creditors, or as to the mortgagor, but the pertinent principle found in that case is that the administrator is a

trustee for the benefit of the creditors of the estate. In the course of the opinion, on page 279 of 29 Ohio St. (23 Am. Rep. 741), *McIlvaine, J.*, says: "I shall not stop to cite cases wherein the executor or administrator has been held to be a trustee for the benefit of the creditors of the estate. The provisions of the eighty-third section of the administration act above quoted clearly establishes such relation. (Said section 83 is now 6091, Rev. St.) The ordinary course of administration is the means and process provided by law whereby creditors of a deceased debtor receive payment. It is true that in the case of a solvent estate the heir has also a beneficiary interest in the trust as a distributee; but, where the estate is insolvent, the interest of the heir is merely technical, as all the assets in such case are administered for the exclusive benefit of creditors. The analogy between the duties of the office of an administrator of an insolvent estate and those of an assignee of an insolvent debtor are so perfect that we might at once affirm that the doctrine of *Hanes v. Tiffany* (25 Ohio St. 549) must control the decision of the present case." The perfect analogy mentioned is reinforced when we consider the duties of an assignee of an insolvent debtor defined by section 6351, Rev. St. 1908: "The probate court shall order the payment of all incumbrances and liens upon any of the property sold, or rights and credits collected, out of the proceeds thereof, according to priority."

This being the relation which an administrator sustains to the creditors of the estate of a deceased person, the case of *Lindemann v. Ingham*, 36 Ohio St. 1, becomes direct authority. It is not necessary to here restate the facts of that case. It was an action against *Lindemann* for conversion of goods and chattels covered by a chattel mortgage, which goods the assignee sold with full knowledge of the mortgage, which instrument was the title of the mortgagee. This court held that: "Where a mortgagor in possession of goods mortgaged makes an assignment thereof for the benefit of his creditors, and the assignee proceeds in the probate court to administer the trust in accordance with the statutes regulating such assignments, the mortgagee cannot maintain an action against the assignee for converting the property to his own use. In such case, his interest in the property under the mortgage, where the assignee is clothed with authority to sell the goods, is transferred to the fund arising from the sale by the assignee. And it will make no difference that the condition in the mortgage was broken at the time of the assignment." In the case at bar the mortgagee sued in replevin after condition broken, and thus gained possession of the property. This court had occasion to again consider the question decided in *Linde-*

mann v. Ingham, supra, in Ingham v. Lindemann, 37 Ohio St. 218. The doctrine of the first case was adhered to, and it has been quoted with approval by this court in several subsequent cases, and we think it has become the settled law of this state.

The plaintiff in error complains of the judgment assessing the damages. The judgment entry shows the following: "And thereupon this cause came on to be heard on said demurrer to said petition, and the court having heard the argument of counsel, and being fully advised in the premises, does find that said demurrer is well taken, and does sustain the same at the costs of the plaintiff, and does render judgment on said demurrer against the plaintiff and in favor of defendant; and on application of the defendant herein filed the court proceeded to assess proper damages to the defendant, the court finding that said defendant, as administrator of Franz Kraft, at the time the property described in plaintiff's petition and replevined from her by said plaintiff, had the right of possession thereof for the purpose of administering the same according to law as administrator of said estate, and the court, being fully advised, does find that the value of the property described in the petition at the time it was replevined was \$2,565.65, and does assess the damages caused to the defendant by said plaintiff replevining said property from her at \$153.83." The court then rendered judgment for the aggregate of the two amounts and costs of the action. Before the demurrer was filed, it seems that some issue had been made up by answer and reply, for the record shows that the defendant had leave to withdraw the answer and the plaintiff to withdraw the reply. Thus the deck was cleared for a demurrer to

the petition, which was filed, and the right of plaintiff to maintain replevin against the administrator was thereby challenged. The question was decided on the demurrer against the right of replevin. The plaintiff did not ask permission to amend his pleading, and he was in possession of the property replevined. It does not appear that either party demanded a jury to assess the damages, and for what we know they may have waived a jury, for the record is silent on the subject. The entry shows that the court made a finding in favor of defendant and against the plaintiff on the demurrer, and that defendant was entitled to possession of the property when suit was brought, and then the court proceeded to find the value of the property at the time of replevin, and assessed its value as the measure of damages. Such a finding presupposes the introduction of evidence, and, where the record is silent, a reviewing court will presume that the court below, being one of general jurisdiction, acted upon evidence to support the finding of value and amount of damages.

Therefore it appears that no one objected to the court hearing the evidence and passing upon it. No one asked for a jury, but the parties proceeded with a submission of the case. The condition of the record here warrants the use of the rule established in *Bonewitz v. Bonewitz*, 50 Ohio St. 373, 34 N. E. 832, 40 Am. St. Rep. 671: "A party may waive his right to a jury trial by acts, as well as by words."

We find no error, and the judgment is affirmed.

Judgment affirmed.

SHAUCK, CREW, SUMMERS, SPEAR, and DAVIS, JJ., concur.

(172 Ind. 336)

McREYNOLDS et al. v. SMITH et al. (No. 21,131.)<sup>1</sup>

(Supreme Court of Indiana. Jan. 26, 1900.)

**1. WILLS (§ 383\*)—CONTESTS.**

Where a will was contested on the ground of testator's mental incapacity and of undue influence, a motion for judgment sustaining the will on the answers to the interrogatories was properly overruled, where the answers found that testator, when the will was written by one of defendants, and when it was signed, did not have mind and memory enough to understand the contents thereof, the ordinary business affairs of life, the extent of his estate, etc.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 383.\*]

**2. WILLS (§ 283\*)—CONTESTS—BURDEN OF PROOF.**

Proponents of a will had the burden to prove its validity, where it gave them valuable rights in derogation of the statutes of descent; where contestants, those legally entitled to the property under such statutes, challenged the validity of the will before any judicial action was taken upon it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 651; Dec. Dig. § 283.\*]

**3. APPEAL AND ERROR (§ 1001\*)—REVIEW—VERDICT.**

In determining the sufficiency of evidence to support a verdict, it is only necessary to review evidence tending to support it, contrary evidence being properly disregarded, since where legal evidence appears on both sides, the Supreme Court cannot disturb the jury's decision upon its weight and importance.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1001.\*]

**4. WILLS (§ 54\*)—TESTAMENTARY CAPACITY—EVIDENCE.**

Where a will was contested on the ground of testator's mental incapacity, contestants could show that when it was suggested to testator that he had made unjust provision for his son, he replied that he had had a revelation to so make the will, that it was a sacred document, and that he might not receive another revelation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 131; Dec. Dig. § 54.\*]

**5. WILLS (§ 38\*)—TESTAMENTARY CAPACITY—MONOMANIA.**

One possessed of a monomania or insane delusion, though rational and discreet in all other things, is incapable of making a valid will, if the monomania or delusion affects the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 78-81; Dec. Dig. § 38.\*]

**6. WILLS (§ 55\*)—TESTAMENTARY CAPACITY—EVIDENCE—SUFFICIENCY.**

Evidence held to sustain a verdict for contestants of a will on the ground of testator's mental incapacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-161; Dec. Dig. § 55.\*]

**7. WILLS (§ 50\*)—CONTESTS—INSTRUCTIONS—TESTAMENTARY CAPACITY.**

In a will contest, it was not error to instruct that the law does not undertake to measure a person's intellect and to define the exact quality of mind and memory he must possess to authorize him to make a will, but that "it does require him to possess mind sufficient to know" the extent and value of his property, the number and names of the natural objects of his bounty, etc.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 96; Dec. Dig. § 50.\*]

**8. WILLS (§ 330\*)—CONTESTS—INSTRUCTIONS.**

In a will contest, an instruction that a will is invalid if made by one laboring under partial insanity if it affects the disposition of his property, etc., was not error for failing to define "partial insanity," especially in the absence of a request for a more specific instruction.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 330.\*]

**9. WILLS (§ 38\*)—TESTAMENTARY CAPACITY—DELUSIONS.**

An exaggerated opinion as to the value and qualities of property may constitute an insane delusion, such as will affect one's testamentary capacity.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 38.\*]

**10. WILLS (§ 329\*)—CONTESTS—INSTRUCTIONS.**

An instruction, in a will contest, that opinions of witnesses as to testator's sanity, based on testimony as to testator's manner, conduct, and conversations, should be tested by the facts upon which they were based to judge of their probable correctness, etc., was not objectionable as applicable to physicians who expressed opinions on hypothetical questions only, and who gave no facts as the basis of the opinion expressed.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 329.\*]

**11. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

In a will contest, it was not prejudicial error to allow a witness to give an opinion that testator's degree of religious faith, persistency, and conduct was evidence of insane mind, where witness had previously detailed testator's conduct as observed by him, and had in his direct examination, without objection, given an opinion that testator was of unsound mind.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4166; Dec. Dig. § 1050.\*]

Appeal from Circuit Court, Howard County; J. F. Elliott, Judge.

Action by Alzora N. Smith and others against William H. McReynolds and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Stanley Merrill and Kirkpatrick & Morrison, for appellants. Bell & Purdum, Blacklidge, Wolf & Barnes, and John E. Moore, for appellees.

HADLEY, J. Appellees, being daughters, brought this suit to prevent the probate of what purported to be the will, and codicil thereto, of their father, George W. Defenbaugh. The defendants Elizabeth Defenbaugh and Wilbur M. Defenbaugh are the widow and minor son of the testator. The defendants McReynolds, Richmond, the General Convention of the New Church in the United States, and S. S. Seward, president of said last-named defendant, are trustees and beneficiaries under said will. The complaint charges unsoundness of mind and undue influence. It is alleged that the decedent was of unsound mind on the subject of the Swedenborgian religion, and that, when he executed said pretended will, he was guided therein by what he imagined to be a peculiar revelation, and that said will was the direct result of a delusion and im-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

aginary revelation, and undue influence. The widow and minor son, made default. The widow renounced the will, and elected to take her rights in the estate under the law. Richmond died. McReynolds, General Convention of the New Church in the United States, and S. S. Seward, president of the General Convention of the New Church in the United States, each filed a separate answer of general denial. The jury returned a general verdict for the plaintiffs, together with answers to interrogatories submitted by the court. The answering defendants moved for judgment in their favor on the answers to interrogatories. The motion was overruled. The answers to the interrogatories that related to the decedent's testamentary capacity at the time the pretended will was executed disclose the facts following: The testator, at the time said purported will was written by McReynolds and examined and criticised by Pollard, and also at the time he signed said will and codicil, to wit, May 12, 1891, and January 5, 1891, did not have mind and memory sufficient to know and understand the contents thereof, and he did not, at the time the will and codicil were executed, have mind and memory sufficient to understand the ordinary business affairs of life, nor have a general knowledge of the value and extent of his estate, and did not, when he executed the will, have mind and memory sufficient to know and understand the business in which he was engaged, and to know the extent of his estate, and the persons who were his wife and children, and to keep these things in his mind long enough to have his will prepared and executed. In the light of these facts it is so plain that the court rightly overruled appellants' motion for judgment that we deem it presumption to cite authorities in support of the ruling.

The motion of appellants for a new trial was overruled. As the reason for a new trial, it is insisted that the verdict of the jury is not sustained by sufficient evidence. The case of *Wait v. Westfall*, 161 Ind. 648, 68 N. E. 271, is not an authority in this case relating to the burden of proof. In the former case, before the will was attacked, the probate court, upon competent and satisfactory proof, had admitted the same to probate; that is, had adjudged the will valid, which included a finding that the testator was of sound mind, and the instrument duly executed. The *Wait Case* was an action to set aside the judgment of probate, because erroneous; and the party assailing the validity of the judgment clearly had the burden of proving what she asserted. The reverse is true in this case. The appellants tendered the probate court a pretended will that gave them valuable rights in derogation of the statutes of descent. Those legally entitled under the statute met appellants at the threshold, and challenged the validity of the instrument be-

fore any judicial action had been taken upon it. In such case it is affke clear that a traverse of such instrument by those prejudiced thereby would impose the burden of maintaining its integrity upon the proponents. *Steinkuehler v. Wempner*, 169 Ind. 154-161, 81 N. E. 482, 15 L. R. A. (N. S.) 673, and cases cited. In determining the sufficiency of the evidence it is only necessary that we review the evidence produced that tends to support the verdict. Contrary evidence may as well be disregarded, since, where legal evidence appears on both sides, and in conflict, we have no authority to disturb the decision of the jury upon its weight and importance. *Robinson & Co. v. Hathaway*, 150 Ind. 679-681, 50 N. E. 883; *Oglebays v. Land Trust Co.*, 41 Ind. App. 481-486, 82 N. E. 494.

There was much direct and positive evidence submitted to the jury in support of the following facts: George W. Defenbaugh was born in 1839, married at the age of 22 and had been a resident of Kokomo for about 40 years. He was always highly respected for his virtues and moral, upright life. Upon his marriage, both he and his wife were active members of the M. E. Church, but 20 or 25 years before his death, which occurred in 1906, he was attracted to the religious doctrines taught by Emanuel Swedenborg. He soon became deeply interested in the new doctrine, and so enthusiastic and earnest in its dissemination that he devoted much of his time and means to its advocacy and in the distribution of tracts and other writings of Swedenborg. His zeal continued to intensify, until Swedenborgian dogmas so completely dominated his mind and thoughts as to intrude themselves into all his business and social relations. There was much unanimity among the witnesses that for 18 or 20 years before his death it had seemed impossible for him to engage in conversation, on any subject, without an intermingling of the tenets and teaching of Swedenborg, and that many business transactions with him had failed on account of his persistence in the presentation of his belief. A number of witnesses estimated that four-fifths of all his conversations, including business contracts, were so occupied. He would accost persons in the street, strangers as well as acquaintances, young and old, and those of high and lowly station, and urge upon them the acceptance of his views as long as he could get a hearing. He would also call upon his own skilled employes—those receiving \$2.50 per day—in working hours, and request them to suspend their work and give him a hearing, and thus detain them from their work two or three hours at a time. The same course of conduct was pursued in the stores and business offices of the city. So, also, in his own home, with the younger members of his family, whom, when seeking to avoid him, he would follow about the house, up and downstairs, and into the yard,

with his entreaties, and give them sums of money to read certain tracts and books. It was also the same way with the family visitors, and when expostulated with by his wife for becoming tiresome to their guests, he would express and seem to feel regret, but in a few moments would lapse again into the same deportment, his fervent insistence on all occasions being that the Word (meaning the Bible) was spiritually revealed to man by Swedenborg's writings, and could not be understood in any other way than by and through such writings, and that all who did not read the same, and thus enter into the spiritual meaning of the Bible, were wholly ignorant of its truths; often spoke about the teachings of Swedenborg being the key that would alone unlock the Bible. He claimed that he could, and did, communicate with the departed; also that he had power to visit the planets, and did visit them, and had acquaintances on Mars, Jupiter, and Saturn; said he often went to Mars, and would give a particular description of its inhabitants, and its canals and mountains; claimed that it had been revealed to him that Saturn was to be his future home, and he would run a stone quarry there; said he had been all through heaven and hell, and knew what was going on in the respective places; asserted that he had visions and revelations; abandoned the putting down of a gas well on his property because, in a vision, he was informed there was no gas under the land. He was the owner and operator of a stone quarry adjacent to the city of Kokomo, worth about \$12,000. He believed that its value was very much greater. Often asserted its value to be one, or more, million dollars, and that it might be operated at a profit of \$100 per day. He made and delivered to his son a statement of the possibilities of the quarry, as follows: "The different kinds of things that can be made from the stone quarry: (1) Building stone and range stone. (2) Dimension stone of several kinds. (3) Artificial stone from ground stone, several kinds. (4) Crushed stone of several kinds. (5) Stone screenings of several kinds. (6) Glass fluxing for many factories. (7) Iron fluxing of higher grade for Chicago and many other towns at a high price. (8) Lime for fluxing and many other purposes. (9) Four feet of sold to be cement rock by geologists. (10) Stone to make mineral wool and several other materials not mentioned. (11) Aluminum in 8 feet of stone as according to the Ill. Steel Company's analysis equal to 5 per cent. making 100 pounds of ore to every ton of stone or 17,408 tons to every acre of my land at \$35.00 per ton, making a total of \$609,280 per acre providing it can be gotten out of the stone according to this estimate. Estimated to be 100,000 perch of good stone to the acre which ought to bring net when sold at 50¢ a perch equal to \$50,000 per acre. (12) The last and best of all, 10 feet of the Magnesia stone

and by using about 25 per cent. to the ton, making it 30¢ per pound, about \$150 per ton, or as estimated to be worth two or three millions dollars to each acre of land." He became careless in his business; neglected necessary repairs to his machinery; lost important contracts for stone because of his persistence in putting aside his business terms for his ceaseless exhortation. He made no material addition to his estate in recent years. The increase in value that has occurred resulted from holding on to what he had until the discovery of natural gas and the consequential growth in population and prices. Under the will the ultimate destination of all his estate, real and personal, upon the failure of grandchildren, was in his church. His estate, at death, was worth about \$35,000. The will and codicil occupies 21 printed pages of the record in making and safeguarding bequests to five beneficiaries, namely, his widow, three children, and his church. It is prolix, indefinite, and often obscure. One of his children, a young lady, at home when the will was executed, is not mentioned in the instrument. To his only son he bequeathed, in fee, land of the value of \$500, and the stone quarry for the life of himself and children, if any should be born, with remainder in fee to his church, upon condition that, during the continuance of the life estate, the son should make annual reports to his church trustees of the receipts and expenditures incident to operating the quarry, and pay over to them one-tenth of the net receipts for support of the church. To his daughters was given no immediate estate, except that his widow should provide them with \$1,000 each, within six months after their marriage, in money or property, and also, an equal interest with their brother in the possible remainder of certain other property, after the extinguishment of their mother's life estate therein. To his first wife, who was living when the will was made, and was the mother of all his children, and a loving and helpful companion for more than 30 years, he gave in fee the homestead, of the value of \$5,000 and for life all the remainder of his property, real and personal, "except all such as I herein otherwise give, devise and bequeath and direct to and for the use of such purposes, persons, trustees and societies hereinafter named and specified," and upon failure of grandchildren all the remainder to go to said trustees for the endowment of the church. His first wife died in 1895, and the testator remarried in 1898, whereupon, in 1901, he executed the codicil to his will, now in suit, conferring upon the second wife, who had lived with him but three years, all the rights, benefits, and powers he had conferred upon his first wife by his former will. As one witness put it, he desired that the name of his first wife be stricken out of the will wherever it occurred, and the name of his second inserted.

When a kinsman suggested to the testator that he thought it was unjust to his son to be given only a life estate in the stone quarry, and that, too, burdened with the duty of reporting and paying a tenth of the income as tribute to the church; and that he (witness) thought it would be discouraging to the young man in the business of operating the quarry, and be less profitable to both, and that he thought it would be better to divide the property and give to his son outright, and in fee, the share he wished him to have, and the remainder to the church. The testator replied that he had had a revelation to make the will in that way, and he was fixed in his purpose. To his son he said he could not change the will; that it was a sacred document, and he might not receive another revelation.

The foregoing evidence was competent as addressed to the question of the testator's mental capacity, and at least tends to prove that the testator had an insane delusion that he was in direct and active communication with the spirit world; that he had actual communication with spirits; had personally visited the planets, formed an acquaintance with their inhabitants, and had had it revealed to him that he should, after death, go to the planet Saturn and conduct a stone quarry, and furthermore, that he had been instructed from the spirit world, by revelation, how he should make his will, and that it was a sacred document he could not change without forfeiting the benefits of revelation. These things not only tend to establish the existence of an insane delusion, but also that the will in question was, at least in some measure, the result of such delusion. It is the law of this state that one possessed of a monomania or insane delusion, although rational and discreet in all other things, will be held to be of unsound mind, and incapable of making a will, if it appears that the monomania or delusion entered into or affected the execution of the will. *Wait v. Westfall*, 161 Ind. 648-665, 68 N. E. 271; *Swygart v. Willard*, 166 Ind. 25-36, 76 N. E. 755. On the question of general unsoundness it is argued that the voluminous, confused, and uncertain provisions of the will are, of themselves, evidence that the testator did not have mind enough to know and understand what was in it. And, further, that his frequent and fervent exhortations in the stores and business offices of his city, his inattention to his own private affairs, his neglect to make necessary repairs to the machinery used in operating the stone quarry, and his apparent unconsciousness in giving offense to, and in driving away, customers for stone, by forcing his religious doctrines into his business dealings, was evidence to warrant the jury in finding that he did not have mind enough to understand the business affairs of life, and to act with discretion therein. It is also claimed that his failure to mention in the will the name of one of his daughters, his fanciful

and unreasonable estimate of the value of his stone quarry, the daily profit of its operation, and the small bequests to his daughters, go strongly to impeach his knowledge of the value and extent of his estate and his recollection of those who were the natural objects of his bounty, their deserts, and his duty toward them. *Teegarden v. Lewis*, 145 Ind. 98-101, 40 N. E. 1047, 44 N. E. 9; *Young v. Miller*, 145 Ind. 652, 44 N. E. 757; *Wait v. Westfall*, 161 Ind. 648, 68 N. E. 271. In addition to the foregoing evidence, about 40 of the old friends and neighbors, who had resided near and known the testator for many years, expressed their opinion, founded on facts testified to, that when he executed the will and codicil he was of unsound mind. There was competent evidence to the contrary, but the jury, from the whole field of the evidence, found that the testator was wanting in testamentary capacity when he executed the will and codicil in suit, and which finding the presiding judge approved, as indicated by the overruling of appellants' motion for a new trial. This must be the end of it; so far as the sufficiency of the evidence is concerned.

The action of the court, in giving and refusing certain instructions, is next complained of.

The first one criticised is No. 8, given upon request of appellees, relating to the subject of testamentary capacity. In substance, it was as follows: The law does not undertake to measure a person's intellect and to define the exact quality of mind and memory which he shall possess to authorize him to make a will, yet it does require him to possess mind sufficient to know the extent and value of his property, the number and names of the persons who are the natural objects of his bounty, their deserts with reference to their conduct and treatment toward him, their capacity and necessity, and that he shall have sufficient active memory to retain all these facts in his mind long enough to have his will prepared and executed. If he is not in the possession of mental faculties to this extent, he is of unsound mind or insane within the meaning of the law. This instruction is in harmony with the standard of testamentary capacity as firmly established by many decisions of this court, among which are the following: *Lowder v. Lowder*, 58 Ind. 538-540; *Burkhart v. Gladish*, 123 Ind. 337-342, 24 N. E. 118; *Harison v. Bishop*, 131 Ind. 161-164, 30 N. E. 1069, 31 Am. St. Rep. 422; *Teegarden v. Lewis*, 145 Ind. 98-101, 40 N. E. 1047, 44 N. E. 9; *Bower v. Bower*, 146 Ind. 893-898, 45 N. E. 595; *Roller v. Kling*, 150 Ind. 159-164, 49 N. E. 948; *Wait v. Westfall*, 161 Ind. 648-662, 68 N. E. 271; *Barricklow v. Stewart*, 163 Ind. 438-441, 72 N. E. 128; *Swygart v. Willard*, 166 Ind. 25-36, 76 N. E. 755. The particular objection is lodged against the words "yet it does require him to possess mind sufficient to know," etc. The objection is founded on an expression used in *Barricklow v. Stewart*, 163

Ind. 438-442, 72 N. E. 128, 130, in these words: "The law does not arbitrarily pronounce a person incompetent to make a will who is unable to know both the extent and value of his property." Standing alone, the sentence quoted is not in line with the uniform decisions of this court, since *Lowder v. Lowder*, supra, 1877, relating to the degree of mental capacity essential to the making of a valid will. See cases last above cited. It is obvious from the context of the opinion that the writer used the words in their restricted sense, by way of illustration, and as applicable only to one who was, from any cause "unable to know the extent," etc.—that is, unable to know for want of opportunity, or means of knowledge—the test, as held by the decisions, and clearly meant by the instruction under consideration, being that the testator, to make a valid will, must have at the time, not necessarily actual knowledge of all the elements embraced within the capacity definition, but sufficient strength and power of mind to grasp, and know in a general way, the different subjects or elements enumerated. It is apparent that the court and writer of the opinion in the *Barricklow Case* entertained this view of the law, as the established standard of testamentary capacity is expressly recognized in the opinion.

Objection is made to No. 4 of the same series. It informed the jury that to find the testator did not have capacity to make a will it was not necessary that the evidence should show that he was a maniac, a madman, or a fit subject for the asylum, but a will is invalid if made by one laboring under partial insanity, or unsoundness of mind, if it is sufficient to, and does, affect the disposition of the property, and, if the jury believed, from the evidence, that the will in controversy was made under the influence of such partial unsoundness of mind, and is the product of it, it should be held invalid. The complaint made of this instruction is that the court failed to explain to the jury what he meant by partial insanity. The court did say that if the will was made under the influence of such partial insanity, and was a product thereof, it was invalid. The jury might reasonably infer that any degree of unsoundness was meant that was sufficient to induce or influence the making of a will in consonance with the mental disorder. This was right, or at most not erroneous. Besides, appellant could have had a more specific instruction by the asking.

The jury was told in No. 6 that an insane delusion exists when a person imagines that a certain state of facts exists which have no existence at all, except in the imagination of such person, and which false impression cannot be removed from such person's mind by any amount of reasoning and argument, and that a will which is the offspring of such delusion is invalid. So, if the jury should find from the evidence that the testator, when he executed the will,

was the owner of a certain stone quarry, and at that time had wild and exaggerated notions of the value and qualities of said stone quarry, which notions had no basis whatever in fact, and were such as no rational mind would believe, and such notion or belief had found permanent lodgment in his mind, and could not be removed by any amount of reason or argument, and if the jury was convinced by these and other facts that the testator was under a delusion concerning the stone quarry, and that such delusion controlled, or affected, the execution of his will, the jury should find it invalid. It is urged that this instruction is faulty for resting delusive facts upon "wild and exaggerated notions of the value and qualities of the stone quarry"; that delusions must relate to facts, and not to opinions. The testimony disclosed that the open market value of the stone quarry (containing about 30 acres) was \$12,000; that the testator asserted its value to be several millions of dollars, and to justify his opinion made out and delivered to his son a statement of 12 distinct elements of value in the stone, a single one of which showed the land to be worth from \$2,000,000 to \$3,000,000 per acre. It was left to the jury to determine whether the testator had, or had not, wild and exaggerated notions about the value and qualities of the stone quarry, and whether such notions as were entertained amounted to an insane delusion. We cannot see why an insane delusion may not spring from a question of value (call it fact or opinion), as well as from anything else. In any case the question is one of reason and reasonableness.

No. 12 of the same series is also criticised. It reads as follows: "Witnesses have testified before you as to facts concerning the manner, conduct, and conversations of the testator, and have, from the facts testified about by them, given to you their opinion as to the soundness or unsoundness of the mind of the testator; but each opinion should be tested by the facts upon which it is based in order to judge of its probable correctness. It is not the opinion of witnesses alone upon which reliance is to be placed, but from the premises which supplied the conviction in the minds of the several witnesses the jury, aided by these opinions, may form its own independent conviction and decide accordingly." The chief complaint is that the instruction is made to apply to physicians who expressed opinions from hypothetical questions only, and who gave no facts as the basis or source of the opinion expressed. We do not think the instruction is open to any such objection. The instruction is expressly approved in *Bower v. Bower*, 142 Ind. 194-199, 41 N. E. 523, and we perceive no fault in it.

Objection is made to divers other instructions given, and to the refusal to give others, that we will not specially notice, but

we have carefully examined all, and find that no error has been committed by the court in reference thereto. Indeed, taking the instructions given as a whole, we think they were full and quite favorable to the appellants.

It is also claimed that the court erred in permitting a nonexpert witness to answer on re-examination the following question: "Having this degree of faith and the conduct and persistency about him that you observed in Mr. Defenbaugh, and as you have detailed to the jury, was it, in your opinion, evidence of unsound mind?" We see nothing prejudicial in the question. The witness had previously detailed the conduct of the testator as observed by him—his great energy and persistence in pushing forward his religious doctrines and literature; his careless conduct in the business of the stone quarry; his alleged visits to Mars; the healing virtues of the sun, etc.—and had in his direct examination, without objection, upon the facts detailed by him, expressed an adverse opinion of the testator's sanity. Under the state of the witness' testimony, we think it would not have been error to have excluded the question and answer, but we cannot see how the appellants were injured by their admission.

Finally, error is also assigned on the overruling of appellants' objection to the hypothetical question propounded by appellees to certain physicians offered by them as experts. If we understand appellants' objection to the question, it is because the question assumes the existence of facts which the evidence does not tend to prove. No effort has been made to point out such facts, either in argument or in stating objections at the time of the ruling, and a careful examination of the question discloses no fact unsupported by the evidence. There are many other objections relating to the evidence set out, but not mentioned in the argument. They are, however, all of minor importance, and were disposed of without prejudicial error to appellants, and we see no good to be accomplished by their separate review.

Judgment affirmed.

MONKS, J., did not participate.

(173 Ind. 248)

JOHNSON v. AMACHER et al. (No. 21,847.)<sup>1</sup>

(Supreme Court of Indiana. Jan. 27. 1909.)

1. DRAINS (§ 2\*)—ESTABLISHMENT—STATUTES—REPEAL—SAVING CLAUSE.

Under Acts 1905, p. 456, c. 157, repealing all former drainage laws, but providing that such repeal shall not affect any pending proceedings in which a ditch has been finally established, or proceedings which will not affect any body of water having more than 10 acres of surface at high-water mark, pending pro-

ceedings for the establishment of a ditch, not designed to affect any body of water within the protection of the act, may be continued and completed as though the act had not been passed.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 2.\*]

2. DRAINS (§ 33\*)—ESTABLISHMENT—PROCEEDINGS—OBJECTIONS.

Where, in a proceeding for the establishment of a public ditch, the verdict of the jury and the judgment of the court providing that the ditch is to be constructed on the route as set out in the reviewers' report, the objection that the report of the reviewers was not made in accordance with the law, for the reason that the route specified in the petition was not followed, cannot be raised by an unverified motion to dismiss on that ground.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 33.\*]

3. APPEAL AND ERROR (§ 671\*)—REVIEW—RECORD—SUFFICIENCY.

Where the evidence is not brought up in the record, the court cannot determine any question depending on the consideration of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2869; Dec. Dig. § 671.\*]

4. APPEAL AND ERROR (§ 1078\*)—ASSIGNMENTS OF ERROR—WAIVER.

Errors not presented in appellant's brief must be deemed waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

Appeal from Circuit Court, Adams County; R. K. Erwin, Judge.

Proceedings by Christian Amacher and others for the establishment of a public ditch, in which Roswell O. Johnson appeared and filed a remonstrance. From a judgment of the circuit court establishing the ditch, Roswell O. Johnson appeals. Affirmed.

Hooper & Lenhart, D. D. Heller & Son, and J. C. Moran, for appellant. L. C. Devoss, C. J. Lutz, and D. E. Smith, for appellees.

MONTGOMERY, J. This proceeding was begun in 1904 before the board of commissioners of the county of Adams upon petition of appellees for the establishment of a public ditch. The viewers reported favorably, and thereupon appellant filed a remonstrance and caused reviewers to be appointed, who confirmed the report of the viewers, and the ditch was established and ordered constructed. Appellant appealed to the circuit court, in which a trial by jury resulted in a judgment for the petitioners. The errors properly assigned in this court challenge the decisions of the trial court in overruling motions to dismiss the action and for a new trial.

On December 26, 1905, appellant filed his motion to dismiss the proceeding, for the reason that the proposed ditch had not been ordered established prior to the taking effect of the drainage law of 1905 (Acts 1905, p. 456, c. 157), which repealed all

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup> Rehearing denied.

former drainage laws. Pending proceedings in which the ditch had been finally established, and also proceedings in which there was no attempt to and which would not lower or affect any lake or body of water having more than 10 acres of surface at high-water mark, were saved by section 14 of the act of 1905 (Acts 1905, p. 480, c. 157). No showing or claim was made in appellant's motion, and it is not apparent from the record, that the proposed ditch was designed to or would lower or affect any lake or body of water within the protection of the law. This proposed drain appears to be within the saving clause of the act of 1905, and may be continued and completed as though that act had not been passed, and no error was committed in overruling appellant's motion to dismiss upon the ground stated. *Kilne v. Hagey*, 169 Ind. 275, 81 N. E. 209; *Smith v. Gustin*, 169 Ind. 42, 80 N. E. 959, 81 N. E. 722; *Clemans v. Hatch*, 168 Ind. 291, 78 N. E. 1065; *Taylor v. Strayer*, 167 Ind. 23, 78 N. E. 236, 119 Am. St. Rep. 469.

After the return of the verdict appellant again moved to dismiss the action, for the reason that the uncontradicted evidence showed that the proposed ditch is to commence 24 rods, and the construction to commence more than 1,600 feet, from the place named in the petition as the commencement of the ditch. This motion is unverified, and the evidence to which reference is made is not before us; hence it is impossible for us to determine the question sought to be raised. The verdict of the jury and the judgment of the court provide that the ditch is to be constructed upon the route and otherwise as set out in the reviewers' report. If the report of the reviewers was not made in accordance with the requirements of the law, appellant should have attacked it directly in a timely and proper way; but it is clear that the motion to dismiss the entire proceeding after the return of an adverse verdict was not a proper or available method to correct the alleged irregularity of which appellant complains.

The motion for a new trial charges that the verdict is not sustained by sufficient evidence, and is contrary to law, and that the court erred in giving and in refusing to give certain instructions. The evidence has not been brought up with the record on appeal, and therefore we cannot determine any question depending upon the consideration of the evidence. The alleged errors with respect to the giving and refusal of instructions have not been presented in appellant's brief, doubtless owing to the absence of the evidence, and must therefore be regarded as waived. *Pittsburgh, etc., R. Co. v. Ross*, 169 Ind. 3, 40 N. E. 845; *May v. Dobbins*, 166 Ind. 331, 77 N. E. 353; *Starkey v. Starkey*, 166 Ind. 140, 76 N. E. 876; *Stamets v. Mitch-*

*enor*, 165 Ind. 672, 75 N. E. 579; *Storer v. Markley*, 164 Ind. 535, 73 N. E. 1081.

No error in overruling appellant's motion for a new trial is made to appear.

The judgment is affirmed.

(171 Ind. 606)

#### STATE v. COLLIER. (No. 21,325.)

(Supreme Court of Indiana. Jan. 28, 1909.)

##### 1. HIGHWAYS (§ 108\*)—REPAIR—CRIMINAL RESPONSIBILITY—AFFIDAVIT—SUFFICIENCY.

An affidavit before a justice of the peace, charging defendant with refusing, in violation of Act March 9, 1903 (Acts 1903, p. 223, c. 124), as amended by Laws 1907, p. 298, c. 180 (Burns' Ann. St. 1908, § 7779), to repair a highway over which a rural mail route was being maintained, defendant "having received notice" that the highway was defective, and "being the duly elected," etc., trustee of the township, was insufficient for failure to aver positively that defendant had received notice, or that he was a township trustee.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 108.\*]

##### 2. HIGHWAYS (§ 108\*)—OFFICERS—CRIMINAL PROSECUTIONS—"ESTABLISHED AND MAINTAINED."

An averment that a highway was one over which a rural mail route was maintained does not show that it was one on which a mail route had been "established and maintained," within Act March 9, 1903 (Acts 1903, p. 223, c. 124), as amended by Laws 1907, p. 298, c. 180 (Burns' Ann. St. 1908, § 7779), making it an offense for certain officers to refuse, after due notice, to repair such a highway.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 108.\*]

##### 3. HIGHWAYS (§ 108\*)—REPAIRS—DUTIES OF OFFICERS.

Act March 9, 1903 (Acts 1903, p. 223, c. 124), as amended by Laws 1907, p. 298, c. 180 (Burns' Ann. St. 1908, § 7779), makes it the duty of boards of commissioners, township trustees, etc., to keep in repair highways on which rural mail routes have been established, giving preference to such highways, provides that in making such repairs the board may repair bridges or culverts wherever necessary, though there may be no appropriation therefor, and makes it an offense for any of the officers named to fail, after notice, to make such repairs. Laws 1905, p. 574, c. 167, § 109 (Burns' Ann. St. 1908, § 7778), makes it the duty of boards of commissioners, on notice from township trustees, to repair or erect bridges or culverts if they deem them necessary. *Held*, that it is not the duty of a township trustee to erect bridges, and he is not guilty of an offense under section 7779, where the repair required is the erection of a bridge.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 108.\*]

Appeal from Circuit Court, Sullivan County; Charles E. Henderson, Judge.

Otha Collier was convicted before a justice of the peace of violation of Act March 9, 1903 (Acts 1903, p. 223, c. 124), as amended by Laws 1907, p. 298, c. 180 (Burns' Ann. St. 1908, § 7779). From a judgment of the circuit court quashing the affidavit, the state appeals. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Walter F. Wood, Pros. Atty., James Bingham, Atty. Gen., and Cavins, White & Thompson, for the State. John T. Hays and Will H. Hays, for appellee.

JORDAN, C. J. The state instituted this prosecution before a justice of the peace against appellee, for an offense committed by violating the provisions of section 1 of an act "to require all highways on which United States rural free delivery mail routes are established, to be kept in repair," etc., approved March 9, 1903 (Acts 1903, p. 223, c. 124), as amended by the amendatory act of 1907 (Acts 1907, p. 298, c. 180; section 7779, Burns' Ann. St. 1908). Appellee was convicted before the justice, and he appealed to the Sullivan Circuit Court. In the latter court his motion to quash the affidavit was sustained, to which ruling the state excepted, and on its refusal to further plead the court rendered judgment, discharging the accused. The state appeals, and assigns that the court erred in quashing the affidavit.

The section upon which this prosecution is based is as follows: "That in addition to the duties now conferred on them by law in respect to the care of highways, it shall be the duty of the board of commissioners, township trustees, road superintendents and road supervisors to keep in repair and in passable condition all highways in their respective districts or jurisdictions along or on which United States rural free delivery mail routes have been or may hereafter be established and maintained, and the township trustees shall set aside at least five per cent. of the amount of road fund received by them each year as an emergency fund to be used in carrying out the provisions of this act. It shall be the duty of the above-named officers, in performing their duties in respect to highways, to give preference to the highways along or over which such rural mail routes have been or may hereafter be established and maintained. It shall be the duty of such officers to see that such highways are properly drained, are kept free of all obstructions, including snowdrifts, and are at all times in condition to be safe and readily passable to ordinary travel. It shall be the duty of said officers, and of each of them, upon receiving notice of the defective or impassable condition of any of the highways so used by mail routes above defined, at once to repair, or cause to be repaired, the said highway or highways. *In making such repairs the board may repair bridges or culverts wherever necessary for the purposes of this act, regardless of the fact that there may be no appropriation therefor, and pay for the same out of any moneys in the county treasury not otherwise appropriated.* If any member of any board of commissioners, any township trustee, road supervisor or superintendent shall fail to repair any such highway within his jurisdiction, or to cause the same to be done, for a period of

five days after receiving notice of the defective condition thereof, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not over \$2 for each day he shall have so failed after receiving such notice." (Our italics.)

The charging part of the affidavit is as follows: "That on the 18th day of May in the year 1908, at the county of Sullivan and state of Indiana, Otha Collier late of said county, did then and there unlawfully fail, refuse, and neglect to repair, or cause to be repaired, a certain public highway then and there being in Turman township, said public highway then and there being defective and in an impassable condition, and being a public highway over which a rural mail route was then and there maintained, the said Otha Collier then and there having received notice, more than five days prior thereto, that said public highway was defective and in an impassable condition, the said Otha Collier then and there, and for more than five days prior thereto, and at the time of the giving of said notice, being the duly elected, qualified, and acting township trustee of said Turman township; that said rural mail route was so maintained over said public highway at the time of the giving of said notice; that said defective and impassable public highway runs from the north line of section 11 [here the route of the highway is stated]; that the defective and impassable condition of said public highway was then and there, and for more than five days prior thereto, and at the time of the giving of said notice, of such a nature that it could have been easily repaired, or caused to be repaired, by the said Otha Collier; that the defective and impassable condition of said highway was then and there, and at the time of the giving of said notice, due and owing to the absence of a bridge at and over a certain stream crossing said public highway, contrary to the form of the statutes," etc.

The deficiencies pointed out and urged against the affidavit by appellee are: First. That there are no positive averments that appellee was a township trustee, or that he had notice of the defective and impassable condition of the highway in question. It is asserted that the pleader has attempted to show these essential facts by mere recitals. Second. That the act in question relates to highways "along or on which United States rural free delivery mail routes have been or may hereafter be established and maintained," and the affidavit only avers that the alleged highway was one over which a rural mail route was then and there maintained, there being no charge that any United States rural free delivery mail route had been established on the highway. Third. That the affidavit is bad, because, as therein alleged, the defective and impassable condition of the highway is due to an absence of a bridge at and over a certain stream crossing said public highway; and that the duty, under

the law, of constructing and repairing the same is imposed upon the board of commissioners. The affidavit may be said to be open to the criticism urged in the first objection. There are no positive averments to show that appellee was a township trustee and had received notice of the condition of the highway. Mere recitals in a pleading will not suffice for positive averments. *Terre Haute, etc., Co. v. State*, 169 Ind. 242, 82 N. E. 81; *State v. Metsker*, 169 Ind. 555, 83 N. E. 241.

There is also an absence of any averments to show that the highway was one along which a United States rural free delivery mail route had been established and maintained. In view of the language of the statute in question, the averment only that a rural mail route was then and there maintained is not sufficient to bring the highway within its provision. Aside, however, from these deficiencies of the pleading, the cardinal question arises, Was it the duty of appellee, in the first instance, under the law and the facts in this case, either to construct or repair the bridge, the absence of which as alleged, rendered the highway defective and impassable? Section 100 of the act of 1905, "concerning highways" (Acts 1905, p. 574, c. 167; section 7778, Burns' Ann. St. 1908), provides: "If the township trustee of the township where any proposed bridge or culvert is to be located or repaired shall notify the board of commissioners of his county of the necessity of such location or repair, and if in the opinion of the commissioners the public convenience shall require the building or repairing thereof, they shall cause surveys and estimates to be made and provide for the erection of the same: Provided, that if the board of commissioners shall not deem such bridge or culvert of sufficient importance to justify an appropriation from the county treasury for the building or repair thereof, the trustee of the township in which is located such bridge or culvert may appropriate any part of the road fund in the township treasury for that purpose, if he shall deem it right and expedient to do so." This section, as therein provided, imposes upon the boards of commissioners the duty of providing for the construction and repair of bridges and culverts connected with, or forming a part of, a public highway. It is true that this section does not require the board, on its own motion in the first instance, to construct or repair the bridges or culverts therein contemplated. The proper township trustee is to take the initiative by notifying the board of the location or repair of the proposed bridge or culvert. Upon receiving such notice, then, if in the opinion of the board the public convenience shall require the building or repair of the bridge or culvert in question, such board is required to

make the necessary provisions for so doing. But if the board "shall not deem such bridge or culvert of sufficient importance to justify an appropriation from the county treasury for the building or repairing thereof, the trustee of the township in which is located such bridge or culvert may appropriate any part of the road fund in the township treasury for that purpose, if he shall deem it right and expedient to do so." The material provisions of this section as formerly embraced in section 19 of the highway statute of 1883 (Acts 1883, p. 62, c. 56), as amended in 1885 (Acts 1885, p. 203, c. 81, § 8; Elliott's Supp. § 1588), were interpreted and construed by this court in the appeal of Board of Commissioners, etc., v. Washington Township, 121 Ind. 379, 23 N. E. 257. It was held in the latter case that under the provisions of the section then in question the board of commissioners was not relieved of its general duty to maintain and repair county bridges on public highways. See, also, so far as applicable, Board, etc., v. Mutchler, 137 Ind. 140, 36 N. E. 534; Board, etc., v. Wagner, 138 Ind. 609, 38 N. E. 171; Board, etc., v. Nichols, 139 Ind. 611, 38 N. E. 526; Board, etc., v. Sisson, 2 Ind. App. 311, 28 N. E. 374, and cases there cited. In fact the Legislature, in enacting section 7778, supra, upon which, as heretofore stated, this prosecution is based, appears to have recognized that it was the duty of the board of commissioners to repair bridges and culverts upon the highways therein mentioned and contemplated, for it will be observed that by that part of the section italicized it is expressly provided that the board of commissioners, in making such repairs, may repair bridges or culverts wherever necessary, etc., regardless of the fact that there may be no appropriation therefor, and pay for the same out of any money in the county treasury not otherwise appropriated.

It is manifest, under the facts alleged, that there is no showing that appellee violated the statute by failing either to construct or repair the bridge to which the impassable condition of the highway is attributed. On any view of the case, the affidavit must be held to be insufficient, and the motion to quash was properly sustained.

Judgment affirmed.

(171 Ind. 589)  
CLEVELAND, C., C. & ST. L. RY. CO. v.  
LYNN. (No. 21,239.)

(Supreme Court of Indiana. Jan. 27, 1909.)  
APPEAL AND ERROR (§ 835\*)—REHEARING—  
CONTENTIONS OTHER THAN THOSE MADE ON  
THE HEARING.

Where, in the original briefs, appellant did not make the point that an instruction given at appellee's request was erroneous, but presented the question only of that instruction and an instruction given at appellant's request being inconsistent and calculated to mislead the jury,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and appellee contended merely that the instruction given at his request was good and not in conflict with the instruction given at appellant's request, and did not even suggest that the instruction given at appellant's request was erroneous, but tacitly conceded that it was good, while the Supreme Court might not refuse to entertain a petition for a rehearing predicated upon points not raised in the original briefs, if to do so would work manifest injustice, such a case is not presented.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3242; Dec. Dig. § 835.\*]

On petition for rehearing. Petition overruled.

For former opinion, see 85 N. E. 999.

**PER CURIAM.** Appellee has filed his petition, supported by an able brief, for a rehearing in this cause, on the grounds that this court erred in holding that there is a conflict between instruction No. 10, given at the request of appellee, and instruction No. 19, given at the request of appellant; also, in holding or intimating that instruction No. 10 was not, and is not, a correct statement of the law applicable to the facts and the evidence; in holding, or implying, that it is not necessary for the court to pass upon the correctness of instruction No. 19; in holding, or implying, that appellant, by requesting instruction No. 19 claimed by appellee to be erroneous, and in conflict with instruction No. 10, could entitle appellant to a reversal as an invited error; in reversing the judgment by reason of alleged conflict between instruction No. 10, asked by appellee and given, and claimed to be correct, and instruction No. 19, given at the request of appellant, and now claimed to be incorrect.

In the original briefs of the parties, appellant did not make the point, or cite any authority, or discuss the question, as to whether instruction No. 10 was erroneous or not, but made the point, and presented the question only of the two instructions being inconsistent and calculated to mislead the jury. Appellee contented himself with the insistence that instruction No. 10 was good, and that it was not in conflict with instruction No. 19, and did not even suggest that No. 19 was not a good instruction; on the contrary, tacitly conceded that it was. Whilst the court might not refuse to entertain a petition for a rehearing predicated upon points not raised in the original points or briefs, if to do so would work manifest injustice, we do not think this is such a case. It was upon the presentation made by the parties that the original opinion was based, and was the reason for the language employed in the opinion, when the court said, "We are not called upon to determine whether instruction No. 19 should have been given," etc., for, as presented, the conflict between the two instructions is manifest, and, taken together, could lead to but one result.

The petition for rehearing is overruled.

(172 Ind. 441)

**TRUELOVE et al. v. TRUELOVE et al.**<sup>1</sup>  
(No. 21,388.)

(Supreme Court of Indiana. Jan. 28, 1909.)

**1. DESCENT AND DISTRIBUTION (§ 6\*)—STATUTES.**

The statutes regulating the descent and distribution of property contain the entire law on the subject, so that one claiming the estate of a decedent, or an interest therein, must point out the statutory provision under which it is acquired.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 25; Dec. Dig. § 6.\*]

**2. STATUTES (§ 222\*)—CONSTRUCTION—REFERENCE TO COMMON LAW.**

Though the descent and distribution of property is governed entirely by statute, the common law may be considered in determining the construction of the statutes and the meaning of the words and terms employed therein.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 301; Dec. Dig. § 222.\*]

**3. STATUTES (§ 222\*)—CONSTRUCTION—REFERENCE TO COMMON LAW.**

When words of a definite signification under the common law are used in a statute intended to remedy defects in or to supersede the common law, and there is nothing to show that such words are used in a different sense, they are deemed to have been employed in their known and defined common-law meaning.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 301; Dec. Dig. § 222.\*]

**4. BASTARDS (§ 100\*)—INHERITANCE.**

Since a bastard at common law was *filius nullius*, he was therefore kin of nobody, and had no ancestor from whom any inheritable blood could be derived.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. § 250; Dec. Dig. § 100.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 717, 718; vol. 8, p. 7588.]

**5. BASTARDS (§ 97\*)—INHERITANCE—STATUTES.**

Burns' Ann. St. 1908, § 2908, providing that illegitimate children shall inherit from the mother as if they were legitimate, and through the mother, if dead, any property or estate which she would, if living, have taken by gift, devise, or descent from any other person, does not grant to the children of an illegitimate child the right to inherit in case the parent is not living.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. § 248; Dec. Dig. § 97.\*]

**6. BASTARDS (§ 97\*)—INHERITANCE—STATUTES—CONSTRUCTION—"CHILD"—"CHILDREN"—"BROTHER"—"SISTER."**

The words "child," "children," "brother," or "sister," in Burns' Ann. St. 1908, §§ 2992, 2993, 2996, relating to descent, mean legitimates only, so that on the death of an intestate leaving neither children nor other descendants, nor husband, father, or mother, but a brother of the full blood, and the descendants of two illegitimate half-brothers, the surviving brother took the entire estate.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. § 248; Dec. Dig. § 97.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 884, 885; vol. 2, pp. 1115-1140; vol. 8, p. 7601; vol. 7, pp. 6522, 6523.]

Appeal from Circuit Court, Owen County; J. W. Williams, Judge.

Action by Mary E. Truelove and others against Emeline Truelove and others for partition. Judgment for plaintiffs for less than

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup> Rehearing denied. Mandate modified, 88 N. E. 516.

the relief demanded, and they appealed to the Appellate Court, by which the cause was transferred to the Supreme Court. Reversed, with instructions.

See 86 N. E. 1000.

Willis Hickam, for appellants. I. H. Fowler and J. C. Robinson, for appellees.

**MONKS, J.** This was an action for partition and to quiet title to the real estate described in the complaint. The questions involved are presented by the exceptions of appellants to the conclusions of law. It appears from the special finding that on October 1, 1903, Caroline E. Coats died intestate the owner in fee simple of the land in controversy; that she left surviving her no children, or their descendants, no husband, and no father or mother. The mother of the said Caroline E. Coats was the mother of two legitimate children, said Caroline and her brother, Timothy W. Truelove, and of two illegitimate sons by an unknown father. Said Caroline left surviving her her said brother, Timothy W. Truelove, and the descendants of the two illegitimate sons of her mother, both of whom were dead at the time of her death. Appellants claim to own all of said real estate as the heirs of Timothy W. Truelove, the brother of the deceased. Appellees claim an interest in said real estate as heirs of said Caroline, through their fathers, her illegitimate half-brothers. The conclusions of law were to the effect that appellants, as the heirs of Timothy W. Truelove, were the owners in fee simple of the undivided one-third of said land, and that the descendants of each of said illegitimate half-brothers of the deceased were the owners in fee simple of the undivided one-third of said land.

Sections 3, 4, and 6 of the statutes of descent, being sections 2992, 2993, and 2996 of Burns' Annotated Statutes of 1908, are as follows:

"Sec. 3. If any intestate shall die without lawful issue of their descendants alive, one half of the estate shall go to the father and mother of such intestate, as joint tenants, or, if either be dead, to the survivor, and the other half to the brothers and sisters and to the descendants of such as are dead, as tenants in common.

"Sec. 4. If there be neither father nor mother, the brothers and sisters of the intestate living, and the descendants of such as are dead, shall take the inheritance as tenants in common. If there be no brothers or sisters of the intestate or their descendants, the father and mother shall take the inheritance as joint tenants; and if either be dead, the other shall take the estate."

"Sec. 6. Kindred of the half blood shall inherit equally with those of the whole blood; but if the estate shall have come to the intestate by gift, devise or descent from any ancestor, those only who are the blood of such ancestor shall inherit: Provided, that

on the failure of such kindred other kindred of the half blood shall inherit as if they were of the whole blood."

It was held by this court in *Cloud v. Bruce*, 61 Ind. 171, that: "Our statutes regulating the descent and distribution of property embodies the entire law upon the subject. It provides for every conceivable cause." One claiming the estate of a deceased person or any interest therein must, in order to establish his claim, point to some provision of the statute giving it to him. Appellants and appellees both point to sections 3 and 4, supra, as establishing their respective claims to the property in controversy. Appellants contend that the terms "brothers and sisters" and "their descendants" mean and apply to legitimate brothers and sisters, either of the whole or half blood, or their descendants; while the appellees contend that these terms mean and apply to illegitimate as well as legitimate brothers and sisters and their descendants, and entitle them, as the descendants of said illegitimate brothers, to share with the heirs of the legitimate brother in the distribution of the estate of Caroline E. Coats. Appellees also contend that we cannot look to the rules of the common law when construing our statutes of descent; that they have no application to our law on that subject, and they refer to Webster's definition of "brother and sister" and "half brother and sister" as being the guide which should control us in construing said sections.

While it is true that the descent and distribution of the property in this state is governed entirely by statute, it is also true that in the construction of said statutes and determining the meaning of the words and the terms employed we are to look to the meaning attached to such words and terms by the common law. Statutes which are intended to remedy defects in or supersede the common law must be read and construed in the light of that law. When words of a definite signification under the common law are used in such statutes, and there is nothing to show that they are used in a different sense, they are deemed to be employed in their known and defined common-law meaning. Black on Interpretation of Laws, pp. 232, 233; 2 Lewis' Sutherland, Stat. Const. § 455, and cases cited in note 24; *Holt v. Agnew*, 67 Ala. 360; *Walton v. State*, 62 Ala. 197; *McCool v. Smith*, 1 Black, 459, 17 L. Ed. 218; *Rice v. Railroad Co.*, 1 Black, 358, 17 L. Ed. 147; *Mayo v. Wilson*, 1 N. H. 53; *Brocket v. Ohio, etc., R. Co.*, 14 Pa. 241, 53 Am. Dec. 534; *Allen's Appeal*, 99 Pa. 196, 44 Am. Rep. 101; *Apple v. Apple*, 38 Tenn. 348; *Burk v. State*, 27 Ind. 430, 431; *State v. Berdetta*, 73 Ind. 185, 188, 196, 197, 38 Am. Rep. 117. It was said by this court in *Jackson v. Hocke*, 84 N. E. 830: "At common law an illegitimate child was considered the son of nobody. He was sometimes called 'filius nullius' (the son of no one), and sometimes 'filius populi' (the son of the people)." 1

Blackstone, Commentaries, 458, 459; 2 Kent, Commentaries, 211, 212; 5 Cyc. 639-648; Bingham on Descendants, p. 419; Blacklaws v. Milne, 82 Ill. 505, 15 Am. Rep. 339; Simmons v. Bull, 21 Ala. 501, 56 Am. Dec. 257, and notes on pages 258, 261-265. It is said in Blackstone, Commentaries, p. 459: "A bastard cannot be an heir to any one; neither can he have heirs, but of his own body, for, being nullius filius, he is therefore a kin of nobody, and has no ancestor from whom any inheritable blood can be derived." It is a rule of construction that prima facie the word "child," "children," or other terms of kindred, when used either in a statute or will, means legitimate child or children or kindred. 5 Cyc. 640; Bingham on Descents, 483; McDonald v. Pittsburg, etc., R. Co., 144 Ind. 459, 461, 43 N. E. 447, 82 L. R. A. 809, 55 Am. St. Rep. 185, and cases cited; Blacklaws v. Milne, supra; McCool v. Smith, 1 Black, 459, 17 L. Ed. 218; Kent v. Barker, 68 Mass. 535; Curtis v. Hewins, 52 Mass. 294; Minot v. Harris, 132 Mass. 531; Hayden v. Barrett, 172 Mass. 472, 474, 52 N. E. 530, 70 Am. St. Rep. 295; Croan v. Phelps' Adm'x, 94 Ky. 213, 21 S. W. 874, 23 L. R. A. 753, and note on pages 754-758."

When therefore the word "child," "children," "brother," or "sister" is used in the statute of descent, it must be held to mean legitimate child, children, brother, or sister, unless the language of the statute clearly shows that they were used in a different sense. It is evident therefore that the Legislature employed the words "brother and sister or their descendants" in this sense in said sections 3 and 4 quoted above. It is manifest that had the mother, legitimate brother, and the two illegitimate brothers survived Caroline E. Coats, under section 3 of the statute of descent, being section 2992, Burns' Ann. St. 1908, the mother and the legitimate brother would have taken all of her estate to the exclusion of the two illegitimate brothers.

It is earnestly insisted by appellees that, in determining the meaning of the sections in question, the court must look to the provision of section 8 of the statute, being section 2998, Burns' Ann. St. 1908, which provides: "Illegitimate children shall inherit from the mother as if they were legitimate, and through the mother, if dead, any property or estate which she would, if living, have taken by gift, devise or descent from any other person." Appellees' contention is that, while this section of the law does not govern the descent of said real estate in this case and appellees do not take under it, it must be considered in connection with sections 3, 4, and 6, being sections 2992, 2993, and 2996, Burns' Ann. St. 1908, in determining the meaning of the words "brothers and sisters" in said sections, and therefore the rights of appellees in this case.

Section 8 (section 2998), supra, while it enables the illegitimate child to inherit property its mother would have taken if living, does not by its terms grant to the children of such illegitimate child such right in case said parent is not living, and the terms thereof cannot be extended so as to give such right. Curtis v. Hewins, 52 Mass. 294; Pratt v. Atwood, 108 Mass. 40, 41; Sanford v. Marsh, 180 Mass. 210, 62 N. E. 263; Williams v. Kimball, 35 Fla. 50, 16 South. 783, 26 L. R. A. 746, 48 Am. St. Rep. 238. The case of Parks v. Kimes, 100 Ind. 148, is cited to support appellees' contention. In that case the claimant to the estate in controversy was plainly and clearly within the express words of section 8 (section 2998), supra, and was therefore awarded the estate because her mother, if living, would have inherited said estate from her son. Said section 8 (section 2998) gave the illegitimate child that which the mother would have taken from her legitimate son, had she survived him. Numerous decisions of the courts of other states are cited as supporting appellees' contention that, where the statute gives an illegitimate child the right to inherit what its mother would have taken if living, such right will be extended to its descendants, if the illegitimate child be dead; but these decisions are based, so far as we have been able to ascertain, upon statutes clearly conferring upon descendants of illegitimate children the right to inherit that which would have been taken by their parents if living, provisions not contained in said sections of our statutes.

Under the facts shown by the special finding, the entire estate of Caroline E. Coats descended to her legitimate brother, Timothy W. Truelove, and from him to appellees.

Judgment reversed, with instructions to restate the conclusions of law and render judgment in conformity with this opinion.

(171 Ind. 531)

ETTER v. CLEVELAND, C. & ST. L. RY. CO. (No. 21,143.)

(Supreme Court of Indiana. Jan. 28, 1909.)

# 1. CARRIERS (§ 13\*)—REGULATION—STATUTES—CONSTRUCTION.

The Legislature, by passing Acts 1905, p. 83, c. 53, regulating carriers, prohibiting unjust discrimination in rates, and providing that nothing shall prevent the issuance of commutation tickets, etc., did not intend to prohibit all competition in passenger business on the part of railroad companies, and the right of a railroad company to compete with a traction railroad company for passenger business is not denied.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 13.\*]

# 2. CARRIERS (§ 13\*)—REGULATION—STATUTES—CONSTRUCTION—"COMMUTATION TICKET."

Acts 1905, p. 96, c. 53, § 14, prohibits unjust discrimination in rates on the part of railroad companies, but provides that nothing shall prevent the issuance of commutation passenger

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tickets. A railroad company, to compete with a traction company for passenger business between designated points, sold tickets at a reduced rate good for a continuous passage in either direction between such points. The tickets were in two parts and were good either for a round-trip passage for one person, or for the passage of two persons one way. It was stipulated in each of the parts of the ticket that it was to be void after 30 days from date of sale. The tickets at the designated points were sold to all persons who desired them on the payment of the reduced rate. *Held*, that the tickets were commutation tickets within the statute defined as a ticket issued at a reduced rate by a carrier entitling the holder to be carried over a given route a given number of times or an unlimited number of times during a fixed period.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 13.\*

For other definitions, see *Words and Phrases*, vol. 2, p. 1845.]

Appeal from Circuit Court, Montgomery County; Jere West, Judge.

Action by Jacob R. Etter against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

M. H. Clodfelter and Harry N. Fine, for appellant. L. J. Hackney, S. C. Kennedy, Benj. Crane, and Chas. M. McCabe, for appellee.

JORDAN, O. J. This action was instituted by appellant on December 22, 1905, to recover the penalty provided by section 16 of an act of the Legislature "providing for the creation of a railroad commission," approved February 28, 1905 (Acts 1905, p. 89, c. 53). Appellee railroad company demurred to the complaint for insufficiency of facts. This demurrer was sustained and judgment rendered by the court against appellant on the demurrer. He appeals and assigns as error that the court erred in sustaining the demurrer to his complaint.

The complaint, among others, alleges the following facts: Appellee is a duly incorporated railroad company and engaged as a common carrier in the transportation of passengers and freight. For five years and over it has been the owner and operator of a railroad line which extends from the city of Indianapolis, Ind., to the city of Peoria, in the state of Illinois. The city of Crawfordsville, situated in Montgomery county, Ind., is a regular station on appellee's line of railway, at which passengers are received and discharged from passenger trains which are run and operated by appellee over its said line of railway. There are two other stations on said line east of Crawfordsville at which passengers are also received and discharged, viz., Linnsburg and the town of New Ross. The latter town, it is averred, is 11 miles distant from Crawfordsville and 11 miles nearer to the city of Indianapolis than is the city of Crawfordsville.

Between these latter cities there has been constructed and is in operation an interurban electric traction railroad, which is also alleged to be a common carrier, over which a numbers of cars are run each day at certain intervals from the city of Crawfordsville to the city of Indianapolis for the transportation of passengers. The rate for transporting passengers over this traction road from the city of Crawfordsville to the city of Indianapolis is 75 cents for each passenger one way, and \$1.40 for a round-trip ticket between said cities. Before this traction line commenced to carry passengers from Crawfordsville to Indianapolis at said rate, appellee company charged each passenger carried over its road from Crawfordsville to Indianapolis for a single trip \$1.30, or \$2.35 for what is termed or known as a "round-trip ticket." After said traction company commenced to carry passengers over its road between the aforesaid cities at the rates above mentioned, appellee company issued certain passenger tickets and placed them on sale and sold them at its station at Crawfordsville and at no other stations on its said road east or west of said city of Crawfordsville, except the city of Indianapolis. These tickets were sold to all persons applying for them at said station of Crawfordsville at the rate of \$1.40 and were received and accepted by appellee company for passage one way over its road from Crawfordsville to Indianapolis for two passengers or for a round trip between said stations for one passenger. The tickets were generally known as "two-trip tickets" and were placed by appellee at said station of Crawfordsville for general use to all persons desiring to purchase them. The complaint avers that the tickets were issued and sold by appellee at said station of Crawfordsville for the purpose of competing with said traction line of railway in the transportation of passengers between Crawfordsville and Indianapolis. The tickets so issued and sold by appellee consisted of two parts, attached to each other, and are as follows:

"Issued by Cleveland, Cin., Chi., St. Louis Ry. Co. The Big Four Route. Good for one continuous passage in either direction between Crawfordsville, Ind., and Indianapolis, Ind. Void after thirty days from date of sale as stamped on back. (Form 2 T.) H. J. Mein, G. P. A.

"Issued by Cleveland, Cin., Chi., St. Louis Ry. Co. The Big Four Route. Good for one continuous passage in either direction between Crawfordsville, Ind., and Indianapolis, Ind. Void after thirty days from date of sale as stamped on back. (Form 2 T.) H. J. Mein, G. P. A."

By the means and use of these tickets a passenger thereby secured a cheaper rate per mile from Crawfordsville to Indianapolis

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

than was the rate per mile to Indianapolis from any of the stations on appellee's line west of the city of Crawfordsville. Appellant is a physician, engaged in the general practice of his profession of medicine, and it is alleged: That on the 22d day of November, 1905, he was in said town of New Ross, the aforesaid station on appellee's road, and was required to go from said town to Indianapolis on professional business. That he applied to appellee's ticket agent at said station of New Ross for a ticket from that station to Indianapolis over appellee's road; that in order to secure said ticket he was compelled to and did pay therefor the price of \$1, which amount was the regular fare one way from said station to Indianapolis, although the town of New Ross is 11 miles nearer Indianapolis than is the city of Crawfordsville. Wherefore the plaintiff demands judgment for \$500, etc. Counsel for appellant argue and insist that by the sale of the railroad tickets in question appellee railway company was guilty of an unjust discrimination and thereby violated the provisions of section 14 of the railroad statute of 1905, supra. Or, in other words, they contend that "by placing on sale at Crawfordsville and Indianapolis a certain kind of passenger ticket for the use of the general public, and at the same time requiring the general public at all intermediate stations to pay the old price, almost twice as much per mile, appellee was not only guilty of palpable discrimination against localities, but was also guilty of discrimination against every person who was compelled to pay the higher rate." They further insist that "the sale of these cheap tickets only at Crawfordsville and Indianapolis induced people along the line at intermediate stations to buy a one-way ticket from the home station to Crawfordsville, although the latter town was further away from Indianapolis than the home station, in order to get the benefit of this low rate to the capital city."

Section 16 of the act in question provides: "In case any railroad company subject to this act shall do, cause to be done, or permit to be done, any matter, act or thing in this act prohibited, or declared to be unlawful, or shall omit to do any act, matter or thing therein required to be done by it, such railroad company shall be liable to the person or persons, firm or corporation injured thereby for the damages sustained in consequence of such violations, and in case said railroad company shall be guilty of extortion or discrimination as by this act defined, then in addition to such damages, such railroad company shall pay to the person, firm or corporation injured thereby a penalty of not less than \$100.00 nor more than \$500.00, to be recovered by civil action in any court of competent jurisdiction in any county into or through which such railroad may run. \* \* \*

The insistence of counsel for ap-

pellee is that the lower court did not err in sustaining the demurrer to the complaint for the reason that section 16, as well as the act generally, is unconstitutional by reason of the limitation contained in section 21 of said act, which reads as follows: "Provided, that this act shall not apply to street or interurban railroads, except as section three substitutes the railroad commission created hereby for the auditor of state, in respect to duties pertaining to the construction and maintenance of interlocking works at crossings of railroads and railroads operated by electricity." It is argued that excepting interurban railroads from the application of the statute renders it antagonistic to the Constitution of Indiana and also the fourteenth amendment of the federal Constitution, for the reason that the statute is thereby made to discriminate against steam railroad companies and denies to appellee company equal protection of the law. It is claimed that it places a burden upon appellee company and other railroad companies of like character that it does not place upon other corporations similarly situated. Or, in other words, it is asserted that the principal question is this: "While there is a difference between a railroad operated by steam and one operated by electricity, is the difference such as is proper to impose a penalty on the steam railroad companies for acts prohibited by the statute in question and not proper to impose a penalty on interurban railway companies?"

As a second reason for justifying the ruling of the lower court in sustaining the demurrer to the complaint, counsel assert that the railroad passenger tickets in question are "commutation tickets," which are expressly excepted from the prohibitions of the act of 1905, and therefore the complaint must be held insufficient to entitle appellant to recover the penalty provided by section 16, supra. In this appeal we have to deal exclusively with the provisions of the act of 1905, supra, and are not concerned with the provisions of the amendatory act of 1907 (Acts 1907, p. 454, c. 241). If the complaint in this case is insufficient on demurrer because of the second reason advanced by appellee's counsel, then, under a well-settled rule, we will not consider or determine the constitutional question as raised or presented. Turning to section 14 of the act of 1905, we find that this section, after dealing with the question of special rates, rebates, charges, etc., on the part of the railroad companies, and providing what shall constitute an unjust discrimination, further provides, by subdivision "e," "that nothing in this act shall prevent \* \* \* the issuance of mileage, excursion, or commutation passenger tickets." It is evident that the Legislature, by passing the statute of 1905, supra, did not intend thereby to break down or stifle all competition in passenger business on the

part of railroad companies. This view is supported by *Interstate, etc., Commission v. Baltimore, etc., R. Co.* (C. C.) 43 Fed. 37; same case on appeal, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699. In these latter cases party-rate tickets, under the interstate commerce act, were involved and sustained by the court. These tickets were "each good for a party of ten persons at the rate of two cents per mile per capita, while single passengers were charged three cents per mile." The court held in the cases cited that the tickets neither constituted an unjust discrimination nor an undue or unreasonable preference or advantage within the purview of the interstate commerce act, in case such party-rate tickets were offered to the public generally, and it did appear that the rate charged a single passenger was not unreasonable.

Under the alleged facts, the right of appellee, by means of selling and furnishing the tickets in question, to compete for passenger business between the stations of Crawfordsville and Indianapolis with the traction railroad company mentioned in the complaint, is neither expressly nor impliedly denied by the statute. These tickets, as it appears, were sold for \$1.40, a reduced rate. They were in two parts and were good and receivable by the railroad company either for a round-trip passage for one person between the stations of Crawfordsville and Indianapolis, or were good for the passage of two persons one way between said stations. It was stipulated in each of the parts of the ticket that it was to be void after 30 days from date of sale. The tickets, at the stations at which they had been placed for sale, were furnished and sold by appellee to all persons who desired them, upon the payment of \$1.40. Or, in other words, their sale was open to all persons applying therefor, without discrimination, upon the same terms, conditions, and circumstances. By employing the term "commutation passenger tickets," in section 14, *supra*, the Legislature certainly used the term with the meaning as usually understood or accorded to it by leading authorities on the definition of terms or words. "Commutation," as applied to railroad tickets, is defined by the *Standard Dictionary* to be "A railway or other ticket entitling the holder to repeated passage or other service, etc., at a reduced rate; a season ticket." The *Century Dictionary* has the following definition: "A ticket issued at a reduced rate by a carrier of passengers entitling the holder to be carried over a given route a limited number of times, or an unlimited number during a certain period." In 8 Cyc. p. 398, a "commutation ticket" is defined to be "a ticket as for transportation which is evidence of a contract for service at a reduced rate; a ticket for one passenger, good for more than one ride or for more than

one passenger for one ride, sold at reduced rate; a ticket issued at reduced rate by a carrier of passengers entitling the holder to be carried over a given route a limited number of times, or an unlimited number of times during a certain period; the purchase of a right to go upon a certain route during a specified period for a less amount than would be paid in the aggregate for separate trips." See, also, *Interstate, etc., Commission v. Baltimore, etc., R. Co.* (C. C.) 43 Fed. 37; *Interstate, etc., Commission v. Baltimore, etc., R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699. In the *Interstate, etc., Commission v. Baltimore, etc., R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699, the court, in affirming the decision of the Circuit Court, quoted with approval the following from the concurring opinion of Judge Sage therein: "The difference between commutation and party-rate tickets is that the commutation tickets are issued to induce people to travel more frequently, and party-rate tickets are issued to induce more people to travel. There is, however, no difference in principle between them; the object in both cases being to increase travel without unjust discrimination and to secure patronage that would not otherwise be secured."

As the tickets herein involved, under the definition and holding of the authorities to which we have referred, fall within the class known and denominated as "commutation tickets," and as the issuance of such tickets is expressly excepted from the prohibitions of our railroad commission act, by section 14, *supra*, it must follow that appellant is not entitled to recover the penalty prescribed by section 16, *supra*, and the demurrer to the complaint was properly sustained. While we place our holding upon the fact that the tickets in question were excepted from the provisions of the statute, nevertheless we are not to be understood as impliedly holding that, in the absence of the exception in the act, the tickets, under the facts, would come within the inhibition of the statute.

Judgment affirmed.

(48 Ind. A. 482)

HELMS v. APPLETON et al. (No. 6,413.)<sup>1</sup>  
(Appellate Court of Indiana, Division No. 2.  
Jan. 29, 1909.)

JUSTICES OF THE PEACE (§ 188\*)—JURISDICTION—AMOUNT IN CONTROVERSY—INCREASE ON APPEAL—EFFECT.

Jurisdiction of an action brought in a justice's court is fixed when it is brought and by the amount then claimed, and, that amount having been less than \$200, on appeal to the circuit court from a judgment for defendants, plaintiff could recover the original sum claimed, together with interest and attorney's fees, which accrued pending the appeal, though the total amount exceeded \$200.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 724; Dec. Dig. § 188.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup> Transfer denied.

On petition for rehearing. Petition overruled.

For former opinion, see 85 N. E. 733.

RABB, J. Appellant insists in his petition for rehearing that the judgment rendered in the court below must be reversed for the reason that the action originated before a justice of the peace, and therefore the complaint could not be amended in the circuit court to increase the plaintiffs' demand beyond \$200, and that a judgment for over that amount is void. This question was not raised in appellant's original brief, but we have given it due consideration. The case was begun before a justice of the peace on the 16th day of November, 1905. The appellant appeared before the justice and made defense. The case was tried before the justice and judgment rendered in appellant's favor on December 1, 1905. There was at that time due on the note, of principal and interest, \$151.47, and whatever would be a reasonable attorney's fee, not exceeding \$20, the amount then demanded in the complaint. This was all that was demanded in the complaint, and it would have been the limit of the plaintiff's recovery had judgment been rendered in his favor at that time; and this he was then entitled to recover. The jurisdiction of the justice was fixed when the suit was begun, and by the amount then claimed. This question was decided by the Supreme Court as early as the case of *Gregg v. Wooden*, 7 Ind. 499, where the court say with reference thereto: "The statute fixing the jurisdiction of a justice of the peace, so far as the amount involved is concerned, referred to the amount claimed at the time the action was commenced. The jurisdiction, having once attached, will not be defeated by a defense of the cause, and the accumulation of interest pending the suit may be recovered." In *Bargis v. Farrar et al.*, 45 Ind. 41, the same rule is recognized, and a judgment rendered for over \$200, in a case brought before a magistrate and appealed to the circuit court, is affirmed where it appeared that at the time the action was commenced before the justice the amount claimed and due was within the jurisdiction of the justice, but the accumulation of interest during the pendency of the action increased the amount to over that sum. In the case of *Stair v. Bishop*, 121 Ind. 273, 23 N. E. 144, the court say with reference to this question: "If a defendant, who is sued before a justice of the peace, appeals, and thus adds to the fees of the attorney in the case, where he undertakes to pay a reasonable attorney's fee, he has no just reason to complain if he is compelled to pay an increased attorney's fee."

It is true that here the appellant did not take the appeal from the justice of the peace, but that does not alter the case. It is conclusively adjudged that he was justly owing

the debt, and all he did in resisting its payment was wrongful. Had he permitted the appellees to take judgment on the note before the justice, which he was legally entitled to do, the amount of the judgment could not have exceeded \$171; but he appeared to appellees' action and procured the justice to render an erroneous judgment against appellees, thus compelling the appellees to appeal the case to the circuit court in order to enforce their rights, and thereby involving the necessary increase in the attorney's fee and interest. He now insists that, because appellees' claim grew, on account of such resistance on his part, the court has lost jurisdiction to render judgment for all that is due him. His contention is without support of reason, justice, or authority.

Petition for rehearing overruled.

(43 Ind. App. 224)

ADVISORY BOARD OF COAL CREEK TP.,  
MONTGOMERY COUNTY, v. LEVAN-  
DOWSKY et al. (No. 6,721.)†

(Appellate Court of Indiana, Division No. 2  
Jan. 29, 1909.)

1. TOWNS (§ 30\*) — OFFICERS — ADVISORY  
BOARD—STATUTORY AUTHORITY.

The township advisory board created by Acts 1899, p. 150, c. 105, is advisory to the township trustee, who, under Burns' Ann. St. 1903, § 9565, makes contracts with its consent and approval and has the care and management of all property belonging to the township, and the board, in the absence of express authority, has no power to sue.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. § 54; Dec. Dig. § 30.\*]

2. TOWNS (§ 30\*) — OFFICERS — ADVISORY  
BOARD—STATUTORY AUTHORITY.

Under Burns' Ann. St. 1908, §§ 9595, 9597, requiring the township advisory board to prosecute actions on the bond of a trustee who has paid an unauthorized debt, and to collect a specified sum from a trustee failing to file a copy of his report within a specified time from final settlement, the board of a town has no power to sue the trustee thereof and the school township to prevent them from carrying out a contract for the construction of a schoolhouse.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. § 54; Dec. Dig. § 30.\*]

3. PARTIES (§ 76\*)—JOINDER OF PLAINTIFFS—  
WANT OF CAPACITY TO SUE—DEMURRER.

A complaint must state facts sufficient to constitute a cause of action in favor of all who join as plaintiffs, or a demurrer thereto will be sustained, and hence a complaint in an action by a township advisory board and by the members thereof in their own behalf as taxpayers as joint plaintiffs, to prevent the trustee of the township and the school township from carrying out a contract for the construction of a schoolhouse, states no cause of action as against a demurrer, where the advisory board has no power to sue for such relief.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. § 118; Dec. Dig. § 76.\*]

Appeal from Circuit Court, Montgomery County; J. Claybaugh, Special Judge.

Action by the Advisory Board of Coal Creek Township, Montgomery County, and by the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† On Rehearing. For former opinion in Division No. 1, see 84 N. E. 346.

members thereof in their own behalf, against Peter Levandowsky, Trustee of Coal Creek Township, and the Coal Creek School Township. From a judgment for defendants on sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

Haywood & Burnett and Jones & Murphy, for appellants. Crane & McCabe, A. W. Reynolds, and W. R. Wood, for appellees.

**ROBY, J.** Action by the Coal Creek township advisory board and by the members thereof in their own behalf as taxpayers, as joint plaintiffs, seeking an injunction against the defendants to prevent them from carrying out a contract for the construction of a \$28,000 schoolhouse in Wingate, Ind. The complaint was in two paragraphs. Demurrers for want of facts, addressed to each paragraph, were sustained. Plaintiffs reserved exceptions and refused to plead further. A judgment was thereupon rendered against them, from which they appeal.

The power of the advisory board to maintain the action is challenged by the demurrer and denied in argument. It is insisted by appellees that the statute does not confer the express power upon the advisory board to bring an action for an injunction, which is the character of the one now under consideration. Section 6 of the act of Feb. 27, 1899 (Acts 1899, p. 154, c. 105; section 9595, Burns' Ann. St. 1908), makes it the duty of the board to institute and prosecute a suit in the name of the state for the use of the township to recover upon the bond of a trustee when he has paid an unauthorized debt; and by section 8 of said act (Acts 1899, p. 155, c. 105, § 8; section 9597, Burns' Ann. St. 1908), upon failure of the trustee to file a copy of his report with the auditor within 10 days from final settlement, the advisory board is required to collect by suit, for the benefit of the township, \$5 per day for each day's delay. No express power to bring other suits is conferred upon the advisory board. The advisory board is what its name imports—advisory to the township trustee, who makes contracts with its consent and approval and has the care and management of all property belonging to the township. Section 9565, Burns' Ann. St. 1908; Advisory Board v State ex rel. Whaley, 164 Ind. 295, 301, 73 N. E. 700; Advisory Board v. State ex rel. Smith, 166 Ind. 237, 76 N. E. 986.

In the absence of express authority to sue, the advisory board cannot maintain an action, and such authority will not be implied. The case of McGregor v. State, 31 Ind. App. 483, 68 N. E. 315, is analogous in principle. The duty of the county superintendent is quite as closely connected with the employment of teachers in the public schools as the advisory board is with the construction of a schoolhouse, and no express authority is giv-

en by which either of them may institute suits in equity to obtain injunctions.

The advisory board not being a proper party plaintiff, the designation of the individual members of such board as plaintiffs and taxpayers does not make the pleading good. It must state facts sufficient to constitute a cause of action in favor of all who join as plaintiffs. Gas Co. v. Spaugh, 17 Ind. App. 683, 688, 46 N. E. 691; Brumfield v. Drock, 101 Ind. 190, 197; Martin v. Davis, 82 Ind. 38.

It follows that the demurrers to the paragraphs of complaint were correctly sustained. Whether the facts stated were otherwise sufficient is not decided.

Judgment affirmed.

(48 Ind. A. 213)

**A. N. CHAMBERLAIN MEDICINE CO. v. H. A. CHAMBERLAIN MEDICINE CO.** (No. 6,258.)

(Appellate Court of Indiana, Division No. 1. Jan. 29, 1909.)

**1. TRADE-MARKS AND TRADE-NAMES (§ 85\*)—INFRINGEMENT — INJUNCTION — DEFENSES — MISREPRESENTATION OF PLAINTIFF.**

Where a patent medicine company advertised its nostrum as a certain cure for a large number of diseases, many of which, such as diphtheria, were highly dangerous, and for which the medicine would be palpably ineffectual, equity will not enjoin an infringement of the trade-name of such medicine by a competitor, even though the latter may also fraudulently advertise its own medicine.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 94; Dec. Dig. § 85.\*]

**2. EQUITY (§ 65\*) — MAXIM — NECESSITY OF CLEAN HANDS.**

One seeking relief in equity must come with pure hands and conscience, and cannot claim relief against fraud, unless he is himself free from fraud in connection with the subject-matter of the relief sought.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185-187; Dec. Dig. § 65.\*]

**3. APPEAL AND ERROR (§ 1028\*)—HARMLESS ERROR—AFFECTING ONE NOT ENTITLED TO SUCCESS.**

When the decree below was correct on the merits, any errors at trial were harmless and need not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4034; Dec. Dig. § 1028.\*]

Appeal from Circuit Court, Elkhart County; James S. Dodge, Judge.

Suit by the A. N. Chamberlain Medicine Company against the H. A. Chamberlain Medicine Company. From a judgment for defendant, plaintiff appealed. Affirmed.

Otto E. Deahl and Vanfleet & Vanfleet, for appellant. James L. Harman, for appellee.

**HADLEY, J.** This is a suit for an injunction by appellant against appellee because of an alleged unfair competition and infringement of the trade-name "A. N. Chamberlain's Immediate Relief." It is sought to restrain H. A. Chamberlain Medicine Company from

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
86 N.E.—63

using the words "Chamberlain" and "Medicine" in its corporate name, and from using the words "Chamberlain" and "Relief" in the name of its medicine: "H. A. Chamberlain's Infallible Relief." There is a further prayer for \$1,000 damages. An answer in two paragraphs, the second alleging that the appellant, prior to and during the pendency of a former action between the parties, used obscene literature in its advertising matter, and falsely advertised and represented its medicine to be a cure for divers and incongruous diseases, was filed, and the issues were closed by a reply in general denial. The cause was tried by the court, and a judgment rendered for the defendant, from which this appeal is taken.

It appears that A. N. Chamberlain of Elkhart, Ind., in 1850, being the owner of a secret formula for compounding a medicine of certain drugs, began to manufacture and sell such medicine under the name of "A. N. Chamberlain's Immediate Relief." In 1891 a corporation was formed in Elkhart, Ind., to make and sell the medicine, and A. N. Chamberlain transferred thereto all the right, title, and interest in the medicine, and has since continued to manufacture and sell the same. Mr. Harvey A. Chamberlain, of Elkhart, whose father was a cousin of A. N. Chamberlain, in 1902 assisted in organizing the "H. A. Chamberlain's Medicine Company," to manufacture a medicine from a formula which he owned, and which had been discovered by his father. It is shown by the uncontradicted evidence that appellant's medicine, known as "Chamberlain's Immediate Relief," was widely advertised and represented to the public as being a certain and effectual cure for the following divers diseases: "Eczema or yellow fever, Asiatic cholera in its first stages, or chilblains, catarrh or seasickness, diphtheria or pimples, cholera morbus or bee stings, bites of poisonous reptiles or piles, dysentery or scratches on horses, scarlet fever or sour stomach, measles or cramps, neuralgia or general debility, hysterics or hog cholera, la grippe or bloat and scours in horses, cattle and sheep, diarrhoea or itching and eruptions, bilious fever or wind galls on horses, bloody flux or sick headache, fever and ague or heaves in horses, colic or toothache, spotted fever or nervous tremors, sore throat or chicken cholera, cold feet or scalds and burns, rheumatism or earache, dumb ague or cuts and bruises, colds or summer complaint, coughs or colic in man or beast, griping pains or nervous headache, sprains and wounds or diseases of young lambs"—all from one and the same bottle. We have exhibited the diseases, for which appellant claims its medicine to be a panacea, in the above form in order to show at a casual glance the absurd incongruity of its representations, and thereby illustrating the character of the business that appellant is praying a court of equity to protect. It will be seen that this medicine

is claimed to be a sovereign remedy for about all of the ills that flesh is heir to; and, if appellant's said representations are to be believed, and they are certainly made for this purpose, then, as is well said in *Fetridge v. Wells*, 13 How. Prac. (N. Y.) 385: "It would seem that so long as this medicine may be procured it will be a folly to grow old and a mistake to die."

There is another phase of appellant's advertisements we cannot overlook. It not only recommends its medicine as a cure for diphtheria, along with other diseases, but emphasizes this recommendation with a separate line: "This sure cure for diphtheria for sale by all druggists." And advises, by what purports to be testimonials, that doctor bills as well as lives can be saved by using this specific in cases of diphtheria. This wanton advice, with reference to this known deadly disease, this reckless disregard for the consequences on human life, this palpable falsehood, put forth to deceive distressed, ignorant, and credulous people to their detriment, in cases of life and death, in order to make a few more sales of this nostrum, is atrocious and little less than a crime. "The philosophy of the cure by Chamberlain's Immediate Relief," say these advertisements, "is very simple, and will at once commend itself to every thinking person. It is an antiseptic (against putrefaction), and kills poison whenever it comes in contact with it. It will kill the poisonous bacteria that lodge in the throat, and it will also destroy the terrible little animalcules." We hardly think it necessary to say more to convince an ordinarily informed mind that the business of appellant transacted through the medium of the trade name and mark that it is sought to have protected by this court is fraudulent and a deception upon the people. We do not say the medicine has no merit. It is unnecessary for us to pass upon that point, but it is apparent that it cannot have anywhere near the miraculous virtues ascribed to it, and its advertisements present an attempt at a gross imposition upon the public, as well as a menace to human life.

It is an ancient and equitable rule that "he who comes into a court of equity must come with pure hands and a pure conscience," and it is also well established by the authorities that, if a complainant in a court of equity claims relief against the fraud or imposition of others, he must himself be free from the same charge with reference to the same matter. If the business of such complainant is, or is sought to be, affected and injured by the misrepresentation or deceit of another, he cannot be heard in a plea that by the fraudulent rivalry of another his own fraudulent profits are destroyed or diminished. The exclusive privilege of deceiving or perpetrating a fraud upon the public is hardly a fit subject to be entertained in a court of equity, and certainly not one that such a

court can be required to aid or sanction. *Fetridge v. Wells*, supra; *Pidding v. How*, 8 Sim. 477; *Wolfe v. Burke*, 56 N. Y. 115; *Laird v. Wilder*, 9 Bush (Ky.) 131, 15 Am. Rep. 707; *Kohler Mfg. Co. v. Beeshore*, 59 Fed. 572, 8 C. C. A. 215; *Fowle v. Spear*, 7 Penn. L. J. 176, Cox Am. Trade-Mark Cases, 67; *Heath v. Wright*, 3 Wall. Jr. 141, Fed. Cas. No. 6,310; *Worden v. Cal. Fig Co.*, 187 U. S. 517, 23 Sup. Ct. 161, 47 L. Ed. 282; *Piso Co. v. Vorgt*, 4 O. N. P. 347; *Partridge v. Menck*, Cox Am. Trade-Mark Cases, 72; *Houchens v. Houchens*, 95 Md. 37, 51 Atl. 822. In the case last cited the medicine was represented to be a sure cure for smallpox and diphtheria. The court say: "This not only asserts a falsehood but was clearly designed to deceive the public. The law is well settled by all the cases that a court of equity will not lend its aid to a scheme to defraud the public." In *Worden v. Cal. Fig Co.*, supra, Mr. Justice Shiras, speaking for the court, says: "We find, however, more solidity in the contention, on behalf of the appellants, that, when the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade-mark, or in his advertisements and business, be himself guilty of any false or misleading representation; that if the plaintiff makes any material false statement in connection with the property which he seeks to protect, he loses his right to claim the assistance of a court of equity." Numerous cases are therein cited to support this doctrine. In the case of *Leather Cloth Co. v. Leather Cloth Co.*, 4 De Gex J. & S. 137, the Lord Chancellor says: "That where the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not, in his trade-mark, or in the business connected with it, be himself guilty of any false or misleading representation."

It is no defense to the charge here discussed that appellee may be in the same respects equally an offender. It will be considered that it, in a like case, would be likewise dealt with. Appellant's manner of using its trade-name and trade-mark and conducting its business connected therewith is a fraud upon and a danger to the public. The law may permit it, but equity will not protect it.

Many other questions are presented, but as the cause was correctly decided, and could not have been correctly decided any other way, since there is no equity in the case, and intervening errors, if any, could not affect the result, we shall not extend this opinion to consider them.

Judgment affirmed.

(43 Ind. A. 735)

SMITH v. OHIO OIL CO. (No. 6,371.)  
(Appellate Court of Indiana, Division No. 1.  
Jan. 26, 1909.)

CONSTITUTIONAL LAW (§ 208\*)—PAYMENT OF WAGES—PENALTY—CLASS LEGISLATION. Acts 1885, p. 36, c. 21 (Burns' Ann. St. 1901, §§ 7056, 7057; Burns' Ann. St. 1908, §§ 7981, 7982), requiring corporations, etc., to pay certain employes monthly, and prescribing a penalty for their failure to do so, is unconstitutional as class legislation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649-677; Dec. Dig. § 208.\*]

Appeal from Circuit Court, Wells County; Edwin C. Vaughn, Judge.

Action by S. Walter Smith against the Ohio Oil Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Elchhorn & Matlock, for appellant. Simmons & Dalley, for appellee.

WATSON, C. J. This was an action by the appellant to recover \$49 wages due him from appellee, and to recover the further sums of \$92, statutory penalty, and \$50, attorney's fees, under Acts 1885, p. 36, c. 21 (sections 7056 and 7057, Burns' Ann. St. 1901; sections 7981 and 7982, Burns' Ann. St. 1908).

The cause was put at issue and trial by the court had, which resulted in a finding and judgment for appellant for \$49. The errors assigned in this court are (1) the sustaining of appellee's motion to strike out parts of the complaint; (2) the overruling of appellant's motion to modify the judgment.

The record discloses that the appellee, before trial, offered to confess judgment for \$49, so the only question involved in this controversy is the statutory penalty and the attorney's fees under the above sections.

In the case of *Toledo, etc., R. Co. v. Long*, 169 Ind. 316, 82 N. E. 757, the court held sections 7981 and 7982, supra, unconstitutional, upon the authority of *Bedford Quarries Co. v. Bough*, 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (N. S.) 418, and cases there cited.

The judgment is therefore affirmed.

(43 Ind. A. 187)

ERIE CRAWFORD OIL CO. v. JONES.  
(No. 6,333.)  
(Appellate Court of Indiana, Division No. 2.  
Jan. 26, 1909.)

EVIDENCE (§ 469\*)—PAROL EVIDENCE—APPLICATION OF PAYMENTS.

Where defendant claimed an interest in land as lessee under an oil and gas lease which plaintiff claimed was forfeited for nonpayment of rent, and defendant alleged that its assignor had made the payments before defendant procured the lease, evidence was admissible to show that the lease in question was but a substitution for a prior one between plaintiff and de-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defendant's assignor, and that, when the later lease was made, the assignor was paying rent under the former one, and it was agreed between plaintiff and the assignor that the payments should continue under the later lease, and that the payments in question were made on the prior lease and not on the later one; the evidence not being addressed to what the terms of the new lease were or what the rights of the parties would be under it, but merely to the application of a payment of rent, and hence not being contradictory of the terms of the written lease.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2148; Dec. Dig. § 469.\*]

Appeal from Circuit Court, Randolph County; Henry C. Fox, Special Judge.

Action by Richard H. Jones against the Erie Crawford Oil Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Simmons & Dailey, for appellant. Engle, Caldwell & Parry, for appellee.

RABB, J. This action was brought in the court below by the appellee to quiet his title to the premises described in his complaint. The controversy involves the forfeiture of a gas and oil lease of the premises, executed by appellee to the appellant's assignor. There was a special finding of facts and conclusions of law stated thereon, and exceptions by appellant to the conclusions of law. Appellant's motion for a new trial was overruled, and judgment rendered on the findings in favor of the appellee. The question presented by the record turns entirely upon the admissibility of certain evidence.

The substantive provisions of the lease, so far as they are necessary to a decision of the question involved, are as follows: "In consideration of the sum of one dollar the receipt of which is hereby acknowledged, R. H. Jones and Stella Jones, first party, hereby grant and guarantee unto the Woodbury Glass Company, second party, all the oil and gas, in and under the following described premises, together with the right to enter," etc. (Then follows a description of the land). "To have and hold the above premises for and during the term of five years from this date, and as much longer as oil and gas are produced in paying quantities or the rents are paid thereon. \* \* \* In case no well is completed within \_\_\_\_\_ years from this date, then the grant shall become null and void, unless second party shall pay first party at Parker Banking Company, in Parker, fifty cents per acre, payable semi-annually in advance for each year thereafter such completion is delayed," etc.

The lease was dated August 16, 1901. No well was ever completed on the premises, and no possession of the premises ever taken by the lessee. The appellant became the owner of the lease in July, 1903, and in the month of July paid \$20 as the semiannual rental provided for in the lease, but made no further

payments thereon. On the 1st day of July, 1904, appellant deposited in the Parker City Bank \$80, to be paid appellee as rental on the land in question, which appellee refused to receive. By the terms of the lease a semi-annual payment of the rent was due on February 16, 1904. It is not pretended or claimed by appellant that this semiannual rental was ever paid by it, but their contention is that their assignor paid the rental, and that no rent was due at that time on account of payments not made by appellant but made by its assignor.

There was evidence that the appellant's assignor paid to the lessor on January 1, 1902, the sum of \$20 as rental on these premises, and appellant claims credit for this payment as being made under the contract and for the rent from August 16, 1902, to February 16, 1903. Another payment was made by appellant's assignor on July 1, 1903, which appellant claims paid the rent from February 16, 1903, to August 16, 1903; while it is the contention of the appellee that these payments of rent made by the appellant's assignor were not for the period subsequent to August 16, 1902, and witnesses were permitted to testify with reference to these payments that the lease in question was but a substitution for a prior lease that had theretofore been executed by appellee to the appellant's assignor on the premises, and that, at the time the lease in question in this case was executed, the appellant's assignor was paying rent upon the land at the rate of 50 cents per acre, semiannually, and making the payments on July 1st and January 1st of each year, and that it was agreed and understood between the parties to this lease that these payments of rent should continue under the new lease as they had been paid under the old, and that the payment of \$20 on January 1, 1902, was a payment, and meant and intended as such by both the parties, of the rental of the land under the old contract from January 1, 1902, to July 1, 1902.

Appellant claims that this testimony was incompetent because it contradicted the terms of the written lease. We think this contention cannot be sustained. It was clearly within the power and right of the original lessee to pay rental of this property from the day the contract was made, if he chose, and it was no concern of the appellant. He had a perfect right to pay the rental under the old contract, if he chose to do so, and his doing so would clearly violate no right of the appellant. The evidence is addressed, not to what the terms of the new lease are, or what the rights of the parties would be under it, but to the application of the payment of the \$20 made January 1, 1902, and both the appellee and the officers of the appellant's assignor testified that this payment was made under the old contract, and to pay the rental from January 1, 1902, to July 1, 1902, as the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

payment itself clearly indicated was the intention.

We think there was no error in admitting parol evidence to show what the original contract between the parties was, and to what they meant and intended the \$20 paid January 1, 1902, should be applied. The appellant at that time had no interest in this lease, and what the then lessor and lessee agreed to do between themselves was a matter that could not affect the rights of the appellant. *Sargent v. Robertson*, 17 Ind. App. 411, 48 N. E. 925, and cases cited.

The evidence shows without controversy that, when the appellant took the assignment of the lease, it was informed up to what time the rental on the lease was paid, and that it would be due for them to pay the rent in July following, which they did.

Taking the facts as they are admitted to be in this case, and they clearly show that the lease was forfeited for failure to pay the rental due in February, 1904, and that, if mistakes were made in the progress of the trial, they were harmless, and the case correctly determined upon its merits.

Judgment affirmed.

(48 Ind. App. 200)

**FRASER v. CHURCHMAN. (No. 6,516.)**

(Appellate Court of Indiana, Division No. 2.  
Jan. 26, 1909.)

**1. TRUSTS (§ 13\*)—CONSIDERATION FOR CONVEYANCE.**

A conveyance of land by one heir, who held it in trust for all the heirs, to another heir as trustee for all the heirs, made in recognition of the interest of the other heirs, was founded upon a sufficient consideration.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 11; Dec. Dig. § 13.\*]

**2. FRAUDULENT CONVEYANCES (§ 49\*)—PROPERTY HELD IN TRUST.**

A conveyance of land, held by one heir in trust for all the heirs, to another, in compliance with a parol agreement and upon a sufficient consideration, is valid as against the trustee's creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 105; Dec. Dig. § 49.\*]

**3. TRIAL (§ 355\*)—VERDICT—SPECIAL FINDINGS—EVIDENTIARY FACT—INCORPORATING IN SPECIAL VERDICT.**

It being difficult to differentiate between conclusions, ultimate facts, and evidentiary facts when facts are close to the line dividing the inferential facts from the evidentiary facts, the only safe plan is to incorporate them in the special verdict.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 848; Dec. Dig. § 355.\*]

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by Kate M. Fraser against William F. Churchman on a note, aided by attachment. Judgment for plaintiff on the note, and for defendant as to the attachment, and plaintiff appeals. Affirmed.

Averill & Collins, for appellant. Ayres, Jones & Hollett, for appellee.

ROBY, J. Suit begun on May 10, 1906, by appellant upon a note for \$10,000 executed by appellee and another on December 27, 1902. The complaint was accompanied by an affidavit in attachment showing appellee to be a nonresident, and whether or not certain real estate in Marion county is subject to the levy and sale under the writ of attachment is the question for decision, judgment having been rendered on the note without controversy. The court made a special finding, and for a second conclusion of law stated that the real estate attached as the property of William F. Churchman was not subject to such attachment, and that it should not be sustained. An exception to this conclusion presents the question for determination.

It is found: That appellee and five others were the heirs of Anna Churchman. That appellee was her executor, and on May 4, 1904, filed his final report, which was shortly thereafter approved. That there were certain items of personal property which had not been administered, and it was orally agreed by those concerned that appellee should hold such assets as trustee, and as soon as they could be reduced to money then they should be divided between the six. That among said assets were certain shares of building and loan stock amounting to \$9,000. That by the arrangement between the association and appellee, acting as trustee, appellee prior to October 25, 1903, agreed to accept real estate in redemption of said stock, and that to carry out said arrangement he procured one Pattison to act for him, and pursuant to such arrangement he paid Pattison by check \$7,400, which sum was by Pattison paid to the association, which conveyed to him various descriptions of real estate. That on January 4, 1904, Pattison conveyed the same to appellant, and that the whole transaction was a means adopted by which to convey said real estate in part cancellation of the shares of stock referred to above. That on November 14, 1904, appellee conveyed said real estate to Robert M. Churchman, as trustee, he being one of the six heirs named, and that such conveyance was made in recognition of the interest of the other heirs. That appellee held the title thereto in trust for said heirs, and that this was the only consideration for the conveyance by him. That appellee on November 15, 1904, conveyed his individual interest in said land to his wife in settlement of alimony in a divorce suit by her, which deed was duly recorded.

Appellant's attorneys argue the case as though this were a suit by the other heirs against appellant, and they held a brief for the defendant; but the action is not one to enforce an unexecuted parol trust in lands.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The attempt is to hold the real estate for the debt of the trustee by virtue of a writ levied upon it after the parol trust has been fully executed. The law does not prevent the voluntary doing of that which ought to be done, and upon the facts stated the conveyance was founded upon a sufficient consideration, and in compliance with a parol agreement was, as against the trustee's creditors, entirely valid. *Thomas v. Merry* (1888) 113 Ind. 83, 88, 15 N. E. 244; *Mohn v. Mohn* (1887) 112 Ind. 285, 13 N. E. 859.

The point is made by appellant that the findings relative to a trust relation are conclusions, and various cases are cited tending to sustain that view. It would be very difficult to deduce from the decisions in Indiana a rule by the use of which conclusions, ultimate facts, and evidentiary facts can be differentiated. The holdings are conflicting, and leave the law exactly as indicated by the following extract: "The only safe plan is to put them into the special verdict, where they can do no harm if they should turn out, in the opinion of the court, to be evidentiary facts, and where their absence might be fatal if they should turn out to be inferential facts." *L. N. A. & Chi. R. Co. v. Miller* (1895) 141 Ind. 533, 550, 37 N. E. 343.

The finding under consideration seems to have been constructed in accordance with the direction thus given to the bar, and in the opinion of this court it "turns out" that enough facts are stated to justify the conclusions of law drawn by the court below.

Judgment affirmed.

(43 Ind. A. 218)

**BACON v. BACON.** (No. 6,349.)

(Appellate Court of Indiana, Division No. 1.  
Jan. 29, 1909.)

**1. DIVORCE (§ 11\*)—INTEREST OF PUBLIC.**

Marriage being an institution in which the public is interested and which is protected by law, the courts will consider the interest of the public, as well as that of the parties in granting divorces.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 13; Dec. Dig. § 11.\*]

**2. DIVORCE (§ 184\*)—APPEAL—REVIEW—DISCRETION OF TRIAL COURT.**

A decision denying a divorce will not be disturbed on appeal, on the ground of insufficiency of evidence, unless there is a clear abuse of discretion by the trial court.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 570-573; Dec. Dig. § 184.\*]

Appeal from Circuit Court, Elkhart County; James S. Dodge, Judge.

Action by William P. Bacon against Ada L. Bacon. From a judgment for defendant, plaintiff appealed. Affirmed.

Hile & Baker, for appellant.

**MYERS, J:** This was a proceeding for a divorce, brought by the husband, the appellant, against the wife, the appellee. The

appellant assigns as error the overruling of his motion for a new trial, in which he assailed the finding against him as not sustained by sufficient evidence and as contrary to law.

From the allegations of the complaint it appears that the parties lived together as husband and wife less than six months. The cause of separation is not stated in the pleadings. It appeared in evidence that the appellant abandoned the appellee. The alleged grounds for a divorce were adultery and inhuman treatment. The former ground was alleged to have arisen more than two months after the separation. The only instance of alleged cruel and inhuman treatment to which a date was specifically assigned was stated to have occurred more than five months after the separation; and it was charged that on various occasions, the times of which were not more definitely indicated, the appellee, while at appellant's place of business, had indulged in rude accusations against the appellant, falsely accusing him of improper relations with other women, and that at various other times, not specified, she created such a disturbance in his store as seriously to injure his business. The appellee failed to appear to the action and was defaulted. At the trial the prosecuting attorney appeared and resisted the petition. The only evidence introduced, other than that showing the residence of the parties, was the testimony of the appellant. The evidence on the question of the appellee's alleged adultery was almost wholly hearsay, aside from which it was not inconsistent with her innocence, and was not sufficient to support a finding against her upon that charge. There was evidence of ill temper, jealousy, and boisterous and unbecoming language on the part of the wife. The appellant testified to some physical violence done and attempted on him by her at his store, about five months after the separation, from which it does not appear that he was subjected to any physical injury or suffering. The appellant's own conduct and language toward the appellee, before or at the time of these outbursts of temper on the part of the wife, was but slightly shown. It appears that the first actual meeting of these parties occurred in October and they were married on December 18th of the same year. After marriage they soon tired of each other, and a separation took place in June of the year following their marriage. Marriage is an institution in which the public have an interest. Accordingly the law has thrown its safeguarding regulations about the contract, not only by prescribing the manner of entering upon the estate, but also by taking the sole control of the method of dissolving the bonds of matrimony. The interest of the public may be further presupposed from the statutory provision re-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

quiring the public prosecutor to appear and resist all undefended applications for a divorce. Our statutes manifestly contemplate that the court in such cases has in its care the interest of the public, along with the individual rights involved in the proceeding; and the parties must be regarded as having only rights in a large sense consistent with the public welfare. In the trial of this class of cases the court proceeds with constant reference to these particular rights; and this court, proceeding, as it must, upon the presumption that the trial court has disposed of the application with such high sense of responsibility, will approach the question of disturbing, upon the evidence, a decision denying a divorce with like sense of responsibility and a hesitancy peculiar to the special quality of the case. It was said in *Ruby v. Ruby*, 29 Ind. 174: "The contract of marriage imposes obligations of the highest legal and moral character, and should not be annulled or disturbed for slight or trivial causes; and, whilst this court may exercise a supervisory control in such cases over the action of the lower courts in cases clearly requiring it, still, where a divorce for such a cause has been refused, it should be a very clear case of an improper exercise of that power to justify this court in reversing the judgment of the lower court."

The court may have been somewhat influenced, in determining the value of the appellant's testimony, by a consideration of his apparent hastiness in entering into, as well as a lack of appreciation of the extent of, the marriage relation, and for other reasons clearly visible and impressive to the trial court and not to be seen here. The cause has been twice tried in the court below with the same result.

Judgment affirmed.

(43 Ind. A. 221)

**VANDALIA R. CO. v. McANINCH et al.**  
(No. 6,384.)

(Appellate Court of Indiana, Division No. 1.  
Jan. 29, 1909.)

**1. PLEADING (§ 204\*)—DEMURRER.**

Where one paragraph of a complaint containing several paragraphs is good, the complaint is not demurrable as an entirety.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 486; Dec. Dig. § 204.\*]

**2. APPEAL AND ERROR (§ 1040\*)—REVIEW—HARMLESS ERROR—OVERRULING DEMURRER.**

OVERRULING DEMURRERS to each of two paragraphs of a complaint is harmless error, where one of the paragraphs is insufficient, but the court made special findings of fact as to the other paragraph and based its judgment thereon.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1040.\*]

**3. RAILROADS (§ 108\*)—FENCES—CONSTRUCTION BY ABUTTING OWNER—RECOVERY OF COST FROM RAILROAD.**

Under Burns' Ann. St. 1908, §§ 5447, 5448, requiring railroads to build fences along their

right of way within a year, and providing for service of notice to construct, an owner of property abutting a railroad, who constructs a fence after failure of the railroad to comply with a notice given, may recover the cost of the fence from the railroad, though it appears that there was at one time a fence, but that for three years prior to the notice there had been none.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 103.\*]

Appeal from Circuit Court, Clinton County; Joseph Claybaugh, Judge.

Action by Valentine S. McAninch and another against the Vandalia Railroad Company to recover the cost of constructing a railroad fence. From a judgment for plaintiffs, defendant appeals. Affirmed, with 10 per cent. penalty.

Albert D. Thomas and Michael E. Foley, for appellant. Joseph Combs, for appellees.

WATSON, C. J. This was an action brought by the appellees against appellant in two paragraphs, in which judgment was recovered for the building of a fence along the right of way of appellant where appellee's land abuts on said right of way. The first paragraph of the amended complaint charged that the railroad had wholly failed to erect a fence along its right of way. The second paragraph proceeded upon the theory that a fence had theretofore been erected, but had been out of repair, so as to have become insufficient to prevent domestic animals going upon said right of way from said abutting land. Demurrers were addressed to each paragraph, as well as to the complaint as an entirety, which were overruled by the court and exceptions saved. The errors assigned in this court are: (1) The rulings upon these demurrers; (2) error in stating the conclusions of law upon facts found; (3) overruling motion for a new trial.

It is conceded that the first paragraph of amended complaint is good. If either paragraph is good, a demurrer to the complaint as an entirety should be overruled. *Green v. Eden*, 24 Ind. App. 583, 56 N. E. 240; *P. C. & St. L. R. R. Co. v. Reed*, 36 Ind. App. 67, 75 N. E. 50; *Brake et al. v. Payne*, 137 Ind. 479, 37 N. E. 140; *Maynard v. Waidlich*, 156 Ind. 562, 60 N. E. 348.

The special finding of facts discloses that there was at one time a fence along the side of the right of way of appellants where the real estate abutted on the same, but when and by whom it was built it does not disclose, nor how long since it has been destroyed; but the following further fact is found: "That on said date there was no fence along the side of said right of way abutting on said real estate, and had not been there for three years prior to the 11th day of July, 1905." The record discloses that appellant was served with notice by appellees to build said fence on July 11, 1905,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

as required under section 5448, Burns' Ann. St. 1908 (Acts 1885, p. 224, c. 91). This notice was given pursuant to the provisions of section 5447, Burns' Ann. St. 1908, which provides that railroads completed at the time of the taking effect of this act within 12 months, and roads thereafter completed within 12 months after completion, shall be required to fence their right of way and thereafter to maintain said fences. It also provides the kind of a fence to be erected and maintained. The special findings clearly show that the judgment herein was rendered on the first paragraph of the amended complaint. Therefore, if there be any error committed in overruling the demurrer to the second paragraph of the amended complaint, it was harmless. *Rohrof v. Schulte*, 154 Ind. 183, 55 N. E. 427.

In view of what we have said as to other assignments of error, we are of the opinion that the court did not err either in stating its conclusions of law upon the special facts found or overruling appellant's motion for a new trial. The law requiring railroads to fence their right of ways, except where same is exempted, is a wise and wholesome law. The primary object of the Legislature in the enactment of such a law was for the safety of the passengers upon the railroads.

An examination of the whole record in this case convinces us that the conclusions reached by the trial court were just and equitable, and the court by its findings and judgment meted out justice to the parties.

The judgment is affirmed, with 10 per cent. penalty thereon.

(43 Ind. App. 786)

**VANDALIA R. CO. v. COX.** (No. 6,335.)  
(Appellate Court of Indiana, Division No. 1.  
Feb. 3, 1909.)

Appeal from Circuit Court, Clinton County; Joseph Claybaugh, Judge.

Action by Florence M. Cox against the Vandalia Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed, with 10 per cent. penalty.

Albert D. Thomas and Michael E. Foley, for appellant. Joseph Combs, for appellee.

**HADLEY, J.** This was an action brought by appellee against appellant for reimbursement for money expended in constructing a fence along appellant's right of way through appellee's lands, under sections 5447, 5448, and 5449, Burns' Ann. St. 1908. Upon trial appellee was given judgment for the amount of her claim and \$25 attorney's fees.

The case in its substantial particulars is the same as the case of *Vandalia Railroad Company v. Valentine S. McAninch et al.* (No. 6,384, decided at the present term of this court), 86 N. E. 1031, and upon the authority of that case this cause is affirmed. Other questions are presented in this case, but they are all technical, unsubstantial, and without merit. The action of the appellant in the premises is indefensible.

Judgment affirmed, with 10 per cent. penalty thereon.

(43 Ind. App. 309)

**WILEY v. COMMONWEALTH LOAN & SAVINGS ASS'N OF INDIANA.**  
(No. 6,337.)

(Appellate Court of Indiana, Division No. 1.  
Jan. 27, 1909.)

**1. BUILDING AND LOAN ASSOCIATIONS (§ 39\*)  
— CONTRACTS — FALSE REPRESENTATIONS —  
DEFENSES.**

A bond given by a stockholder to a building and loan association bound him to the payment of a specified sum, with interest and premium, in monthly installments during the continuance of the loan, and provided that the loan should continue until the stock securing the bond matured under a by-law providing that it should mature when the amount of stock payments, together with its pro rata share of the dividends, equaled the par value of the same. The bond and certificate of stock each provided that payments on the stock should be limited to 98 monthly payments, but there was no declaration that payments on the loan were so limited. *Held*, that the stockholder could not defeat an action on the bond, and to foreclose a mortgage securing the same by showing false representations as to the construction of the contract, made at the time of the making of the loan.

[Ed. Note.—For other cases, see *Building and Loan Associations*, Cent. Dig. § 76; Dec. Dig. § 39.\*]

**2. BUILDING AND LOAN ASSOCIATIONS (§ 18\*)  
— CONTRACTS WITH BORROWING MEMBER —  
CONSTRUCTION.**

A bond given by a stockholder of a building and loan association to the association bound him to pay \$500, with interest and premium, payable in equal monthly installments during the continuance of the loan, and provided that the loan should continue until the stock securing it matured, under a by-law which provided that the stock should mature when the amount of stock payments, together with its pro rata share of the dividends, equaled the par value of the same. *Held*, that the court properly refused to credit the stock with the monthly payments of premium and interest, since to do so would give the stockholder the use of the money without payment of interest.

[Ed. Note.—For other cases, see *Building and Loan Associations*, Cent. Dig. § 23; Dec. Dig. § 18.\*]

Appeal from Circuit Court, Clinton County; Joseph Claybaugh, Judge.

Action by William H. Wiley against the Commonwealth Loan & Savings Association of Indiana, in which defendant filed a cross-complaint. From a judgment for defendant, plaintiff appeals. Affirmed.

John C. Farber, Higgins & Holloman, and S. M. Ralston, for appellant. B. F. Ratliff, for appellee.

**HADLEY, J.** This was an action brought by appellant against appellee to cancel a mortgage given by appellant's grantor to appellee. The complaint is in two paragraphs, the first of which avers that by the terms of the written contract between the parties the debt had been fully paid, and the mortgage should be released. The second paragraph avers the terms of the written contract, and also avers that the appellee had fraudulently and falsely construed said contract at the time of the making of the loan,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and thereby induced the mortgagor to enter into the same; that under the contract as so falsely construed the loan had been fully paid. Demurrers to each of said paragraphs were overruled. Appellee filed answer to each of said paragraphs, and also filed a cross-complaint, wherein the bond given for the debt and the mortgage to secure the same, a certificate of stock that was issued at the time of the making of the loan to appellant's grantor, and which was a part of the transaction and held by appellee to secure said bond, together with the by-laws of the association, referred to in said instruments, were exhibited. It is also shown that said mortgage and bond were executed by one Jones to appellee, and the certificate of stock issued to said Jones; that thereafter appellant purchased the land covered by said mortgage, and in his deed, as a part of the consideration of said transfer, assumed and agreed to pay said mortgage. Prayer for a judgment against appellant and foreclosure of said mortgage.

To this cross-complaint appellant answered in six paragraphs—the first, a general denial; the second, plea of payment; the third, a discharge by reason of the terms of the contract, as shown by the writings; the fourth and fifth, a discharge by reason of the writings as falsely and fraudulently represented and construed by appellee at the time of the making of the loan, whereby appellant's grantor was induced to enter into the contract; the sixth, a detailed plea of payment. The court sustained a demurrer to the third, fourth, and fifth paragraphs of this answer. Upon issues joined, trial was had by the court, and judgment rendered in favor of appellee. Appellant assails the ruling of the court upon the demurrers to the third, fourth, and fifth paragraphs of answer to the cross-complaint.

We do not deem it necessary to set out the terms of the bond, mortgage, certificate of stock, and by-laws, which together formed the contract and are exhibited by the cross-complaint and paragraphs of answer thereto under consideration, since the contract thus shown is in all the essential details substantially the same as is considered in the cases of Guaranty Savings, etc., *Ass'n v. Simko*, 35 Ind. App. 412, 74 N. E. 273, *Miller v. Wayne, etc., Ass'n*, 32 Ind. App. 480, 70 N. E. 180, *Wayne, etc., v. Gilmore*, 37 Ind. App. 146, 72 N. E. 190, and *Wayne, etc., v. Skelton*, 27 Ind. App. 624, 61 N. E. 951, and must be governed by the same rules as are therein laid down, which must be considered established, and a review or discussion of the same would be unprofitable.

Appellant has sought to distinguish this case from those cases; but the bond, mortgage, certificate of stock, and by-laws, all forming a part of the transaction, are exhibited, and will not bear the construction put upon them by appellant. The bond primarily binds the obligor to the payment of

\$500, together with 6 per cent. interest and 6 per cent. premium per annum, payable in equal monthly installments during the continuance of the loan; and it is provided that the loan shall continue until the stock, which is held to secure the bond, matures under section 43 of the by-laws. Section 43, referred to, provides that the stock shall mature when the amount of stock payments, together with its pro rata share of the dividends, shall equal the par value of the same. The bond and certificate of stock each provides that payments on the stock shall be limited to 96 monthly payments, but nowhere is there a declaration that payments on the loan are so limited. There is some circumlocution in arriving at the exact contract; but the different parts are all connected and referred to in such a way that an ordinarily careful reading of the various instruments discloses the whole contract with clearness. The fourth and fifth paragraphs of answer to the cross-complaint averred substantially the same acts of fraud and misrepresentation as are alleged in *Wayne, etc., Association v. Gilmore*, supra, and *Guaranty Savings, etc., Association v. Simko*, supra, and the rules given in those cases must be applied here.

Appellant also insists that the amount of the recovery is too large, for the reason that the court refused to credit the stock with the monthly payments of premium and interest. This position is untenable, since such a construction would be permitting appellant to pay the interest and premium to himself. Appellant's own figures show that in such a case appellant would have the use of \$500 for eight years, and during that time would pay in \$720, and at its expiration would receive \$774.41 with which to repay his loan, thereby having free use of \$500 for said term and in addition receiving \$54.41 clear profit. Where the profit is to come from is not shown. If, as appellant contends, this premium and interest should have been paid into the loan fund, it could only be apportioned and credited upon the stock as dividends, and then only as earnings after the payment of expenses after July, 1897. It is true that prior to said last-mentioned date all earnings that went into the loan fund had to be apportioned to the stock, except, perhaps, what might be necessary to recoup losses; but after said date it was provided by the by-laws, in compliance with the law enacted at that time, that the expense fund should be abolished and receipts therefor turned into the loan fund, and all expenses paid out of the earnings in the loan fund. This being true, it does not appear that there was any portion of the loan fund that was not properly applied to appellant's stock as dividends, and upon the evidence the amount was properly assessed.

We have considered all of the questions properly presented, but have not entered into an extended discussion in this opinion, for

the reason that it could only be a repetition of what has already been said in the cases cited.

Judgment affirmed.

(43 Ind. A. 167)

**BARBER ASPHALT PAVING CO. v. CITY OF WABASH.** (No. 6,257.)

(Appellate Court of Indiana, Division No. 1.  
Jan. 28, 1909.)

**1. MUNICIPAL CORPORATIONS (§ 339\*)—PUBLIC IMPROVEMENT—CONTRACTS—CONFORMITY TO PREVIOUS NEGOTIATIONS—TIME LIMIT.**

Though preliminary negotiations, specifications, and bids for a street improvement are silent as to when the work must be completed, still the city may insert a time limit in the contract as finally entered into with the contractor, since such power will be implied from the general power and duty as to streets, and from the fact that the improvement was one which must be made in the summer time, and hence made it necessary to place a time limit thereon.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 339.\*]

**2. EVIDENCE (§ 6\*)—JUDICIAL NOTICE—SEASONS—LAWS OF NATURE.**

Courts take judicial knowledge of the seasons of the year.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 5; Dec. Dig. § 6.\*]

**3. EVIDENCE (§ 5\*)—JUDICIAL NOTICE—COMMON KNOWLEDGE—TIME OF PAVING STREETS.**

Courts know, as a matter of common knowledge, that certain pavements for city streets are not laid in the winter months.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4; Dec. Dig. § 5.\*]

**4. MUNICIPAL CORPORATIONS (§ 362\*)—PUBLIC IMPROVEMENTS—CONTRACTS—TIME LIMIT—WAIVER OF PROVISION.**

Where a contract to pave a city street provides that, on failure to complete the work in time, the contractor will pay to the city \$25 a day liquidated damages, the city does not waive its right to collect the damages by the fact that the cost of the improvement is charged both against the city and the abutting owners, and the assessment on the owners was made without respect to such damages.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 362.\*]

**5. DAMAGES (§ 83\*)—LIQUIDATED DAMAGES OR PENALTY—QUESTION FOR COURT.**

Whether a per diem payment, to be made on failure to complete a contract for paving a city street in time, is a penalty or liquidated damages is purely a question for the court.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 83.\*]

**6. DAMAGES (§ 78\*)—LIQUIDATED DAMAGES OR PENALTY—CONTRACTS—STREET IMPROVEMENT—"FORFEIT."**

A contract for the improvement of a city street provided for completion before October 1st, and for a failure to complete the contractor agreed to "pay and forfeit" to the city as "liquidated damages" the sum of \$25 per day after October 1st. Held that, though the word "forfeit" ordinarily means "penalty," its meaning, like that of the words "liquidated damages," is to be determined by the connection in which it is used, and in view of the fact that it was necessary to complete such improvement in the summer months, and damages might reasonably flow from a failure to complete within

the time limited, the damages will be considered liquidated damages, and not a penalty, regardless of whether the city actually suffered damages by the delay.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 157-163; Dec. Dig. § 78.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2893-2899; vol. 8, p. 7665.]

Appeal from Circuit Court, Wabash County; A. H. Plummer, Judge.

Action by the Barber Asphalt Paving Company against the City of Wabash to recover on a street paving contract. From a judgment entered on sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Wilson & Townley, for appellant. Shiveley & Switzer, for appellee.

**MYERS, J.** By this action appellant sought to collect from appellee \$750 on account of a written contract entered into between appellant and appellee for the improvement of a certain street in the city of Wabash pursuant to the provisions of an act of the General Assembly of this state, approved March 11, 1901 (Acts 1901, p. 534, c. 231). The complaint was in one paragraph, to which a demurrer for want of facts was sustained. Plaintiff refused to plead further, and judgment was rendered against it and in favor of appellee for costs.

From the complaint it appears that the contract in question called for the improvement of a certain portion of Wabash street in the city of Wabash according to certain plans and specifications relative thereto and made a part of said contract. Neither the plans, specifications, demand for bids, nor did appellant's bid or the acceptance of its bid, contain any provision fixing a time certain for the completion of the work, but the written contract subsequently entered into did provide that "said improvement shall be finally and in all respects completed on or before the first day of October, 1901, and the party of the first part agrees to pay and forfeit to the city of Wabash as liquidated damages, the sum of twenty-five dollars (\$25) for each and every day after said first day of October, 1901, until said work is finally completed and ready for acceptance by the party of the second part." Said specifications, among other provisions contained the following: "The work shall be commenced and carried on to completion at such points as the city engineer may designate; no square shall be blocked except where the contractor is actually working, and each square, as soon as the pavement is laid, at the discretion of the engineer, shall be thrown open to public use; but such openings or using of the street shall not be deemed or held to be an acceptance of any part of the work; the engineer from time to time may suspend the work at certain places, or altogether, if, in his opinion, public need requires it; but said engineer shall not

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

have the right to stop the work altogether for more than one week at a time excepting that, whenever in the opinion of said engineer, the weather is not suitable for doing work, he may cause the work to be suspended." It is also shown that the proposed improvement was more than 3,000 feet in length and intersected by a number of cross streets; that appellant, pursuant to said contract, entered upon the work of making said improvement, but failed to complete the same until October 31, 1901; that pursuant to law the cost (\$26,807.38) of making said improvement was assessed in part against said city, and the balance against the property abutting the improved portion of said street; that the amount so assessed against the abutting property has been paid, as well as the amount assessed against said city, except said sum of \$750, which said city refused to pay solely because of appellant's delay in the completion of said work. The complaint also states "that the defendant was not damaged or injured in any sum whatever by plaintiff's delay in the completion of said improvement."

The parties to this appeal by their briefs, under the heading "propositions or points" (Rules of the Supreme and Appellate Courts, § 22, cl. 5 [55 N. E. vi]), present but one question, and that question rests on the effect to be given that stipulation in the contract relating to the time when the work shall be completed and ready for acceptance. If this stipulation is to be construed as fixing a penalty, the judgment must be reversed. If it is a case of liquidated damages the judgment must be affirmed. Appellant, in connection with the above question, has submitted for our consideration certain other questions, which we will first notice. Appellant insists that the above stipulation was for the benefit of the abutting property owners, and, as the city did not consider them in making the assessments against the abutting property, it thereby waived its right to insist upon the payment of any damages for delay, citing *Gulick v. Connely*, 42 Ind. 134, 136; that such stipulation was invalid for the reason that the procedure in cases of this kind is governed by statute, and as the statute is silent on that subject, the common council had no authority to include it in the contract, and because there was no new consideration moving to the contractor to assume any obligation other than those named in the specification, citing *State v. Common Council*, 138 Ind. 455, 463, 37 N. E. 1041. In the case last cited the opinion discloses that the common council had instructed the mayor, on behalf of the city, to enter into a certain contract, and the question in that case was whether the mayor had exceeded his authority; the contract as signed not having been approved by the council. In the case before us there is no claim that the contract was not duly entered into on the part of the city, or that it was not the contract of appellant. Appellant proceeded under the contract. All

the rights it claimed were by virtue of the contract, and any burden it may have legally incurred thereby was enforceable unless released in some manner authorized by law.

While the preliminary proceedings had by the city did not call for a time limit for the completion of the work, yet upon the theory that cities have no right to obstruct streets for an unreasonable length of time in making public improvements (*Cummins v. City of Seymour*, 79 Ind. 491, 495, 41 Am. Rep. 618), and in the making of such improvements they act ministerially, and their negligence may be the basis of an action (*Murphy v. City of Indianapolis*, 158 Ind. 238, 63 N. E. 469), and being required by law to exercise reasonable care to keep the streets in a safe condition for travel (*City of Muncie v. Hey*, 164 Ind. 570, 74 N. E. 250; *City of Vincennes v. Spees*, 35 Ind. App. 389, 74 N. E. 277), and having the power to contract for the making of the improvements, carries with it the implied power necessary to make this contract effective (*Boyce v. Tuhey*, 163 Ind. 202, 70 N. E. 531). The council having in mind these, as well as other well-settled principles of law relative to its duty regarding streets and its power over the same, no doubt desired a speedy consummation of the proposed improvement, and to that end had the stipulation in question inserted in the contract. It has been held that after bids have been received for a street improvement, council may include extra work not specified in the improvement ordinance or in the advertisement for bids, and assess the cost of such work against the abutting property. *Boyd v. Murphy*, 127 Ind. 174, 25 N. E. 702. The holding in that case goes farther than we are required to go in order to uphold the action of the council in requiring a time limit. Courts take judicial knowledge of the seasons of the year (*Wasson v. First National Bank*, 107 Ind. 206, 219, 8 N. E. 97), and it is a matter of common knowledge that in this climate street improvements of the character contemplated by the parties are not made during the winter months, and for that reason the council in awarding the contract was interested in having the improvement made during seasonable weather, and the streets cleared before the time when climatic conditions were likely to stop the work. The fact of appellant's agreement to complete the work within a specified time, for aught that appears, might have been an inducement for the council to enter into the contract with appellant, and of itself a consideration sufficient to support the stipulation. The *Connely* Case cited by appellant was one where the property owner sought to have his assessment reduced by reason of a provision in the contract, which provided "that five per centum per month should be deducted from the assessment of all work done after the extension of the time of the completion of the contract." Held that the time to enforce the provision was when the last assessment was allowed, and that

the provision was enforceable or not at the option of the city. In the case at bar more than \$4,000 of the cost of the improvement was assessed against appellee, and the complaint shows that all of said sum had been paid except \$750. Here the provision is that appellant "agrees to pay and forfeit to the city of Wabash as liquidated damages" the sum of \$25 for each and every day, etc. Its promise was made to the city. The city retained \$750 of the amount due from it to appellant. These facts are far from showing a waiver on the part of the city to claim the benefit of the breach of the contract to complete the work within the specified time, and the Connelly Case, as to this question, is not in point. Again, referring to the language of the contract in question, Is the per diem payment to be regarded in the nature of a penalty, or as liquidated damages? This is purely a question for the court (2 Parsons on Contracts [9th Ed.] \*492), and it may well be said that it is one, as here presented, not easily answered, for the reason there are but few well-established rules applicable alike to all cases of this character. Many cases will be found in the books, but as a rule they are made to rest upon facts peculiar to the individual case. The case here is one to be determined from the contract. The breach is admitted, and the complaint alleges that no damages whatever resulted to appellee because of the breach. Such an allegation might be important in some cases, but of slight weight in this case, when we consider the language employed, the situation of the parties, and the subject-matter of the agreement at the time it was made. It is clear that the parties could not say in advance, whether a failure to complete the work within a given time would result in considerable damages or none at all. Heretofore in this opinion we have given some attention to the importance of an early completion of the improvement, and what we then said is pertinent in determining the question of the intention of the parties, which is often taken by the courts as a controlling guide in determining cases of this class. When the contract was entered into we assume that appellant was acting in good faith, and believed that 47 days was time enough in which to do the work, but, for some reason not given, 30 additional days were required.

The appellant largely relies upon the word "forfeit," found in the stipulation above quoted, to maintain its contention that the contract calls for actual damages only. At the time of making the contract nor is there now any rule or pecuniary standard by which to measure all damages which might result to the abutting property owners or to the city or the users of the street by reason of unnecessary delay in completing the work. The subject being one where the question of damages might likely arise, it was proper for the parties to agree upon such damages in

advance, and have their agreement enforced, unless to do so would work an absurdity or be unduly oppressive. *Menges v. Milton Piano Co.*, 96 Mo. App. 283, 70 S. W. 250. Nothing appearing in this case to take it without the general rule, appellant will not be heard to say, on finishing the work, and after making certain that which at the time was uncertain and conjectural and difficult to prove, that no loss did actually result from its breach of the contract. The word "forfeit" ordinarily imports a penalty, but not necessarily so. Its meaning is determined, like the words "liquidated damages," by the connection in which it is used. *Merica v. Burget*, 86 Ind. App. 453, 75 N. E. 1083; *Chaudé v. Shepard*, 122 N. Y. 397, 25 N. E. 358; *Noyes v. Phillips*, 60 N. Y. 408; *Ex parte Alexander*, 39 Mo. App. 108; *Pogue v. Ke-weah Power & Water Co.*, 138 Cal. 664, 72 Pac. 144; *Eakin v. Scott*, 70 Tex. 442, 7 S. W. 777; *Wibaux v. Grinnell Live-Stock Co.*, 9 Mont. 154, 22 Pac. 492; *Mayne on Dam.* (5th Ed.) 146; *Pastor v. Solomon*, 28 Misc. Rep. 125, 55 N. Y. Supp. 956; 3 Parsons on Contracts (9th Ed.) \*167; *Streeper v. Williams*, 48 Pa. 450. The court, in *People v. Love*, 19 Cal. 676, in speaking of the word "penalty," said: "For determining whether a specified sum was intended and must be treated as a penalty or as liquidated damages it is a well-established principle of construction that it will be treated and enforced as liquidated damages, where it is agreed to be paid for doing, or failing to do, an act in respect to which the damages are uncertain and not measurable by any exact pecuniary standard." In the case of *Hall v. Crowley*, 87 Mass. 304, 81 Am. Dec. 745, the court had under consideration the effect of the word "forfeit" as used in a contract containing the following clause: "For each and every day's delay in the completion of said houses after December 1st, said Hall is to forfeit \$5." The court, after concluding that the sum named was reasonable, and should be treated as liquidated, and so intended by the parties, said: "In cases of this nature, where the intent of the parties is so clear, the use of the word 'forfeit,' in the clause providing for damages in case of a breach, is not regarded as of much weight"—citing *Lynde v. Thompson*, 2 Allen (Mass.) 456. This court, in the case of *Merica v. Burget*, supra, following the rule declared by the court in *Jaqua v. Headington*, 114 Ind. 309, 16 N. E. 527, said: "That where the sum named is declared to be fixed as liquidated damages is not greatly disproportionate to the loss that may result from a breach, and the damages are not measurable by any exact pecuniary standard, the sum designated will be deemed to be stipulated damages." *Texas & St. L. Ry. Co. v. Rust* (C. C.) 19 Fed. 239, 241; *Studabaker v. White*, 31 Ind. 211, 99 Am. Dec. 628. In *Nilson v. Jonesboro*, 57 Ark. 168, 20 S. W. 1093, the town had granted to Nilson

and others the right, for a term of years, to lay tracks and operate a street railroad in certain streets within the town. The contract contained a stipulation requiring the completion of the road within a specified time. For the breach of that stipulation it was provided that the parties holding the right should forfeit the privileges granted by the town, and should "also forfeit and pay the sum of \$500" to the town. The breach was admitted, and the actual damages to the town by virtue of the breach agreed to be \$50. The question in the case was whether the stipulated sum should be considered as a penalty or as liquidated damages. In considering the case the court said: "In the case at bar the appellee is a municipal corporation, and could not in its corporate capacity suffer any injury by a breach of the contract. If an actual loss was contemplated by the stipulation in question, it could only therefore have been such as would result to the public. And as the parties must have known that it was wholly impracticable to measure this by any rule of damages, it is reasonable to suppose that they intended to fix, by the terms of the contract, the precise sum recoverable by its breach. *Clark v. Barnard*, 108 U. S. 436, 460, 2 Sup. Ct. 878, 27 L. Ed. 780. The stipulated sum is not so large as to be suggestive of an intention to make it a penalty, and no argument in favor of treating it as such can be drawn from the form or language of the instrument. The phrase 'forfeit and pay,' found in the third clause, when construed with all the other provisions of the contract, cannot be reasonably taken to have any other meaning than that, in the contingency there mentioned, the appellants would become liable to pay, and should pay, to the appellee the sum of \$500." Appellant insists that under the part performance rule, applicable to contracts of the character in question, the sum named should be construed as a penalty, and not as liquidated damages. The pleaded facts do not bring the case within that rule. For aught that appears a greater part of this improvement may have been done after the time fixed in the contract for its completion.

Judgment affirmed.

(44 Ind. App. 35)

WILSON v. FAHNESTOCK. (No. 6,300).<sup>1</sup>

(Appellate Court of Indiana, Division No. 2. Jan. 27, 1909.)

**1. JUDGMENT (§ 519\*)—ACTION ON JUDGMENT—COLLATERAL ATTACK.**

An action on a judgment, the record of which discloses no agreement for the satisfaction thereof, but which only shows a recital of the filing of a receipt acknowledging satisfaction forming no part of the judgment, is not a collateral attack on the judgment.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 519.\*]

**2. EVIDENCE (§ 408\*)—PAROL EVIDENCE—RECEIPT.**

A paper acknowledging satisfaction of a judgment of which it forms no part is a mere receipt, and may be contradicted or explained.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1829-1842; Dec. Dig. § 408.\*]

**3. EXECUTORS AND ADMINISTRATORS (§ 224\*)—CLAIMS—FILING OF CLAIMS.**

Where a wife was induced to sign a satisfaction of a judgment for alimony while of unsound mind, and she continued of unsound mind until her death, which occurred after the death of the husband, it was necessary to file the judgment as a claim against decedent's estate in order to recover the alimony awarded.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 224.\*]

**4. INSANE PERSONS (§ 66\*)—SATISFACTION OF JUDGMENT—CAPACITY TO EXECUTE—DISAFFIRMANCE.**

Where a wife, while of unsound mind, executed a satisfaction of a judgment for alimony, and she continued to be of unsound mind until her death, occurring after the death of the husband, the filing of the judgment as a claim against her husband's estate was a sufficient disaffirmance of the satisfaction.

[Ed. Note.—For other cases, see Insane Persons, Dec. Dig. § 66.\*]

**5. PLEADING (§ 194\*)—DEMURRER—ANSWER TO PART OF COMPLAINT.**

Where, in an action on a judgment for alimony, the complaint alleged that plaintiff's testatrix signed a satisfaction while of unsound mind, and that she continued to be of unsound mind until her death, an answer directed to the whole complaint, but which did not deny or avoid the allegation of mental unsoundness, was demurrable.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 194.\*]

**6. INSANE PERSONS (§ 73\*)—CONTRACTS—VALIDITY.**

A contract of a person of unsound mind, but who has not been judicially determined to be insane, is voidable.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 133; Dec. Dig. § 73.\*]

**7. INSANE PERSONS (§ 97\*)—ACTIONS—PLEADINGS—SUFFICIENCY.**

Where, in an action on a judgment for alimony, the complaint alleged that testatrix acknowledged satisfaction of the judgment while of unsound mind, and that she continued to be of unsound mind until her death, an answer alleging that the contract was entered into in good faith and on sufficient information and was understood by the parties to secure to testatrix a fair provision, and that the husband had no knowledge of the mental unsoundness of testatrix, was insufficient to meet the allegations of mental unsoundness.

[Ed. Note.—For other cases, see Insane Persons, Dec. Dig. § 97.\*]

**8. CONTRACTS (§ 111\*)—VALIDITY—ALIMONY—PUBLIC POLICY.**

A contract, purporting to satisfy a judgment for alimony not in existence, entered into pending a suit for divorce, and conditioned on judgment for divorce being granted, is void as against public policy.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 517; Dec. Dig. § 111.\*]

**9. CONTRACTS (§ 138\*)—INVALIDITY—EFFECT—ESTOPPEL.**

One who has derived benefit from a contract void as against public policy is not es-

<sup>1</sup>For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
<sup>2</sup>Rehearing denied. Transfer to Supreme Court denied.

topped thereby to defend against such contract when it is sought to be enforced against him.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 690; Dec. Dig. § 138.\*]

**10. INSANE PERSONS (§ 97\*)—ACTION—ISSUES—EVIDENCE.**

Where, in an action on a judgment for alimony, the complaint alleged in one paragraph that the receipt acknowledging satisfaction of the judgment was executed and delivered before the rendition thereof and pending the action for divorce, and alleged in another paragraph that the receipt was executed after the judgment of divorce and when the wife was of unsound mind, in which condition she remained until her death, evidence of mental unsoundness of the wife was admissible.

[Ed. Note.—For other cases, see *Insane Persons*, Dec. Dig. § 97.\*]

**11. EXECUTORS AND ADMINISTRATORS (§ 92\*)—CONTRACTS OF DECEDENT—DISAFFIRMANCE.**

A contract of a person of unsound mind, but not judicially declared incompetent, may be avoided by his representative, where such person continued incompetent until death.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 403; Dec. Dig. § 92.\*]

**12. JURY (§ 12\*)—RIGHT TO TRIAL BY JURY—ACTIONS.**

Where, in an action on a judgment for alimony, the complaint alleged that testatrix prior to the rendition of the judgment executed a satisfaction thereof without consideration, and the answer was a general denial, the issues were triable by jury.

[Ed. Note.—For other cases, see *Jury*, Dec. Dig. § 12.\*]

Appeal from Circuit Court, St. Joseph County; Walter A. Funk, Judge.

Action by Sarah M. Wilson, executrix of Carrie B. Fahnestock, deceased, against Augustus A. Fahnestock, administrator of Camillus S. Fahnestock, deceased. From a judgment for defendant, plaintiff appeals. Reversed, with instructions.

Osborn, McVey & Osborn and Hickey & Wolfe, for appellant. W. B. Biddle, for appellee.

COMSTOCK, P. J. Appellant, as executrix of Carrie B. Fahnestock, deceased, sought to recover on a judgment for alimony rendered in favor of the appellant's testatrix and against the appellee's intestate in the Laporte circuit court on October 8, 1899. A trial was had by the court, a special finding of fact and the conclusions of law stated, and over a motion for a new trial judgment was rendered in favor of appellee.

The complaint is in two paragraphs. The first, omitting the caption, alleges, substantially: That the plaintiff was duly appointed executrix of the last will and testament of Carrie B. Fahnestock, deceased, and qualified as such executrix on the 19th day of November, 1903; that on the 8d day of October, 1899, the said Carrie B. Fahnestock recovered a judgment for alimony in the Laporte circuit court against said Camillus S. Fahnestock in the sum of \$5,000 (setting out copy

of the judgment); that prior to the rendition of said judgment and on the 2d day of October, 1899, the said Carrie B. Fahnestock was induced by said Camillus S. Fahnestock to sign what purported to be a receipt and satisfaction of said judgment, but that the same was without any consideration whatever, and was signed and executed by the said Carrie B. Fahnestock before said divorce proceeding was tried and before alimony in any sum had been allowed by the court; that said judgment is due and unpaid. The second paragraph of complaint differs from the first only in that it is alleged therein that for a long time prior to the rendition of said judgment the said Carrie B. Fahnestock was, and up to the time of her death continued to be, of unsound mind and incapable of transacting ordinary business affairs, and that on the 2d day of October, 1899, while incapacitated as aforesaid, she was induced by the said Camillus S. Fahnestock to sign, etc. Said judgment as it appears from each paragraph of complaint reads, in part, as follows: "And it is further ordered and adjudged by the court that the defendant recover of and from the plaintiff as alimony the sum of \$5,000, all of which is ordered, adjudged and decreed. And now again come the parties, and the defendant herein files her receipt by which she acknowledges the payment of said sum of \$5,000 as above allowed. It is further ordered and decreed that the defendant pay the costs of this action."

The appellee answers in four paragraphs: (1) General denial. (2) Plea of payment. (3) Setting out: That after the commencement of the action for a divorce the parties through their respective attorneys entered into an agreement concerning their property rights, whereby it was agreed that should said divorce be granted a judgment for \$5,000 alimony should be entered subject to the conditions for payment and satisfaction thereof pursuant to a contract (set out) providing, among other things, that in consideration of the release and satisfaction of a judgment for alimony in the sum of \$5,000 awarded Carrie B. Fahnestock in the Laporte circuit court on the 2d day of October, 1899, said Camillus S. Fahnestock is to pay to the first-named party the sum of \$5,000, as follows, etc.; that said contracts were signed on the 2d day of October, but were not delivered until after the rendition of said judgment; that said judgment would not have been rendered if contract had not been relied upon; that the said Carrie B. Fahnestock received and has retained each and all the several payments until her death; that she nor her executrix has ever tendered or offered to return any of said moneys or things before filing said claim; and that the plaintiff and his intestate have fully performed all the conditions of said contract. The fourth paragraph of answer is substantially the same, except

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

that it presents the facts more specifically than the third as in estoppel.

A demurrer to the third and fourth paragraphs of answer respectively was overruled, and the appellant replied: (1) A verified general denial. (2) That "the paper writing and receipt set out in defendant's third paragraph of answer, purporting to be a copy of a contract and receipt executed between the said Carrie B. Fahnestock and Camillus S. Fahnestock, was never executed by the said Carrie B. Fahnestock, but that some time prior to the granting of the divorce mentioned in said defendant's third paragraph of answer, said Camillus S. Fahnestock induced the said Carrie B. Fahnestock to sign her name to said paper writing and receipt; that at the time the said Carrie B. Fahnestock was induced to sign said paper writing and receipt she was of unsound mind and unable to understand, and did not understand any of the terms and conditions of said purported contract and receipt, and that she continued to be of unsound mind up to the date of her death, and that she never received any consideration for signing said pretended contract or receipt." (3) That "the plaintiff admits that said pretended contract and receipt set up in defendant's third paragraph of answer were signed by plaintiff's intestate, Carrie B. Fahnestock, but that said pretended contract and receipt were signed and delivered by the parties prior to the 3d day of October, 1899, and prior to the rendition of the judgment for alimony in said cause; that said agreement mentioned in said contract set forth in defendant's third paragraph of answer was never adopted by the court trying said cause for divorce, and said receipt was signed and delivered, without consideration, before the rendition of said judgment for alimony to the said Camillus S. Fahnestock, and by his attorney filed without the knowledge of the said Carrie B. Fahnestock." (4) That prior to the 3d day of October Camillus S. Fahnestock was the husband of Carrie B. Fahnestock, and said parties resided in the city of Laporte, Ind.; that Camillus S. Fahnestock was a noted and eminent physician about 50 years of age, in good health, and had a large amount of property and earning from \$7,000 to \$9,000 annually; that prior to the above date, the said Carrie B. Fahnestock was weak in body and mind, and had been for some time prior thereto, and for said reason said Camillus S. Fahnestock was very anxious to secure a divorce from said Carrie B. Fahnestock; that on the 19th day of September, 1899, said Camillus S. Fahnestock instituted divorce proceedings against the said Carrie B. Fahnestock in the Laporte circuit court, setting up the fact of her mental condition, as a cause for said divorce, and while she was being treated for said mental disease, and was unable by reason of said disease to understand or appreciate or know what was transpiring with relation to her affairs; that the attorney who repre-

sented the said Carrie B. Fahnestock in said divorce proceedings was employed by the husband and paid by him; that the husband had prepared the paper writing set forth in defendant's third paragraph of answer and purporting to be a contract in settlement of alimony awarded the said Carrie B. Fahnestock in said divorce proceeding, and also what purported to be a receipt for said sum of \$5,000 alimony, and secured the signature of the said Carrie B. Fahnestock to said paper writing and receipt while she was in the condition aforesaid; that the pretended contract and receipt were prepared and her signature was obtained before the granting of said divorce, and before the rendition of said judgment for alimony, and that the same had never been ratified by her or any one acting or having authority to act in her behalf; that prior to the 3d day of October, 1899, an oral agreement was made by the parties to the said divorce proceeding, whereby the said Camillus S. Fahnestock agreed that a judgment of \$5,000 be entered against him in said divorce proceeding, and that he would pay to the said Carrie B. Fahnestock the sum of \$25 per month, etc.; that as a confirmation of said oral agreement said judgment was entered, and said Camillus S. Fahnestock paid to said Carrie B. Fahnestock, or caused to be paid, the sum of \$25 per month up to the time of her death on the 6th day of September, 1903. Wherefore the plaintiff demands judgment, etc. The replies filed to the fourth paragraph of answer are identical with those filed to the said third paragraph. A demurrer to the second, third, and fourth paragraphs of reply to the third and fourth paragraphs of answers were respectively overruled. The cause was tried by the court, a special finding of facts made, and conclusions of law stated thereon, and judgment rendered in favor of appellee. Many errors are assigned. A part of them only need be considered.

It is insisted by appellee that the action is a collateral attack upon the judgment. The claim must be disallowed. It is a proceeding upon the judgment, the satisfaction of which was not in issue. The record discloses no agreement for the satisfaction of the judgment. The recital of the filing of the receipt is not a part of the decree. It is a receipt which may be contradicted or explained.

It is also insisted that there should have been a disaffirmance before the commencement of the suit, and that there has been laches. Unsoundness of mind from the signing of the contract to the death of the testatrix is alleged. The testatrix died after appellee's intestate. It was necessary to file the claim against his estate. The claim was filed within ——— months after the death of the testatrix. There was no laches, and the filing was sufficient disaffirmance.

The third and fourth paragraphs of answer each purports to answer the entire complaint. If either fails to do this, it is not

good. State ex rel. v. Tomlinson, 16 Ind. App. 677, 45 N. E. 1116, 59 Am. St. Rep. 335; Walker v. Walker, 150 Ind. 317, 50 N. E. 68, and cases cited.

Neither the third nor fourth paragraphs of answer denies or avoids the allegations of unsoundness of mind. They were material. The contract made, under the circumstances alleged, the testatrix not having been judicially determined to be of unsound mind, was voidable. It could not have been disaffirmed by her; her mental unsoundness continuing until her death. *Atna Life Ins. Co. v. Sellers*, 154 Ind. 370, 373, 56 N. E. 97, 77 Am. St. Rep. 481; *Teegarden v. Lewis*, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9; *Somers v. Pumphrey*, 24 Ind. 231. The allegations in said answers as to unsoundness of mind are as follows: "That said contract was entered into in good faith and upon sufficient information and understood by said parties and their attorneys of the financial circumstances of said Camillus S. Fahnestock, for the purpose of securing to the said Carrie B. Fahnestock a fair and liberal provision and maintenance without any knowledge or belief by said Camillus S. Fahnestock or his attorney that Carrie B. Fahnestock was then of unsound mind." This does not meet the allegations of unsoundness of mind of said testatrix.

The answer shows: That the contract and receipt is a contract relating to alimony made during the pendency of a suit for divorce executed before the rendition of the decree; that its performance was conditioned upon a decree, "should a divorce be granted"; "that said contract and receipt were held by said attorneys under the agreement that, if a divorce should be granted as aforesaid, plaintiff by his attorney should consent to the rendition against him of said judgment." It purported to be a satisfaction of a judgment not in existence. The manifest purpose of the contract was to facilitate the procuring of the divorce. The wife would have been probably without remedy, if, during the five years the contract was to run, the husband had disposed of his property or gone beyond the jurisdiction of the court. The provision of \$25 a month for support of the wife was providing for a duty already imposed upon him. In *Moon v. Baum*, 58 Ind. 194, the Supreme Court said: "It is not competent for a husband and wife to make a valid agreement as to alimony, during the pendency of a suit of divorce, independent of the sanction of a decree for divorce. The agreement set out in the complaint must therefore be held as voluntary on the part of Andrew Baum. An action will not lie to reform a voluntary agreement—one which the party is not bound to execute." In *Evans v. Evans*, 93 Ky. 510, 20 S. W. 605, the wife brought suit for divorce and alimony, and the husband set up a contract in defense

thereof that no suit was to be brought for alimony for the period of one year. The court in the course of its opinion say: "Such a contract should not be upheld. It is in violation of public policy, it is inconsistent with the full course of justice, and it is not reasonable and just to the wife. The husband, during the period covered by the contract, might dispose of his entire estate. It would likely work a defeat of justice, and render the innocent and unoffending wife a pauper. It does not fully protect her rights, and should not therefore be enforced. *Browne, Divorce, Alimony*, p. 270." See, also, *Fredericks v. Sault*, 19 Ind. App. 604, 49 N. E. 909; *Scherer v. Scherer*, 23 Ind. App. 384, 55 N. E. 494, 77 Am. St. Rep. 437; *Watson v. Watson*, 37 Ind. App. 548, 77 N. E. 355; *Walters v. Hutchin's Adm'r*, 29 Ind. 137; *Everhart v. Puckett*, 73 Ind. 409; *Wilde v. Wilde*, 37 Neb. 891, 56 N. W. 724; *Hamilton v. Hamilton*, 89 Ill. 349; *Thompson v. Thompson*, 132 Ind. 288, 31 N. E. 529; *Stokes v. Anderson*, 118 Ind. 533, 21 N. E. 331, 4 L. R. A. 313; *Greenhood, Public Policy*, pp. 490-491, § 9. As we have stated, the fourth paragraph of answer presented the facts as an estoppel. A person who has derived benefit from a contract which is void as against public policy is not estopped thereby to defend against such contract when it is sought to be enforced against him. *Brown v. First Nat. Bank*, 137 Ind. 655, 672, 37 N. E. 158, 24 L. R. A. 206.

Appellant sought to prove the mental condition of Mrs. Fahnestock at the time of the divorce proceedings and the execution of the receipt. This evidence was excluded. The first paragraph of complaint alleged that the receipt was executed and delivered before the rendition of the judgment. The second paragraph is framed upon the theory that it was not executed until the marriage had been dissolved, and when the testatrix was of unsound mind; and in which condition she remained until her death. If appellant should fail to sustain the first paragraph of complaint by reason of the fact that said release and contract were delivered after the decree was rendered, then she should be permitted to introduce evidence of unsoundness of mind, whether the contract and receipts were executed for valuable consideration or no consideration, for, if she was of unsound mind, she or her representative had the right to avoid the same.

Appellant requested in writing that the issues of fact set forth in the first and second paragraphs of the complaint be tried by jury. The request was refused. As to the first, it should have been granted.

Judgment reversed, with instructions to sustain appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

(237 Ill. 434.)

**PEOPLE, to Use of STATE BOARD OF PHARMACY, v ZITO et al.**

(Supreme Court of Illinois, Dec. 15, 1908.  
Petition for Rehearing Stricken  
Feb. 5, 1909.)

**1. STATUTES (§ 164\*)—REPEAL—AMENDATORY ACTS—EFFECT.**

In the absence of any constitutional or legislative provision on the subject, an amending act may operate as a repeal of the statute amended but the general rule is that an amendment is only a repeal as to the portions of the original act left out of the amendment, and as to the portions unchanged, in form or substance, the amendatory act is a mere continuation of the original act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 239; Dec. Dig. § 164.\*]

**2. STATUTES (§ 278\*)—CONSTRUCTION—PROSPECTIVE OPERATION.**

Rev. St. 1874, c. 181, providing general rules for the construction of statutes, and the effect of amendatory acts as a repeal, and providing expressly that the rule shall be observed as to all statutes in force at the time of its enactment or which might thereafter be enacted, cannot be limited to statutes in force at the time of its passage.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 376; Dec. Dig. § 278.\*]

**3. STATUTES (§ 178\*)—CONSTRUCTION—INTENT OF LEGISLATURE.**

Where by statute the Legislature lays down general rules for the construction of statutes, the rules are only to be observed when such construction would not be inconsistent with the manifest intention of the Legislature or repugnant to the context of the same statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 257; Dec. Dig. § 178.\*]

**4. CONSTITUTIONAL LAW (§ 203\*)—EX POST FACTO LAWS—PUNISHMENT—EFFECT OF REPEAL.**

The punishment inflicted under a penal statute cannot be increased by an amendatory or repealing act, but a defendant would be entitled to have the punishment fixed under the law as it stood at the time of the commission of the crime, unless the penalty be mitigated, in which case, under the express provisions of Rev. St. 1874, c. 181, § 4, a defendant may consent to be punished under the new law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 584; Dec. Dig. § 203.\*]

**5. FINES (§ 1\*)—STATUTES—AMENDMENT.**

Laws 1903, p. 248, §§ 14a, 14b, made it unlawful for any druggist to conceal or give away cocaine except on the written prescription of a licensed physician or dentist. The amendatory act (Laws 1907-08, p. 89), left out the prescription of a dentist and made the penalty larger. *Held*, that where an action to recover a fine had terminated, and a penalty had been assessed and was pending on appeal at the time of the amendment, it was unaffected thereby, under Rev. St. 1874, c. 181, § 2, providing that a statute containing provisions similar to a prior statute shall be construed as a continuation of such prior statute and not a new enactment, and section 4, providing that no law shall be construed as repealing a former law except as to matters which cannot stand by the terms of the new law.

[Ed. Note.—For other cases, see Fines, Cent. Dig. § 2; Dec. Dig. § 1.\*]

**6. DRUGGISTS (§ 11\*)—ACTIONS—BILL OF PARTICULARS—SUFFICIENCY.**

In an action to recover a fine for the sale by a druggist of cocaine without the written

prescription of a physician, a bill of particulars, giving the particulars of the sale, but not stating to whom the sale was made, or whether it was made by defendant personally or through an agent or clerk, is sufficient, though the sale was, in fact, made by a clerk.

[Ed. Note.—For other cases, see Druggists, Dec. Dig. § 11.\*]

**7. PENALTIES (§ 40\*)—ACTIONS—APPEAL—WITHDRAWAL OF EVIDENCE.**

In an action against a druggist to recover a fine, evidence of one prior conviction of defendant for a similar offense being admissible to increase the penalty, the action of the court, upon requiring the prosecution to show only one conviction, in permitting the prosecution to withdraw an offered conviction and put in evidence another conviction, was not prejudicial to defendant.

[Ed. Note.—For other cases, see Penalties, Dec. Dig. § 40.\*]

**8. FINES (§ 7\*)—ACTIONS—EVIDENCE—OTHER OFFENSES—DRUGGISTS.**

In an action against a druggist to recover a fine for selling cocaine without a prescription of a physician, evidence of other sales is admissible, where the defendant was contesting the authority of the clerk by whom the sale was made, to show the manner of conducting the business, the authority of the clerk, and to show intent.

[Ed. Note.—For other cases, see Fines, Cent. Dig. § 8; Dec. Dig. § 7.\*]

**9. FINES (§ 1\*)—STATUTES—CONSTRUCTION—AMENDMENT—REPEAL.**

Act 1901 (Laws 1901, p. 238) regulating the sale of drugs, provided that the act was not to apply to the sale of patent or proprietary medicines in original and unbroken packages. Amendatory Act 1903 (Laws 1903, p. 248) made it unlawful for any druggist to sell or give away cocaine, and the prohibition applied to every person. *Held* that in an action against a druggist to recover a fine for a sale of cocaine after the amendatory act went into effect, he could not show that the drug sold was a patent or proprietary medicine in an unbroken package, as the later act controlled.

[Ed. Note.—For other cases, see Fines, Cent. Dig. § 2; Dec. Dig. § 1.\*]

**10. DRUGGISTS (§ 12\*)—OFFENSES—SALE OF COCAINE—STATUTES.**

The fact that by Laws 1901, p. 238, and Laws 1903, p. 248, making it an offense to retail cocaine without the prescription of a physician, it is also provided that cocaine might be sold at wholesale under certain conditions without a prescription, does not affect a druggist's liability for selling at retail without a prescription.

[Ed. Note.—For other cases, see Druggists, Cent. Dig. § 11; Dec. Dig. § 12.\*]

**11. CONSTITUTIONAL LAW (§ 83\*)—SENTENCE—"IMPRISONMENT FOR DEBT."**

A sentence, on a conviction of selling cocaine without a prescription of a physician, that defendant be confined until the fine assessed was paid, is not unconstitutional as an "imprisonment for debt."

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 151½; Dec. Dig. § 83.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3447, 3448.]

Appeal from Appellate Court, First District, on Writ of Error to Municipal Court of Chicago; Arnold Heap, Judge.

Action by the People, to use of the State Board of Pharmacy, against Paul Zito and another, to recover a fine for selling cocaine.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

From a judgment of the Appellate Court (140 Ill. App. 611), affirming a judgment in favor of relator, respondents appeal. Affirmed.

William Schreider, for appellants. E. I. Frankhauser, for appellee.

CARTWRIGHT, C. J. The municipal court of the city of Chicago rendered judgment against Paul Zito and Frank Zito, the appellants, in an action of debt in the name of the people, for the use of the State Board of Pharmacy, on the verdict of a jury finding them guilty of selling cocaine, and ordered that they stand committed to the county jail of Cook county until the fine and costs should be paid. The record was removed to the Appellate Court for the First District by writ of error, and, the Appellate Court having affirmed the judgment, this appeal was taken.

The suit was begun and prosecuted to final judgment under sections 14a and 14b, which were added in 1903 (Laws 1903, p. 248), to the act of 1901 (Laws 1901, p. 238), regulating the practice of pharmacy. After the cause had been argued and submitted to the Appellate Court for decision, the Legislature amended said sections by an act approved and in force January 17, 1908 (Laws 1907-08, p. 88). No mention of that amendment was made in the brief or argument for the appellants in this court, but before the submission of the cause they entered their motion to have the judgment reversed and the suit abated on the ground that the amendatory act of 1908 operated as a repeal of the sections under which they were prosecuted without any provision saving pending prosecutions.

The amendatory act does not purport to repeal the sections as they previously existed or any provision contained therein, but only provides that they shall be amended to read as therein stated, by which the provisions against the sale of cocaine are made more stringent. In the absence of any constitutional or legislative provision on the subject, an amending act may operate as a repeal of the statute amended; but the general rule is that an amendment is only a repeal as to the portions of the original act left out of the amendment, and as to the portion unchanged, in form or substance, the amendatory act is a mere continuation of the original act. 26 Am. & Eng. Ency. of Law (2d Ed.) 713. However, we have a general act to the same effect, which constitutes chapter 131 of the Revised Statutes of 1874. That act provides that in the construction of all statutes certain rules shall be observed, unless such construction would be inconsistent with the manifest intent of the Legislature or repugnant to the context of the same statute. Section 2 establishes the rule that the provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such prior

provisions and not as a new enactment. Section 14a, as it existed when the offense was committed and when the prosecution was carried on, made it unlawful for any druggist or other person to retail or sell or give away cocaine except upon the written prescription of a licensed physician or dentist. The amendatory act of 1908 declared it to be unlawful for any druggist or other person to retail, sell, or give away cocaine except upon the written prescription of a duly registered physician, and so far as its provisions are the same as those of the act of 1903 (Laws 1903, p. 248), it is to be construed as a continuation of the prior provisions and not as a new enactment. A section was added increasing the penalty for the offense by allowing imprisonment as well as a fine, but the penalty recovered against the defendants is within the provisions of both acts. The sale of cocaine did not cease to be an offense under the amendatory act, which, in that respect, was but a continuation of the act of 1903.

Section 4 of said chapter 131 also relates to the subject under consideration, and is as follows: "No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. This section shall extend to all repeals, either by express words or by implication, whether the repeal is in the act making any new provision upon the same subject, or in any other act." This court has given full force to the provisions of section 4 whenever occasion required. In the case of *Farmer v. People*, 77 Ill. 322, the statute was applied to a prosecution for selling intoxicating liquor to a minor, and it was held that a repealed statute furnished the right of action or prosecution, but not the practice or mode of procedure, which would be governed by the practice under a later act. In *Roth v. Eppy*, 80 Ill. 283, the construction required by the statute was adopted in a suit brought under an act to provide against the evils resulting from the sale of intoxicating liquors, in force July 1, 1872, which had been revised by an act covering the whole subject, in force July 1, 1874. Again, in *Hyslop v. Finch*, 99 Ill.

171, it was held that what had been done prior to the repeal of an act was valid, and what remained to be done must conform to the requirements of the subsequent act.

It is urged that the statute was merely designed to save prosecutions and suits under pre-existing statutes, and that it has no relation to legislative acts subsequent to its passage; but to adopt such a construction would not only do violence to all rules, but to the language of the statute itself, which declares that the rules shall be observed as to all statutes in force at the time of its enactment or which might thereafter be enacted. There has been no inconsistency between the decisions as to the effect of the act. It provides that certain rules shall be observed unless the construction would be inconsistent with the manifest intent of the Legislature or repugnant to the context of the same statute, and there have been some cases where it could not be applied. The case of *Mix v. Illinois Central Railroad Co.*, 116 Ill. 502, 6 N. E. 42, was an action in debt by Mix to recover penalties from the Illinois Central Railroad Company for failing to bring trains to a full stop before crossing another railway. After the suit was commenced, the Legislature amended the act, not only by changing the distance within which the stop must be made, and the penalty, but also by requiring all suits to be prosecuted in the name of the people, so that an action could not be maintained by a private person. Under the repealed act the penalty belonged to the person suing, but under the new act it was to be paid into the county treasury. The suit had not been prosecuted to judgment when the new act was passed, and it was held that, inasmuch as a private person acquires no right to a penalty by merely suing for it, the Legislature might amend or repeal the law as well after as before suit was brought to recover the penalty. As suit could not be brought by an individual under the new act, the further proceedings could not conform to it. In *Holcomb v. Boynton*, 151 Ill. 294, 37 N. E. 1031, the act giving jurisdiction to the county court of DeKalb county in suits to enforce mechanics' liens was repealed without any saving clause as to proceedings begun and pending under the old law, and as the court was then without jurisdiction to take any further steps in the case, and the proceeding was incomplete, it was held that a sale under the decree was void. In *Vance v. Rankin*, 194 Ill. 625, 62 N. E. 807, 88 Am. St. Rep. 173 there was a petition for a writ of mandamus to compel the president and trustees of a village to disconnect certain territory. The writ was awarded, and the Appellate Court affirmed the judgment; but while the appeal was pending in the Appellate Court the Legislature repealed the act under which the suit was brought, and made it discretionary with

the president and trustees whether they would disconnect territory or not, and also provided that the act should apply to and affect all pending cases, whether application had been made for disconnecting or not.

Counsel misapprehends the purport of these decisions, which all clearly come within the provision that the rules of construction fixed by the statute are only to be observed where such construction would not be inconsistent with the manifest intent of the Legislature or repugnant to the context of the same statute. It would not be competent for the Legislature to limit by the general act its own legislative powers, and where a contrary intent is expressed the general provisions of chapter 131 do not apply. *Mix v. Illinois Central Railroad Co.*, supra. The punishment inflicted cannot be increased by an amendatory or repealing act, which would bring it into conflict with the constitutional prohibition against ex post facto laws (*Johnson v. People*, 173 Ill. 131, 50 N. E. 321); but a defendant would be entitled to have the punishment fixed under the law as it stood at the time of the commission of the crime. If, however, any penalty, forfeiture, or punishment be mitigated by any provisions of the new law, section 4 provides that with the consent of the party affected the provisions may be applied to any judgment pronounced after the new law takes effect. *Kossakowski v. People*, 177 Ill. 563, 53 N. E. 115. The motion of the appellants is denied.

The first alleged error mentioned in the brief for appellants is that the bill of particulars was insufficient, and the court therefore erred in admitting evidence under it. The bill of particulars alleged that the sale was made on November 17, 1906, in the city of Chicago, but did not state to whom the sale was made, nor whether it was made by defendants personally or through an agent or clerk. Counsel says that, to the surprise of the appellants, evidence was admitted that the sale was made by a clerk. It was proved, and there was no controversy over the facts, that the appellants kept Crown Catarrh Powder, which was a compound of cocaine, for sale in the store, and that the clerk was employed to sell what was kept there for sale. It was not necessary to give the name of the person to whom the sale was made or to state that the name was unknown. *Cannady v. People*, 17 Ill. 158; *Green v. People*, 21 Ill. 125; *Rice v. People*, 38 Ill. 435. It was not denied that the clerk had authority to sell, and was expected to sell, whatever was called for, and appellants would doubtless have suffered a genuine surprise to learn upon the trial that he had refused to sell anything kept in the store for sale to a customer who asked for it.

The bill of particulars charged but one sale, and the court permitted evidence of other sales. The penalty is greater for the second offense, and evidence was offered of a

prior conviction for the purpose of having the greater penalty inflicted; but no objection was made to such proof. It was practically conceded that the people had the right to show one previous conviction; but, when there was an attempt to prove a number of convictions, the court ruled that the people could only prove one, and required them to select the one upon which they would rely. The people were then permitted to withdraw the record of a conviction which had been offered and to offer another, and there was no prejudice to the appellants in so doing.

The court permitted evidence of other sales before, and one sale after, the one on which the prosecution was based, and it is alleged that the ruling was wrong. Appellants were contesting the authority of the clerk to make any sale, and the evidence was not improper for the purpose of showing the manner of conducting the business and the authority of the clerk, as well as on the question of intent. 23 Cyc. 270.

The court excluded evidence that Crown Catarrh Powder was a patent or proprietary preparation and was sold in original and unbroken packages. The original act of 1901 regulated the sale of drugs and medicines and fixed the qualification of pharmacists, and by a proviso to section 1 the act was not to apply to the sale of patent or proprietary preparations in original and unbroken packages, so that they could be sold by any person, whether a pharmacist or not. The amendatory act of 1903 made it unlawful for any druggist or other person to retail or sell or give away cocaine or any salts or compound thereof, and the prohibition applied to every person, whether a druggist or not. The amendatory act, being a later expression of the legislative will, must prevail. The law now provides that a wholesale dealer may sell cocaine at wholesale by displaying on a label the name and quantity of cocaine or its compounds, with the word "poison." The fact that a wholesale dealer might sell cocaine to the appellants, which they might lawfully sell on the prescription of a physician, has nothing to do with their right to sell it at retail without a prescription, in violation of the law.

Finally, it is insisted that the judgment is erroneous because it orders commitment of the appellants until the penalty shall be paid, and this argument is based upon the constitutional prohibition against imprisonment for debt. That prohibition applies only to debts in their proper and popular sense, where the relation of debtor and creditor exists. It does not extend to actions for fines or penalties inflicted for violations of the penal laws of the state. *Kennedy v. People*, 122 Ill. 649, 13 N. E. 213. The case of *Kettles v. People*, 221 Ill. 221, 77 N. E. 472, cannot be distinguished from this one, and it was there held proper, where a fine is recovered, to order,

as a part of the judgment, that the defendant be committed to jail until the fine is paid.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(237 Ill. 442)

**MASON v. BLOOMINGTON LIBRARY ASS'N et al.**

(Supreme Court of Illinois. Dec. 15, 1908. Rehearing Denied Feb. 4, 1909.)

**1. CHARITIES (§ 15\*)—VALIDITY—PURPOSES OF GIFT—CARE OF BURIAL GROUND.**

A perpetual trust to take care of a private burial lot cannot be created, unless authorized by statute.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 39; Dec. Dig. § 15.\*]

**2. CHARITIES (§ 15\*)—VALIDITY—PURPOSES OF GIFT—CARE OF BURIAL GROUND.**

Hurd's Rev. St. 1905, c. 21, §§ 22-28, providing that trusts may be created to take care of a private burial lot in the hands of the board of directors provided for by the act providing for the management of county cemetery grounds, does not authorize a perpetual trust to take care of a private burial lot by creating a trust fund in the hands of a private trustee.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 39; Dec. Dig. § 15.\*]

**3. CHARITIES (§ 15\*)—VALIDITY—PURPOSES OF GIFT—CARE OF BURIAL GROUND—"STATUTORY TRUST."**

A trust created under a statute authorizing a trust to be created in perpetuity for the purpose of caring for and keeping in repair a cemetery, burial lot, or monument, is a "statutory trust," in contradistinction to a charitable trust.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 39; Dec. Dig. § 15.\*]

**4. CHARITIES (§ 15\*)—VALIDITY—PURPOSES OF GIFT—CARE OF BURIAL GROUND.**

A bequest to a trustee to use the interest of a trust fund for the care of the family burial lot of testatrix is void.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 39; Dec. Dig. § 15.\*]

**5. CHARITIES (§ 12\*)—VALIDITY—PURPOSES OF GIFT—EDUCATION—"CHARITABLE TRUST."**

A trust to establish for the benefit of the public an art gallery for the advancement of education in art is a "charitable trust."

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 36; Dec. Dig. § 12.\*]

For other definitions, see *Words and Phrases*, vol. 2, p. 1074.]

**6. CHARITIES (§ 37\*)—VALIDITY—PURPOSES OF GIFT—EDUCATION.**

Testatrix devised and bequeathed the residue of her estate to trustees in trust to establish, in connection with a library association, an art gallery and studio, for the collection, preservation, and exhibition of works of art in charge of the officers of the association. The association incorporated to establish and maintain a library conveyed its property to another association and ceased to exist. Held to create a charitable trust, and, under the doctrine of cy pres, a court of chancery might substitute for the association mentioned in the will the association purchasing its property for the purpose of administering and carrying into execution through the trustees the trust created.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. §§ 91-93; Dec. Dig. § 37.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**7. CHARITIES (§ 37\*)—VALIDITY—CERTAINTY AS TO PERSONS OR OBJECTS.**

Where a bequest is for charity, it matters not how uncertain the persons or objects may be, or whether the persons to take are in esse, or whether the legatee is a corporation capable of taking, or whether the bequest can be carried into exact execution, for the court will sustain the legacy and give it effect according to its own principles, and where a literal execution becomes impracticable, the court will execute it as nearly as it can according to the original purpose.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 91-93; Dec. Dig. § 37.\*]

**8. CHARITIES (§ 47\*)—CREATION—TRUSTEES—APPOINTMENT.**

A testator creating a charitable trust may name the trustees who shall execute the trust and determine the manner in which their successors shall be appointed.

[Ed. Note.—For other cases, see Charities, Dec. Dig. § 47.\*]

**9. CHARITIES (§ 47\*)—CREATION—TRUSTEES—APPOINTMENT.**

Where a testator, creating a charitable trust, named the trustees who should execute the trust, but failed to designate how their successors should be appointed, a court of chancery should, in case the trustees resigned, failed to qualify, or died, or were otherwise disqualified, appoint trustees as their successors; but the court should exercise such power only on proof that a vacancy existed, and on notice to all parties in interest, including the trustees named in the will, if living.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 85; Dec. Dig. § 47.\*]

**10. APPEAL AND ERROR (§ 747\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.**

Where, in a suit for the construction of a will containing a gift to trustees to establish, in connection with a library association, an art gallery, the circuit court held that a trust fund should be turned over to the trustees for the association named, and it was assigned that the court erred in so holding, the Appellate Court was authorized to pass on the question whether the circuit court had properly disposed of the fund, and, on determining that the circuit court erred in decreeing that the fund should be held by the trustees for the benefit of the association, had the right although no cross-assignments of error were filed, to determine what disposition the circuit court should make of the fund on the case being remanded to that court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3053; Dec. Dig. § 747.\*]

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, McLean County; C. D. Myers, Judge.

Bill in chancery by Nelson P. Perry and another, executors of Emily T. Perry, deceased, for the construction of her will. Pending suit, Nelson P. Perry died, and by leave of court the surviving executor filed an amended bill joining Samuel B. Mason, executor of Nelson P. Perry, deceased, and others, parties. From a decree of the Appellate Court reversing a decree of the circuit court and remanding the cause with directions, Samuel B. Mason, executor of Nelson P. Perry, deceased, appeals. Reversed and remanded.

This was a bill in chancery filed by Nelson P. Perry and Thomas C. Kerrick, ex-

ecutors of the last will and testament of Emily T. Perry, deceased, in the circuit court of McLean county, to obtain a construction of the will of Emily T. Perry. Pending the litigation the files were destroyed by fire, and Nelson P. Perry died. By leave of court the surviving executor restored the files and amended his bill, making new parties. Samuel B. Mason, executor of the last will and testament of Nelson P. Perry, deceased, the Bloomington Library Association, and the city of Bloomington filed answers; each claiming the fund in controversy. A trial was had before the chancellor, and a decree entered, from which the executor of the last will and testament of Nelson P. Perry, deceased, prosecuted an appeal to the Appellate Court for the Third District, where the decree of the circuit court was reversed, and the cause was remanded, with directions, and the executor of the last will and testament of Nelson P. Perry, deceased, has prosecuted a further appeal to this court.

The provisions of the will necessary to be considered in disposing of the questions involved read as follows:

"(1) I direct, first, that all my lawful debts and funeral expenses shall be paid, and that the sum of \$500 shall be placed in the hands of a proper person as trustee (John H. Russell, of Middletown, Connecticut, being hereby empowered to name and appoint such trustee), from which said sum of \$500 there shall be expended so much as such trustee shall consider necessary and proper for a monument at my burial place, and the residue of such sum of \$500 shall by such trustee be put and kept at interest, and such interest shall be annually expended in the care of the family burial lot where I shall be buried."

"(7) I give, devise and bequeath in trust to Jonathan H. Cheney, of Bloomington, as trustee, \$6000 upon the following trusts, viz.: The said trustee shall keep and put said sum at interest upon good security during the lifetime of my husband, Nelson P. Perry, and shall collect the interest therefrom, and pay the same as collected to my said husband during the lifetime of my said husband, for his support; and no part of said fund, either principal or interest, shall ever be subject to or liable for the claim or claims of any creditor or creditors of my said husband in the hands of said trustee or otherwise, and said trustee shall never, in anywise, be answerable to any creditor of my said husband for or on account of any of said fund, either principal or interest."

"(9) The residue of my estate, including therein the \$6000 hereinbefore devised in trust to Jonathan H. Cheney, after said trust shall have terminated by the death of my said husband, I give, devise and bequeath to said Jonathan H. Cheney and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexe

Chalmers C. Marquis, trustees, in trust for the following uses and purposes, viz.: To establish, in connection with the Bloomington Library Association, an art studio or art gallery and studio, meaning thereby a suitable place wherein works of art will be collected, kept, preserved or exhibited for the advancement of education in art, the conduct, management and supervision of which art gallery and studio shall be in charge of the officers of the Bloomington Library Association. The said art gallery or studio shall be named the 'Russell Art Annex,' or some suitable name or appellation of which the name Russell shall be a part, in commemoration of my mother, Rachel P. Russell. The said trustees may, in their discretion, turn over to said library association the whole or a part of the principal sum of said fund for the use aforesaid, or may put and keep the whole, or a part thereof, at interest upon good security, collect the interest thereof and pay the same as collected to said Bloomington Library Association for the use as aforesaid."

The decree found: That there was in the hands of the surviving executor the sum of \$4,972.56; that out of said fund there should be set aside \$406 in accordance with the first paragraph of said will, the sum of \$94 having been expended by the executors for a monument for the testatrix, and, after deducting said \$406 and paying the costs of suit, the balance of said fund should be turned over to trustees for the benefit of the Bloomington Library Association, for the purpose of carrying out the provisions of the ninth paragraph of the will. The decree then appointed Samuel B. Mason trustee to receive the \$406 under the first paragraph of the will, and J. H. Burnham and H. H. Green trustees to receive the balance of the fund under the provisions of the ninth paragraph of the will. The Appellate Court agreed with the construction placed upon paragraph 1 of the will by the circuit court, but held that under the ninth paragraph of the will the doctrine of cy pres should be applied, and that the fund disposed of by that paragraph of the will should be held by trustees for the purpose of establishing, in connection with the Withers Public Library, an art studio or art gallery and studio, wherein works of art might be collected, kept, and preserved or exhibited, for the advancement of education in art.

Barry & Morrissey, for appellant. Louis Fitz Henry, for appellees.

HAND, J. (after stating the facts as above). It is first contended that the first paragraph of the will creates a perpetuity and is void, and that the court erred in appointing a trustee and in directing that the amount remaining of the \$500 mentioned in that paragraph, after the purchase of a monument, should be turned over to a trustee to be kept at interest; the interest to

be expended in the care of the family burial lot where the testatrix should be buried. The law is well settled in this country that a perpetual trust cannot be created to take care of a private burial lot, unless the creation of such trust is authorized by statute. 6 Cyc. 918; 5 Am. & Eng. Ency. of Law (2d Ed.) 933; *Bates v. Bates*, 134 Mass. 110, 45 Am. Rep. 305; *Coit v. Comstock*, 51 Conn. 352, 50 Am. Rep. 29; *Johnson v. Hollifield*, 79 Ala. 423, 58 Am. Rep. 596; *Hopkins v. Grimshaw*, 165 U. S. 342, 17 Sup. Ct. 401, 41 L. Ed. 739. In this state the Legislature has provided (*Hurd's Rev. St. 1905*, c. 21, §§ 22-28) that trusts may be created for such purpose in the hands of the boards of directors provided for by "An act to provide for the proper care and management of county cemetery grounds"; but there is no statute in this state which provides for the creation of such a fund in the hands of a private trustee. A trust created under a statute authorizing a trust to be created in perpetuity for the purpose of caring for and keeping in repair a cemetery, burial lot, or monument is characterized by the court in *Morse v. Inhabitants of Natick*, 176 Mass. 510, 57 N. E. 996, as a "statutory trust," in contradistinction to a charitable trust. The cases of *Green v. Hogan*, 153 Mass. 462, 27 N. E. 413, and *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401, are not therefore in point. In *Bates v. Bates*, supra, the court said an examination of the authorities (and many cases are cited) "will show that it has been repeatedly held that a bequest to provide a fund for the permanent care of a private tomb or burial place could not be treated as a public charity, and thus made perpetual, and that such bequest would be void." It was also pointed out in that case that there was in force in that state a statute similar to the statute in this state hereinbefore referred to, but it was said "these statutory provisions have here no application." And in *Coit v. Comstock*, supra, it was said: "It has been held in numerous decisions that bequests for the purpose of keeping burial lots or cemeteries in good order or repair are not given in charity, and therefore are not protected by the statute of charitable uses." And in *Johnson v. Hollifield*, supra, it was said: "It seems to be well settled by the course of decisions that a bequest of money, the interest thereon to be perpetually applied to preserving and keeping in repairs the graves and monuments of testatrix and other named persons, is repugnant to the rule against perpetuities, and void." We would be glad to hold, were it possible so to do, the trust attempted to be created by the testatrix by the first paragraph of her will valid. We are, however, forced by the current and great weight of authority to hold that a trust like the one in question is not a gift to any public use, and that its purpose is purely private and secular. Our conclusion

is therefore that the trust attempted to be created by the first paragraph of the will is void, and that the portion of the \$500 mentioned in that paragraph, remaining after the purchase of the monument, should be treated as a part of the residuary estate of the testatrix and disposed of under paragraph 9 of said will.

The next contention arises over the proper construction to be placed upon the ninth paragraph of the will. The Bloomington Library Association was incorporated under and by virtue of a special act of the Legislature approved February 23, 1867, which act designates the objects for which the association was organized to be, "to establish and maintain a library and reading room, to procure literary and scientific lectures and otherwise promote the intellectual improvement of its members," and said association succeeded to all the property rights of a voluntary association theretofore existing in the city of Bloomington known as the "Ladies' Library Association," and said association was empowered by said act to create a capital stock not to exceed in amount \$100,000, which was divided into shares of \$50 per share, to raise a fund for the purpose of promoting the objects of the association, including the erection of a building for its use, and it was provided that, after the payment of all expenses, any surplus arising from the rents and profits of any real estate or buildings purchased or built by the association with such capital stock should annually be divided pro rata among its stockholders, and the act was declared to be a public act. On June 1, 1885, Sarah B. Withers conveyed to the said association a lot situated in the city of Bloomington, upon the condition, among other things, that the said association should erect or cause to be erected upon said lot a building suitable for its library, and to accommodate its members and the public under the usual and customary regulations adopted for the government of such associations. The association accepted the said conveyance and erected a building on said lot at a cost of more than \$20,000, and equipped the same with furniture, etc., and placed therein its books, pictures, etc., at a cost of about \$25,000, and used and conducted the same as a public library and reading room until June 18, 1894. On that day said association conveyed to the board of directors of the Withers Public Library, an association organized under the laws of the state of Illinois, all its property of every character, in trust, upon the condition, among other things, that the same should be used as a free public library, for the use and benefit of the inhabitants of the city of Bloomington forever, and the property has been used, and is now used, for such purpose, and since the execution of said conveyance said Bloomington Library Association has ceased to ex-

ercise any of its charter powers and has no property of any consequence.

We think it clear that the ninth paragraph of Emily T. Perry's will created a trust to establish an art studio or art gallery and studio, wherein works of art were to be collected, preserved, and exhibited for the advancement of education in art. While the testatrix provided that the studio or studio and art gallery mentioned in paragraph 9 of her will should be carried on in connection with the Bloomington Library Association, she did not create a trust for the benefit of said library association; but, on the contrary, she created by that paragraph of her will a trust for the benefit of the public, for the purpose of erecting an art studio or art gallery and studio, which was to be carried on for the advancement of education in art. That the creation of a trust to establish for the benefit of the public an art studio or art gallery and studio for the advancement of education in art is, within the meaning of all the authorities, a charitable trust, we have no question (*Kemmerer v. Kemmerer*, 233 Ill. 327, 84 N. E. 256), and we think it equally clear that as the Bloomington Library Association has ceased to exist as a going association for the purpose of exercising its charter powers (*Miller v. Riddle*, 227 Ill. 53, 81 N. E. 48, 118 Am. St. Rep. 261), under the doctrine of *cy pres*, as understood in this state, a court of chancery has the power to substitute the Withers Public Library in the place of the Bloomington Library Association, for the purpose of administering and carrying into execution, through said trustees, the trust created by the ninth paragraph of said will. In *Kemmerer v. Kemmerer*, supra, this court, on page 338 of 233 Ill., on page 261 of 84 N. E., quoted with approval the following language from *Story's Equity Jurisprudence*: "If the bequest be for charity, it matters not how uncertain the persons or the objects may be, or whether the persons who are to take are in esse or not, or whether the legatee be a corporation capable, in law, of taking or not, or whether the bequest can be carried into exact execution or not, for in all these and the like cases the court will sustain the legacy and give it effect according to its own principles; and where a literal execution becomes inexpedient or impracticable, the court will execute it as nearly as it can according to the original purpose, or as (as the technical expression is) *cy pres*." The Appellate Court, we are of the opinion, did not therefore err in holding that the fund which the ninth paragraph of the will provided should be set aside for charity should be administered by the trustees in connection with the Withers Public Library, instead of in connection with the Bloomington Library Association, under the provisions of the ninth paragraph of said will.

It is further contended that the court erred in appointing J. H. Burnham and H. H. Green trustees, in the absence of any showing that Jonathan H. Cheney and Chalmers C. Marquis, the trustees named in the ninth paragraph of the will, had resigned, refused to act, or were disqualified from acting. The testatrix had the power to name the trustees who should execute the trust created by paragraph 9 of her will, and also the power to determine the manner in which their successors should be appointed, if she saw fit. *French v. Northern Trust Co.*, 197 Ill. 80, 64 N. E. 105. She named trustees, but failed to designate how their successors should be appointed in case of a vacancy in their trusteeships. A court of chancery had therefore, in case said trustees resigned, failed to qualify, died, or were otherwise disqualified, power to appoint trustees as their successors; but such court, unless the trustees disclaimed, should only exercise such power upon proof that a vacancy existed and upon notice to all parties in interest, which would include the trustees named in the will, if they were living. *Hall v. Irwin*, 2 Gilman, 176; 22 Ency. of Pl. & Pr. p. 38.

It is finally said that the city of Bloomington, which appeared and set up the rights of the public in and to said fund under the provisions of paragraph 9 of the will, failed to assign cross-errors in the Appellate Court, and that the Appellate Court, for want of a proper assignment of cross-errors, was powerless to pass upon the question whether or not the trust fund arising under the ninth paragraph of the will could, *ex pres*, be applied by the trustees named under that paragraph of the will or appointed by the court to carry out the provisions of the trust, in connection with the Withers Public Library, but that, the Appellate Court having held that said trust fund could not be administered by the trustees in connection with the Bloomington Library Association, it was bound to reverse the case and direct the fund to be paid to the appellant, as executor of the last will and testament of Nelson P. Perry, deceased. We do not agree with such contention. The bill was filed for the purpose of obtaining a construction of the will of Emily T. Perry, and it was assigned as error in the Appellate Court that the circuit court erred in holding that the fund in the surviving executor's hands should be turned over to said trustees for the Bloomington Library Association. That assignment authorized the Appellate Court to pass upon the question whether the circuit court had properly disposed of the fund in said surviving executor's hands, and, that court having held that the circuit court had erred in decreeing that said fund should be held by the trustees for the benefit of or turned over to the Bloomington Library Association, it had the right

to determine what disposition the circuit court should make of said fund upon the case being remanded to that court; otherwise the bill for a construction of the will would have wholly failed.

The decree of the circuit court and the judgment of the Appellate Court will be reversed, and the cause will be remanded to the circuit court for further proceedings in accordance with the views hereinbefore expressed.

**Reversed and remanded.**

(237 Ill. 452.)

#### BONNEY v. BONNEY.

(Supreme Court of Illinois. Dec. 15, 1908.

Rehearing Denied Feb. 4, 1909.)

#### 1. RELEASE (§ 18\*)—VALIDITY—DURESS.

Where a wife, while about to start for the trial of a divorce suit against her husband, was told that unless she signed a release of a certain claim her husband would attempt in the divorce action to take her children from her, and, after reading the release and understanding its legal import, signed it freely and voluntarily, being perfectly sane at the time, she could not thereafter claim that she signed it under duress, since one who, while in his right mind and in full control of his faculties, who understands what he is doing, and has full power to sign or refuse to sign a paper, signs it, does not do so under duress.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 33; Dec. Dig. § 18.\*]

#### 2. CONTRACTS (§ 47\*)—CONSIDERATION.

An instrument affecting rights of property, executed without consideration, has no binding force or effect in law, and may be avoided as between the parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 220, 256; Dec. Dig. § 47.\*]

#### 3. RELEASE (§ 57\*)—CONSIDERATION—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a referee's finding that a release of complainant's right to certain bonds was without consideration.

[Ed. Note.—For other cases, see Release, Dec. Dig. § 57.\*]

Error to Appellate Court, First District, on Appeal from Circuit Court, Cook County; Thomas G. Windes, Judge.

Bill by Margaret A. Bonney against Lawton C. Bonney. A decree of the circuit court dismissing the original and all cross-bills was reversed by the Appellate Court, and defendant brings error. Affirmed.

This was a bill in chancery filed by Margaret A. Bonney against Lawton C. Bonney on the 31st day of December, 1900, in the circuit court of Cook county, to set aside and cancel a certain release bearing date December 19, 1890, whereby Margaret A. Bonney waived any and all claim which she had against Lawton C. Bonney by reason of his having taken possession of and disposed of \$30,000 worth of the bonds of the Chicago General Railway Company of which Margaret A. Bonney was the owner and to require him to return to her said bonds, and on a failure to return said bonds that he be

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

required to account to her for the value of said bonds. The defendant answered the bill and filed a cross-bill, to which he made Margaret A. Bonney and Valerian Bonney, Ada Bonney, Pauline Bonney, James D. Lamb, the People's Trust & Savings Bank, and Charles L. Bonney defendants. Answers and replications were filed to the cross-bill of Lawton C. Bonney by the defendants thereto, and Charles L. Bonney filed a cross-bill, and a cross-bill by the guardian ad litem of Valerian Bonney, Ada Bonney, and Pauline Bonney, the minor children of Margaret A. Bonney and Charles L. Bonney, was also filed. All the cross-bills were answered and replications were filed, and the cause was referred to the master to take the proofs and report his conclusions. The master filed a report, in which, after finding that the allegations of the original bill had been established by the evidence, he recommended that all the cross-bills be dismissed, and that a decree be entered upon the original bill in favor of Margaret A. Bonney, according to the prayer of said bill. Lawton C. Bonney filed objections to the master's report with the master, which were overruled and renewed as exceptions in the circuit court, where they were in part sustained, and a decree was entered in that court dismissing the original and all the cross-bills for want of equity, whereupon Margaret A. Bonney prosecuted an appeal to the Appellate Court for the First District, where the decree of the circuit court was reversed, and the cause remanded, with directions to the circuit court to enter a decree upon the original bill in accordance with the recommendations of the master, and that the cross-bills be dismissed, and Lawton C. Bonney has sued out a writ of error from this court to review the judgment of the Appellate Court.

From the foregoing statement it will be seen that the parties to the litigation, other than Margaret A. Bonney and Lawton C. Bonney, have been eliminated in this court, and the sole question here to be decided is: Did the Appellate Court err in holding that the release from Margaret A. Bonney to Lawton C. Bonney, bearing date December 19, 1899, should be set aside and canceled, and said Lawton C. Bonney be required to turn over to Margaret A. Bonney said bonds, and in case of a failure so to do to account to her for the value of said bonds? The record filed in this court contains 1656 pages, and the abstract 152 pages, and the evidence introduced in support of the cross-bills is commingled throughout the record with that introduced in support of the original bill. The questions, however, involved in this court are not, when searched out in the record, numerous or difficult of solution.

It appears: That Margaret A. Bonney and Charles L. Bonney were husband and wife. That Margaret A. Bonney inherited from her father a 10-acre tract of land situated near the city of Chicago and about \$10,000 in

money, some time after her marriage with Charles L. Bonney. That Lawton C. Bonney and Charles L. Bonney are brothers, and were engaged in the real estate business in the city of Chicago under the firm name of Bonney Bros. That they took charge of Margaret A. Bonney's property inherited from her father and subdivided and sold the real estate and used her money substantially as their own. That afterwards they promoted the Chicago General Railway Company, which operated in the city of Chicago. That Charles L. Bonney, some time prior to the year 1899, transferred to Margaret A. Bonney 31 of the bonds of said railway company of the par value of \$30,000. That Margaret A. Bonney had them in her possession, and had collected for a number of years the interest accruing thereon, and used the same in support, in part, of herself and three minor children. That in 1899 Charles L. Bonney and Margaret A. Bonney made a trip to Europe. That a young woman accompanied them of whom Margaret A. Bonney became very jealous, probably with cause, before their return, and upon their return to America, early in the fall of 1899, Charles L. Bonney and his wife separated. That in the month of October, 1899, Margaret A. Bonney and her two minor daughters, in company with a Mrs. Leffingwell, returned to Europe with the consent of her husband and upon his promise to support her in Europe in the manner in which she had been living in Chicago. That prior to her going to Europe the second time she placed the said railway bonds with the Merchants' Loan & Trust Company in the city of Chicago, with instructions to deliver them, upon request, to either Lawton C. or Charles L. Bonney. Upon the arrival of Margaret A. Bonney and her party in Rome, she soon was without funds and was unable to hear from her husband. She thereupon left her children in Rome, in company with Mrs. Leffingwell, and returned to Chicago, where she arrived on November 23, 1899. She immediately went to the bank where she had left her bonds and found that they had been removed by Lawton C. Bonney on the 6th of November. In company with Mr. Leffingwell, an attorney who was a mutual friend of herself and husband, she called upon Lawton C. Bonney to obtain her bonds. He informed her he had her bonds, but desired to retain them for a short time, as her husband Charles L. Bonney, was about to make a sale of the Chicago General Railway Company, and that her bonds, together with other bonds, would, upon such sale being consummated, be guaranteed by the purchaser, and that her bonds would then be returned to her. By such representations he prevailed upon her to go to Clinton, Iowa, to the home of her mother, with a view to remaining until a sale of the railway could be consummated. She went to Clinton, where she remained for some weeks, but nothing was

done toward the sale of the railway. In the month of December, 1899, the subject of a divorce of Margaret A. Bonney from her husband, Charles L. Bonney, was talked of, and on the 14th of that month a meeting was held in Chicago, at the office of Leffingwell, at which Charles L. Bonney and the solicitor of Margaret A. Bonney Maj. Connelly, of Rock Island, and Mr. Ankeny, a brother of Margaret A. Bonney, were present. Charles L. Bonney made a proposition for settlement of alimony in case a divorce should be granted to Margaret A. Bonney, but nothing was done on that day, and the parties separated. On the following day the solicitors of the parties—Mr. Plumb representing Charles L. Bonney, and Maj. Connelly representing Margaret A. Bonney—in company with Mr. Ankeny and Lawton C. Bonney, had another interview, at which Charles L. Bonney or Margaret A. Bonney was not present. The second interview resulted in an agreement that Margaret A. Bonney was to obtain a divorce, and that \$2,500 in cash was to be paid her, and four promissory notes, due in 6, 12, 18, and 24 months, for the sum of \$2,500 each, signed by Charles L. and Lawton C. Bonney, and 81 lots situated in the city of Chicago, were to be given to Margaret A. Bonney as alimony, and she was to have the custody of the children. In pursuance of said agreement, a bill for divorce was prepared in Mr. Leffingwell's office, a young man in his office by the name of Barnes being named therein as solicitor, and Charles L. Bonney signed an appearance and an answer admitting the averments of the bill, and, said documents being filed, a decree for divorce was granted thereon to Mrs. Bonney in the circuit court of Cook county on the ground of extreme and repeated cruelty. Nothing had been said to Margaret A. Bonney during the negotiations leading up to the divorce proceeding or the settlement of the alimony question about Margaret A. Bonney surrendering her bonds or any claim for their conversion by Lawton C. Bonney; but, just as the parties were starting for the courthouse to have a hearing in the divorce proceeding, Mr. Leffingwell said to Margaret A. Bonney that Lawton C. Bonney had appropriated her railway bonds to his own use, and that he demanded of her a release from all liability growing out of that transaction, and produced a paper, written in pencil, releasing said Lawton C. Bonney from such liability, for her to sign. Mrs. Bonney at first declined to execute such release. Mr. Leffingwell thereupon said to her that if she did not sign the release Charles L. Bonney had said that he would attempt, in the divorce proceedings, to take from her her children. After reading the release, and after some talk with Leffingwell and her brother, Mr. Ankeny, who was present, she signed the pencil memoranda and signed her name upon a blank sheet of paper, upon

which Mr. Leffingwell informed her the pencil memoranda would be written in ink, and they went into court; the release being delivered to Leffingwell. Margaret A. Bonney and Lawton C. Bonney testified to the cruelty of Charles L. Bonney, and a decree of divorce was granted. The \$2,500 was paid to Margaret A. Bonney, and the four promissory notes, signed "Bonney Bros.," were delivered to Mr. Lamb, and the city property was conveyed to Mr. Lamb as trustee, which settlement of the alimony was confirmed by a supplemental decree entered in the divorce proceeding, and the release was delivered by Leffingwell to Lawton C. Bonney. Margaret A. Bonney immediately went to Rome, where her daughters were, where she remained until the month of June, 1900, when she returned to Chicago. Upon her return Mrs. Bonney demanded the bonds of Lawton C. Bonney, and upon his refusal to surrender them or to account to her for the value thereof she filed this bill.

By the cross-bill of Lawton C. Bonney, and by the cross-bills filed by Charles L. Bonney and by the guardian ad litem in the name of the minor children of Margaret A. and Charles L. Bonney, it was sought to set aside and impeach the alimony decree entered in the divorce proceeding. Subsequent to the commencement of this suit, the same relief was sought by original bill by Charles L. Bonney, and cross-bills were filed substantially to the same effect as the cross-bills filed in this case, by Lawton C. Bonney and upon behalf of said minors. The original bill and cross-bills in that case were dismissed as to Mrs. Bonney, Mr. Lamb, the trustee, and a bank which it was averred had some interest in the property turned over by Charles L. Bonney to his wife, Margaret A. Bonney, in settlement of alimony, upon their respective demurrers being sustained thereto, which decree of dismissal was affirmed by this court on the ground that, the decree being a consent decree, it could not be thus impeached, and for multifariousness. 210 Ill. 95, 71 N. E. 375.

Lyman M. Paine, for plaintiff in error.  
Thomas S. McClelland, for defendant in error.

HAND, J. (after stating the facts as above). The first reason urged as ground for affirming the judgment of the Appellate Court is that Margaret A. Bonney was in such mental condition that she did not understand the nature of the transaction in which she was engaged at the time she executed said release on the 19th day of December, 1899, and that for want of mental capacity to execute said release it was void. This contention is without force. All of the witnesses who testified upon the subject stated that Mrs. Bonney was competent to do business at the time she signed said release, and Mrs. Bonney admitted she fully understood the import of the release when

she signed it. The contention therefore that Margaret A. Bonney was without sufficient mental capacity to release the liability of Lawton C. Bonney to her upon the bonds belonging to her which he had converted to his own use cannot be sustained.

It is next contended that said release was obtained by duress. The law is: A party in his right mind and in full control of his faculties, who understands what he is doing and has full power to sign a paper or refuse so to do, if he sign the paper, does not sign it under duress. *Kerting v. Hilton*, 152 Ill. 658, 38 N. E. 941. Applying the principle thus announced to the facts of this case, we think it clear that Margaret A. Bonney was not acting under such duress at the time she executed said release as will enable her to avoid the release on the ground of duress. She was perfectly sane, and admits she read the release, understood its legal import, and signed it freely and voluntarily. Clearly, the release was not executed under duress. *Eberstein v. Willets*, 134 Ill. 101, 24 N. E. 967; *Rendleman v. Rendleman*, 156 Ill. 568, 41 N. E. 223; *Stover v. Mitchell*, 45 Ill. 213.

It is lastly contended that the release was made without consideration, is therefore void, and should be set aside. The principle is elementary that an instrument affecting the rights of property, executed without consideration, has no binding force or effect in law and may be avoided as between the parties. The evidence is conflicting as to whether or not the liability of Lawton C. Bonney for the return of said bonds to Margaret A. Bonney, or his liability for the value thereof, was talked of during the negotiations which led up to the divorce proceeding and the agreement as to alimony. The great weight of the evidence is that it was not then taken into consideration, and it is not claimed by any one that the surrender of her right to said bonds or a release of Lawton C. Bonney for having converted them to his own use was mentioned to Margaret A. Bonney until the question of alimony had been fully settled, and it was agreed that she should take a divorce, and she was starting to the courthouse for the purpose of having a hearing in the divorce proceeding. We think it clear therefore that the matter of Lawton C. Bonney's liability for said bonds and the agreement of Charles L. Bonney to pay said money and deliver said promissory notes and convey said real estate to a trustee for the use of said Margaret A. Bonney in settlement of alimony were two distinct transactions, and that Mrs. Bonney never received anything from Lawton C. Bonney, or any one else, for the release of the liability of Lawton C. Bonney to surrender to her said bonds or to account to her for their value. Charles L. Bonney, in connection with his brother, Lawton C. Bonney, had

stripped Margaret A. Bonney of the entire estate which she received from her father, with the exception of said bonds, which on the 19th day of December, 1899, were of about the value of \$9,000, and we think it clearly appears from the evidence, at the time the alimony question was settled between Margaret A. Bonney and her husband, she expected the bonds would be returned to her, and, in addition thereto, that she would receive from Charles L. Bonney the amount of alimony which he had agreed to pay her or set aside for her use. Lawton C. Bonney had represented to Margaret A. Bonney that he had said bonds in his possession, and that he would return them to her when the sale of the railway took place, which sale he said would be consummated within a few days, when the bonds would be guaranteed by the purchaser, and that Margaret A. Bonney had no notice that he had, or claimed to have, converted the bonds to his own use until she had settled with her husband the question of alimony and felt she could not well recede from the divorce proceedings, when Lawton C. Bonney sprung upon her the release and insisted that she execute the same. Upon the entry of the divorce decree Margaret A. Bonney immediately started for Europe, where her daughters were, and where she remained until the following summer, and upon her return she took active steps at once to recover the bonds. We are of the opinion therefore that the Appellate Court correctly held that the decree of the circuit court dismissing Margaret A. Bonney's bill should be reversed, and that a decree should be entered upon the case being remanded, in accordance with the findings of the master.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(237 Ill. 463)

#### FORD v. HINE BROS. CO.

(Supreme Court of Illinois. Dec. 15, 1908.

Rehearing Denied Feb. 4, 1909.)

#### 1. APPEAL AND ERROR (§ 1091\*) — REVIEW — DECISION OF INTERMEDIATE COURT — PRESUMPTIONS.

On appeal from a judgment of the Appellate Court affirming a judgment for plaintiff, the Supreme Court must assume that his witnesses' testimony is true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4302; Dec. Dig. § 1091.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 705\*) — NEGLIGENCE USE OF STREET—PROXIMATE CAUSE.

To make a driver's negligence the proximate cause of injury to plaintiff by collision in a street, it was not necessary that the driver should have foreseen the particular injury; it being sufficient that he, by using ordinary care, could have foreseen that some injury might result from his negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515; Dec. Dig. § 705.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**3. APPEAL AND ERROR (§ 1033\*)—HARMLESS ERROR—ERRORS FAVORABLE TO PARTY COMPLAINING—INSTRUCTIONS.**

In an action for injury caused by a driver's negligence, error in an instruction that, to make defendant liable, the jury must find that the driver must have foreseen the particular injury which resulted, was harmless to defendant, since it required plaintiff to prove more than the law required him to prove.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4056; Dec. Dig. § 1033.\*]

**4. NEGLIGENCE (§ 135\*) — IMPUTED NEGLIGENCE—EVIDENCE—SUFFICIENCY.**

Evidence, in an action for injury to a street car conductor caused by a wagon driver's negligence, *held* to warrant a finding that the motorman was not negligent.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 276; Dec. Dig. § 135.\*]

**5. NEGLIGENCE (§ 89\*)—IMPUTED NEGLIGENCE — NEGLIGENCE OF DRIVER OF VEHICLE.**

Any negligence of a motorman in taking his car around a corner would not defeat the conductor's right to recover from defendant for its driver's negligence in driving against the car.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 134; Dec. Dig. § 89.\*]

**6. NEGLIGENCE (§ 136\*)—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.**

Contributory negligence, where the facts are in dispute, is a jury question.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 333; Dec. Dig. § 136.\*]

**7. MUNICIPAL CORPORATIONS (§ 706\*)—DRIVING IN STREET—CONTRIBUTORY NEGLIGENCE.**

In an action for injury to a street car conductor caused by a wagon being driven against the car, whether he was guilty of contributory negligence *held*, under the evidence, a jury question.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; Albert C. Barnes, Judge.

Action by David Ford against the Hine Bros. Company, a corporation. From a judgment of the Appellate Court for the First District affirming a judgment for plaintiff, defendant appeals. Affirmed.

E. E. Gray, F. J. Canty, and J. C. M. Clow, for appellant. Charles Cheney Hyde and Charles B. Elder, for appellee.

**HAND, J.** This was an action on the case commenced by the appellee, against the appellant, in the superior court of Cook county, to recover damages for a personal injury alleged to have been sustained by the appellee in consequence of a collision between a wagon being driven by the servant of appellant upon one of the streets of the city of Chicago and a street car being operated upon said street, on which the appellee was conductor, as a result of which the appellee was struck by the pole of said wagon and was injured. The case has been twice tried. The first trial resulted in a verdict and judgment in favor of the defendant, which was reversed by the Appellate Court. 115 Ill. App. 153. On the

second trial the jury returned a verdict in favor of the appellee for the sum of \$3,000, which judgment has been affirmed by the Appellate Court for the First District, and a further appeal has been prosecuted to this court.

Appellee was standing upon the rear of his car, which came from the west upon Twenty-Second street and was just turning north on to Clark street, when a wagon drawn by two horses and heavily loaded was driven by the servant of appellant from the east on Twenty-Second street, down a sharp incline. The pole of the wagon struck the controller upon the rear of the car, glanced off, and hit the leg of the appellee, breaking the neck of the femur. Twenty-Second street immediately west of Clark street is crossed by a viaduct, and the downgrade in Twenty-Second street at the point where the accident took place is caused by a depression to allow that street to pass beneath said viaduct. The grade extends east from Clark street about 200 feet, and street cars coming from the west upon Twenty-Second street, in order to get on to Clark street, make a turn north immediately after passing from beneath said viaduct. There is a conflict in the testimony in regard to the manner in which the team was being driven at and just prior to the accident. The testimony introduced on behalf of appellee tends to show that the driver was drunk; that the wagon was heavily loaded; that the lines were hanging down upon the horses' hips; that the driver was trying to light a cigar; that the team was going down the grade at as high a rate of speed as it could without galloping; that the car was directly across the north side of the street, in plain sight of the driver for at least 100 feet east of the point where the collision occurred; and that the driver made no effort to avoid a collision until he was within from 10 to 35 feet of the car, when he grabbed the lines and attempted to stop his horses or turn them to the left, but that the team and wagon were then going at so high a rate of speed downgrade that the team could not stop the heavy load or turn the wagon to the left to avoid the car, and the collision took place. The evidence of the appellant tended to show that the driver was in full control of his team and that the accident was inevitable. This court cannot weigh the evidence, and it must therefore be assumed in this court that the evidence of the witnesses of the appellee is true, and that the team was being driven at a high and reckless rate of speed downgrade, directly towards the side of the car upon which appellee was conductor, at the time of the injury.

It is first contended that the fourth and fifth instructions given on behalf of the appellee are erroneous. The first criticism made upon these instructions is common to both. The instructions read as follows, and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the portions thereof which are claimed to vitiate each of them are herein italicized:

"If the jury believe, from the evidence, under the instructions of the court, that the driver of the wagon of the defendant was guilty of negligence as charged in the declaration or some count thereof, and that the plaintiff was injured as a direct and proximate result of such negligence, and that the injury to the plaintiff would not have occurred excepting for said negligence of the said driver, *and that a reasonable person in the position of the driver at the time of said negligent acts could have foreseen that injury to persons upon the car upon which the plaintiff was riding might result from such acts*, and that the said driver, at the time of the said negligence, if any, was in the employ of the defendant as its servant and acting within the scope of his employment, and that at the time and on the occasion of his injury the plaintiff was in the exercise of reasonable care for his own safety, then the jury will find the issues for the plaintiff, as against the defendant.

"Even though the jury may believe, from the evidence, that the motorman upon the car upon which the plaintiff was riding at the time of his injury was guilty of negligence in the management of said car which directly contributed to cause the injury to plaintiff, yet such negligence of the motorman, if there was negligence, cannot be imputed to the plaintiff so as to prevent his recovery in this case if the circumstances hereinafter mentioned existed, and if the jury believe, from the evidence, under the instructions of the court, that they existed, and that the driver of the wagon of the defendant which collided with the street car was guilty of negligence in manner and form as alleged in the declaration or some count thereof, and that such negligence of the said driver directly and proximately concurred with the negligence of the said motorman to cause the injury to the plaintiff, and that the said injury would not have occurred but for the negligence of the said driver, *and that a reasonable man in the position of the said driver at the time of such negligence on his part, if any, could foresee that such injury might result from the acts of the said driver*, and if the jury further believe, from the evidence, that the driver of the said wagon was in the employ of the defendant as its servant at the time and place in question and was acting within the scope of his employment at the said time and place, and if the jury further believe, from the evidence, under the instructions of the court, that plaintiff himself was in the exercise of reasonable care for his own safety, then it is the duty of the jury to find the issues for the plaintiff, notwithstanding the negligence of the motorman on the said street car."

The Appellate Court held that each of said instructions would have been correct—and this seems to be conceded by counsel

for the appellant—except for the incorporation therein of the parts thereof hereinbefore pointed out, and that as said clauses imposed a burden upon the appellee greater than he was required to sustain in order to make a case, the errors, if any, in the instructions, were committed against the appellee and not the appellant, and that they do not for that reason constitute reversible error.

The brief of appellant is taken up largely with a discussion of the facts, as it insists, with a view to advise the court that the case is close upon the facts, and that for that reason the jury should have been accurately instructed. We think this contention of counsel may be conceded and still the errors in the instructions complained of should not reverse the case. The only thing wrong that we can discover in either of these instructions is that they inform the jury that the driver, in order to make the appellant liable, must have foreseen that the injury which did occur might reasonably have been expected to result from his driving the team down said incline, hitched to a heavy load, at a high rate of speed and without attempting to control it, while the law is that the appellant would have been liable if a reasonable person driving the team, under the same circumstances, by the exercise of ordinary care ought to have foreseen that some injury might result from said negligent acts. In other words, in order to make the negligent acts of the driver the proximate cause of the injury, it was not necessary that the driver should have foreseen the particular injury which occurred to appellee, but that it was sufficient if the driver, by the exercise of ordinary care, could have foreseen that some injury might result from his negligence. In *Illinois Central Railroad Co. v. Siler*, 229 Ill. 390, on page 394, 82 N. E. 362, on page 364, 15 L. R. A. (N. S.) 819, it is said: "In order to make a negligent act the proximate cause of an injury, it is not necessary that the particular injury, and the particular manner of its occurrence, could reasonably have been foreseen. *City of Dixon v. Scott*, 181 Ill. 116, 54 N. E. 897. If the consequences follow in unbroken sequence from the wrong to the injury without an intervening efficient cause, it is sufficient if, at the time of the negligence, the wrongdoer might, by the exercise of ordinary care, have foreseen that some injury might result from his negligence." We think therefore the Appellate Court was right in its holding that the only defects in said instructions were that they required the driver, acting as a reasonably prudent man, to foresee that the particular injury which happened to appellee was likely to take place from the negligent manner in which the team was being driven; rather than that he was required to foresee that some injury might result from his negligent acts; that is, that the instruction required the appellee to prove

more to make out a case than the law required him to prove. The errors in the instructions did not therefore injure appellant.

It is next contended that the injury was caused, in part, by the negligence of the motorman in charge of the car in not stopping the car in time to permit the team to pass in front of it, instead of in its rear, and that the conductor is bound by the acts of the motorman, they being fellow servants, and that his right of recovery, by reason of the negligence of the motorman, is defeated; and it is urged that the fifth instruction was erroneous in so far as it informed the jury that the negligence of the motorman, if there was negligence on his part, could not be imputed to the appellee. The car had just come out from under the viaduct and was on the point of turning north into Clark street when the team and wagon appeared something like 100 feet east of the car, on Twenty-Second street, going west. The jury were justified, we think, in finding, from the evidence, that the motorman had the right to assume that the driver would stop his team or would turn to the left and not attempt to drive over the car, and that in bringing his car into Clark street without stopping he was not guilty of negligence. If, however, it be assumed that the motorman was guilty of negligence in attempting to turn the car into Clark street, which contributed to appellee's injury, we do not think the appellee was thereby defeated of the right of recovery against the appellant on account of the negligence of the driver. In *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, at page 262, 32 N. E. 285, at page 291, 18 L. R. A. 215, it was said: "An 'efficient cause' is simply the 'working cause,' or that cause which produces effects or results (Webster), and a proximate cause is that which stands next in causation to the effect—not necessarily in time or space, but in causal relation." It was further said in that case (page 261 of 143 Ill., page 291 of 32 N. E. [8 L. R. A. 215]): "It is well settled that where the injury is the result of the negligence of the defendant and that of a third person, or of the defendant, and an inevitable accident or an inanimate thing has contributed, with the negligence of the defendant, to cause the injury, the plaintiff may recover if the negligence of the defendant was an efficient cause of the injury. 2 Thompson on Negligence, 1085, § 3; Bishop on Non-Contract Law, §§ 39, 450, 452; Shearman & Redfield on Negligence, § 31 et seq.; *Carterville v. Cook*, 129 Ill. 152, 22 N. E. 14, 4 L. R. A. 721, 16 Am. St. Rep. 248; *Consolidated Ice Machine Co. v. Kelfer*, 134 Ill. 481, 25 N. E. 799, 10 L. R. A. 696, 23 Am. St. Rep. 688, and cases cited. In such case the negligence of two independent persons resulting in injury to the third, where neither is sufficient within itself, both are to be

treated in combination as the proximate cause of the injury. It is clear that the negligence of the fellow servant, in and of itself, could not have produced the injurious results suffered by appellee. The negligence of appellant and the fellow servant were therefore concurrent causes, and combined were the proximate cause of the injury."

It is finally contended that the appellee was guilty of such contributory negligence as to defeat a right of recovery. The question of contributory negligence, where the facts are in dispute, is a question of fact. The appellee was on his car and in a place where he had the right to be, and he was not in the presence of the approaching team required to abandon his car and its passengers or leave the place where he was on the car, as a matter of law. Whether he did what a reasonably prudent man should have done under the circumstances and in the face of the approaching danger to protect himself from injury clearly was a question of fact for the jury, and not a question of law.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(237 Ill. 470)

#### KEHOE v. MARSHALL FIELD & CO.

(Supreme Court of Illinois. Dec. 15, 1908. Rehearing Denied Feb. 4, 1909.)

#### 1. APPEAL AND ERROR (§ 1094\*)—REVIEW—DECISION OF INTERMEDIATE COURT—DIVIDED COURT.

That the Appellate Court was divided in opinion in reversing a judgment of the circuit court, does not enable the Supreme Court to review controverted questions of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4327; Dec. Dig. § 1094.\*]

#### 2. APPEAL AND ERROR (§ 1095\*)—REVIEW—DETERMINATION OF CAUSE—FINDINGS AND CONCLUSIONS.

In an action for false imprisonment, a finding by the Appellate Court that defendant in error was "not guilty of the wrongs and injuries averred in the declaration" was a finding of ultimate and controlling facts, and not of the evidentiary facts merely, and was therefore sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1095.\*]

Error to Appellate Court, First District, on Appeal from Circuit Court, Cook County; R. W. Clifford, Judge.

Action by Bridget Kehoe against Marshall Field & Co. From a judgment of the Appellate Court reversing a judgment of the circuit court for plaintiff, defendant brings error. Affirmed.

Thomas E. Rooney, Ferdinand Goss, and Charles S. McNett, for plaintiff in error. Benson Landon (William S. Forrest, of counsel), for defendant in error.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

CARTER, J. Plaintiff in error, in an action on the case, brought her suit in the circuit court of Cook county against defendant in error for false arrest and imprisonment. Issues being joined, a trial by jury resulted in a verdict of \$5,000 against defendant in error. Judgment being entered on the verdict, on appeal to the Appellate Court for the First District the judgment, by a divided court, was reversed, with the finding of facts that the defendant in error was "not guilty of the wrongs and injuries averred in the declaration." The cause was thereupon brought to this court by writ of error.

Plaintiff in error's main contention is that, as the justices of the Appellate Court were divided in opinion, this court should review and determine controverted questions of fact arising in the trial of the cause. We have held that the provision of the new practice act (Hurd's Rev. St. 1908, c. 110) authorizing such a review of controverted questions of fact is unconstitutional. *Hackett v. Chicago City Railway Co.*, 235 Ill. 116, 85 N. E. 320; *Weglenska v. Studebaker Manf. Co.*, 235 Ill. 296, 85 N. E. 326; *Mozeiko v. Lehigh Valley Transportation Co.*, 235 Ill. 324, 85 N. E. 618. These decisions settle this question adversely to plaintiff in error's contention, and the law, therefore, stands as it did prior to the enactment of the present practice act. This court can only look into the record to ascertain whether the Appellate Court has properly applied the law to the facts as found by it and recited in its judgment. *Scheevers v. Illinois Central Railroad Co.*, 235 Ill. 227, 85 N. E. 192. The decision of the Appellate Court in such cases being conclusive as to all matters of fact, we cannot review them. *Williams v. Forbes*, 114 Ill. 167, 28 N. E. 463; *Weeks v. Chicago & Northwestern Railway Co.*, 198 Ill. 551, 64 N. E. 1039.

No question is raised as to the admission or exclusion of evidence or the instructions of the court. The argument addressed to us is purely a discussion of facts to establish that the Appellate Court erred in finding the facts differently from what they were found by the circuit court. No ruling on any question of law was excepted to which is now pressed as a ground of error. Whether the finding of the Appellate Court is right or wrong on these facts, the law does not permit us to inquire. *Williams v. Forbes*, supra.

Some question is made as to the sufficiency of the finding of facts by the Appellate Court. The issues in this cause under the declaration were whether or not the defendant was guilty of "the wrong and injuries" therein set forth. Manifestly, these issues were solely questions of fact, depending entirely upon the evidence. The rule is that the Appellate Court shall find the ultimate and controlling facts, and not the evidentiary facts. We think the finding in this case satisfied the requirements of the law. *Luckowitz v. Eagle*

*Brewing Co.*, 235 Ill. 246, 85 N. E. 213; *Martin v. Martin*, 212 Ill. 301, 72 N. E. 418; *Trakal v. Heusner Baking Co.*, 204 Ill. 179, 68 N. E. 399.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(237 Ill. 473)

# BURT v. GARDEN CITY SAND CO.

(Supreme Court of Illinois. Dec. 15, 1908.

Rehearing Denied Feb. 4, 1909.)

## 1. SALES (§ 174\*)—CONTINUING CONTRACT—DEFAULT OF BUYER—EXCUSE FOR NONPERFORMANCE BY SELLER.

Where plaintiff, a manufacturer of cement, agreed to sell the entire annual output of his mill to defendant, payment for all cement delivered to be made monthly, plaintiff was entitled to stop further deliveries where defendant was in default in his payments for three months next preceding such stoppage.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 434; Dec. Dig. § 174.\*]

## 2. SALES (§ 71\*)—CONSTRUCTION OF CONTRACT—QUANTITY—"OUTPUT."

A contract to sell the entire "output" of a cement mill for a year requires the seller to deliver no more than he actually produces in the mill during the year, though the production does not equal the estimated capacity of the mill, and the mere expectation of the buyer that the mill would be operated to its full capacity cannot be imported into the contract, and thus extend by implication the plain meaning of its terms.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 192; Dec. Dig. § 71.\*]

## 3. SALES (§ 181\*)—ACTION FOR PRICE—DEFECTS IN QUALITY—BURDEN OF PROOF.

In an action for the price of cement delivered under a contract which provided that the cement should be up to the standard fixed by the American Society of Civil Engineers, the burden of proving that cement delivered did not conform to such standard was on the defendant.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 475; Dec. Dig. § 181.\*]

## 4. TRIAL (§ 296\*)—INSTRUCTIONS—SUBMISSION OF MATTERS OF LAW—CURED BY OTHER INSTRUCTIONS.

In an action for the price of goods sold, an erroneous instruction that it was incumbent on defendant to prove a warranty admittedly contained in the contract of sale was not calculated to mislead the jury, where the court further instructed that the legal effect of the contract was a question of law for the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 710, 711; Dec. Dig. § 296.\*]

## 5. SALES (§ 284\*)—WARRANTY—BREACH.

A warranty in a contract for the sale of cement that the cement should conform to a certain standard was complied with where the cement was of the required quality when delivered to the buyer on cars for shipment.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 803; Dec. Dig. § 284.\*]

## 6. SALES (§ 172\*)—PERFORMANCE BY SELLER—INABILITY TO PROCURE CARS.

A manufacturer of cement who has used reasonable diligence in making shipments under a contract for the sale of the entire output of his mill is not liable for failure to make de-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

liveries owing to his inability to procure cars for its transportation.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 427; Dec. Dig. § 172.\*]

Appeal from Appellate Court, First District, on Appeal from Municipal Court of Chicago; Edward A. Dicker, Judge.

Action by Wellington R. Burt against the Garden City Sand Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

Edwin C. Crawford, for appellant. Hoyne, O'Connor & Irwin, for appellee.

HAND, J. This was an action in assumption, commenced on January 8, 1907, in the municipal court of Chicago, by the appellee, against the appellant, to recover for the value of certain cement sold and delivered by the appellee to the appellant. The jury returned a verdict for the appellee for the sum of \$34,464.14, upon which verdict the municipal court rendered judgment, which judgment has been affirmed by the Appellate Court for the First District, and a further appeal has been prosecuted to this court.

The contract under which the cement was sold was in writing and bore date January 1, 1906, and provided that the party of the first part (the appellee) agreed to sell, and the party of the second part (the appellant) agreed to buy, the entire output of cement manufactured during the year 1906 by the party of the first part at his cement plant, located at Bellevue, Mich. The contract provided that cement purchased during the months of January and February should be paid for at \$1.05 per barrel, in bulk, f. o. b. cars at Bellevue, except about 65,000 barrels already sold, which was to be delivered at once for \$1 per barrel, less a commission of 8 per cent., and that cement purchased from March 1st, to December 31st, inclusive, was to be paid for at \$1.08 per barrel in bulk, f. o. b. cars at Bellevue, and that all cement shipped during any month was to be paid for on the 15th day of the second month following, and that the cement was to be of a quality that would pass the specifications of the American Society of Civil Engineers and the board of local improvements of the city of Chicago. Shipments were made as follows: In January, 2,475 barrels; February, 5,195 barrels; March, 16,087½ barrels; April, 37,460 barrels; May, 40,466½ barrels; June, 20,084 barrels; July, 25,963 barrels; August, 21,944 barrels; September, 18,995½ barrels; and October, 6,844 barrels. On October 15th there was due for cement shipped in August \$21,976.26, and shipments had been made in September to the amount of \$20,670.29, which would be due November 15th, and in October to the amount of \$7,000, which would be due December 15th. The mill of appellee was new, and there had been serious delays

in filling the orders of appellant for cement. On October 15th, however, the appellee was behind in filling orders only 1,500 barrels. On that day the appellant failed to make the payment due for the August shipments, and wrote appellee the following letter: "We make no remittance to you to-day, as we are trying to ascertain where we stand on sales of your cement not filled on our orders by you. The losses will be very heavy to us, and will, in all likelihood, much exceed the amount we are owing you. Just as soon as we can do so we will send you a statement showing the loss to us from your failure to comply with your contract." To this the appellee replied upon the 22d of October, as follows: "We want to say to you that unless you pay us what is due on the cement shipped you on or before the 27th of this month we shall consider the contract annulled. Will you be kind enough to write us at Saginaw whether or not you intend to pay us and go on with the contract?" Shipments were continued by the appellee until October 27th, after which, no payments having been made, he discontinued to make shipments, and the appellant thereafter gave no orders for shipments. The appellant filed a set-off for damages for the nondelivery of cement and for cement delivered claimed to be of a grade inferior in quality to that specified in the contract, which equaled the amount of the appellee's claim, and it was stipulated on the trial that \$50,882.81 worth of cement had been shipped by the appellee to the appellant in August, September, and October, 1906, none of which had been paid for by appellant; that appellant had returned sacks, etc., to appellee to the amount of \$16,735.29; and that there was due the appellee from appellant the sum of \$34,317.43, with interest, subject to such set-off as appellant might prove, if any, and subject also to the appellant's further right to disprove the correctness of any item in appellee's claim.

The main controversy between the parties in this court arises over the proper construction of the words, "the entire output of cement manufactured during the year 1906 by the party of the first part at his cement plant located at Bellevue, Michigan"; it being the contention of the appellant that the output of the plant was about 300,000 barrels per year if running at its full capacity, and that the appellee was bound to operate the plant to that extent and fill shipping orders to that amount, or pay damages to it for a failure so to do, while it was the contention of the appellee that he did not bind himself by the contract to operate his plant for any length of time further than was necessary to enable him to make shipments of cement to the amount of 65,000 barrels—in other words, that he had only agreed specifically to ship 65,000 barrels of cement and the over-plus of the output of his plant, if any, and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that, if he shipped 65,000 barrels of cement and what further output of the plant there was, he had complied with his contract.

We have considered all the provisions of the contract entered into between the parties, which will be found set forth in full in the opinion of the Appellate Court, and we find no other provision thereof which throws any light upon the meaning of the words heretofore referred to. We are therefore of the opinion the controversy between the parties must be determined from those words alone, from which we conclude if appellee shipped, after shipping the 65,000 barrels of cement specifically agreed to be shipped, whatever surplus of cement was produced by the plant of the appellee up to October 15th, he had complied with his contract, and was not in default upon his contract upon that day, and that the appellant could not terminate the contract on that day or put the appellee in default, and that as the appellee had made such shipments, and the appellant did not make payment to the amount due upon October 15th by October 27th, in accordance with the letter of appellee of October 22d, the appellee had the right to terminate the contract between the parties, and recover in this suit the entire amount due for shipments of cement made in August, September, and October. We therefore are of the opinion the trial court did not err in giving to the jury the following instruction on behalf of appellee: "The court instructs the jury that the refusal on the part of the defendant to make payment on the 15th day of October, 1906, in accordance with the terms of the contract entered into by and between the parties, amounted to a breach of said contract on its part, and you are further instructed as a matter of law that such breach of the contract on its part entitled the plaintiff to refuse to make any further shipments of cement under said contract; and the court further instructs the jury that the plaintiff having elected to abandon the contract by reason of such breach on the part of the defendant on and after October 27, 1906, the jury should consider the contract as rightfully terminated on and after said last mentioned day." It would seem clear that the output of the plant for the year 1906 was the cement manufactured at the plant during that year. The Century Dictionary defines "output" as "the quantity of material put out or produced within a specified time"; and Webster says it is "the amount of coal or ore put out from one or more mines, or the quantity of material produced by or turned out from one or more furnaces or mills in a given time." If the appellant was not satisfied to take the output of the plant for the year 1906, but desired to bind the appellee to furnish a certain number of barrels of cement during that time, it should have specified in the contract the number of barrels of cement that were to be shipped by appellee

upon its orders during that year. This it did not do. It was therefore entitled to only the output of the plant, whatever that might be, over and above the 65,000 barrels specifically agreed to be shipped.

It is urged, however, by the appellant that it appears from the contract and extraneous facts and circumstances in evidence that the parties intended that the plant should be operated to its full capacity, and that the appellant should receive during the year what cement could reasonably be produced by the plant when run at its full capacity. The contract does not so state, and the court cannot import into the contract a provision which the parties have omitted therefrom. To do so would be to make a new contract for the parties. In *Maryland v. Baltimore & Ohio Railroad Co.*, 22 Wall. 105, 22 L. Ed. 713, it is said: "It would \* \* \* be inadmissible to deduce an implication of a promise, not from the contract itself, but from the extraneous fact that such a promise ought to have been exacted. Ordinarily a reference to what are called surrounding circumstances is allowed for the purpose of ascertaining the subject-matter of a contract or for an explanation of the terms used—not for the purpose of adding a new and distinct undertaking." And in *Knox v. Lee*, 12 Wall. 457; 20 L. Ed. 287: "There is a well-recognized distinction between the expectation of the parties to a contract and the duty imposed by it. \* \* \* Were it not so, the expectation of results would be always equivalent to a binding engagement that they should follow." And in *Aspden v. Austin*, 5 Ad. & Ell. (N. S.) 671, the court said: "Where parties have entered into written engagements, with express stipulations, it is manifestly not desirable to extend them by implication. The presumption is that having expressed some they have expressed all the conditions by which they intend to be bound under the instrument. It is possible that each party to the present instrument may have contracted on the supposition that the business would, in fact, be carried on and the service in fact continued during the three years, and yet neither party might have been willing to bind themselves to that effect; and it is one thing for the court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as upon full consideration the court may deem fitting for completing the intention of the parties, but which they, either purposely or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written. The latter adds to the obligation by which the parties have bound themselves, and is, of course, quite unauthorized, as well as liable to great practical injustice in the application."

It is also claimed by the appellant that the trial court erred in giving to the jury the following instruction: "The court instructs the

jury that under the law of this state it is incumbent upon the party claiming damages by reason of a breach of warranty to prove such warranty, its breach, and that damages have resulted by reason of such breach of warranty, and in this case it is incumbent upon the defendant, before it is entitled to recover any damages by reason of its alleged breach of warranty in the failure of the plaintiff to ship cement of the quality guaranteed, that the defendant prove, by a preponderance of the evidence, that plaintiff warranted the cement in question, as claimed by the defendant, that the plaintiff has committed a breach thereof by delivering to the defendant, or on its order, cement of a quality inferior to that warranted, and that damages have resulted to the defendant by reason of the inferior quality, as claimed." We think the foregoing instruction correctly stated the law as to where rested the burden of proof. If appellee delivered cement to the appellant or shipped it upon its order, and the appellant claimed that it was not up to the standard of the specifications of the American Society of Engineers and the board of local improvements of the city of Chicago, the burden rested upon it to show that fact. In *Morris v. Wibaux*, 159 Ill. 627, 43 N. E. 837, it was held that the burden of proof rested upon the purchaser of personal property to show that the quality of the property delivered was not up to the standard of the warranty. The court, on page 641 of 159 Ill., on page 841 of 43 N. E., says: "Where the appellee delivers the identical thing sold and has performed his contract in that behalf, if the appellant alleges that it fails to possess the attributes it was warranted to possess, he may so plead, and on that issue the burden would rest on him, the appellant." See, also, *Maltman v. Williamson*, 69 Ill. 423. The instruction was inaccurate in so far as it informed the jury that it was incumbent upon the appellant to prove the warranty as the warranty arose upon a contract in writing, and the construction of the contract was for the court, and not for the jury. The jury, however, were not misled on that proposition, as the court, upon behalf of the appellant, instructed the jury that the legal effect of the contract introduced in evidence was a question of law for the determination of the court, and not a question of fact for the determination of the jury. It was not denied that the appellee had warranted the cement to be of a quality which would pass the specifications of the American Society of Civil Engineers and of the board of local improvements of the city of Chicago.

The fifth instruction given on behalf of the appellee informed the jury if the cement delivered was of the quality specified by the contract when delivered at Bellevue, then the liability of the appellee regarding the quality of the cement ceased. We think this was

correct, as the appellee was not an insurer that the cement would retain its qualities under all circumstances.

The jury were also instructed that, if the appellee was unable to procure cars in which to ship cement, that fact would relieve him from liability for a failure to fill the shipping orders sent him by appellant. The view of the trial court was that the appellee was bound to use all reasonable effort to operate his plant for the entire year, and to fill all shipping orders sent him by appellant. While we think the trial court was mistaken in its view of the law in this regard, still, if that were the law and the appellee was required to try his case upon the theory that it was, then the appellee was only required to make all reasonable effort to make shipments of cement upon the orders of appellant, and, if he was unable to procure cars in which to make shipments, he would be relieved from liability. We think the jury were properly instructed as to the law of this case.

The appellant has urged other reasons as grounds of reversal, but we are of the opinion they are without force. When the appellant refused to make further payments on the contract on the 15th of October, the appellee had the right to terminate the contract, as he did, on the 27th of October. On that day the appellant had in its hands upwards of \$50,000 worth of cement which had been delivered to it by the appellee and for which it had not paid, and the appellee was not required to go on after that date delivering cement to the appellant under the contract without receiving payment therefor. *Harber Bros. Co. v. Moffat Cycle Co.*, 151 Ill. 84, 37 N. E. 676.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(337 Ill. 482.)

**SKAKEL v. CYCLE TRADE PUB. CO. et al.**  
(Supreme Court of Illinois. Dec. 15, 1908. Rehearing Denied Feb. 3, 1909.)

1. EXECUTION (§ 250\*)—SALE—INADEQUACY OF PRICE—VACATION.

A valid sale of real estate under an execution for \$132.04 will not be set aside, in the absence of fraud, mistake, or violation of some duty by the officer, solely because the property was worth \$20,000.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 703-707; Dec. Dig. § 250.\*]

2. EXECUTION (§ 385\*)—RETURN.

A constable to whom an execution had been delivered returned that the defendants named had no "personal" in his county whereof he could cause to be made the judgment and costs mentioned, according to the command of the writ, and he therefore returned the same, no part satisfied. *Held*, that the word "property" after the word "personal" in such return would be implied, and that its omission did not invalidate

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the return or a transcript filed in the circuit court's clerk's office based thereon.

[Ed. Note.—For other cases, see *Execution*, Dec. Dig. § 335.\*]

Vickers, Hand, and Carter, JJ., dissenting.

Appeal from Circuit Court, Cook County; Julian W. Mack, Judge.

Action by William Skakel against the Cycle Trade Publishing Company and others. Decree for complainant, and defendants appeal. Reversed and remanded, with directions.

John Maynard Harlan, for appellants. Edward B. Healy, for appellee.

**CARTWRIGHT, C. J.** On March 25, 1902, William Skakel, appellee, filed his bill in equity in the circuit court of Cook county against the Cycle Trade Publishing Company and James Artman, appellants, asking the court to set aside a judgment recovered against him in favor of said cycle company before a justice of the peace of said county on September 21, 1900, and a sale of real estate made by the sheriff of said county to Artman on May 21, 1901, in pursuance of the transcript filed in the office of the clerk of the circuit court and an execution issued thereon. The grounds for relief alleged were that the judgment was taken in violation of an agreement between the attorneys of the parties, under which the suit had been continued from time to time from July 23, 1900, until September 21, 1900, and that he had a good defense, and the bill also alleged that the property sold for \$132.04 was worth \$20,000. After the bill was filed, and before answering, defendants, for the purpose of inducing a settlement and avoiding the expense of litigation, offered to accept \$75, which was a little more than half the amount due, and settle the whole matter; but the offer was rejected. The defendants then filed their answer, and the replication was filed thereto. On March 5, 1906, Artman paid \$332.99 taxes on the property for the year 1905. On June 19, 1906, the complainant filed a supplemental bill, alleging that a deed had been made by the sheriff and asking to have it set aside. On July 1, 1907, Artman paid \$332.27 taxes for the year 1906, and on March 19, 1908, he paid \$352.68 taxes for the year 1907. The cause came on for hearing, and the court heard the evidence, and afterward, on March 31, 1908, gave the complainant leave to file instant an amendment of his bill upon the terms of paying to Artman the taxes paid, as aforesaid, with interest, and \$500 attorney's fees. The amendment was made, alleging that the transcript filed with the clerk of the circuit court contained this copy of the return on the execution issued by the justice: "The within-named defendants, William Skakel and Edmund Church, have no personal in my county whereof I can cause

to be made the judgment and costs within mentioned, or any part thereof, according to the command of the within writ, and I therefore return the same, no part satisfied, this 11th day of March, 1901. H. B. Goodrich, Constable"—and further alleging that the levy was grossly excessive, an abuse of the process of the court, and a fraud upon the rights of complainant, and that the sale was made en masse. The court thereupon on the same day entered a decree specifically finding, and reciting in detail, the requisite facts to show that the judgment and the sale were legal in every respect, that the sheriff at the sale first offered the premises in separate tracts or lots, and, no bid having been made for any of said tracts or lots separately, he then offered any two or more, less than the whole number, together, and, no bid having been made for any two or more of said tracts or lots less than the whole number, he then offered the premises together, and they were sold by him for \$132.04. The decree found that the attorney of the cycle company notified complainant that the levy had been made, and the premises had been advertised for sale, and informed complainant of the time fixed for the sale. The court found as a fact that the five lots sold were worth \$4,000 each, and the whole premises worth \$20,000, and concluded, as a matter of law, that the levy upon the four lots and bidding for and purchasing the whole was a fraud upon the complainant. The court therefore decreed that Artman should convey all his interest in the premises to the complainant upon repayment of the amount of the sale, with interest at 6 per cent., and the amount of the taxes, with interest at the same rate, and \$500 solicitor's fees. From that decree, this appeal was prosecuted.

The judgment was rendered by the justice on September 21, 1900, and at the time of the levy on the real estate the complainant was notified of the fact and of the time when the sale would take place. He had been served with process in the suit and had paid no attention to it after his recovery from the illness on account of which it had been continued. If he first learned of the judgment when it was too late to appeal, and he had not been at fault, there was still time and opportunity to remove the case to the circuit court by certiorari. He paid no attention to the notice of the levy or to the sale, but within a year after the sale, when he had a right to redeem, he filed his bill to set aside the judgment and sale. When the bill was filed, the cycle company offered to accept \$75 in full of the claim, but the complainant rejected the offer. He still had several months to exercise his legal right to redeem the property, but he made no redemption, and on September 30, 1902, the sheriff made a deed to Artman. On the day the de-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cree was rendered, and after the cause was heard, the complainant for the first time, by his amendment, charged the defendants with fraud, and alleged that the sale was made en masse, and that the word "property" was omitted in the copy of the constable's return included in the transcript. The complainant failed and neglected to pursue any of the legal remedies that were open and available to him, and there is no element in the case which commends him to a court of equity.

The only possible ground of complaint is that valuable property was sold for a small price, and it is settled beyond controversy that mere inadequacy of price will not justify a court of equity in setting aside a judicial sale where there is a right of redemption. Public policy and the interest of debtors require that stability should be given to judicial sales, and that they should not be disturbed unless there has been some mistake, fraud, or the violation of some duty by the officer making the sale or the purchaser. In *Davis v. Pickett*, 72 Ill. 483, this court affirmed a decree dismissing the bill where a 40-acre tract worth \$300 was sold for \$5, a quarter section worth \$2,000 to \$3,000 was sold for \$2.50, and two town lots worth \$75 each were sold for \$2. The rule was there emphatically stated that mere inadequacy of price, however great, is not ground for setting aside a judicial sale. In *O'Callaghan v. O'Callaghan*, 91 Ill. 228 a house and lot worth \$4,000 were sold for \$10; but it was held that such fact, alone, was not ground for setting aside the sale, and that the circuit court could not do otherwise than it did and dismiss the bill. In *Dobblins v. Wilson*, 107 Ill. 17, where property was sold for \$2,700 and resold by the purchaser for \$18,000, and the complainant did not choose to avail himself of the privilege of redemption, it was held that equity would afford no relief. There is no case cited by counsel where a sale has been set aside for mere inadequacy of price, where the owner could have paid the amount of the bid and redeemed his land.

The point is made that the transcript omitted the word "property" after the word "personal," in the return of the constable. If this rendered the sale void so that the purchaser acquired no title, it appeared on the face of the transcript and would afford no basis for relief in a court of equity. The court, in the decree, found and recited as a fact that the execution was duly issued, and that the constable "did duly return the said execution into the said justice court with his return duly indorsed thereon, by which it appeared that the defendants named in said execution, William Skakel and Edmund Church, had no personal property in said Cook county whereof could be made the said judgment and costs in said execution mentioned, or any part thereof, according to the command of said writ, and that therefore said constable returned the same no part satisfied the 11th day of March, A. D. 1901."

No cross-errors have been assigned on that finding of fact. It appears, then, that there was a mere omission of a word in the copy filed in the clerk's office; but the copy could mean nothing except that no personal property was found. The execution commanded that of the goods and chattels of the defendants the constable should make the amount of the judgment, and the statute made it the duty of the constable to proceed with the collection of the execution by levy on personal property, and when it should appear by the return of the execution that the defendants had not personal property sufficient to satisfy the judgment and costs, a transcript might be filed in the office of the clerk of the circuit court. The word "personal" applied to anything out of which the judgment and costs could be made by the constable—could mean nothing but personal property of the defendants. Artman had a right to bid as he saw fit and violated no duty which he owed to the complainant in so doing. The judgment of the justice of the peace was a valid and enforceable claim against the complainant, and the sale was regular in all respects. The complainant did not choose to avail himself of the right of redemption which was open to him, but chose to stand by while Artman paid the taxes on the property, and refused even to settle the claim for a part of the amount for which the land was sold. Under these circumstances, a court of equity ought not to give him any relief.

The decree of the circuit court is reversed, and the cause is remanded to that court, with directions to dismiss the bill.

Reversed and remanded, with directions.

VICKERS, J. (dissenting.) I do not concur in the opinion of the majority of the court in this case, and will briefly state the reasons why I do not consider the reasoning sound, or the conclusion just and equitable, reached in the majority opinion.

The fundamental error in the majority opinion arises from the assumption that "the only possible ground of complaint is that valuable property was sold for a small price." If this conclusion was warranted by the facts in the record, then the conclusion drawn in the majority opinion, that mere inadequacy of price is not a sufficient ground for setting aside a judicial sale, could not be the subject of serious controversy. That this assumption is a misapprehension is shown by the fact that the majority opinion proceeds to point out and discuss an objection that was made to the transcript, in respect to the omission of the word "property" after the word "personal," in the return of the constable. In my opinion the disposition made of this objection to the transcript, in the majority opinion, wherein it is said, "if this rendered the sale void, so that the purchaser acquired no title, it appeared on the face of the transcript

and would afford no basis for relief in a court of equity," announces a doctrine that has no application to bills, such as this was, to redeem one's real estate from an irregular sale. I have always understood the law to be that one whose property had been sold for the payment of a just debt might for sufficient reason file a bill in equity for the purpose of removing the cloud upon his title, even though the judgment might be void and unenforceable at law. I do not, however, regard the judgment under which the real estate in this case was sold as void. It is not necessary, in order to give appellee a standing, in equity, to redeem, that he should show that the judgment under which the sale was made was void. If there were irregularities in the procedure not affecting the jurisdiction of the court, such facts, connected with gross inadequacy of price, will warrant a court of equity in setting aside the sale upon such equitable terms as good conscience and fair dealing require.

Upon referring to the appellants' abstract of the record (pages 80 to 83, inclusive), I find what purports to be an abstract of the transcript filed in the circuit court, upon which the execution was issued. This abstract fails to show that the summonses issued by the justice, and the returns thereon, were copied in the transcript. Section 136 of chapter 79 of Hurd's Revised Statutes of 1905 provides as follows: "Every transcript desired to be used for the purposes aforesaid shall be certified by the justice of the peace making the same, to be truly copied from the files and books of his office, and shall contain a copy of the original and each subsequent summons or process issued by the justice of the peace, the return of the officer or officers thereon, the judgment and the execution or executions issued thereon, with the return of the officer upon the same, and a copy of his docket in the case." This statute is mandatory, and a transcript which fails to contain copies of all processes issued by the justice of the peace is insufficient. *Hobson v. McCambridge*, 180 Ill. 367, 22 N. E. 823; *Wooters v. Joseph*, 137 Ill. 113, 27 N. E. 80, 81 Am. St. Rep. 355; *Merrick v. Carter*, 205 Ill. 73, 68 N. E. 750. Thus we see that the statute requiring the copies of the summonses and other processes to be in the transcript was disregarded. This was a serious irregularity.

The abstract which appellants have filed, and which I must assume states the facts as favorable to appellants as the record will warrant, shows that the transcript was not certified to by the justice of the peace who rendered the judgment. The law requires that the transcript shall be certified by the justice of the peace. This is another irregularity not noticed in the majority opinion.

In order to warrant the sale of real estate upon an execution issued upon a tran-

script from a justice of the peace, it must appear that there has been a return of the execution showing that the judgment debtor has no personal property out of which the debt can be collected. The return in this case of the only execution shown in the transcript was that the defendants, "William Skakel and Edmund Church, have no personal in my county whereof I can cause to be made the judgment and costs within mentioned, or any part thereof, according to the command of the within writ, and I therefore return the same no part satisfied." This return does not appear to have been signed by any one, and the abstract does not show whether it was made by a constable or written by some unauthorized person. I think that the signature of a constable to the return is important, and that a failure to sign it is a very grave irregularity. No one could be sued for making a false return such as the above, without resorting to evidence to show who, in fact, made the return.

In the next place, this return might be literally true, and yet the defendants have \$100,000 of personal property liable to execution. The return does not show that the defendants have no personal property, but simply says the defendants have no "personal in my county whereof I can cause to be made the judgment and costs." Of course, a court of equity, in order to accomplish justice, might read into this return the word "property" after the word "personal"; but it seems to me that it is a perversion of equitable principles to supply a defective return in order to uphold a sale of \$20,000 worth of real estate for \$182.04. I may guess or surmise that there was an omission of the word "property" after the word "personal" in the return, but the word "property" is not the only word that might be read into this return and make complete sense. I might insert the word "chattels," "effects," "estate," "goods," "earnings," etc., any one of which would make the sense complete, but would not make the return legal. This return, I think, is not in compliance with the statute.

With these defects and irregularities in the record, I think it is a serious misapprehension to assume that this sale must be set aside for inadequacy, alone. In the case of *Hobson v. McCambridge*, supra, the suit was docketed, "T. Battles, for the use of Dr. W. H. Hobson," but the judgment was in favor of W. H. Hobson. The transcript filed with the circuit clerk showed an execution issued by the justice in favor of "T. Battles, for the use of Dr. W. H. Hobson." There was there no other irregularity. It was perfectly clear that W. H. Hobson was the beneficial plaintiff, and the judgment was in his favor, yet this court in that case held that the slight variance between the execution and the judgment, in connection

with the fact that \$2,000 worth of real estate had been sold to satisfy a judgment of \$56.60, was such an irregularity as to warrant a court of equity in depriving the purchaser of the advantage of a title acquired through such sale. In the course of the opinion in that case, on page 378 of 130 Ill., and page 826 of 22 N. E., this court said: "While inadequacy, alone, may not, upon the grounds of public policy, be sufficient, of itself, to set aside a sale on execution, or a judicial sale, yet where there are circumstances of irregularity or of fraud, or that show that unfair advantage was sought by the purchaser or the person benefited by the sale, the inadequacy of price may be always taken into consideration and may become conclusive evidence of fraud. *Freeman on Executions*, § 309; *Morris v. Robey*, 73 Ill. 462; *Davis, Cory & Co. v. Chicago Dock Co.*, 129 Ill. 180, 21 N. E. 830."

In *Wooters v. Joseph*, supra, the transcript filed in the circuit court was complete in all respects, except that the copy of the execution issued on the judgment failed to show that it was signed by the justice. This was held to be a fatal defect.

In *Merrick v. Carter*, supra, the transcript showed the following return upon an execution issued by the justice: "Demand made August 7, 1894. Return execution no part satisfied, August, 1904." This return was held sufficient, in connection with the sale of \$3,500 worth of real estate for \$100, to justify setting the sale aside. On page 76 of 205 Ill., and page 751 of 68 N. E., in that case this court said: "The method of enforcing the judgment of a justice against real estate is purely statutory, and such statutory proceeding must be strictly pursued, or no title will be obtained by virtue of a sale thereunder. *Illinois Central Railroad Co. v. Weaver*, 54 Ill. 319; *Webster v. Steele*, 75 Ill. 544."

As already suggested, in the case at bar four lots belonging to appellee, worth in the aggregate \$20,000, were sold in mass for \$132. In view of the serious irregularities pointed out, I think that a court of equity ought not to hesitate to set aside this sale upon equitable terms. This the court below did, requiring appellee to pay, in addition to the judgment, costs, interest, and taxes, an attorney fee of \$500. While appellee's conduct in connection with this transaction does not commend him to the favorable consideration of the court, still I think that the terms imposed by the court below were ample punishment, without depriving him of \$20,000 worth of real estate.

I think the judgment below should be affirmed.

HAND and CARTER, JJ., concur in the dissenting opinion of Mr. Justice VICKERS.

(237 Ill. 492)

**PARKHURST-DAVIS MERCANTILE CO. v. MERCHANT UNDERWRITERS AT THE INDEMNITY EXCHANGE et al.**

(Supreme Court of Illinois. Dec. 15, 1908.  
Rehearing Denied Feb. 4, 1909.)

**1. INSURANCE (§ 608\*)—ACTION ON POLICY—NATURE AND FORM.**

Though an action at law may be brought, a court of equity will take jurisdiction of a suit to enforce payment of a fire policy issued by an unincorporated association composed of corporations, firms, and individuals for the purpose of issuing insurance policies to its members on the mutual plan because the remedy in equity is more adequate, the procedure in equity being peculiarly adapted to enforce the performance of any personal act required of the manager or committee of the association to obtain satisfaction of the decree.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1517; Dec. Dig. § 608.\*]

**2. INSURANCE (§ 288\*) — FIRE INSURANCE — FRAUD OF INSURED.**

The agent of an unincorporated association issuing policies to its members on the mutual plan offered to write a policy on the mercantile stock of insured on the basis of the board rate with 15 per cent. off. The agent was told by the insured what the board rate was, and he could not write insurance on the terms which he proposed. He then offered to make a flat rate less 15 per cent., which offer was accepted, and a policy was issued. The policy was reissued from time to time without request from insured. There was nothing in the policy from which it could be inferred that the rate was fixed with reference to the rate paid for other insurance. *Held*, that renewal policies were not void because of the failure of insured to give information as to the cost of other insurance.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 288.\*]

**3. INSURANCE (§ 336\*) — FIRE INSURANCE — CONTRACTS — CONSTRUCTION — "CONCURRENT."**

A provision in a fire policy, "\$150,000 total concurrent insurance permitted," is at most ambiguous and susceptible of more than one construction, and hence the construction most favorable to insured must be adopted, and it must be construed to permit other insurance to the amount of \$150,000; the word "concurrent" meaning "running with."

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 871; Dec. Dig. § 336.\*]

**4. INSURANCE (§ 603\*)—FIRE INSURANCE—DISCHARGE FROM LIABILITY.**

In an action on fire policies, the claim of insured against a water company for its failure to furnish sufficient water or pressure was compromised. Insured acted in good faith, and the compromise was made by attorneys acting for all insurers. *Held*, that an insurer could not defeat a recovery on its policy on the ground that insured had released the water company from liability, and had thereby prevented subrogation.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1499; Dec. Dig. § 603.\*]

**5. INSURANCE (§ 603\*)—FIRE INSURANCE—DISCHARGE FROM LIABILITY.**

Where property destroyed by fire could not have been saved had a water company not been negligent in furnishing an insufficient supply of water or insufficient pressure, the fact that insured released the company from liability did not defeat a recovery on a fire pol-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

icy on the ground that such release prevented subrogation on the part of insurer.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1499; Dec. Dig. § 603.\*]

Appeal from Appellate Court, First District, on Error to Superior Court, Cook County; Joseph E. Gary, Judge.

Suit by the Parkhurst-Davis Mercantile Company against the Merchant Underwriters at the Indemnity Exchange and others. From a decree of the Appellate Court (140 Ill. App. 504), affirming a decree for complainant, defendants appeal. Affirmed.

Barger & Hicks, for appellants. Frederick A. Brown, William F. Schoch, Lee Munroe, and George A. Kline, for appellee.

CARTWRIGHT, C. J. The Merchant Underwriters at the Indemnity Exchange, an association engaged in insuring its subscribers or members against loss or damage by fire or lightning and doing business in the city of Chicago, issued two policies of insurance to the Parkhurst-Davis Mercantile Company, a corporation of the state of Kansas, on its wholesale grocery stock in the city of Topeka—one for \$10,000 and the other for \$20,000. On February 13, 1904, while the policies were in force, the property insured was burned, and, the Underwriters having refused to pay the amount of the policies, the mercantile company filed its bill in equity in the superior court of Cook county against the Underwriters and the manager and a number of members to enforce payment. The nature of the business carried on by the Underwriters and the agreement executed by subscribers were explained at length in the case of *Warfield-Pratt-Howell Co. v. Williamson*, 233 Ill. 487, 84 N. E. 706, and need not be repeated here. The defenses interposed by answer to the bill were, first, that the rate of premium to be paid was to be 15 per cent. less than the rate at which the complainant's other insurance was written, and the complainant falsely represented that it was obtaining its other insurance at a much less rate than it was, in fact, paying, and thereby induced the managers of the Underwriters to issue the policies at a less premium rate than otherwise would have been charged; second, that the policies were to be void if the insured had other insurance on the property exceeding \$150,000, including these policies, and at the time the fire occurred there was insurance on the property amounting to \$160,000; third, that the complainant, by releasing the receiver of a water company from liability for the loss, released and discharged the Underwriters. Another defense not set up by the answer is that the complainant had a complete and adequate remedy at law, and for such reason could not maintain the suit. Upon a hearing the court found the equities

for the complainant and entered a decree in its favor for \$32,512.50, together with costs, and ordered the committee of the Underwriters to pay the same out of funds on hand. The defendants sued out a writ of error from the Appellate Court for the First District, and that court affirmed the decree. From the judgment of the Appellate Court this appeal was prosecuted.

The defendants demurred to the bill, alleging as one ground of their demurrers that the complainant had an adequate remedy at law; but, when the demurrers were overruled, they did not stand by them. They answered on the merits, without setting up the claim that the complainant had an adequate remedy at law. But, if the question whether a court of equity could grant the relief sought by the bill is proper to be considered, it is answered by the decision in *Warfield-Pratt-Howell Co. v. Williamson*, supra. It was there held that, although an action at law could be brought, a court of equity would take jurisdiction on the same facts and grant relief because of the special circumstances of the situation and because the remedy in equity is more adequate; the procedure in courts of equity being peculiarly adapted to enforce the performance of any personal act required of the manager or committee in order to obtain satisfaction of the decree.

The first defense on the merits alleged in the answer and now insisted upon is that the policies were void because of the fraudulent practices of the complainant in concealing from the manager of the Underwriters the rates paid by it to other insurers on the same risk. Probably the usual method of insurance by the Underwriters was to fix a premium rate 15 per cent. less than other insurance companies. But that was not the contract with the complainant. There is nothing of that kind in either policy, nor anything from which it could be inferred that the rate was fixed with reference to the rate paid for other insurance. It is stated below the signature that, when a request for insurance is made, the subscriber should inform the manager what the insurance companies' rates are, and, where the insurance companies' rates vary, the highest prevailing rate is to be given. Indorsed on the back of each policy is an amount purporting to be a premium, with a deduction which in fact appears to be 15 per cent., but there is nothing in the nature of a contract on the subject. The insurance was renewed at different times, and the agent of the Underwriters who called on the president of complainant and secured the first insurance offered to write the business on the basis of the board rate with 15 per cent. off. He was told that the board rate was 85 cents, and he could not write the insurance on the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

terms which he proposed. He then offered to make a flat rate of 75 cents less 13 per cent., and that offer was accepted, and the first policy was issued in October, 1901, for \$20,000. In June, 1902, another policy for \$10,000 was issued on the same risk and at the same rate, not based on the cost of other insurance at all. No request was ever made for any renewal of the policies, but new policies were sent to the complainant from time to time, about two weeks before the expiration of the existing policy. One of these policies was sent to the complainant on October 13, 1902, renewing the insurance for one year. On May 29, 1903, another policy was sent renewing the one for \$10,000, which would expire June 15, 1903. On October 13, 1903, another policy in renewal of the one for \$20,000 was sent to the complainant. The policies of May 29, 1903, and October 13, 1903, were the policies in force at the time of the fire, and they were sent to the complainant by the Underwriters without any application or representation and on the same terms as the previous policies. There was a postscript to each of the letters inclosing renewal policies relating to or calling for information as to the insurance companies' rates, but there was no answer to either of them, and the Underwriters neither canceled the policies nor demanded the information. The agent who first took the insurance could have easily ascertained the board rate or the rates of other insurance companies, and the Underwriters could have learned at any time what they were. As the insurance of the complainant was not based on the alleged system or practice but upon a special contract, and the subsequent policies were mere renewals of the first, they were not void because of a failure to answer the questions or give the information. If the Underwriters considered the information material or ground for canceling the policies, the proper course would have been to have insisted on an answer or canceled the policies.

Each policy provided that it should be void, unless otherwise provided by agreement indorsed thereon or added thereto, if the insured had other insurance on the property, and each policy contained the following: "\$150,000 total concurrent insurance permitted." The complainant had insurance aggregating, with these two policies, \$100,000, but did not have other insurance beyond the amount specified if they were excluded. The controversy over the language quoted is whether concurrent insurance means insurance including the policies in question or other insurance concurring with it. "Concurrent," as used in the policies, means running with, and it would not be a strained or unnatural construction to say that the parties meant \$150,000 of other insurance running with these policies. There is evidence tending to show that the parties so understood the meaning of the permission

given. After the loss occurred and proofs were called for, the complainant furnished to the Underwriters a list of the policies, amounting in all to \$100,000, and there was a notation on the bottom of that list of the board rate at \$1.05. On March 26, 1904, the manager wrote the complainant that he had received the list of companies, and noted that the board rate was \$1.05, making that a ground of objection, but saying nothing about the other insurance exceeding the limit. No objection on that ground was made at the time or for a long time afterward, and the inference would be that the Underwriters understood the provision as to concurrent insurance the same as the complainant. The most that can be said of the provision is that it was ambiguous, and, being equally susceptible of more than one construction, that one must be adopted which is most favorable to the insured. It would have been a very easy matter to have made the provision perfectly clear and definite, and, in view of the rules of construction, we interpret the provision as permitting other insurance concurring with that of the Underwriters to the amount of \$150,000.

The third ground of the defense is that the complainant released the Topeka Water Company and its receiver from liability for the loss, and thereby discharged the Underwriters by preventing subrogation. The water company was in the hands of a receiver, and the insurance companies employed attorneys who filed an intervening petition in the name of the complainant in the receivership proceeding, alleging that the loss occurred by reason of the fault and negligence of the water company. An agreement was entered into on April 21, 1904, between the attorneys acting for the insurance companies and the complainant, by which the several insurance companies were to be entitled to such an amount as the amount of insurance paid by them should bear to the whole amount of the loss, and they should each pay the costs of the litigation on the same basis. The attorneys compromised the claim, and the proportion of the moneys received to which the Underwriters would be entitled on payment of their policies was reserved for that association. The complainant acted in perfect good faith and the compromise was made by attorneys acting for all the insurance companies, so that the defense could not avail if there had been a liability of the water company. It was necessary for the defendants to prove that such a liability existed, and this they failed to do. The evidence showed that, whatever fault or neglect there may have been on the part of the water company in furnishing an insufficient supply of water or insufficient pressure, the property could not have been saved if there had been no such negligence.

We conclude that the decree of the superior court was in accordance with the equi-

ties of the parties, and that the Appellate Court did not err in affirming it.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(237 Ill. 499)

**DALE v. MODERN WOODMEN OF AMERICA.**

(Supreme Court of Illinois. Dec. 15, 1908. Rehearing Denied Feb. 4, 1909.)

**COURTS (§ 219\*)—APPELLATE JURISDICTION—AMOUNT IN CONTROVERSY.**

Under Practice Act, § 121 (Laws 1907, p. 468), allowing a writ of error to the Supreme Court in cases where the amount in controversy exceeds \$1,000, a writ of error will not lie to review a judgment of the intermediate Appellate Court affirming a judgment for \$1,000 in a case in which there is no certificate of importance.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 219.\*]

Error to Appellate Court, Fourth District, on Error to Circuit Court, Gallatin County; Jacob R. Creighton, Judge.

Action by Sarah R. Dale against the Modern Woodmen of America. From a judgment of the Appellate Court (140 Ill. App. 16) affirming a judgment for plaintiff, defendant brings error. Writ dismissed.

Truman Plantz and William H. Hartzell, for plaintiff in error. W. R. McKernon, for defendant in error.

**DUNN, J.** This writ of error is prosecuted to reverse a judgment of the Appellate Court for the Fourth District affirming a judgment for \$1,000, recovered against the plaintiff in error in an action of assumpsit in the circuit court of Gallatin county.

Section 121 of the practice act (Laws 1907, p. 468) provides that in all cases where the sum or value in the controversy shall exceed \$1,000, exclusive of costs, any party to such cause shall be permitted to remove the same to the Supreme Court by appeal or writ of error. We have held that under this section neither an appeal nor a writ of error would lie to review the judgment of the Appellate Court in cases of this character where said judgment did not exceed \$1,000. *Atton v. South Chicago City Railroad Co.* (Ill.) 86 N. E. 277. By expressly allowing a writ of error in cases where the amount in controversy exceeds \$1,000 the Legislature has denied it in all other cases. The inclusion of cases where the amount in controversy exceeds \$1,000 excludes all other cases, and any other construction would require the rejection of the words "or writ of error" from the section as meaningless. In this case there is no certificate of importance. This court has therefore no jurisdiction to review the judgment of the Appellate Court, and the writ of error will be dismissed.

Writ dismissed.

(237 Ill. 500)

**BLACK v. CHICAGO, B. & Q. R. CO.**

(Supreme Court of Illinois. Dec. 15, 1908. Rehearing Denied Feb. 4, 1909.)

**1. EVIDENCE (§ 11\*)—JUDICIAL NOTICE—GOVERNMENTAL MATTERS—TITLE TO PUBLIC LANDS.**

Courts take judicial notice that the United States was the original proprietor of lands granted by it to the state, that section 16 in each township was so granted for school purposes, and that in fractional townships, for which no land had been appropriated for school purposes, certain quantities of land were granted to the state, to be selected by the Secretary of the Treasury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 15; Dec. Dig. § 11.\*]

**2. EVIDENCE (§ 835\*)—DOCUMENTARY EVIDENCE—CERTIFICATES—PROCEEDINGS IN LAND OFFICE.**

The official certificate of a register or receiver of a land office of the United States to any fact or matter of record in his office is competent evidence to prove the fact so certified under the statutes in regard to evidence and depositions in civil actions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1276; Dec. Dig. § 835.\*]

**3. EVIDENCE (§ 842\*)—DOCUMENTARY EVIDENCE—EXEMPLIFICATIONS—PROCEEDINGS IN LAND OFFICE.**

The exemplification of the books and records of the General Land Office certified by the recorder is competent evidence of the truth of its recitals under the general rules of evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1302; Dec. Dig. § 342.\*]

**4. EVIDENCE (§ 383\*)—DOCUMENTARY EVIDENCE—CERTIFICATES—EXEMPLIFICATIONS.**

The official certificate of the recorder of the General Land Office showing the selection of certain land by the state, approved by the Secretary of the Treasury, is evidence that the selection by the surveyor of state school lands was approved by the Secretary of the Treasury, and is equivalent to proof of a selection by him as required by section 2, Act Cong. May 20, 1826, c. 83, 4 Stat. 179, providing for the selection by him of certain land for the support of schools in fractional townships for which no land had previously been appropriated for school purposes.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1664; Dec. Dig. § 383.\*]

**5. PUBLIC LANDS (§ 51\*)—GRANTS TO STATE—TITLE.**

Under Act Cong. May 20, 1826, c. 83, 4 Stat. 179, appropriating for each fractional township, for which no land had been appropriated for school purposes, a certain amount of land for such purposes, the lands so appropriated were not granted directly to the township, but were to be held by the same tenure and upon the same terms for the support of schools as section 16 of each township, the title to which was held by the state.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 138; Dec. Dig. § 51.\*]

**6. PUBLIC LANDS (§ 51\*)—SCHOOL LANDS—GRANTS TO STATES—TITLE.**

Under Act Cong. May 20, 1826, c. 83, 4 Stat. 179, appropriating for each fractional township, for which no land had been appropriated for school purposes, a certain amount of land for such purposes, the title of the state was not a mere passive trust, which the statute of uses would execute, thereby placing the legal title in the inhabitants of the township, but the state was a purchaser for valuable considera-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion, with full power to sell or lease the school lands for the use of schools, as the Legislature might provide and as might be considered most beneficial for the public.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 138; Dec. Dig. § 51.\*]

#### 7. EJECTMENT (§ 89\*)—EVIDENCE—ADMISSIBILITY.

In an action to recover a tract of land by a certain description, in which plaintiff showed the grant of the land as school lands to the state and a patent to him from the state, describing the land as alleged in his declaration, the plats of the land were admissible for the purpose of identifying the property, though proof of the preliminary steps prescribed for the sale of school lands and the platting of the same was not made, as, if the defendant claimed there was no such property, he should have shown the fact.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 250; Dec. Dig. § 89.\*]

#### 8. LIMITATION OF ACTIONS (§ 11\*)—CONSTRUCTION OF STATUTES—OPERATION AGAINST STATE.

Limitations do not run against the state as to lands held by it for public school purposes so long as it holds the title thereof in its sovereign capacity for the use of the public or a portion thereof.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 36; Dec. Dig. § 11.\*]

#### 9. LIMITATION OF ACTIONS (§ 11\*)—CONSTRUCTION OF STATUTES—OPERATION AS TO STATE—MUNICIPAL CORPORATIONS.

The maxim of the common law, "Nul-lum tempus occurrit regi," extends to the state in its sovereign capacity as to governmental matters, and no delay in resorting to the remedy will bar the right; but the rule does not extend to minor municipalities holding title to property for purely local use, as in such cases the reason of the maxim fails.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 38; Dec. Dig. § 11.\*]

Error to Circuit Court, Cass County; Harry Higbee, Judge.

Action by Harry L. Black against the Chicago, Burlington & Quincy Railroad Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Sweeney & Walker (Chester M. Dawes, of counsel), for plaintiff in error. Milton McClure, for defendant in error.

**CARTWRIGHT, C. J.** Harry L. Black, defendant in error, brought his action of ejectment in the circuit court of Cass county against the Chicago, Burlington & Quincy Railroad Company, plaintiff in error, to recover possession of a tract of land described in the amended declaration as fractional block 103½ of School Commissioners' addition to Beardstown, in section 14, township 18 north, range 12 west of the third principal meridian. An issue was formed under the plea of the general issue, and the cause was tried by the court without a jury. The plaintiff claimed title through a grant from the United States to the state of Illinois of the west half of said section 14 for school purposes, in pursuance of a selection by the Secretary of the Treasury, and by a patent from the state of Illinois to him dated Sep-

tember 17, 1907, and the defense was adverse possession of the block for 27 years. The court found the issue for the plaintiff, and entered judgment accordingly for the possession of the premises and for costs. The writ of error in this case was sued out from this court to bring the record here for review.

The questions presented are, first, whether the plaintiff made out a case entitling him to judgment; and, second, whether adverse possession for over 20 years was a defense to the action.

By act of Congress, section No. 16 in every township was granted to the state, for the use of the inhabitants of such township, for school purposes, and, in order to make provision for the support of schools in fractional townships for which no land had been appropriated for that purpose, the act of Congress of May 20, 1826, c. 83, § 4 Stat. 179, reserved and appropriated for each fractional township a certain amount of land. By section 2 of the act the tracts so appropriated were to be selected by the Secretary of the Treasury, to be held by the same tenure and upon the same terms, for the support of schools in such township, as section No. 16 was or might be held in the state where the township was located. The plaintiff offered in evidence an exemplification certified by the recorder of the General Land Office on March 20, 1908, of a list of lands selected under that act, showing the selection of the west half of section 14, township 18 north, range 12 west, by the state of Illinois. The list consisted of a report by Thomas Cox, register at Springfield, Ill., of the tracts of land selected by James C. Stephenson, surveyor of the school lands on the Illinois river, including the tract in question, and the recorder of the General Land Office certified that it was a true and literal exemplification of the original list of lands approved by the Secretary of the Treasury on February 27, 1827. The plaintiff then offered in evidence the record of an original plat of School Commissioners' addition to Beardstown under a survey made February 24, 1832, in which the fractional block now in question had no number. He then offered a plat of said fractional block, acknowledged by the board of school trustees of the township on April 25, 1907, by which they caused the fractional block to be surveyed and numbered. This proof was followed by the introduction of the patent dated September 17, 1907, from the state of Illinois to the plaintiff.

Courts take judicial notice that the United States was the original proprietor of the lands granted to the state; that section 16 in each township was so granted for school purposes; and that, in fractional townships for which no land had been appropriated, certain quantities of land were granted to the state, to be selected by the Secretary of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the Treasury. *Smith v. Stevens*, 82 Ill. 554; *Chicago & Alton Railroad Co. v. Keegan*, 185 Ill. 70, 56 N. E. 1088.

It is urged that there is no proof that the west half of section 14 was selected by the Secretary of the Treasury. But the certificate of the recorder of the General Land Office recites that the list shows the selection of that tract by the state of Illinois, approved by the Secretary of the Treasury on February 27, 1827, which is proof of the fact that the selection as made by Stephenson was approved by the Secretary of the Treasury and amounted to a selection by him. The official certificate of a register or receiver of a land office of the United States to any fact or matter on record in his office is evidence and competent to prove the fact so certified under the statute in regard to evidence and depositions in civil cases, and the official certificate of Cox was evidence of the selection by Stephenson, surveyor of the school lands. The exemplification of the books and records of the General Land Office certified by the recorder was competent evidence of the truth of its recitals under the general rules of evidence. *Seely v. Wells*, 53 Ill. 120; *Wilcox v. Jackson*, 109 Ill. 261.

Counsel say that the lands to be selected in lieu of section 16 were not granted to the state, but were granted directly to the township. We do not so understand the act of Congress, under which the lands were to be held by the same tenure and upon the same terms, for the support of schools, as section No. 16, the title of which was held by the state.

Another proposition advanced is that the title of the state was a mere dry or passive trust, which the statute of uses would execute, and the legal title was thereby placed in the inhabitants of the township. The state did not become a mere naked trustee, but was a purchaser for valuable consideration, with full power to sell or lease the school lands for the use of schools, as the Legislature might provide and as might be considered most beneficial for the public. *Bradley v. Case*, 3 Scam. 585; *Trustees of Schools v. Schroll*, 120 Ill. 509, 11 N. E. 243, 60 Am. Rep. 575. The legal title to the land in controversy remained in the state until the grant to plaintiff.

It is further contended that the plats introduced in evidence were not valid or sufficient to confer title on the plaintiff for want of proof that the preliminary steps prescribed for the sale of school lands and platting the same were taken. If it would have been necessary in any case to prove that such steps were taken in order to sustain a plat made in the year 1882, it was not necessary in this case. The plaintiff was endeavoring to recover a tract of land by a certain description, and showed a grant to the state of Illinois and a patent to him from the

state. It was proper for him to introduce the plats for the purpose of identifying the property. *Allmendinger v. McHie*, 189 Ill. 308, 59 N. E. 517. The description of the patent corresponded with the description in the declaration, and if defendant claimed there was no such property it should have shown the fact. *Glanz v. Zlabek*, 233 Ill. 22, 84 N. E. 36. The plaintiff proved title to the land in controversy.

The defendant proved that it had been in possession of the tract of land for 27 years and had its tracks on it, together with a pump and well and a small building 10 by 15 feet. It had no title, but had a conveyance from another railroad company, which only purported to cover such lands as that railroad company owned. The defendant's grantor had no title, and the only defense was the statute of limitations, which does not run against the state so long as it holds title for the use of the public or a portion thereof. *Trustees of Commons v. McClure*, 167 Ill. 23, 47 N. E. 72. The maxim of the common law, "Nullum tempus occurrit regi," extends to the state in its sovereign capacity as to all governmental matters, and no delay in resorting to the remedy will bar the right. The reason for the maxim falls in the case of a minor municipality holding the title of property for purely local use, and therefore the exemption does not extend to it. *Brown v. Trustees of Schools*, 224 Ill. 184, 79 N. E. 579, 115 Am. St. Rep. 146. The title to the property in controversy here was in the state in its sovereign capacity during the time defendant claims the statute of limitations was running against it, and that defense was not available. The judgment is affirmed.

Judgment affirmed

(237 Ill. 506)

GOUWENS v. GOUWENS et al.

(Supreme Court of Illinois. Dec. 15, 1908. Rehearing Denied Feb. 4, 1909.)

1. QUIETING TITLE (§ 44\*)—EXECUTION—LEVY—DIRECTIONS TO OFFICER—SUFFICIENCY OF EVIDENCE.

In an action to quiet title against a sheriff's deed on execution sale, on the issue whether execution was so issued on judgments as to preserve their lien after a year from their rendition, or whether directions were given to the officer not to levy the executions, but to let them expire, evidence held to show that no such directions were given.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 1; Dec. Dig. § 44.\*]

2. JUDGMENT (§ 795\*)—LIEN—NECESSITY OF EXECUTION—ISSUANCE WITHOUT LEVY.

Executions were issued on judgments and delivered to an officer with directions to execute, but the officer made no effort to execute them, and on the return day made return of no property found. Alias executions were not issued until more than a year after the judgments were entered. Held that, though a judgment ceases to be a lien after the expiration of one

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

year if no execution be issued thereon, the lien of the judgments was preserved, since it is the duty of an officer, when he receives a writ and no instructions are given, to execute it with due diligence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1898; Dec. Dig. § 795.\*]

### 3. EXECUTION (§ 268\*)—SALE—CREDITS OF DEBTOR.

A wife receiving her husband's property charged with a lien of judgments and a mortgage prior to the judgments may not redeem from the mortgage foreclosure sale, and, on the land being sold to satisfy the judgments, be credited with the amount so paid.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 763, 764; Dec. Dig. § 268.\*]

### 4. EXECUTION (§ 268\*)—SALE—TAXES PAID—HUSBAND AND WIFE.

A wife receiving her husband's property charged with judgment liens cannot be credited, on a sale of the lands under the judgments, for taxes paid after the judgment became a lien and before seizure of the land under execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 762; Dec. Dig. § 268.\*]

Appeal from Circuit Court, Cook County; C. M. Walker, Judge.

Suit by Mary J. Gouwens against Rollin A. Gouwens and others to remove a cloud on the title to land. From a decree dismissing the bill for want of equity, complainant appeals. Affirmed.

John C. Trainor, for appellant. I. T. Greenacre, for appellees.

FARMER, J. This is an appeal from a decree of the circuit court of Cook county dismissing the appellant's bill in chancery for want of equity.

The allegations of the amended bill and supplemental bill necessary to an understanding of the vital questions involved are as follows: The bill alleged that complainant was the owner in fee of 70 lots, therein described, and that she acquired title to them by conveyance from her husband, John J. Gouwens. The deed to her for 11 of the lots was dated and recorded February 28, 1901, and to 59 of them March 9, 1901. That on December 3, 1898, a judgment for \$235.50 had been rendered in the superior court of Cook county against the complainant's husband in favor of Anton Steinbach, which will be hereafter called the Steinbach judgment, and that on November 29, 1898, a judgment for \$693.16 had been rendered against said John J. Gouwens in the superior court of Cook county in favor of Rollin A. Gouwens, which will be hereafter referred to as the Gouwens judgment, both of which judgments were subsequently assigned to Peter Van Drunen, one of the defendants to the bill. The bill alleged that executions were issued on each of said judgments the day they were rendered, but that the execution issued on the Steinbach judgment was delivered to the sheriff of Cook county with directions to make no levy, but to hold the writ until the return day, and that it was afterwards, on

March 3, 1899, returned not satisfied; that the execution issued on the Gouwens judgment was not delivered until the 18th day of June, 1899, when it was delivered to the sheriff for the sole purpose of having it returned so that an alias writ might be procured; that an alias writ was issued upon the judgment on the 17th day of June, 1899, and delivered to the sheriff, with directions to hold the same until the return day thereof, and to make no levy upon property under it; that upon the 23d day of March, 1901, executions were issued on each of said judgments, and by virtue of them the lands described in the bill were levied upon by the sheriff and afterwards sold. There was no redemption from this sale, and a deed was issued to the holder of the certificate of purchase by the sheriff. The bill further alleges that, at the time these last-mentioned executions were issued, John J. Gouwens had no title or interest in the property, and that the judgments against him were not liens against said property at the time of the conveyances by him to appellant, for the reason that no executions had been issued upon said judgments within one year and delivered to the sheriff to be collected or levied upon property. The bill also alleged that after appellant acquired title to the lots in controversy she paid the taxes assessed against them each year, amounting in all to \$500, and that she redeemed a portion of the lands from sale under a foreclosure proceeding in which the lots were sold to satisfy a mortgage given by her husband and herself in May, 1897, to secure a note of her husband. The bill further alleged that the levy of said executions, and the sale of property thereunder, and the deed executed by the sheriff, were clouds upon the appellant's title, and she prayed to have them declared null and void, and that the certificate of purchase and deed from the sheriff be ordered to be delivered up to the clerk of the court to be canceled, and that appellant's title to the property be confirmed.

A demurrer to the bill was overruled, and the defendants thereto filed pleas in bar, which were sustained by the circuit court and a decree entered dismissing the bill. On appeal to this court it was held the pleas were not good and that the court erred in sustaining them. The decree was therefore reversed and the case remanded. *Gouwens v. Gouwens*, 222 Ill. 223, 78 N. E. 597, 113 Am. St. Rep. 395. Upon the reinstatement of the cause in the circuit court, issues were formed by answers and replications, and the cause heard by the chancellor upon documentary evidence and the testimony of witnesses heard in open court.

We have not deemed it necessary to set out the somewhat voluminous pleadings in detail, for the reason that the question whether executions were issued upon the judgments

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

within the meaning of the law, so that their lien was preserved beyond the period of one year from the date of their rendition, is decisive of the case. Appellant's contention is that no execution was issued upon either judgment within one year from their rendition, within the meaning of the law; that the executions issued were not delivered to the sheriff to be executed, but were delivered to him with instructions to not execute but hold them until their return day and then return them, and that this could not have the effect of preserving the liens of the judgments beyond one year, but was the same as if no executions had been issued within the year. If this position is correct, it would follow that the judgments were not liens upon the property involved when the conveyances were made to appellant, February 28 and March 9, 1901. Appellees deny that when the executions issued December 3, 1898, and June 17, 1899, were delivered to the sheriff, instructions were given not to execute them, but to hold them until their return day, and insist they were delivered to be executed, and the sheriff was so instructed at the time.

All the executions issued on both judgments, except the alias issued June 17, 1899, on the Gouwens judgment, were delivered by the attorney or agent of plaintiff in execution to C. L. Harper, execution clerk in the sheriff's office, who noted thereon the time of the receipt, the fees paid, and filed the writ and entered it in the execution docket. The alias execution on the Gouwens judgment was delivered to Mr. Gneuwich, Mr. Harper's assistant, while the latter was absent at lunch. A fee of 75 cents was paid the sheriff by plaintiff in execution when the first execution issued on the Steimbach judgment and the alias writ issued on the Gouwens judgment were delivered to him. These executions were both returned at their expiration, indorsed: "The within named defendant not found and no property of the within named defendant found in my county on which to levy this writ, I therefore return the same no property found and no part satisfied." A fee of 10 cents was paid the sheriff when the execution issued November 29, 1898, was delivered to him, June 16, 1899. As this writ had expired before it was received by the sheriff, it was returned by him, indorsed, "Received too late for service." Harper testified he was execution clerk in the sheriff's office in 1898 and 1899, and had been for 16 or 18 years previous; that when the execution issued on the Steimbach judgment December 3, 1898, and the alias execution issued on the Gouwens judgment June 17, 1899, were delivered and the fee paid, no instructions were given to make a demand for or levy upon property; that when the party who delivered the execution issued on the Steimbach judgment was asked if he wanted a levy made he said, "no," and the execution was simply filed in the sheriff's

office and permitted to remain there till it expired. The witness testified that from December, 1898, to December, 1899, 5,000 executions were received in the sheriff's office, all of which passed through his hands, except such as came in while he was absent at lunch. He stated he had an independent recollection, in every instance, of a writ being received, and of what was said and done; but it is apparent from his whole evidence that his testimony was based more upon what he testified was the custom of the office and the instructions given him by the sheriff than upon his independent recollection of the particular instance. It was, according to his testimony, customary to ask the person who delivered an execution whether a levy was to be made, and, if it was, this determined the fee to be collected in advance. The fee allowed by law for receiving and filing an execution and allowing it to expire without any effort to serve it or levy upon property, and then returning it, could not have exceeded 20 cents, but the witness testified his instructions from the sheriff were to collect 75 cents on all executions delivered, and, if no action was taken under the writ, in a great many instances the fee, and in some cases all of it but 10 cents, was refunded when the execution was returned, but if a demand for property was to be made a fee of \$1.25 was collected. Harper was not present when the alias execution on the Gouwens judgment was delivered to Gneuwich, his assistant, but he testified he gave his assistant the same instructions the sheriff had given him. The witness stated that the fee being indorsed on the writs as collected was one reason why he reached the conclusion that no levy was desired under them, and that he supposed it was principally because of his custom to ask every person who delivered an execution what he wanted done with it, and collected a fee accordingly, that he could tell what they said. Gneuwich testified that when executions were delivered to him he would ask the person delivering them whether a demand for or a levy on property was to be made, and that the fee collected was determined by the instructions given. He testified the only instructions given him when the execution issued on the Gouwens judgment was delivered was to file it; that no description of property to be levied on was given him, and that, if it had been, the fee would have been \$2.50. He further testified that he had no independent recollection of what was said and done at the time the writ was delivered, but his testimony was based upon the custom of the office, his instructions from his superior, and the indorsements made on the writ. Frederick R. De Young, on behalf of appellees, testified that he delivered the execution issued December 3, 1898, on the Steimbach judgment, to Mr. Harper on the day it was issued, and the one issued June 17, 1899, on the Gouwens judgment, to Gneuwich on

the day that it was issued; that he was attorney for the plaintiff in execution in the Steinbach case, and that he delivered the execution in the Gouwens case to Gneuwich for Mr. Greenacre, attorney for the plaintiff in execution, in whose office he had formerly been. De Young was originally one of the solicitors for appellees in this case, but withdrew from it by leave of court when the demurrer to the bill was overruled. He testified that when he delivered the writs to Harper and Gneuwich he paid the fee of 75 cents in each case, and, in reply to an inquiry as to what should be done with the writs, said he wanted them obeyed, or words to that effect—he could not recall the exact language; that at the time the writs were delivered his information was that the judgment debtor was traveling in Iowa, and he did not give the sheriff his address or any description of property to be levied on.

If the contention of appellant be conceded to be correct, that an execution issued and delivered to the sheriff with instructions not to execute the same is no more effective to preserve the lien of the judgment beyond one year from its rendition than if no execution had been issued within that time, we nevertheless think this case must be determined against appellant upon the ground that the proof in this record fails to show that instructions were given the sheriff, when the writs were delivered, not to execute them. It is true, no instructions were given the sheriff, when these executions were delivered, about levying them on any particular property, but we understand the law to be that, while the plaintiff in execution has the right to control it and give the sheriff directions about executing it, still he is not bound to do so. When the writ is received and no instructions are given, it is the duty of the officer to proceed with due diligence to execute it. "No doubt a prudent plaintiff would, on delivering the writ to the officer, take pains to inform him where property subject to the writ could be found, and would at all times co-operate with the officers in their attempts to execute the writ. The plaintiff who pursues this course places the officer in such a position that his failure to at once proceed to levy gives rise to a presumption of negligence. But plaintiff is not bound to pursue this course. He need only place the writ in the officer's hands for service. The officer must then make reasonable search and inquiry." *Freeman on Executions* (2d Ed.) § 252. The same principle is announced in *Gilmore v. Davis*, 84 Ill. 487, where it is said (page 489): "We believe the doctrine to be, as the object of an execution is to obtain satisfaction of the judgment on which it issues, on its delivery to the proper officer it gives to the creditor a priority, because the law imposes the duty upon the officer to execute it without delay."

It is the duty of a sheriff to receive an

execution when tendered him, and the failure of a judgment creditor to give instructions about executing it is not sufficient to render the writ dormant or ineffective to preserve the lien of the judgment. In this case, if any instructions were given when the writs were delivered, they were given in answer to inquiries by the execution clerks as to what it was desired should be done with them. Harper and Gneuwich testified they were told not to execute the writs and, while Harper testified he had an independent recollection of each transaction when writs were delivered to him, the fact that these transactions occurred in large numbers every day, and the further fact that his whole testimony, taken together, shows that he was testifying more from what he said his instructions were and the custom of the office than from any independent recollection of the transaction, was a proper matter to be considered by the chancellor in determining the weight to be given to his testimony. The same is also true of the testimony of Gneuwich, who did not claim to have any independent recollection of the transaction, but based his testimony on instructions given him and the custom of the office in such matters. De Young testified that he remembered delivering the writs issued December 3, 1898, on the Steinbach judgment, and June 17, 1899, on the Gouwens judgment, and what was said at the time. He does not pretend to remember the exact language, but says the substance of it was that when asked what should be done with the writs he told the officers to execute them. He gives some reasons which he claimed aided him in remembering the transaction. Whether his testimony should be given greater weight, under all the circumstances, than that of Harper and Gneuwich was a proper question for determination by the chancellor, who saw and heard the witnesses testify. In such cases the rule is that the finding of the chancellor will not be disturbed unless it is clearly contrary to the weight of the evidence, and we cannot say that the decree in this respect was not justified by the testimony.

The proof showed that after appellant acquired the conveyances to the property she redeemed a portion of the lots from a sale made under a foreclosure proceeding to foreclose a mortgage given by her husband and herself May 12, 1897, paying \$721.54 to make said redemption. After the conveyance to appellant by her husband she also paid taxes, or at least a portion of them, assessed against the lots, and it is contended that the decree is contrary to equity in not requiring appellees to pay to appellant the amount of money expended by her in the payment of taxes and redemption of the lots from the foreclosure proceeding. We do not think this contention sound. Appellant received her title subject to the liens

of the mortgage and the existing judgments, of which she was bound to take notice. If she chose voluntary to remove an incumbrance that had priority over the judgment liens, she would be placed in no better position than her husband would have been if he had discharged the lien. Equity does not require a judgment creditor to repay a judgment debtor taxes assessed against the debtor's land and paid by him after the judgment becomes a lien and before the land is seized under the execution.

We are of opinion the decree of the circuit court was right, and it is affirmed.

Decree affirmed.

(237 Ill. 516)

**COBE v. GUYER et al.**

(Supreme Court of Illinois. Dec. 15, 1908.  
Rehearing Denied Feb. 3, 1909.)

**1. COURTS (§ 131\*)—RECEIVERS—APPOINTMENT—JURISDICTION—SUPERIOR COURT OF COOK COUNTY.**

Homestead and Loan Association Act (Hurd's Rev. St. 1905, p. 526, c. 32, § 91p), § 25, providing that receivers may be appointed upon filing a petition by stockholders in the circuit court of the county in which the association's principal office is located, etc., is a general grant of jurisdiction to the circuit court, and under Const. art. 6, §§ 23, 24, making the organization and the powers of the judges of the superior court and of the circuit court of Cook county identical, the superior court has the same jurisdiction to appoint such a receiver as the circuit court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 131.\*]

**2. COURTS (§ 36\*)—JURISDICTION—PRESUMPTIONS—COURTS OF GENERAL JURISDICTION—EXERCISE OF SPECIAL STATUTORY POWERS.**

In the exercise of special powers conferred by statute and not exercised according to the course of the common law, a court of general jurisdiction does not differ from a court of limited and special jurisdiction, and nothing will be presumed to be within the jurisdiction which does not distinctly appear to be so, it being necessary that the jurisdiction, both as to the subject-matter and as to the persons to be affected by it, appear by the record; but, when the special powers are exercised according to the course of the common law, the same presumption of jurisdiction will usually attend the judgments of the court as in cases falling within its general powers.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 142-144; Dec. Dig. § 36.\*]

**3. CORPORATIONS (§ 609\*)—DISSOLUTION AND FORFEITURE OF FRANCHISE—JURISDICTION—EQUITY.**

Courts of chancery have no jurisdiction, in the absence of statute, to decree dissolution of a corporation by declaring a forfeiture of its franchise; but such jurisdiction may be conferred upon them by statute.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2421; Dec. Dig. § 609.\*]

**4. COURTS (§ 35\*)—JURISDICTION—PRESUMPTIONS—COURTS OF GENERAL JURISDICTION—EQUITY—APPOINTMENT OF RECEIVER.**

Courts of equity have always had jurisdiction to enforce the proper administration of trusts, to prevent and correct fraud and mismanagement of trustees and agents of corpora-

tions in control of their affairs, and to appoint receivers, and Homestead and Loan Association Act (Hurd's Rev. St. 1905, p. 526, c. 32, § 91p), § 25, giving power to appoint receivers of such associations upon petition of a certain number of stockholders, is not in derogation of common law, nor summary; but the power is to be exercised in the usual form of chancery proceedings, and merely extends the court's former jurisdiction to furnish a new remedy, where the existing one was inadequate, stockholders having the right, without statute, to the protection of a court of equity against fraudulent mismanagement of the corporate affairs, and hence the same presumption of the court's jurisdiction obtains in suits under that section as in cases falling within its general powers, and jurisdiction does not depend upon the record showing that the requirement of the section that the petition be sworn to and a cost bond filed was complied with.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 140, 141, 145, 146; Dec. Dig. § 35.\*]

**5. USURY (§ 117\*)—EVIDENCE—BURDEN OF PROOF.**

The burden is upon a party urging usury as a defense to establish it with reasonable clearness.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 328; Dec. Dig. § 117.\*]

**6. USURY (§ 53\*)—ATTORNEY FEE FOR EXAMINING ABSTRACT OF TITLE.**

Where a loan was made at the full legal rate of interest, a deduction from the amount loaned, of attorneys' fees for examining the abstract of title, was not usurious.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 115; Dec. Dig. § 53.\*]

**7. USURY (§ 45\*)—DEDUCTING INTEREST IN ADVANCE.**

Where a loan was made at the full legal rate of interest, deducting the interest in advance was not usurious.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 98; Dec. Dig. § 45.\*]

Error to Appellate Court, Second District, on Appeal from Circuit Court, Rock Island County; Emery C. Graves, Judge.

Bill by Ira M. Cobe against E. H. Guyer and others. From a judgment of the Appellate Court for the Second District (189 Ill. App. 592), affirming a decree for complainant, defendants bring error. Affirmed.

J. T. Kenworthy and S. R. Kenworthy, for plaintiffs in error. S. W. Swabey (W. R. Moore, of counsel), for defendant in error.

DUNN, J. This writ of error is prosecuted to reverse a judgment of the Appellate Court affirming a decree of foreclosure of a mortgage.

The plaintiffs in error executed a mortgage, dated September 1, 1899, for \$10,000, to the Masonic Mutual Savings & Loan Association, a corporation organized under the homestead and loan association act. Afterward a receiver was appointed for the association by the superior court of Cook county, to whom all its assets were conveyed, and the receiver, under the order and upon the approval of the court, sold and assigned to defendant in error all the assets of the association, including this mortgage. Two

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defenses were relied upon in the circuit court, and the refusal to recognize them constitutes the error complained of here. It was claimed by the plaintiffs in error that the defendant in error had acquired no title to the mortgage, or to the indebtedness secured by it, by virtue of the conveyance to the receiver and by the receiver to him, because the superior court had no jurisdiction, and its decree was therefore void. The other defense was usury.

The receiver was appointed under the authority given by section 25 of the Homestead and Loan Association Act (Hurd's Rev. St. 1905, p. 526, c. 32, § 91p), which reads as follows: "Receivers may also be appointed, whenever nine or more shareholders of any association shall file a petition in the circuit court of the county in which the principal office of such association is located, setting forth the facts relied upon for the appointment of a receiver. Such petition shall be subscribed and sworn to by such petitioners, and shall be accompanied by a good and sufficient bond, conditioned for the payment of all fees, expenses and attorney's fees incident to such proceeding or proceedings, in the event the allegations set forth in the petition shall not be sustained, the amount of such bond, and the sureties thereof, shall be approved by the court, and the cause shall thereupon proceed as other causes in equity." It is argued that this section confers jurisdiction on the circuit court alone, and not upon the superior court. In *Jones v. Albee*, 70 Ill. 34, it was held that by virtue of the provisions of sections 23 and 24 of article 6 of the Constitution the superior court and the circuit court were placed upon precisely the same footing, and that the organization of the two courts, and the powers of the judges thereof, were identically the same. "Indeed, under the Constitution there is no distinction, except in name, between the superior court of Cook county and the circuit court of Cook county. Both courts have the same jurisdiction and exercise the same powers." *Berkowitz v. Lester*, 121 Ill. 99, 11 N. E. 860. So in *Samuel v. Agnew*, 80 Ill. 553, it was said the superior court and the circuit court were practically branches of the same court. The superior court is in legal effect a circuit court, and where a special statutory jurisdiction is conferred on either court, the other will by the same act acquire a like jurisdiction. *Chicago & Northwestern Railway Co. v. Chicago & Evanston Railroad Co.*, 112 Ill. 589. The fact that the language of the section requires the petition to be filed in the circuit court of the particular county in which the principal office of the association is located does not affect the question. The section is a general grant of jurisdiction to the circuit court, limiting the venue to the county of the location of the association involved.

But it is further argued that if the superior court has jurisdiction of the subject-mat-

ter, under section 25, it cannot be held to have had jurisdiction of the particular case in which the receiver was appointed, because the facts necessary to the exercise of such jurisdiction do not affirmatively appear on the record. The position of the plaintiffs in error is that in appointing a receiver under section 25 the court, though one of general jurisdiction, exercises a special statutory jurisdiction, and that every fact necessary to its exercise must fully appear. The section requires a petition of nine or more shareholders, subscribed and sworn to by them, to be filed, accompanied by a bond for the payment of costs and attorney's fees if the allegations of the petition are not sustained, and since the record of the proceeding in the superior court for the appointment of the receiver does not show that the petition was sworn to by all of the nine petitioners, or that it was accompanied by a bond, it is insisted that the record fails to show any jurisdiction in the superior court, and its record is therefore void.

It is true that in the exercise of special powers conferred by statute and not exercised according to the course of the common law a court of general jurisdiction does not differ from a court of limited and special jurisdiction, and that nothing will be presumed to be within the jurisdiction which does not distinctly appear to be so. The jurisdiction in such cases, both as to the subject-matter and as to the persons to be affected by it, must appear by the record. The rule is laid down in many decisions. *Watts v. Dull*, 184 Ill. 86, 56 N. E. 303, 75 Am. St. Rep. 141; *Payson v. People*, 175 Ill. 267, 51 N. E. 588; *Chicago & Northwestern Railway Co. v. Galt*, 133 Ill. 657, 23 N. E. 425, 24 N. E. 674; *Munroe v. People*, 102 Ill. 406; *Johnson v. Von Kettler*, 84 Ill. 315; *Morse v. Presby*, 25 N. H. 299; *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959. But as was said by the court in the case last cited: "The qualification here made, that the special powers conferred are not exercised according to the course of the common law, is important. When the special powers conferred are brought into action according to the course of that law—that is, in the usual form of common-law and chancery proceedings—by regular process and personal service where a personal judgment or decree is asked, or by seizure or attachment of the property where a judgment in rem is sought, the same presumption of jurisdiction will usually attend the judgments of the court as in cases falling within its general powers." To the same effect is the case of *Harvey v. Tyler*, 2 Wall. 328, 17 L. Ed. 871.

Courts of chancery have no jurisdiction, in the absence of statutory authority, to decree a dissolution of a corporation by declaring a forfeiture of its franchise. *Wheeler v. Pullman Iron & Steel Co.*, 143 Ill. 197, 32 N. E. 420, 17 L. R. A. 318; *People v. Wetgley*, 155 Ill. 491, 40 N. E. 300. Bu

such jurisdiction may be conferred upon courts of chancery by statute. *Chicago Indemnity Ass'n v. Hunt*, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549; *Hunt v. Le Grand Roller Skating Rink Co.*, 148 Ill. 113, 32 N. E. 525. The power of the superior court to exercise jurisdiction in the suit for the dissolution of the corporation is derived from section 25 of the Homestead and Loan Association Act. But such power is not in derogation of the common law and is not summary, but is exercised in the usual form of chancery proceedings. Courts of equity have always had jurisdiction to enforce the proper administration of trusts, to prevent and correct fraud and mismanagement of trustees and of the agents of corporations in control of their affairs, and to appoint receivers, and the effect of the statute is merely to extend this jurisdiction to meet new necessities and furnish a new remedy in cases where the remedy already existing was inadequate. Stockholders had the right, without any statute, to call upon a court of equity to protect them against the fraudulent mismanagement of the affairs of the corporation. *Wheeler v. Pullman Iron & Steel Co.*, supra. The statute merely extended this right to include other cases of an equitable nature. The requirement that the bill shall be sworn to and a cost bond filed is a rule of procedure, and the jurisdiction of the court does not depend upon the record showing that such rule was complied with. In *Ward v. Farwell*, 97 Ill. 533, a receiver for an insurance company had been appointed by the circuit court upon a petition by the auditor of public accounts, under a statute authorizing such action. In a suit brought by the receiver against the stockholders to enforce payment for their stock, it was held that while the act contemplated a final decree dissolving the corporation or restraining it from transacting further business before a receiver should be appointed, yet the appointment of the receiver before final decree was not void, but was an irregularity which the defendants could not take advantage of.

The bond given by plaintiffs in error for the repayment of the \$10,000 borrowed required the monthly payment of \$50 dues on stock and \$58.34 interest, being at the rate of 7 per centum per annum; but the plaintiffs in error insist that the following clause appearing in the bond made it usurious: "And it is further provided that twelve or more stock payments shall be applied upon said loan after deducting all sums and charges advanced." It is urged that this clause required the application of the payments for dues on the principal of the loan as often as 12 payments were made, without any reduction in the interest payment. The meaning of the clause is obscure. If the payments were to be applied as the plaintiffs in error claim, the effect would be to reduce the in-

terest payment pro rata, though not expressly stated, and the plaintiffs would be entitled to credit for the withdrawal value of their shares. The burden of proof was on the plaintiffs in error to establish usury, and they must make it appear with reasonable clearness. The deduction of attorney's fees for the examination of the abstract was not usurious. *Ammondson v. Ryan*, 111 Ill. 506. Neither was the deduction of interest in advance. *Brown v. Scottish-American Mortgage Co.*, 110 Ill. 235. The dues for six months, \$300, were retained by the association. Plaintiffs in error did not protest against it. It was probably done with their consent. There is no evidence that it was done as a shift or device to take more interest than allowed by law. The evidence does not show the loan to have been usurious.

The decree was right, and the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(237 Ill. 523)

SHACKLEFORD et al. v. BENNETT et al.  
(Supreme Court of Illinois. Dec. 15, 1908.  
Rehearing Denied Feb. 5, 1909.)

INJUNCTION (§ 235\*)—LIABILITY ON BOND—ACCRUAL OF CAUSE OF ACTION.

Notwithstanding Laws 1861, p. 133, § 1, as amended in 1874 (Rev. St. 1874, c. 69, § 12), providing that where an injunction is dissolved, the court before final disposition of the cause shall assess damages, but providing that a failure to make such assessment shall not bar an action on the injunction bond, an action on an injunction bond obligating the parties thereto to pay "all such costs and damages as shall be awarded" to defendant in case the injunction is dissolved may be maintained at any time after the dissolution of an injunction, though the injunction action is still pending.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 535; Dec. Dig. § 235.\*]

Appeal from Appellate Court, First District, on Error to the Municipal Court of Chicago; Arnold Heap, Judge.

Action by Myrtle S. Bennett and another against Charles Shackelford and others. From a judgment for plaintiffs, defendants appeal. Affirmed by the Appellate Court, and referred to the Supreme Court on a certificate of importance. Affirmed.

C. D. F. Smith and W. P. Black, for appellants. Quin O'Brien, for appellees.

VICKERS, J. This was an action of debt brought in the municipal court of Chicago by Myrtle S. Bennett and Alanson C. Noble against Charles Shackelford and others upon an injunction bond executed by defendants. A judgment was recovered by plaintiffs below for \$125, which judgment has been affirmed by the Appellate Court for the First District. The case comes to this court from the Appellate Court upon a certificate of importance.

On August 7, 1906, Charles Shackelford

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
86 N.E.—68

filed a bill in the superior court of Cook county to enjoin the further prosecution of a suit then pending against him before a justice of the peace. An order was made for a temporary injunction, and the bond in suit in this case was executed in the penal sum of \$400. The injunction bond was in the usual form, the condition of which was as follows: "The condition of the above obligation is such that if the above bounden Charles Shackelford, William P. Black and James Donovan, their executors or administrators, or any of them, shall and do well and truly pay or cause to be paid to said Myrtle S. Bennett and Alanson C. Noble, their heirs, executors, administrators or assigns, all such costs and damages as shall be awarded to any one or more of said defendants, jointly or severally, against the said complainant in case the said injunction shall be dissolved, then the above obligation to be void, otherwise to remain in full force and virtue." The appellees answered the bill, and on December 10, 1906, procured an order dissolving the injunction. On December 12th, appellees filed their suggestions of damages in the superior court, but no damages were in fact assessed prior to the commencement of this suit upon the bond. Afterwards, on the 20th of December, the present action on the injunction bond was commenced in the municipal court. On March 6, 1907, the court in which the injunction proceeding was pending sustained a demurrer to Shackelford's bill and dismissed the cause out of court.

The only question which we regard as open for consideration in this court is whether this action on the injunction bond can be maintained before the final disposition of the chancery proceeding in which it was filed. Appellants contend that the law is that a right of action on an injunction bond does not accrue until there has been a final decree in the suit in which the injunction was obtained and the bond executed, and that the right of action does not accrue immediately upon the dissolution of the injunction. Appellees contend that immediately upon the dissolution of the injunction the right of action accrued to them on the bond, and that such right is not dependent upon the final disposition of the cause wherein such injunction was issued. Numerous authorities outside of this state are cited by the appellants which apparently sustain their contention, and it is their contention that such rule obtains here.

There is an apparent conflict between the decisions of this court upon this question, but a careful examination of the statutes in force at the different times when this question has been before this court will show that the supposed conflict is entirely due to the difference that existed in the statutes. Under the statute of 1845 it was not necessary that the court, after dissolving an injunction, should, before the final disposition of the case, assess damages, and it was held in

Hibbard v. McKindley, 28 Ill. 240, that the assessment of damages by the court which had issued the injunction was not necessary before bringing a suit at law upon the bond. In 1861 the statute was changed, whereby it was provided "that in all cases where an injunction is dissolved by any court of chancery in this state, the court, after dissolving such injunction and before final disposition of the suit, upon the party claiming damages by reason of such injunction suggesting in writing the nature and amount thereof, shall hear evidence and assess such damages as the nature of the case may require and to equity appertain to the party damaged by such injunction, and may award execution to collect the same." Laws 1861, § 1, p. 133. Under this statute it was held in *Brownfield v. Brownfield*, 58 Ill. 152, that the assessment of damages by the court issuing the injunction was a condition precedent to the right to maintain an action at law upon the bond, and a similar holding was made in *Mix v. Vail*, 86 Ill. 40; and in *Terry v. Hamilton Primary School*, 72 Ill. 476, it was held improper to assess damages until the final disposition of the case, where the only prayer of the bill was for an injunction. It was there said (page 479 of 72 Ill.): "The only prayer of the bill was for an injunction, and, although by affidavits and other proofs it might appear to be eminently proper to dissolve the injunction temporarily granted, still on a final hearing evidence might have been adduced requiring that there should be a perpetual injunction."

It thus appears that, while the law of 1861 was in force and unmodified, the rule in this state was that a suit could not be maintained on an injunction bond until after there had been an assessment of damages by the court granting the injunction, and that in bills for injunctions only no assessment of damages could be made until final disposition of the case, from which it would seem necessarily to follow that, until there had been an assessment of damages and a final disposition of the principal case, no action at law could have been maintained upon an injunction bond, particularly in a case where the only relief sought was an injunction. In 1874 the Legislature added a proviso to the law of 1861, to the effect that a failure to assess damages by the court issuing the injunction should not operate as a bar to an action upon the injunction bond. Rev. St. 1874, c. 69, § 12. Since the addition of this proviso this court has gone back to the doctrine of *Hibbard v. McKindley*, supra, and other cases in line with it, and the rule now adhered to is that upon the dissolution of an injunction there is an immediate cause of action upon the bond accruing to the party against whom the injunction was directed for the costs and damages sustained in and about the dissolution of such injunction, and the fact that the court has failed to assess damages or finally dispose of the case is no

defense to such action. *Keith v. Henkleman*, 173 Ill. 137, 50 N. E. 692. This rule gives the party damnified the benefit of the condition in the bond. Appellants' agreement in the bond is that they will pay all costs and damages that may be sustained upon the dissolution of the injunction. When it was shown that the injunction had been dissolved and costs and damages sustained, appellees were immediately entitled to action for the breach of the bond. The only damages claimed were for attorney fees in connection with the dissolution of the injunction.

The judgment of the Appellate Court for the First District is free from error, and the same is accordingly affirmed.

Judgment affirmed.

(237 Ill. 527)

PEOPLE ex rel. HEALY, State's Atty., v. BARRIOS.

(Supreme Court of Illinois. Dec. 15, 1908. Rehearing Denied Feb. 3, 1909.)

1. ATTORNEY AND CLIENT (§ 53\*) — DISBARMENT PROCEEDINGS—EVIDENCE.

Evidence in disbarment proceedings considered, and *held* to establish the misconduct of the attorney as to his client, authorizing disbarment.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 75; Dec. Dig. § 53.\*]

2. ATTORNEY AND CLIENT (§ 42\*) — GROUND FOR DISBARMENT—DECEPTION OF COURT.

Procuring an original order for the payment of alimony in a divorce suit by fraud and misrepresentation is a ground for disbarment.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 54; Dec. Dig. § 42.\*]

Disbarment proceedings by the People ex rel. John Healy, State's Attorney, against Federico M. Barrios. Disbarment ordered.

This is a proceeding for the disbarment of Federico M. Barrios, a member of the bar engaged in the practice of his profession in Chicago. The information was filed at the relation of certain members of the bar constituting the grievance committee of the Chicago Bar Association, and, as amended, charges:

First. That respondent was employed about August, 1904, by one Emma Heisler, of the city of Chicago, in a divorce proceeding instituted against her by her husband; that, by an oral agreement made by the parties at the time, Mrs. Heisler was to pay respondent \$25 in full for his services; that \$10 was paid at the time; that Mrs. Heisler was a washerwoman, of very small means, and thereafter, in order to pay the balance of said fee, she began doing respondent's washing, devoting one day in each week to that work from August, 1904, to December, 1906; that shortly after the employment of respondent Mrs. Heisler paid him the further sum of \$10; that subsequently various sums of money were allowed Mrs. Heisler

as solicitor's fees in the proceeding, amounting to \$70; that Mrs. Heisler's husband was required by order of court to pay her as alimony, during the pendency of the divorce suit, \$3 per week; that the order for its payment was procured by respondent without Mrs. Heisler's knowledge; that the payments of alimony were made by complainant in the divorce suit to the clerk of the court, and were collected from the clerk by respondent, and retained by him, to the amount of \$81, of all of which Mrs. Heisler was ignorant; that the services of Mrs. Heisler as a washerwoman for one day in the week, for 116 weeks, were worth \$1.50 per day, or a total sum of \$174, which, together with the amounts collected by respondent, paid by order of the court as solicitor's fees, the amount of alimony allowed Mrs. Heisler, collected by respondent, and the cash paid him by her, made a total sum received by him of \$345, and that, although respondent was only entitled to \$25, he had failed to account to Mrs. Heisler for the money received by him in excess of that amount, but fraudulently converted it to his own use. The information further alleged that respondent claimed he and Mrs. Heisler made an agreement in October, 1905, by which he was to receive, in addition to the amount paid him in cash by her, all moneys collected in the divorce proceeding from her husband, as alimony or otherwise, but, notwithstanding said agreement, the information charges that at various times after October, 1905, and up to October, 1906, respondent falsely and fraudulently represented to the circuit court that the alimony ordered to be paid in said proceeding was for the use of Mrs. Heisler and her children, and to be used for their living expenses.

Second. That the respondent was, on the 3d day of February, 1900, indicted by a grand jury of the criminal court of Cook county for unlawfully making an assault upon one Cora D. Carson, a female, with intent feloniously and forcibly to ravish and carnally know her against her will; that thereafter respondent entered a plea of not guilty to said indictment, but afterwards withdrew said plea and entered a plea of "guilty of assault in manner and form as charged in said indictment"; that evidence was heard by the court and a judgment entered against respondent that he pay a fine of \$100 and costs and stand committed until the fine and costs were paid, wherefore the information alleges that the respondent's license as an attorney and counselor at law should be revoked and canceled and his name stricken from the roll of attorneys of this court.

Respondent's answer to the first charge in the information denies that he agreed to take Mrs. Heisler's case for \$25, and alleges

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the agreement was that he was to receive a reasonable fee out of the money collected in the divorce proceedings. Respondent denies that Mrs. Heisler washed for him, in payment of his fees, 116 weeks, but alleges that every time she did wash for him he paid her for her services, and that during the time she claims to have washed for respondent he had four other washerwomen. The answer alleges that prior to respondent's engagement by Mrs. Heisler in the divorce suit he represented her before a police magistrate in a proceeding instituted by her against her husband for wife abandonment, on account of which she became indebted to him for services in the sum of \$30; admits that he collected \$20 as solicitor's fees from Mrs. Heisler's husband, but denies that he collected \$70; admits that he collected \$81 as alimony, a part of which he applied on the expenses of the divorce proceedings, and avers that this was done with the consent of Mrs. Heisler. Respondent denies that he obtained an order for the payment of alimony without the knowledge of Mrs. Heisler, and avers that out of the \$81 collected by respondent he paid Mrs. Heisler \$9, for which he held her receipt. The answer further avers that Mrs. Heisler executed to him a written authority in January, 1906, to collect the alimony; that she was fully informed as to all money collected and the disposition of it, and that she paid rent to the amount of \$25 out of said alimony money to her mother's landlord. Respondent avers that all money he received from Mrs. Heisler was \$20 in cash, about \$72 of alimony money and \$20 solicitor's fees from complainant in the divorce suit, and that the expenses attending the divorce suit were \$62.75, and alleges that Mrs. Heisler owed him \$30 for services in the justice's court and for other legal services, which she never paid, which she told him to take out of the alimony allowed her in the divorce case; that his services in the divorce case were reasonably worth \$300; and sets out in considerable detail a statement of the services rendered by him. Respondent denies falsely and fraudulently representing to the court that the alimony paid by Mrs. Heisler's husband was for the use of herself and children, and denies that he ever at any time concealed, or attempted to conceal, from Mrs. Heisler procuring the allowance and payment of the alimony, or that he ever took any steps in the case without her knowledge.

As to the second charge in the information, the answer admits the allegations with reference to the indictment of respondent and his plea of guilty to assault in manner and form as charged and the judgment of the court on said plea, but alleges that the plea did not include the charge of an assault upon Cora D. Carson with intent to feloniously and forcibly ravish and carnally know her against her will, but simply admitted the making of an assault upon her.

The cause was referred to John F. Holland, one of the masters in chancery of the superior court of Cook county, as special commissioner, to take the testimony and report his conclusions of law and fact. After hearing the testimony the commissioner reported that he found from the evidence that respondent agreed with Mrs. Heisler to perform the necessary legal services for her in the divorce suit for \$25, to be paid by her in cash as soon as she was able to earn it; that in the contract of employment there was no provision for services to be rendered by respondent in relation to the custody of the children of Mrs. Heisler and her husband, or with reference to procuring alimony or solicitor's fees in the divorce proceeding, and no agreement was made about the disposition of any solicitor's fees or alimony that might be collected by order of the court; that shortly afterwards Mrs. Heisler paid respondent \$25 in accordance with the agreement; that in November, 1905, respondent procured an order of the court directing Mrs. Heisler's husband to pay \$20 solicitor's fees and \$3 per week temporary alimony; that the \$20 solicitor's fees was paid the respondent by the attorney for Mrs. Heisler's husband, Frederick Heisler; that during the months of November and December, 1905, and January, 1906, Frederick Heisler paid to the clerk of the court \$25 temporary alimony, which was paid to one Frank Converse for rent by order of Mrs. Heisler; that some time in January, 1906, the respondent obtained from Mrs. Heisler a written order authorizing the clerk of the circuit court to pay respondent all money paid by Frederick Heisler as temporary or permanent alimony until otherwise notified, except the sum of \$4, which was to be paid to Converse; that after said order was obtained the respondent treated all alimony paid by Frederick Heisler in said divorce proceeding as his own, and between March, 1906, and November, 1906, collected the sum of \$81 of money so paid by Frederick Heisler to the clerk of the circuit court; that out of that sum he paid Mrs. Heisler at one time \$3, at another \$3, and at another \$6, and retained all the balance of the money collected by him. The commissioner further finds that at various times Frederick Heisler was in arrears in the payment of alimony, and that applications were made to the court by respondent in the months of April, June, July, and December, 1906, for attachments for contempt to enforce payment; that said applications were based on affidavits made by Mrs. Heisler, in certain of which it was stated "that affiant [Emma Heisler] and her two children were in need of the money so past due," and in certain of which it was stated "that affiant [Emma Heisler] has two children of the said complainant to support, and is in need of said temporary alimony," and in certain of which it was stated "that affiant [Emma Heisler] has no other means of support except her own hard labor, and that she labors

daily when she can find work"; that respondent presented these affidavits to the court, and verbally stated at the time that the alimony so in arrears was needed and desired for the support of Emma Heisler and her two infant children. The commissioner further found that respondent rendered other legal services for Mrs. Heisler for which he had not been paid otherwise than by the alimony collected and retained by him, but that he kept no account of his services or of the moneys collected and disbursed by him, and never rendered Mrs. Heisler any statement thereof; that Mrs. Heisler rendered services for the respondent as a washerwoman, for which she was occasionally paid, but whether paid in full or not could not be determined from the evidence; that the divorce suit was tried in November, 1906, and a verdict returned in favor of Mrs. Heisler; that the case was tried for her by John A. Ronayne, an attorney employed on her behalf by respondent and with her knowledge and consent; that the trial lasted two days, and respondent paid Ronayne \$50 for his services. The commissioner further finds that the services rendered by respondent to Mrs. Heisler were reasonably worth all he collected from her, and all he received that was paid by Frederick Heisler as solicitor's fees and alimony. Upon the second charge in the information, after reciting the record of the indictment and conviction of respondent, the commissioner reports that Cora D. Carson, upon whom the assault was made, was at the time a girl 16 years old, and was employed the day previous to the assault as a stenographer in the office of respondent, and was at the time of said assault in respondent's office.

The conclusion of the commissioner is that respondent's method of doing business with clients, as shown by the evidence, could not be too strongly condemned, but, as the amount of money received by him did not exceed the sum fairly due him for the services rendered, the commissioner was of opinion that it could not be said the evidence established respondent's guilt of unprofessional or criminal conduct; and, as to the conviction in the criminal court, the commissioner reported that as the offense "was committed nine years ago, and, so far as this record discloses, his life has been free from any criminal conduct during that period, the undersigned is led to recommend that the extreme penalty of disbarment be not imposed upon the respondent."

John L. Fogle, for relator. Charles Hughes, for respondent.

FARMER, J. (after stating the facts as above). Relator filed no exceptions to the commissioner's finding of facts, but excepted to his conclusion that under the facts as found respondent should not be disbarred and his name stricken from the roll of attorneys of this court. Respondent has filed exceptions to the commissioner's finding of

facts and also to his conclusions therefrom, it being the claim of respondent that the conclusions are prejudicial to him. Appreciating the importance of the case to respondent, we have carefully read all the testimony as abstracted by him and much of it from the record also. In many respects it was of a very contradictory nature. It will only be necessary to consider the facts the commissioner reported as proven, and to determine whether those facts were proven by the testimony, and, if so, whether they justify and sustain the conclusions of the commissioner.

It is stoutly denied by respondent that the proof justified the finding that he agreed with Mrs. Heisler to represent her in the divorce case for \$25, but he claims the agreement was he was to receive a reasonable fee for his services. Our consideration of the evidence on this question satisfies us that the commissioner's report in this respect is sustained by it. It is very apparent that Mrs. Heisler was very poor and very ignorant. She claimed to have been driven out of her home by her husband. They had two young children. One of them was in Mrs. Heisler's custody when she first employed respondent, and he afterwards secured the custody of the other one for her. Her testimony shows she had very little comprehension of a court proceeding or the necessary steps required to be taken in her case. She appears to have relied implicitly upon respondent, and to have done as he advised her. In a short time after his employment Mrs. Heisler paid respondent the \$25. This employment appears to have been in September, 1905. In October following, respondent filed an answer to Frederick Heisler's bill for divorce, and also filed a cross-bill for separate maintenance. In November, 1905, he secured an order of the court requiring Frederick Heisler to pay his wife \$20 for solicitor's fees and \$3 per week alimony pendente lite. The \$20 solicitor's fee was paid to respondent by Frederick Heisler's counsel and was retained by him. Some of the payments of alimony were made weekly, in accordance with the order of the court, but at different times Frederick Heisler failed to make the payments, and applications were made by respondent to the court for attachments for contempt, to enforce payment. Payments of the alimony were by the order of the court directed to be made by Frederick Heisler to the clerk of the court. Out of the first alimony so paid in, \$25 was, by order of Mrs. Heisler, paid to her mother's landlord on rent. The proof shows, and the respondent admits, he received \$81 of the alimony money, but he contends he had the consent and authority of Mrs. Heisler to receive it; that he paid her a portion of it, and a portion of the remainder he paid, with her knowledge and consent, on expenses incurred in the divorce proceeding. The

proof does not sustain the allegation of the information that Mrs. Heisler had no knowledge of the payments of any alimony being made by her husband. We are strongly impressed from the evidence that she was not advised as to all the payments made, but as \$25 of it was paid out on her order, it is clear she knew of some payments being made. There is other proof also in the record tending to show that she knew of payments being made. Respondent procured from Mrs. Heisler a written order, addressed to the clerk of the circuit court, directing him to pay respondent all money paid in by Frederick Heisler as temporary or permanent alimony until otherwise notified, except \$4, balance of the \$25 she had ordered paid on rent. This order bears no date, but the commissioner found from the evidence that it was signed in January, 1906. The divorce suit was tried by jury in November, 1906. The trial lasted two days, and resulted in a verdict finding Mrs. Heisler not guilty of the charges in the bill—adultery and drunkenness. The trial was conducted for Mrs. Heisler by an attorney named Ronayne, who was employed by respondent for that purpose, he claims, and the commissioner so finds, with her knowledge and consent, and to whom he paid \$50 for his services. The total amount of money the proof shows respondent received was \$126. Of this amount \$25 was paid by Mrs. Heisler, \$20 solicitor's fees, and \$81 alimony paid by Frederick Heisler. The commissioner finds respondent paid out of said moneys to Mrs. Heisler \$12, and to Ronayne \$50, leaving a balance of \$64. Respondent testified that he paid expenses for Mrs. Heisler for the service of writs, orders, rules, typewriting, etc., to the amount of \$62, but he kept no account of these expenses as they were incurred and paid. His testimony on this question was based upon recollection, and stands unaided by any books or memoranda. He kept no record of the services rendered Mrs. Heisler or of moneys received or paid out, and never at any time rendered her any statement of such matters, and produced no receipts for money paid out except the \$50 paid Ronayne and \$12 paid Mrs. Heisler. As we understand the evidence, the first service performed for Mrs. Heisler by respondent was to have her husband arrested on a warrant issued by a justice of the peace for wife abandonment. This was probably before the bill for divorce was filed by Frederick Heisler. But that suit was abandoned. Respondent claims to have paid out \$5 on the expenses of the wife abandonment suit, also a small sum to a detective he says he was instructed by Mrs. Heisler to employ. Mrs. Heisler denies any knowledge of any of these payments, and denies she authorized or ever knew of the employment of a detective.

If the contract of employment had been,

as contended by respondent, that he was to be paid what his services were reasonably worth instead of the fixed sum of \$25, as found by the commissioner, and as we think he was warranted in finding, the amount respondent received could not be considered unreasonable. While \$25 may have been a small fee to respondent, in Mrs. Heisler's condition it was a considerable sum. She had no means, and had to support herself and small children by mental labor. The money to pay the \$25 had to be saved out of her small earnings, and it is to her credit that she paid it as promptly as circumstances would admit. Her ignorance required that she be dealt with by her lawyer in the frankest possible manner, and greater pains taken to fully inform her of what was being done all the time, and what her rights were, than would be required of a more intelligent and better informed client. It is well known to the legal profession that ignorant clients are more difficult to deal with than intelligent ones. Respondent, however, seems to have had no difficulty in obtaining the confidence of Mrs. Heisler and procuring her to do whatever he asked of her in the litigation. She appears to have been a tractable client. Her character was so assailed by her husband as to undoubtedly give her great distress and anxiety. Respondent had been engaged in the practice of his profession in the city of Chicago six years before he was employed by her—time enough for sufficient experience to enable him to know that his dealings with his clients and with the courts should be so open and straightforward as to leave no reasonable room for criticism.

If the decision of this case involved only a determination of whether respondent received more money than his services were worth, the decision would have to be in his favor; but if his contention that Mrs. Heisler authorized him to collect all alimony paid and apply it on his fees be accepted as correct, we think the evidence showed in him such a lack of moral sense and proper appreciation of his relations and duty toward the court in which the litigation was pending as to render him unworthy to be further allowed to practice his profession. After he had procured the order from Mrs. Heisler directing the clerk to pay him the alimony money he went into court four different times, April, June, July, and December, 1906, to enforce payment of the weekly allowance by contempt proceedings. On each of these occasions he presented affidavits of Mrs. Heisler in which it was stated that the money was desired and needed for the support of herself and children, and at the same time, notwithstanding respondent says he was to have the money he was seeking to collect to apply on his fees, he verbally stated to the court that Mrs. Heisler and her children needed the money for their support. The allowance of alimony pendente lite had been

made by the court for the benefit of Mrs. Heisler and her children, and not for solicitor's fees. Twenty dollars was allowed for that purpose and paid to respondent. These litigants were both poor, and this was considered by the court in fixing the allowances made. It was evidently the view of the court that the amounts fixed to be paid by Frederick Heisler as solicitor's fees and alimony were as much as he was able to pay for those purposes pending the suit. If it had been thought proper for him to pay a larger sum for solicitor's fees, it is to be presumed the court would have so ordered. If it had been called to the attention of the court that, after appropriating the \$20, respondent had an agreement with Mrs. Heisler by which he was to have the weekly payments of alimony also to apply on his fees, it would have been the duty of the court to set aside the order for the payment of alimony. Having allowed Mrs. Heisler all the solicitor's fees the court thought her entitled to under the circumstances, it would not have been tolerated that the alimony should also be appropriated for that purpose. This must have been understood by respondent, for he repeatedly, by affidavits presented and verbal statements made by him to the court, represented that the alimony was wanted for the support of Mrs. Heisler and her children, and the aid of the strong arm of the law was asked to force Frederick Heisler to pay this money so that his wife and children might have it to live on. It is of absolutely no consequence whether respondent rendered services worth more than he received pay for, or whether the contract of employment was as claimed by him. The damaging fact is that he concealed the truth and by false representations imposed upon the court, of which he was an officer, in order that he might profit a few dollars thereby. Nor is the offense mitigated by the fact that he paid Mrs. Heisler a few dollars of the money thus collected. Respondent testified that, notwithstanding Mrs. Heisler authorized him to keep all the alimony money collected by him, he paid her \$12 out of it because she was in need, and he did not think "she could afford to lose it all." It was not the purpose of making the order for the payment of the alimony that respondent should collect it and dole out to Mrs. Heisler small sums when in his judgment she needed it. If he had wanted more fees or more money to pay the expenses of the litigation, he knew the only proper way to procure it was to ask the court for an order on Frederick Heisler to pay it. If he had been too poor to pay more, it is not probable that the court would have permitted the money paid for the support of Mrs. Heisler and children to be absorbed for those purposes.

We can take no other view of the finding of facts by the commissioner, which is fully sustained by the evidence, in relation to the conduct of respondent in collecting and ap-

propriating this money, to say nothing of his previous immoral conduct as shown by his plea of guilty to the indictment in the criminal court and the judgment and sentence against him thereon, than that it clearly convicts him of conduct which cannot be passed over with a mere censure, but makes it our duty to strike his name from the roll of attorneys. We are not unmindful of the serious consequences of such action to respondent, and that the proof to justify it must be clear and satisfactory. *People v. Thornton*, 228 Ill. 42, 81 N. E. 793; *People v. Matthews*, 217 Ill. 94, 75 N. E. 444. We can see no difference in moral turpitude between fraud and misrepresentation in procuring an original order for the payment of alimony, and fraud and misrepresentation in enforcing payment upon an order already made. In *People v. Leary*, 84 Ill. 190, we held the procuring of an order for the payment of alimony upon a paper purporting to have been sworn to by the defendant, the wife of complainant, but which, in fact, she did not swear to, her name having been signed to it by her solicitor while she was ill, justified the disbarment of the solicitor. In that case it was said (page 191): "A motive for his conduct may be found in the fact he had procured Mrs. Powers, while in her confinement, to sign a paper authorizing him to receive any money which the court might allow her in the progress of the cause." In *People v. Pickler*, 186 Ill. 64, 57 N. E. 893, it was held that a lawyer who induces a court to allow appeals upon bonds he knows to be worthless or fictitious is guilty of such misconduct as to warrant his disbarment. In *People v. Beattie*, 137 Ill. 553, at page 574, 27 N. E. 1096, at page 1103, 31 Am. St. Rep. 384, it was said: "The lawyer's duty is of a double character. He owes to his client the duty of fidelity, but he also owes the duty of good faith and honorable dealing to the judicial tribunals before whom he practices his profession. He is an officer of the court—a minister in the temple of justice. His high vocation is to correctly inform the court upon the law and the facts of the case, and to aid it in doing justice and arriving at correct conclusions. He violates his oath of office when he resorts to deception or permits his clients to do so." In *People v. Macauley*, 230 Ill. 208, at page 218, 82 N. E. 612, at page 614, 120 Am. St. Rep. 287, it was said: "The standard of personal and professional integrity which should be applied to persons admitted to practice law in the courts is not satisfied by such conduct as merely enables them to escape the penalties of the criminal law."

This court has always held that a high sense of personal and professional integrity must be observed by members of the profession, not only toward clients, but toward the courts in which they practice. They are a part of the machinery of the law for the administration of justice, and it is indispensa-

ble that courts shall in a large measure be able to rely upon their good faith and fair dealing. It is no hardship to make this requirement, and it cannot be relaxed without great detriment to the profession and to the proper administration of justice. Men who cannot conform to the standard fixed must employ their talents in other fields than the legal profession. The proof of respondent's misconduct in the respects mentioned meets the requirements of the rules laid down in the previous decisions of this court, and the commissioner should have recommended disbarment upon the facts found proven.

A judgment will therefore be entered that the rule be made absolute, and respondent's name stricken from the roll of attorneys of this court.

Rule made absolute.

(227 Ill. 541.)

### PEOPLE v. DELUCE.

(Supreme Court of Illinois. Dec. 15, 1908. Rehearing Denied Feb. 4, 1909.)

#### 1. CRIMINAL LAW (§ 1159\*)—WRIT OF ERROR—QUESTIONS OF FACT—REVIEW OF EVIDENCE.

Where the jury has honestly determined the credibility of witnesses, the Supreme Court on a writ of error will not set aside the verdict as against the weight of the evidence, unless satisfied from a consideration of all the testimony that there is a reasonable doubt of accused's guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3075; Dec. Dig. § 1159.\*]

#### 2. CRIMINAL LAW (§ 566\*)—EVIDENCE—IDENTIFICATION.

Evidence identifying accused as one of the robbers who attacked complainant held to sustain a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1278; Dec. Dig. § 566.\*]

#### 3. CRIMINAL LAW (§ 741\*)—TRIAL—QUESTION OF LAW AND FACT.

The weight to be given recent possession of stolen property as an incriminating circumstance is a question of fact and not of law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1713; Dec. Dig. § 741.\*]

#### 4. ROBBERY (§ 24\*)—EVIDENCE—STOLEN PROPERTY—RECENT POSSESSION—"PRIMA FACIE EVIDENCE"—"PRESUMPTIVE EVIDENCE."

Recent possession of stolen property, the proceeds of a robbery or burglary, is "prima facie evidence" of the possessor's guilt, the term "prima facie" being used in the sense of presumptive—at first view—that is, evidence which authorizes but does not require conviction. It does not mean that after such "prima facie evidence" is introduced the burden shifts to the defendant, but only that if the jury, after considering all the evidence, including that of recent possession and any explanation which may have been given, entertain a reasonable doubt of accused's guilt, he must be acquitted, and that such proof is only sufficient to convict when unexplained.

[Ed. Note.—For other cases, see Robbery, Dec. Dig. § 24.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5541, 5542, 5549, 5550; vol. 8, p. 7762.]

#### 5. ROBBERY (§ 23\*)—EVIDENCE—IDENTITY OF COIN.

Where accused admitted the possession of a Russian coin, and did not attempt to show that it was different in amount from that which complainant testified had been taken from him during a robbery, evidence that two witnesses saw a Russian coin in defendant's possession was admissible, though they did not identify it as to amount or any other particulars.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 29; Dec. Dig. § 23.\*]

#### 6. CRIMINAL LAW (§ 784\*)—TRIAL—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

In a prosecution for robbery, the proof held to justify an instruction on circumstantial evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1883; Dec. Dig. § 784.\*]

#### 7. CRIMINAL LAW (§ 792\*)—TRIAL—INSTRUCTIONS—ACCESSORY.

Where, in a prosecution for robbery, it appeared that defendant did not personally take the property from complainant's person, but stood by holding a revolver, an instruction as to an accessory was properly given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1818-1820; Dec. Dig. § 792.\*]

#### 8. CRIMINAL LAW (§ 785\*)—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

An instruction that the jury should determine the credence to which each witness' statement was entitled, as reasonable and intelligent men, but that their power and duty to judge the effect of evidence was not arbitrary, and should be exercised with discretion and in conformity with the instructions on the subject, was not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1772; Dec. Dig. § 785.\*]

#### 9. ROBBERY (§ 24\*)—INTENT TO MAIM AND KILL.

Where, in a prosecution for robbery, there was evidence that accused held a revolver while prosecutor was being robbed, the jury were justified in finding that accused intended to kill or maim, if resisted, though there was no proof that the revolver was loaded.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 32, 33; Dec. Dig. § 24.\*]

#### 10. CRIMINAL LAW (§ 1206\*)—SENTENCE—INDETERMINATE SENTENCE ACT—VALIDITY.

The indeterminate sentence act is not unconstitutional, on the ground that punishment thereunder is not proportionate to the nature of the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8274; Dec. Dig. § 1206.\*]

Error to Criminal Court, Cook County; A. H. Chetlain, Judge.

Donato Deluce was convicted of robbery with intent, if resisted, to kill and maim, and he brings error. Affirmed.

Cantwell & Roth, for plaintiff in error. W. H. Stead, Atty. Gen., and John J. Healy, State's Atty. (Edward S. Day and James J. Barbour, of counsel), for the People.

CARTER, J. Plaintiff in error was indicted in the criminal court of Cook county on the charge of robbing one Wladyslaw Matyasik, being then and there armed with a revolver, with intent, if resisted, to kill and maim. The jury found plaintiff in error

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

guilty, and also found him to be of the age of 19 years. He was sentenced to the State Reformatory at Pontiac, and to reverse this judgment and sentence this writ of error has been sued out.

Matyasik, the complaining witness, testified that at about 11 o'clock on the night of January 24, 1908, he was walking across the Taylor street bridge, in Chicago, when he was stopped by three men and told to hold up his hands; that the plaintiff in error was one of the men, and had a revolver in his hands; that after he had held up his hands he was searched by the men, and they took from his person \$12 in United States money, a Russian coin of the value of \$5, a watch valued at \$15, and a chain valued at \$9, all belonging to him, and thereupon ran away. He reported the matter to the police, and next saw the plaintiff in error at the police station about two weeks later, where he was under arrest. Eddie Kasper and Joseph Kasper testified that a few days after January 24, 1908, they saw the plaintiff in error with a Russian coin in his possession. The plaintiff in error testified that he did not hold up the complaining witness nor take anything from him; that he was at home with his mother and sister all the evening in question, and did not go out that night at all; that he was well acquainted with several Poles living in his neighborhood, and was asked by some of his friends to get a Russian coin changed; that this was the coin the Kaspers saw in his possession; that he did not steal the coin, and knew nothing of the robbery. His mother, Margaret Donato, testified that he was at home during the entire evening of January 24th; that on the way to court with her daughter, Mary, she met the prosecuting witness, who said if she would pay him \$50 he would not prosecute the case. Mary, the daughter, who was nine years old, also testified that plaintiff in error was at home all the evening of January 24th, and that as she was going to court to attend the trial, with her mother, the prosecuting witness said that if the mother would give him \$50 he would not prosecute. One James Pacenti swore that he had known plaintiff in error for a long time, and that his general reputation for honesty was good. There is no testimony in the record showing the business of the prosecuting witness, plaintiff in error, or any of the other witnesses in the case.

Counsel insist that the evidence was not sufficient to justify the conviction. The weight to be given to the testimony and the credit to be given the various witnesses are purely questions for the jury. The law has intrusted to them the consideration of these questions, and this court has no right to interpose by substituting its own opinion when the jury have honestly and according to their best light performed this duty, unless satisfied, from a consideration of all the testimony, that there is a reasonable doubt of the

guilt of the accused. *Gainey v. People*, 97 Ill. 270, 87 Am. Rep. 109; *Miller v. People*, 229 Ill. 876, 82 N. E. 391. The jury had the witnesses before them and could judge of their intelligence, credibility, and manner of testifying far better than this court.

In this connection counsel for the plaintiff in error insist that there was not sufficient identification of plaintiff in error to justify his conviction. Whether or not the bridge was sufficiently lighted for Matyasik to identify the robbers, or whether he identified the plaintiff in error in some other way, the record does not disclose. It does appear, however, that Deluce was positively identified by the prosecuting witness, and the only way this identification is contradicted is by the testimony of himself, his mother, and sister that he was at home at the time the robbery was said to have been committed. The jury had before them all of these witnesses, under an instruction for plaintiff in error that his identity as the guilty person must be proved beyond a reasonable doubt. It was a question of credibility between the witnesses on the two sides—a question peculiarly within the province of the jury. *Rogers v. People*, 98 Ill. 581. They believed the prosecuting witness, and disbelieved the story of the alibi. We cannot say that in doing this they found a verdict against the evidence.

Plaintiff in error insists that the court erred in giving instruction 4, which stated, in substance, that the possession of stolen property, the proceeds of a robbery or burglary, soon after the commission of the offense, is prima facie evidence of the guilt of the party in whose possession such property is found. Without doubt there are contradictory decisions on this branch of the law. In some jurisdictions the mere fact of recent possession is evidence against the possessor, while in others it is only unexplained recent possession which is evidence against the possessor. 25 Cyc. 181. Whatever the law is as to the presumption of guilt, it is everywhere agreed that the question is one of fact and not of law. The jury must pass on all the evidence, and the weight to be given to such evidence is for the jury alone. The law does not presume guilt. 25 Cyc. 184, and cases there cited; 18 Am. & Eng. Ency. of Law (2d Ed.) 485.

Plaintiff in error insists that this court held in *Conkwright v. People*, 35 Ill. 204, that a similar instruction was erroneous. This court in *Comfort v. People*, 54 Ill. 404, had under consideration the question whether the *Conkwright* Case, supra, laid down the doctrine contended for by plaintiff in error, and it was said (page 407 of 54 Ill.): "It is insisted, that the possession of property soon after it is stolen is not, of itself, prima facie evidence that it was stolen by the person in whose possession it is found, and the case of *Conkwright v. People*, 35 Ill. 204, is referred to in support of the position. If the case an-

nounces such a rule, it is too broad and should be limited." The opinion goes on to say that while such recent possession is *prima facie* evidence of guilt, yet it should not control when it is explained by other evidence or surrounding circumstances; that "if the possession is recent after the theft, and there are no attendant circumstances or other evidence to rebut the presumption or to create a reasonable doubt of guilt, the mere fact of such possession would warrant a conviction." This court has frequently had this question, with varying facts, before it for consideration, and the doctrine laid down in the *Comfort Case*, *supra*, has been repeatedly affirmed. *Sahlinger v. People*, 102 Ill. 241; *Smith v. People*, 103 Ill. 82; *Langford v. People*, 134 Ill. 444, 25 N. E. 1009; *Magee v. People*, 139 Ill. 138, 28 N. E. 1077; *Williams v. People*, 196 Ill. 173, 63 N. E. 681; *Watts v. People*, 204 Ill. 233, 68 N. E. 563; *Miller v. People*, *supra*. *Prima facie* evidence means presumptive evidence—at first view—that is, evidence which authorizes but does not require conviction. *State v. Brady*, 121 Iowa, 561, 97 N. W. 62, 12 L. R. A. (N. S.) 199. It does not mean that, after this *prima facie* evidence is introduced, the burden shifts to the defendant, but only that if after the jury, considering all the evidence, including the evidence of recent possession and any explanation of such recent possession which may have been given, then entertain a reasonable doubt of the guilt of the accused, he must be acquitted (*Hoge v. People*, 117 Ill. 35, 6 N. E. 796; *People v. Casey*, 231 Ill. 261, 83 N. E. 278), and that such proof is only sufficient to convict when unexplained. We think there was no error in this record in giving this instruction.

The plaintiff in error further insists that the court committed error in permitting the two Kaspers to testify that they saw a Russian coin in the possession of the plaintiff in error, without identifying it as to amount or in other particulars. Plaintiff in error admitted the possession of a Russian coin, and did not attempt to show that it was different in amount from the one which the complaining witness testified had been taken from him. This evidence was competent. The weight to be given to it is for the jury.

The instructions on circumstantial evidence were justified by the testimony. The instruction as to an accessory, complained of by the plaintiff in error, was properly given. From the testimony before us it might be fairly inferred that plaintiff in error himself did not take the property off the person of the complaining witness, but stood by holding a revolver.

Complaint is also made of the giving of instruction 10 for the prosecution, which it is agreed is the same as the fourth instruction for the people in *People v. Horschler*, 231

Ill. 566, 83 N. E. 428. We have considered the argument of plaintiff in error on this question, and reaffirm the views expressed in that case.

We do not agree with the contention that the jury were not justified in finding that plaintiff in error had an intent to kill and maim because there was no proof that the revolver was loaded, or that there was a variance because such proof was not made.

Plaintiff in error also insists that the indeterminate sentence act is unconstitutional, urging, among other reasons, that the punishment under the act is not proportionate to the nature of the offense. Much of the argument found in the brief on this point would be more properly addressed to a legislative body than to a court. This court fully considered the constitutionality of this act on the matters involved, in *People v. State Reformatory*, 148 Ill. 413, 36 N. E. 76, 23 L. R. A. 139, and *George v. People*, 167 Ill. 447, 47 N. E. 741. These decisions fully cover all the points raised in the briefs. We see no reason to change or add to what we there stated.

We find no reversible error in the record. The judgment of the criminal court of Cook county will be affirmed.

Judgment affirmed.

(237 Ill. 549)

STEPHEN v. DUFFY.

(Supreme Court of Illinois. Dec. 15, 1908.  
Rehearing Denied Feb. 4, 1909.)

1. MASTER AND SERVANT (§ 101\*)—EXCAVATIONS—SAFE PLACE TO WORK—MASTER'S DUTY.

A contractor engaged in excavating rock was bound to provide one employed to operate a steam shovel with a reasonably safe place to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 179; Dec. Dig. § 101.\*]

2. MASTER AND SERVANT (§ 286\*)—EXCAVATIONS—PLACE OF WORK—MASTER'S DUTY—JURY QUESTION.

In an action against a contractor engaged in excavating rock for the death of the operator of a steam shovel caused by an accidental explosion of dynamite which failed to explode with other charges, *held*, under the evidence, a jury question whether the exercise of reasonable care to provide decedent a safe place to work required the contractor to explode the dynamite in a single row of holes, instead of four rows.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1026; Dec. Dig. § 286.\*]

3. MASTER AND SERVANT (§ 118\*)—EXCAVATIONS—EXPLOSIVES.

In determining whether the exercise of due care by a contractor engaged in excavating rock respecting an employee's safety required him to use a slower and more expensive method of exploding dynamite than was used, weight must be given the fact that dynamite is a very powerful and dangerous force.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 209; Dec. Dig. § 118.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

#### 4. MASTER AND SERVANT (§ 206\*)—RISKS ASSUMED.

Among the dangers assumed by a servant are the ordinary risks necessarily incident to the employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 550; Dec. Dig. § 206.\*]

#### 5. MASTER AND SERVANT (§ 288\*)—RISKS ASSUMED—EXPLOSIVES—JURY QUESTIONS.

Whether the operator of a steam shovel assumed the risk of an accidental explosion of dynamite which had failed to explode with other charges held, under the evidence, a jury question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1071; Dec. Dig. § 288.\*]

#### 6. EVIDENCE (§ 512\*)—EXPERT TESTIMONY—ADMISSIBILITY—EXPLOSION OF DYNAMITE.

In an action for the death of an employé caused by an accidental explosion of dynamite which had failed to explode with other charges, expert testimony was admissible to show that a method could have been pursued whereby an inspection would have revealed the existence of a charge missing fire.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2316; Dec. Dig. § 512.\*]

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, Will County; Dorrance Dibell, Judge.

Action by Edmund Stephen, as administrator of Alfred Oestry, against Joseph J. Duffy and others. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant Duffy appeals. Affirmed.

This is an appeal by Joseph J. Duffy from a judgment of the Appellate Court for the Second District affirming a judgment for the sum of \$5,000 recovered by Edmund Stephen, administrator of the estate of Alfred Oestry, deceased, appellee, in the circuit court of Will county, against appellant, for damages for the death of appellee's intestate, alleged to have been caused through the negligence of the appellant. To the suit Joseph J. Duffy and M. J. Scanlon, copartners as J. J. Duffy & Co., and the Joseph J. Duffy Contracting Company, a corporation, were made defendants. The jury were instructed that there was no evidence tending to establish any liability as to any of the defendants except appellant, and they were also instructed to disregard each of the counts of the declaration except the first, second, and third. The first count alleges, in substance, that defendants on December 23, 1904, were engaged in the business of excavating and removing stone and other material from the drainage channel of the Sanitary District of Chicago, in Will county, Ill., and that in the prosecution of said work the defendants drilled holes in the natural ledge of rock, and placed therein dynamite for the purpose of exploding the same to break and loosen the rock so that it might be removed from said channel by means of a steam shovel, which was operated by the deceased under the direction of an engineer; that it was the duty of defendants to exercise reasonable care in placing and exploding the

dynamite so that all of the dynamite would be exploded by the application of the electric current used for that purpose; and that it was their duty to withdraw from the stone any dynamite not so exploded before the deceased engaged in the removal of the blasted stone. The negligence charged in this count is that the defendants carelessly and wrongfully prepared and placed said several charges of dynamite in the holes aforesaid without reasonably careful and proper connections, so that the dynamite was not all exploded by the electric current, and defendants did not use reasonable care to remove the unexploded dynamite before the shoveler on which deceased worked was placed in operation to remove this particular stone. It was averred that as a result of such negligence unexploded dynamite which remained in the mass of broken rock after the application of the current exploded and killed the deceased while he, in the exercise of due care, was assisting in removing the stone. The second count charges a negligent failure to inspect the stone after the explosion resulting from the application of the current for the purpose of ascertaining whether all the dynamite had been exploded. The third count charges a negligent failure to provide for the deceased a safe place in which to work.

At the time of the accident appellant had in his employ a large force of men engaged in excavating a portion of the drainage channel of the Sanitary District of Chicago. The excavation, which was being made in solid limestone, was 162 feet in width, extending across the channel, and about 16 feet deep. The method of operation, which appears to have been the common one in use by contractors engaged in this sort of work, was first to make a channel, running lengthwise of the drainage channel, about 2 inches in width and 16 feet deep along the outer line on each side of the proposed excavation. When the "channeling," as this work was called, was completed for a certain distance, from 28 to 30 holes were drilled, in 4 rows, in the bench of rock. The rows were about 8 feet apart and the holes in each row were the same distance from each other. Each hole was from 12 to 14 feet deep. These holes were two inches in diameter, and, after they were drilled, light explosives were placed therein and fired to clean out the holes, and make a small pocket at the bottom in which to place the main charge of dynamite. After "springing the holes," as this operation was called, each hole was charged with from 40 to 50 pounds of dynamite, and a small copper cap, known as the "exploder," attached to two small wires, was then inserted in and fastened to the last stick of dynamite placed in the hole. In order to prevent this cap from becoming damp, the hole around the cap was filled with soap or some greasy substance. The wires running from each hole

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

were then connected with a main wire leading to the power house, some distance away, and from this point the shots were all fired simultaneously by means of electricity. After the explosion the bench of rock in which the shots were placed would be broken up, and the pile of broken rock would be about four feet higher than the surface of the rock before the shots were fired. After the rock had been broken up in this manner, it was loaded into cars by means of a steam shovel. The deceased was employed on the steam shovel as cranesman, and his duties consisted in directing the movements of the shovel. In order to do this, he was compelled to stand within 15 feet of the rock pile, upon the crane, which swung back and forth between the rock pile and the car. The rock which was being loaded at the time of the accident had been broken up in the manner indicated above two or three days previous to that time. While the deceased was attempting to load the shovel, and while it was in contact with the stone in the mass, a terrific explosion occurred, by which he was so severely injured that he died on the following day. The proof indicates that this was an explosion of dynamite which had been placed in one or more of the holes prior to the application of the electricity, and which had not been exploded by the current. It appears from the evidence that there was nothing on the surface of the broken stone to indicate that the dynamite which injured the deceased remained unexploded after the blasting was done, two or three days before.

At the close of all the evidence, the court denied the motion of appellant for a peremptory instruction, and the action of the court in so doing has been assigned as error. Appellant also contends that the court erred in passing upon objections to evidence offered.

J. L. O'Donnell and T. F. Donovan (R. J. Falonie, of counsel), for appellant. John W. D'Arcy, for appellee.

SCOTT, J. (after stating the facts as above). In the discussion of the motion for a directed verdict a great deal of attention has been given to the question whether the maxim "*res ipsa loquitur*" applies; the position of appellee being that negligence may be inferred against the appellant from the fact of the explosion alone, while appellant insists that the evidence relied upon by appellee should have gone farther, and tended to prove that the presence of the unexploded dynamite was due to some specific act of carelessness on the part of appellant. The evidence clearly shows that the failure of this dynamite to explode may have resulted from any one of several causes. If there was a defect in the manufacture of the exploder, or if the exploder became moist, or if one of the wires leading to it had been broken, the current would not cause the dynamite to explode. Counsel urge that the failure to explode may have been the result of some defect

in the manufacture of the exploder, for which appellant, who had used due care in the purchase of this material, should not be held responsible, and that the proof was fatally defective because it did not negative this and other like possibilities. Although the disposition of the case seems to have turned in the Appellate Court upon the question whether this maxim applies, we are not disposed to regard that as the crucial question. It was the duty of the appellant to exercise reasonable care in providing for deceased a reasonably safe place in which to work, and it may be conceded that the evidence shows in this case that after the charges had been exploded, two or three days before the accident, the mass of broken stone resulting from the explosion had been inspected by employees of appellant, and that there was then nothing apparent to the eye, in any part of that mass of broken rock, to indicate that there was any unexploded dynamite contained therein. The evidence shows, however, that if, instead of exploding the dynamite in an entire block, but a single row of holes had been charged and the current applied to these charges at one time, an inspector examining the broken rock afterward could readily have ascertained the fact if the dynamite in one hole had failed to explode, because in that event there would have been a depression in the broken stone above the hole containing the unexploded dynamite.

Whether or not the exercise of reasonable care in providing a reasonably safe place for the deceased to work in required of appellant that the dynamite in but a single row of holes be exploded at one time, so that an inspection thereof would determine with greater certainty whether or not the dynamite in any one hole had missed, was a question for the jury. It is perhaps true that the method just mentioned would not be as efficacious and speedy in preparing the stone for removal as the method actually used. It is also probable that in using the method now under consideration less satisfactory results would be obtained from the use of the same amount of dynamite than by using the method that was actually pursued and that the prosecution of the work would be made more expensive. In determining whether the exercise of due care on the part of appellant required the use of a slower and more expensive method, weight must be given to the fact that dynamite is a very powerful and dangerous force. In considering a similar question in *Commonwealth Electric Co. v. Melville*, 210 Ill. 70, 70 N. E. 1052, we said (page 78 of 210 Ill., page 1055 of 70 N. E.): "Electricity is a subtle and powerful agent. Ordinary care exercised by those who make a business of using it for profit, to prevent injury to others therefrom, requires much greater precaution in its use than where the element used is of a less dangerous character. As there is greater danger and hazard in the use of electricity, there must be a correspond-

ing exercise of skill and attention for the purpose of avoiding injury to another to constitute what the law terms ordinary care. The care must be commensurate with the danger." The law so stated is applicable here.

Nor can we say as a matter of law that the risk was assumed. Among the dangers assumed by a servant are the ordinary risks necessarily incident to the employment. This man's business was to assist in the operation of a steam shovel engaged in shoveling broken stone. The danger of an explosion of dynamite is not incident to this occupation, and it is not contended that there is any other basis herein for the application of the doctrine of assumed risk. The case was rightfully submitted to the jury.

Several witnesses, skilled by long experience in blasting stone by the method followed by appellant, testified on the part of appellee as experts in reference to the effect of an explosion of a battery of charges, and in reference to an explosion of a smaller number of charges upon the condition and appearance of a ledge of stone, for the purpose of showing whether under given circumstances a proper inspection would show the existence of a charge that had missed fire after the other charges had been simultaneously exploded. It is objected that this was not a proper subject of expert testimony, for the reason that this stone was, in fact, inspected and observed by several persons after the charges had been fired and before the accident occurred, and that the effect of admitting this testimony was to permit the opinions of experts to prevail over the actual facts as they were shown to exist by the testimony of those who had inspected the broken stone. We think this a misapprehension. The testimony of the experts tended to show that a method could have been pursued by which an inspection would have revealed the existence of a charge that had missed fire after the current had been applied, and for that purpose it was proper.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(237 Ill. 559)

**HARTY BROS. & HARTY CO. v.  
POLAKOW.**

(Supreme Court of Illinois. Dec. 15, 1908.  
Rehearing Denied Feb. 4, 1909.)

**1. COURTS (§ 24\*)—JURISDICTION—SUBJECT-MATTER—WAIVER.**

Where jurisdiction of the subject-matter is not conferred on a court by law, the court cannot be invested with jurisdiction by consent.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 76-78; Dec. Dig. § 24.\*]

**2. CONTRACTS (§ 4\*)—"IMPLIED CONTRACT."**

The term "implied contract" includes not only contracts in fact—obligations where the mutual intention to contract, though not ex-

pressed, is implied or presumed from the acts of the parties or from surrounding circumstances—but also denotes that class of obligations imposed or created by law without the consent of the party bound, and in some cases even notwithstanding his actual dissent, because dictated by reason and justice, which obligations are called also "constructive contracts," or "contracts implied by law."

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 4-6; Dec. Dig. § 4.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3428-3431.]

**3. MECHANICS' LIENS (§ 245\*)—LIABILITY OF OWNER—ENFORCEMENT—NATURE OF ACTION.**

Lien Law (Laws 1903, p. 241), § 28 (Hurd's Rev. St. 1908, c. 82, § 42), provides: That if money is due a subcontractor he may sue the owner and contractor jointly for the amount due him in any court having jurisdiction, in the amount claimed to be due, and a personal judgment may be rendered therein, as in other cases; that in such actions the owner shall be liable for no more than the pro rata share, and such action at law shall be maintained against the owner only in case plaintiff establishes his right to a lien; that no judgment or decree shall be rendered until both the contractor and the owner are brought into court; and that all such judgments shall be against both, but shall be enforced against the owner only to the extent he is liable under his contract. *Held*, that an owner under such section is under a quasi contractual obligation to a subcontractor for his pro rata share of the amount due the contractor, which obligation is enforceable against the owner in assumpsit.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 245.\*]

**4. COURTS (§ 183\*)—MUNICIPAL COURT—JURISDICTION—IMPLIED CONTRACTS.**

Under Hurd's Rev. St. 1908, c. 37, § 285, conferring on the Chicago municipal court jurisdiction of all actions, express or implied, when the amount claimed, exclusive of costs, exceeds \$1,000, such court has jurisdiction of an action in assumpsit by a subcontractor to recover a personal judgment against the owner of a building on the latter's quasi contractual obligation for the subcontractor's pro rata share of the owner's liability to the contractor.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 183.\*]

**5. APPEAL AND ERROR (§ 1177\*)—DISPOSITION OF CAUSE—INTERMEDIATE APPEAL—JURISDICTION.**

The Appellate Court being authorized to reverse without remand only where it finds the facts differently from the finding of the trial court and recites the facts found in its judgment, and when it reverses for errors in law which cannot be obviated or cured on another trial, where a judgment was reversed because the Appellate Court erroneously thought the trial court had not jurisdiction of the subject-matter, which holding was overruled on a further appeal to the Supreme Court, the record would be transmitted to the Appellate Court for its consideration of the other errors assigned therein.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1177.\*]

Cartwright, C. J., and Hand and Dunn, JJ., dissenting.

Appeal from Appellate Court, First District, on Appeal from Municipal Court of Chicago; Henry C. Beltier, Judge.

Action by Harty Bros. & Harty Company against Samuel Polakow and another. A

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

judgment for plaintiff against both defendants was reversed by the Appellate Court as to defendant Polakow on his separate appeal, and plaintiff appeals. Reversed and remanded, with directions.

Bulkley, Gray & More, for appellant. Max M. Grossman (H. J. Rosenberg, of counsel), for appellee.

CARTER, J. Harty Bros. & Harty Co., a corporation, brought this suit in assumpsit in the municipal court of Chicago against Samuel Polakow and Bass & Bornstein. Polakow engaged Bass & Bornstein to do the carpenter work for him on a building in Chicago. Appellant contracted with Bass & Bornstein to furnish the millwork for such building. This action was brought to recover for the balance due under appellant's contract with Bass & Bornstein for the millwork or interior finish on said building, under section 28 of the lien act of 1903 (Laws 1903, p. 241; Hurd's Rev. St. 1908, c. 82, § 42). All the preliminary requirements of the lien law, including notice, were complied with by appellee before instituting this action. The court found that appellee had a lien on said building. The trial in the municipal court resulted in a judgment against Polakow and Bass & Bornstein for \$1,683.54. Polakow prayed and was allowed a separate appeal to the Appellate Court for the First District. On the hearing in that court the cause was reversed, solely on the ground that the municipal court was without jurisdiction of the subject-matter of the suit. From the judgment of the Appellate Court, appellant has perfected its appeal to this court.

Appellant first contends that as the question of jurisdiction was not raised in the trial court it was waived. When a court does not have jurisdiction of the subject-matter conferred upon it by law, it cannot be invested with jurisdiction by consent. Such an objection cannot be waived. *Demilly v. Grosrenaud*, 201 Ill. 272, 66 N. E. 234; *Town of Audubon v. Hand*, 223 Ill. 367, 79 N. E. 71.

Does the municipal court of Chicago have jurisdiction of the subject-matter of the suit? If it has, it is agreed that it must be conferred by that part of section 2 of the act creating the court which grants it jurisdiction of "all actions on contracts, express or implied, when the amount claimed by the plaintiff, exclusive of costs, exceeds \$1,000." Hurd's Rev. St. 1908, c. 37, § 265. No express contract relation existed between Polakow and appellant herein, but there was such an express contract between appellant and the copartnership of Bass & Bornstein and another express contract between Bass & Bornstein and appellee. If the municipal court had jurisdiction of this suit, it must be because there was an implied contract between appellant and Polakow.

Said section 28 of the lien law provides

that if money is due a subcontractor he "may either file his petition and enforce his lien" as provided under said law, "or he may sue the owner and contractor jointly for the amount due him in any court having jurisdiction of the amount claimed to be due, and a personal judgment may be rendered therein, as in other cases. In such actions at law, as in suits to enforce the lien, the owner shall be liable to the plaintiff for no more than the pro rata share, \* \* \* and such action at law shall be maintained against the owner only in case plaintiff establishes his right to the lien. All suits and actions by subcontractors shall be against both contractor and owner jointly, and no decree or judgment shall be rendered therein until both are duly brought before the court by process or publication, and in all courts including actions before a justice of the peace and police magistrates, such process may be served and publication made as to all persons, except the owners as in suits in chancery. All such judgments, where the lien is established, shall be against both jointly, but shall be enforced against the owner only to the extent that he is liable under his contract as by this act provided. \* \* \* But this shall not preclude a judgment against the contractor, personally, where the lien is defeated." By what action at law other than assumpsit could recovery be had under this section? That action lies "where a party claims damages for breach of simple contract—i. e., a promise not under seal. Such promises may be express or implied, and the law always implies a promise to do that which a party is legally liable to perform." *Andrews' Stephen on Pleading*, § 53. The term "implied contract" has been used to denote not only contracts implied in fact—that is, obligations where the mutual intention to contract, although not expressed, is implied or presumed from the acts of the parties or from surrounding circumstances—but also to denote that class of obligations imposed or created by law without the assent of the party bound, and sometimes even notwithstanding his actual dissent, upon the ground that they are dictated by reason and justice. These latter obligations have sometimes been called "constructive contracts," or "contracts implied by law"—actions of law adopted to enforce legal duties. *Keener on Quasi Contracts*, p. 5; *Bishop on Contracts*, § 205; *Hertzog v. Hertzog*, 29 Pa. 465; 9 Cyc. 242; 7 Am. & Eng. Ency. of Law (2d Ed.) 91; 15 Am. & Eng. Ency. of Law (2d Ed.) 1078; *Lillard v. Wilson*, 178 Mo. 145, 77 S. W. 74; *Railway Co. v. Gaffney*, 65 Ohio St. 104, 61 N. E. 152. This court has held, in the recent case of *Chudnovski v. Eckels*, 232 Ill. 312, 83 N. E. 846, that there is no distinction between contracts implied by law from the existence of a plain legal obligation, without regard to the intention of the parties, or even contrary thereto, and contracts implied, in fact, from

acts or circumstances indicating the mutual intention; that all alike come within the natural and usual meaning of the words "implied contract." "Whatever the laws order anyone to pay, that becomes instantly a debt which he hath beforehand contracted to discharge." 3 Blackstone, 160; *Bowen v. Hoxie*, 137 Mass. 527; *Bishop on Contracts*, § 205; *Pacific M. S. Co. v. Joliffe*, 2 Wall. 450, 17 L. Ed. 805.

In our opinion the cases of *Cooper v. Skinner*, 124 Mass. 183, and *Smith v. Silsbee*, 53 App. Div. 462, 65 N. Y. Supp. 1083, cited to show that this action is not on an implied contract, do not bear directly on the points involved. The Massachusetts court held that the municipal court of the city of Boston had no jurisdiction to enforce a mechanic's lien where the amount exceeded \$100, but based the decision upon the ground that it would be contrary to the principles adopted in construing statutes to hold that general provisions were intended to change the jurisdiction in a subject-matter in which both the right and remedy were created by a statute which contained full and definite provisions as to the whole subject. Manifestly therefore that decision is not decisive. Furthermore, in the later case of *Milford v. Commonwealth*, 144 Mass. 64, 10 N. E. 516, it was held: That claims for salaries, when established by law, were often spoken of as founded on contract; that in matters of procedure penalties were usually regarded as debts; that actions under statutes to recover for money expended have usually been actions on contracts, and the law regards the money expended a debt and implies a request and promise to pay the money; that a contract is sometimes said to be implied when there is no intention to create a contract and no agreement of the parties; that the law has imposed an obligation which is enforced as if it arose *ex contractu*. The reasoning of this decision would plainly base the action at law provided for under said section 28 of the lien act on an implied contract under the statute. The New York case was an action in the New York Municipal Court to foreclose a mechanic's lien, and it was stated that the court had been created, by the express terms of the statute, without any equity jurisdiction; hence it did not have jurisdiction in the matter in question. But in the opinion the two cases of *Terra Cotta Co. v. Doyle*, 133 N. Y. 603, 30 N. E. 1010, and *Morton v. Tucker*, 145 N. Y. 244, 40 N. E. 3, are referred to with approval. Both these latter were cases in which personal judgments under the New York mechanic's lien law appear to have been obtained against the property owners, and in our judgment the reasoning in both tends to uphold the jurisdiction of the mu-

nicipal court in this proceeding. The decisions involving the construction of lien laws and jurisdiction of courts in other states cannot, however, be decisive on the question here raised, as the statutes called to our attention are so different in wording from our own.

We are disposed to hold that the only action at law that can be brought to recover against the owner under the lien act is *assumpsit*, and that this act, when a subcontractor has complied with its requirements, so as to create a lien in his favor, imposes such an obligation upon the owner that a contract will be implied for all such amounts as may be recovered from him by an action at law under said section 28. This conclusion is further strengthened by the reasoning of this court in decisions as to implied contracts and recoveries therefor under an action in *assumpsit*. *First Nat. Bank v. Gatton*, 172 Ill. 625, 50 N. E. 121; *De Wolf v. City of Chicago*, 26 Ill. 443; *Carter v. White*, 32 Ill. 509; *Toledo, Wabash & Western Railway Co. v. Chew*, 67 Ill. 378; *First Baptist Church of Chicago v. Andrews*, 87 Ill. 172.

Appellant argues that, if the municipal court had jurisdiction to try the cause, no cross-errors having been assigned in this court, the other questions raised by appellee's briefs cannot be considered here (*Kantzier v. Bensinger*, 214 Ill. 589, 73 N. E. 874; *Penn Plate Glass Co. v. Rice Co.*, 218 Ill. 567, 75 N. E. 246), and that therefore the judgment of the Appellate Court should be reversed and that of the municipal court affirmed. The Appellate Court may reverse without remanding under two conditions: First, where it finds the facts in controversy different from the finding of the trial court and recites the ultimate facts so found in its judgment; second, when it reverses for errors of law which can not be obviated or cured on another trial. A want of jurisdiction in the municipal court falls within the second class. The Appellate Court's view on this point being a mistaken one, it should consider the other errors assigned upon the record in that court.

The judgment of the Appellate Court is therefore reversed, and the cause remanded to that court, with directions to enter such judgment as it may deem proper. *Coverdale v. Royal Arcanum*, 193 Ill. 91, 61 N. E. 915. The clerk of this court is ordered to transmit the record herein to the Appellate Court for the First District for further consideration in accordance with these directions.

Reversed and remanded, with directions.

CARTWRIGHT, C. J., and HAND and DUNN, JJ., dissent.

(237 Ill. 588)

**COBE v. GUYER et al.**(Supreme Court of Illinois. Dec. 15, 1908.  
Rehearing Denied Feb. 3, 1909.)**1. BUILDING AND LOAN ASSOCIATIONS (§ 33\*)  
—USURY—EXEMPTION FROM INTEREST LAW—  
EXTENT.**

The exemption of homestead and loan associations from the operation of the interest law applies only to interest, fines, and premiums accruing according to the provisions of the act under which they are organized.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 49; Dec. Dig. § 33.\*]

**2. BUILDING AND LOAN ASSOCIATIONS (§ 33\*)  
—LOANS—PERSUASION OF UNLAWFUL METHOD—  
ESTOPPEL OF BORROWERS.**

Where a building and loan association had never adopted a by-law dispensing with the offering of its money for bids in open meeting, but nevertheless made a loan at a fixed rate of interest and premium, without offering it in open meeting, which could not be done without the adoption of such a by-law under Homestead and Loan Association Act, § 8 (Hurd's Rev. St. 1908, c. 32, § 85), declaring how premiums on loans may be fixed, and the interest and premium which exceeded the legal rate therefore did not accrue according to the provisions of the act and were usurious, and it did not appear that the borrowers had knowledge of the by-laws, or that they were stockholders of the association before the completion of the loan to them, they were not estopped to object that the loan was not made in compliance with the homestead and loan association act, and was therefore usurious.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. § 33.\*]

**3. BUILDING AND LOAN ASSOCIATIONS (§ 33\*)  
—LOANS—USURY—ESTOPPEL OF BORROWER.**

That in arriving at the amount due a building and loan association from borrowers on a usurious loan, at the time of taking new notes and mortgages therefor, the borrowers were credited with their proportionate share of the association's earnings would not preclude them from making the defense of usury.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. § 33.\*]

**4. BUILDING AND LOAN ASSOCIATIONS (§ 33\*)  
—USURY—PREMIUM NOT DETERMINED BY  
STATUTE.**

Homestead and Loan Association Act (Hurd's Rev. St. 1908, c. 32, § 85) § 8, provides that premiums on loans shall be determined either by bids for the priority of loan in open meeting, or, if the association by by-law has dispensed with the offering of its money for bids in open meeting, by the priority of applications for loans. An association, which had not by by-law dispensed with the offering of its money for bids in open meeting, made a loan at a fixed rate of interest and premium which exceeded the legal rate of interest without offering it in open meeting. *Held*, that the loan was usurious under the general law of the state.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 49; Dec. Dig. § 33.\*]

**5. USURY (§ 106\*)—GIVING NEW SECURITY  
FOR USURIOUS DEBT.**

If, after a usurious transaction has been completely settled and closed, a new loan is made, the borrower cannot set up the usury in the former transaction against the new loan, as usury in one transaction cannot be availed of in another; but settlement and agreement upon the amount due and the giving of a new note do not preclude the defense of usury existing in the

original transaction, and hence where a homestead and loan association made usurious loans secured by two mortgages and shares of its stock, and subsequently, on default of the borrower, the sum due was determined and the stock was canceled, the mortgages released, and new notes secured by mortgages given, the defense of usury in the first transaction was not precluded by the later ones.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 263; Dec. Dig. § 106.\*]

**6. USURY (§ 106\*)—EXTENT OF RIGHT TO DE-  
DUCT USURIOUS INTEREST.**

So long as any part of an original principal debt upon which usurious interest was charged remains unpaid, the debtor may insist upon the deduction of the usury, though the parties had had a settlement finding the amount due, including the usury, and only the balance of the principal remaining after the application of all payments, whether of principal or interest, can be recovered.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 263; Dec. Dig. § 106.\*]

**7. USURY (§ 104\*)—DEVICES TO CUT OFF DE-  
FENSE.**

No form given to a contract, no device by which a new form is given to an old transaction tainted with usury, and no mere substitution of securities will cut off the defense of usury.

[Ed. Note.—For other cases, see Usury, Dec. Dig. § 104.\*]

Error to Appellate Court, Second District, on Appeal from Circuit Court, Rock Island County; Emery C. Graves, Judge.

Bill by Ira M. Cobe against E. H. Guyer and others. From a judgment of the Appellate Court (189 Ill. App. 580), affirming a decree for complainant, defendants bring error. Reversed and remanded, with directions to dismiss.

J. T. Kenworthy and S. R. Kenworthy, for plaintiffs in error. S. W. Swabey (W. R. Moore, of counsel), for defendant in error.

DUNN, J. This writ of error is prosecuted to reverse a judgment of the Appellate Court affirming a decree of foreclosure. The mortgagee was the Masonic Mutual Savings & Loan Association, a corporation organized under the homestead and loan association act, and the defendant in error the assignee of the receiver of said association, appointed by the superior court of Cook county under section 25 of that act. Several reasons for reversal are urged; but in the view we take of the defense of usury, which was insisted upon in the circuit court, it will be unnecessary to consider any other question.

The mortgage sought to be foreclosed was dated July 1, 1899, and was made to secure promissory notes of that date for the sum of \$12,000; but the indebtedness originated in August, 1896, when the loan association made a loan of \$10,000 to the plaintiffs in error and one George W. Walker upon 100 shares of its stock. This loan was secured by a mortgage, and the bond given therefor required the payment of \$50 dues, \$50 interest, and \$50 premium, monthly, until the maturity of the stock, when the loan would be paid in ac-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cordance with the plan of the association. Subsequently, the makers of said bond being in default, a new loan of \$2,600 was made to them on August 30, 1898, on 26 shares of the stock of the association, which was also secured by a mortgage; the payments required being \$13 dues, \$13 interest, and \$13 premium monthly. No money was advanced on this loan, but credit was given for its amount on the delinquent installments on the former mortgage. A few months later the obligors were again in default on both loans; the loan association claiming the total amount due to be \$13,379.60. Thereupon the 26 shares of stock were canceled. Notes for \$12,000, bearing 7 per cent. interest, dated July 1, 1899, and secured by mortgage, were given by plaintiffs in error, and the two former mortgages were released. According to the claim of the association, the value of the stock canceled, \$1,328, and the \$12,000 mortgage notes being credited on the amount due on the former mortgage, left a balance of \$51.60, for which the plaintiffs in error gave their note due in 60 days.

The exemption of homestead and loan associations from the operation of the interest law applies only to interest, fines, and premiums accruing according to the provisions of the act providing for their organization. *Jamieson v. Jurgens*, 195 Ill. 86, 62 N. E. 917; *Borrowers' Building Ass'n v. Eklund*, 190 Ill. 257, 60 N. E. 521, 52 L. R. A. 637. By the terms of the bonds given for the payment of the \$10,000 loan and the \$2,600 loan, the obligors were required to pay \$50 and \$18 a month, respectively, as dues on the stock, and interest and premiums at the rate of 12 per cent. per annum. Since the total amount to be paid for the use of the money exceeded the legal rate of interest, these transactions must be held to have been usurious under the general laws of the state, unless the premium required to be paid was determined in the manner provided by the homestead and loan association act (*Hurd's Rev. St. 1908, c. 32, §§ 78-91*). The modes of determining such premium were set forth in section 8 of the act, and were either by bids for the preference or priority of loan in open meeting, or, if the association had by its by-laws dispensed with the offering of its money for bids in open meeting, by the priority of the applications for loans of its stockholders. The \$10,000 loan and the \$2,600 loan were not made upon bids made for the preference or priority of loan in open meeting. The association did not offer its money to be loaned for the highest premium which might be bid for it. The money was loaned at a fixed rate of interest and premium, and it is therefore necessary to inquire whether the association had by its by-laws dispensed with the offering of its money for bids in open meeting, for, if it had not, the premium did not accrue according to the provisions of the act.

In order to show the adoption of such a

by-law, the defendant in error introduced in evidence the record of a special meeting of the stockholders of the association held on the 19th day of August, 1891. The whole of such record, so far as it refers to the matter now under consideration, is as follows: "Bro. John H. Randall then moved that article 6 of the by-laws be amended by striking out sections 1 and 2, and in lieu thereof the following inserted: 'Sec. 1. Every loan of this association shall be made upon a nonnegotiable note or bond, bearing interest and premium, each at the rate of six per cent. per annum, and secured by first mortgage on real estate, which security shall be satisfactory to the board and shall be accompanied by a transfer and pledge of the shares of the borrower to the association. The shares so pledged shall be held by the association as collateral security for the performance of the conditions of said note or bond and mortgage: Provided, that the shares, without other security, may, in the discretion of the board, be accepted as security for an amount not to exceed their withdrawal value: And provided further, that all premiums shall be paid in equal monthly installments on or before the 20th day of each and every month during the continuance of the loan.'" No action on the motion appears to have been taken by the stockholders. The record does not show the adoption of the by-law. The amount of the first loan was \$10,000, and no money was afterward advanced on any of the loans. Payments were made before July 1, 1899, to the amount of \$1,230.52, all of which the law required to be credited on the principal, so that when the \$12,000 notes were given the amount really due was only \$8,769.48. Since that time the master's report shows payments amounting to \$9,413.17, which overpaid the amount due on the notes.

This case is different from that of *Collins v. Cobe*, 202 Ill. 469, 66 N. E. 1079, in which the stockholders had adopted a by-law authorizing the loaning of the money of the association at a fixed rate of interest and premium, though the statute did not then authorize dispensing with bids in open meeting for the preference of loans. The law was afterward amended so as to permit the loaning of money at a fixed rate without requiring bids therefor, and the association having continued to do business in the method provided by the by-law, which had been adopted by the proper authority for that purpose, it was held that the borrowers were estopped to dispute the existence of the by-law by their recognition of it in procuring the loan according to its provisions. But in this case the by-law never was adopted. There is no evidence that the plaintiffs in error had any knowledge on the subject of the by-laws, or that they were stockholders of the association before the completion of the \$10,000 loan made to them. Under such circumstances there is no estoppel against the borrower.

*Free Home Building Ass'n v. Edwards*, 223 Ill. 128, 79 N. E. 64. Nor does the fact that, in arriving at the amount due upon the prior indebtedness at the time the mortgage now in controversy was given, the plaintiffs in error were credited with their proportionate share of the earnings of the association, preclude them from making the defense of usury.

It is contended by the defendant in error that the cancellation of the stock and original securities and taking new notes of plaintiffs in error purged the transaction of usury. It is true that if, after a usurious transaction has been completely settled and closed, a new loan is made, the borrower will not be allowed to set up the usury in the former transaction against the new loan. Usury in one transaction cannot be availed of in another, but settlement and agreement upon the amount due and the giving of a new note do not preclude the defense of usury existing in the original transaction. So long as any part of the original debt remains unpaid, the debtor may insist upon the deduction of the usury (*Payne v. Newcomb*, 100 Ill. 611, 39 Am. Rep. 69; *Jenkins v. International Bank*, 97 Ill. 568; *House v. Davis*, 60 Ill. 367), and only the balance of the principal remaining after the application on the principal of all payments, whether of principal or interest, can be recovered (*Harris v. Bressler*, 119 Ill. 467, 10 N. E. 198). No form which can be given to a contract, no device by which a new form is given to an old transaction tainted with usury, and no mere substitution of securities will avail to cut off the defense of usury. *Hunter v. Hatch*, 45 Ill. 178; *Nickerson v. Babcock*, 23 Ill. 561. The giving of a new note by one of several joint debtors does not deprive the maker of the new note of the right to deduct usury contained in the old note. *Safford v. Vail*, 22 Ill. 328.

The judgment of the Appellate Court and the decree of the circuit court will be reversed, and the cause remanded to the circuit court, with directions to dismiss the bill.

Reversed and remanded, with directions.

(287 Ill. 574.)

#### PEOPLE v. DEPEW.

(Supreme Court of Illinois. Dec. 15, 1908.  
Rehearing Denied Feb. 5, 1909.)

#### 1. INDICTMENT AND INFORMATION (§ 121\*)—BILL OF PARTICULARS.

Where an indictment is so general in its terms as not to fully apprise accused of the precise charge, he may have a bill of particulars.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 316-320; Dec. Dig. § 121.\*]

#### 2. INDICTMENT AND INFORMATION (§ 121\*)—BILL OF PARTICULARS—SCOPE AND EFFECT.

While the effect of a bill of particulars in a criminal case is to limit the evidence to the transactions set out therein, the state need not

set out in the bill all the evidence that it will produce in support of the charge.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 316-320; Dec. Dig. § 121.\*]

#### 3. INDICTMENT AND INFORMATION (§ 169\*)—ISSUES, PROOF, AND VARIANCE—SCOPE OF BILL OF PARTICULARS.

In a criminal case, where a bill of particulars is filed, any evidence tending to establish the transaction set forth therein is admissible, though not incorporated in the bill of particulars.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 320; Dec. Dig. § 169.\*]

#### 4. CRIMINAL LAW (§ 970\*)—MOTION IN ARREST—GROUNDS—BILL OF PARTICULARS.

If a bill of particulars is not sufficiently specific, one more definite and certain should be demanded, and its sufficiency cannot be raised by motion in arrest of judgment.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 970.\*]

#### 5. CRIMINAL LAW (§ 972\*)—MOTION IN ARREST OF JUDGMENT—QUESTIONS RAISED—VARIANCE.

A motion in arrest of judgment raises only questions appearing on the face of the record, and hence does not raise the question of variance between the evidence and a bill of particulars, which arises upon the evidence and can only be shown by bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 972.\*]

#### 6. FALSE PRETENSES (§ 16\*) — "CONFIDENCE GAME."

"The 'confidence game' is any swindling operation in which advantage is taken of the confidence reposed by the victim in the swindler, and the fact that the transaction is made to assume the form of a legitimate contract is not material, if in fact it is a swindling operation.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 20, 25; Dec. Dig. § 16.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1420, 1421.]

#### 7. FALSE PRETENSES (§ 44\*) — CONFIDENCE GAME—ADMISSIBILITY OF EVIDENCE.

In a prosecution for obtaining money by the confidence game, on the question of accused's good faith, evidence of his conversations with the prosecuting witness when hiring him as a salesman, and of his deception in pretending to forward witness' cash deposit to accused's company, while he in fact kept it himself, and evidence of his relation to the company, the extent and character of its business, and of its property and ability to carry out the contract with witness, was admissible.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 58; Dec. Dig. § 44.\*]

#### 8. CRIMINAL LAW (§ 1169\*)—APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a prosecution for obtaining money by the confidence game, the admission of improper testimony that, five years before, accused was in the same business, and that witness twice investigated a complaint against his company to the Post Office Department, was not prejudicial, where the conviction was justified by other undisputed evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

# 9. CRIMINAL LAW (§ 761\*)—TRIAL—INSTRUCTIONS ASSUMING FACTS.

It is not error to assume in a charge an admitted fact or one established by undisputed evidence, and hence in a prosecution for obtaining money by the confidence game, where a suit case shipped after accused's arrest was conclusively shown to have been shipped by his direction, a charge assuming that he caused it to be shipped after his arrest was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1754; Dec. Dig. § 761.\*]

# 10. CRIMINAL LAW (§ 561\*)—SUFFICIENCY OF PROOF.

In a prosecution for obtaining money by the confidence game, it is sufficient if accused be proved guilty beyond a reasonable doubt; it not being necessary that his guilt should be proved beyond the possibility of a doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. § 561.\*]

Error to Circuit Court, Sangamon County; James A. Creighton, Judge.

C. E. Depew was convicted of obtaining money by the confidence game, and brings error. Affirmed.

John G. Friedmeyer and C. J. Christopher, for plaintiff in error. W. H. Stead, Atty. Gen., and Frank L. Hatch, State's Atty. (Joel O. Fitch, of counsel), for the People.

DUNN, J. The defendant was convicted of obtaining \$25 of P. P. Contrakon by means of the confidence game, and has sued out a writ of error to reverse the judgment.

Contrakon is a Greek, who has lived in this country about 10 years, and in April, 1908, was living in Springfield, as he had been for the previous 18 months, working for his brother, who was in the candy business. He saw in a newspaper, and answered, the following advertisement: "Wanted—Three young men; fair education; 21 to 35 years; city and state; call on retail trade, sell and collect; experience unnecessary if willing to start \$9 and expenses; good opportunity for promotion; reference and \$25 cash bond required. Address John Z. Allen, General Delivery, Springfield." Three days later he received a reply from the American Specialty Company of Indianapolis, Ind., saying that Mr. Depew would be in Springfield in a day or so, that he was the representative of the company to whom the selection of its men was left entirely and by whose decision it would abide and keep his contract to the letter, and that, while not guaranteeing a large salary at beginning, it offered a fine opportunity for advancement, and one should soon make \$15 to \$25 per week and expenses. On May 3, 1908, 10 days after the receipt of this letter, Contrakon received a postal card from Depew requesting Contrakon to call on him at the Hotel Silas, in Springfield, regarding the position of calling on the retail trade. Upon going to the hotel Contrakon was taken by Depew to the latter's room, where he had

chewing gum, razors, watches, and fountain pens. He explained the method of transacting their business, which was the selling of these goods and other novelties and the distribution of prizes in connection with the sales. He told Contrakon it was a good proposition, and that his salary would be \$9 a week and his expenses for the first two weeks and would be increased to \$12 or \$15 a week. Contrakon was to collect and remit the balance, after deducting his salary and expenses, and if his collections were insufficient for this purpose the company would pay him the difference. However, a cash deposit of \$25 was required of Contrakon, which he hesitated about making.

Two or three further interviews took place during that day and the next, and Contrakon consulted his brother about the matter. He proposed to Depew to give a bond for \$500, but Depew told him if he wanted the agency he would have to make the cash deposit, which Depew told him was to be sent to the company and would be returned when he quit the company and delivered up his sample case. Depew agreed to furnish Contrakon a mileage book, and Contrakon then finally agreed to the deposit, and a contract was executed in duplicate, by which Contrakon entered the service of the American Specialty Company for the term of 12 weeks as traveling representative and collector, to secure representatives for the sale of the company's goods. Contrakon had a \$5 bill and a \$20 gold piece. At Depew's suggestion the gold was changed into bills. Both parties went to the post office, and there Contrakon handed Depew five \$5 bills, which Depew, in Contrakon's presence, as the latter supposed, placed, together with one copy of the contract, in an envelope stamped and addressed to the American Specialty Company. The package was then registered in Contrakon's name and mailed. As they left the post office Contrakon asked Depew if he would certainly give him his mileage book, and Depew replied that he would not, but Contrakon must pay his own expenses. After making an appointment to meet a little later, they separated. Contrakon went back to the post office, gave back the registry receipt which he had, and received back the letter, which, upon examination later, was found to contain only three sheets of blank paper. Depew was arrested the same evening. On his way to the police station he handed to a companion who was with him some letters, which were taken by the police. One from Depew, addressed to "Dear Carter," stated that the writer had landed one to-day and expected to land another to-morrow, and if he landed the fellow to-morrow he could send Carter \$15, otherwise he would send him \$10.

The American Specialty Company was incorporated in Indiana on November 26, 1907.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

There were but three stockholders, of whom Clarence E. Depew was one. William T. Fletcher, a post office inspector of Indianapolis, visited the place of business of the American Specialty Company in the latter part of May, 1908. It was a room about 15 by 40 feet, in charge of a young lady, with the stock, consisting of chewing gum, dishes, trinkets, and novelties, spread out on a counter. The value of the property did not exceed \$25. Three days later the witness again went to the place and found it vacant.

A bill of particulars was filed by the state's attorney, and it is insisted that the facts stated in the bill of particulars and shown by the evidence do not constitute the confidence game. The indictment, and not the bill of particulars, is the charge upon which the defendant is tried. Where an indictment is so general in its terms as not to fully apprise the defendant of the precise charge made against him, he may call upon the prosecution for a more detailed and particular statement of the facts on which the charge is based. The object of the bill of particulars is to give the defendant notice of the specific charge against him and to inform him of the particular transactions brought in question, so that he may be prepared to make his defense. *McDonald v. People*, 126 Ill. 150, 18 N. E. 817, 9 Am. St. Rep. 547; *Cooke v. People*, 231 Ill. 9, 82 N. E. 863. Its effect therefore is to limit the evidence to the transactions set out in the bill of particulars. But the prosecution is not required to set out in the bill of particulars all the evidence it will produce in support of the charge. Any evidence tending to establish the transaction set forth in the bill of particulars is admissible. If the bill of particulars had not been sufficiently specific, the defendant might have demanded one more definite and certain. If the evidence offered was not limited to the transaction mentioned in the bill of particulars, he might have objected to it on that ground. But his motion in arrest of judgment does not raise the question of the sufficiency of the bill of particulars. The object of such a bill is not to make a substantive charge against the defendant, but to limit the evidence which may be introduced under the indictment to the particular transactions. The indictment, which is the charge, can neither be helped nor hurt by the bill of particulars. Nor did the motion in arrest of judgment raise the question of a variance between the evidence and the bill of particulars. Such motion raises only questions appearing on the face of the record, while the question of variance arises upon the evidence and can only be shown by a bill of exceptions.

The "confidence game" is defined as any swindling operation in which advantage is taken of the confidence reposed by the victim in the swindler. *Maxwell v. People*, 158 Ill.

248, 41 N. E. 995; *Du Bois v. People*, 200 Ill. 157, 65 N. E. 858, 93 Am. St. Rep. 188; *Hughes v. People*, 223 Ill. 417, 79 N. E. 137. The fact that the transaction was made to assume the form of a legitimate contract is not material, if, in fact, it was a swindling operation. *Hughes v. People*, supra; *Chilson v. People*, 224 Ill. 535, 79 N. E. 934. Contrakon parted with his money on account of his confidence in Depew, inspired by the latter's representations as to the advantages Contrakon would derive from the contract. Whether the transaction was carried on by Depew in good faith or was a swindling operation was the question submitted to the jury. On this question Depew's conversations with Contrakon, his deception of him in regard to the transmittal of the money, his letter to Carter, his relation to the American Specialty Company, the extent and character of the business and property of that company, and its ability to carry out the contract, were all proper to be considered, and were considered, by the jury, and we cannot say upon the evidence that there is a reasonable doubt of the guilt of the plaintiff in error.

The witness William T. Fletcher was permitted to testify, over objection, that about five years before the trial the plaintiff in error was in the novelty business, under the name of the Elite Novelty Company, at Terre Haute, Ind., and the witness twice investigated a complaint to the Post Office Department against that company. There was in the witness' testimony on this subject no evidence of anything illegal in connection with that business or defendant's acts. This evidence was incompetent and should not have been received; but its reception did not injure the plaintiff in error, for the verdict was amply justified by the other undisputed evidence in the case. The same may be said of the evidence of the advertisement in the *Detroit News* and the contract with John T. Wineman, in Detroit.

Objection is made to the first instruction given for the people that it assumes the making of the contract was a swindling operation. It contains no such assumption, but requires the jury to find from the evidence, beyond a reasonable doubt, that it was a swindling operation before they can find the defendant guilty.

The second instruction assumes that plaintiff in error, after his arrest, caused an express package to be shipped to Contrakon. This refers to a suit case which was received by the American Express Company on May 11th for Contrakon and which was shipped to him May 9th from Indianapolis by the American Specialty Company. It contained some chewing gum, three fountain pens, stationery, advertising matter, report blanks and similar matter pertaining to the American Specialty Company. This suit case was shipped after the arrest of the plaintiff in error,

and the circumstances show conclusively that it could only have been done by his direction given after his arrest. It is not error to assume in an instruction an admitted fact or one established by undisputed evidence.

The seventh instruction told the jury that if the defendant was proved guilty beyond a reasonable doubt they should not acquit him because it was possible that he was innocent; that the prosecution was not required to prove him guilty beyond the possibility of doubt. It was not error to give it.

The fifth, sixth, and seventh instructions asked by the plaintiff in error were refused. The sixth was without basis in the evidence and the fifth and seventh were based upon the hypothesis that if a valid contract was entered into between the prosecuting witness and the American Specialty Company the defendant must be found not guilty. This is an erroneous view of the law. These instructions omit the element of good faith. Even though a contract legally binding was executed, if it was entered into as a means of perpetrating a fraud and taking advantage of Contrakon's confidence to obtain his money, it was a swindling operation, and the transaction was a confidence game. *Hughes v. People*, supra; *Chilson v. People*, supra.

The judgment is affirmed.

Judgment affirmed.

(237 Ill. 581.)

# LEHIGH VALLEY TRANSP. CO. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Dec. 15, 1908.  
Rehearing Denied Feb. 4, 1909.)

## NAVIGABLE WATERS (§ 20\*)—RIGHTS OF PUBLIC—BRIDGES.

A city, in operating a drawbridge forming a part of one of its streets, acts in its private or corporate, as distinguished from its public or governmental, capacity, and for injury to a vessel from the negligent operation of such draw the city is liable.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 73-99; Dec. Dig. § 20.\*]

Appeal from Appellate Court, First District, on Error to Municipal Court of Chicago; William N. Cottrell, Judge.

Action by Lehigh Valley Transportation Company against the City of Chicago. From a judgment of the Appellate Court affirming a judgment of the municipal court in favor of plaintiff, defendant appeals. Affirmed.

The case was tried in the municipal court without a jury, upon a stipulation of facts, from which it appears that appellant owns and operates over the Chicago river, at the point where Madison street, in said city, intersects the said river, a pivot or swinging bridge. The bridge was built and is maintained and operated solely from funds derived from general taxation of the property lying within the said city, and the city re-

ceives no revenue therefrom. It is operated by an employé of appellant, and it is so constructed that, when it is necessary to open the bridge to permit a vessel to pass through, it may be swung completely around. On July 29, 1907, a vessel belonging to the appellee was moored at a dock about 30 feet west of the bridge, in such a position that the bridge could not be swung in a complete circle without being brought in contact with said boat. Through the negligence of the bridge tender, while attempting to close the bridge after it had been opened to permit a vessel to pass through, the structure swung against appellee's boat and damaged it to the extent of \$115.55. Appellant obtained from the Appellate Court a certificate of importance.

Edward J. Brundage, Corp. Counsel, Charles M. Haft, and Emil C. Wetten, for appellant. Ullmann & Hoag, for appellee.

SCOTT, J. (after stating the facts as above). The appellant contends: That the city, in operating the bridge, was acting in its public or governmental capacity, as distinguished from its private or corporate capacity; that for this reason the doctrine of respondeat superior has no application, and the city cannot be held liable. This question arises upon propositions of law passed upon by the court. The bridge was a part of the street. Cities have always been held liable in this state for injuries resulting from negligence in the care or management of their streets. This case is of that character. That the city is liable for the negligence of its bridge tender in the management of such a bridge was recognized by this court in the case of *City of Chicago v. O'Malley*, 196 Ill. 197, 63 N. E. 652. In that case the bridge tender, Moriarity, had employed O'Brien as a helper without being authorized so to do by the city. Moriarity started to turn the bridge and directed O'Brien to look out for the boys who were on the bridge so that they would not get hurt. O'Brien picked up a stick for the purpose of driving the boys off the bridge, but Moriarity, without waiting for them to leave the structure, commenced turning the bridge. O'Brien ran towards the boys in a threatening manner with the stick, and one of them, in attempting to reach the sidewalk from the bridge, fell between the end of the moving bridge and the abutment and received the injuries for which he sued. The city contended, among other things, that it was not liable because O'Brien was not its servant. This court said: "Whatever was done by O'Brien was done by the direction and with the knowledge of Moriarity, who was the agent of the city, and who owed the duty to conserve the public safety in the operation of the immense and dangerous structure of which he had charge. Moriarity was controlling the movement of the bridge with the full knowledge of the acts of O'Brien

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and the peril of appellee, and it cannot be said, under the evidence, as a matter of fact or law, that O'Brien's acts alone were responsible for the injury. Being apprised of the danger, Moriarity owed the duty of so controlling the movements of the bridge that injury should not result." And the judgment was affirmed on the theory that Moriarity's negligence entitled the appellee to recover from the municipality. It does not seem that any contention was made in that case that the city was not liable for the acts of the bridge tender. The opinion, however, clearly recognizes the existence of that liability, and, on principle, cases of the character of that one and of the one at bar cannot be distinguished from innumerable cases which have been determined by this court in which it has been held that a city is liable for an injury resulting from a negligent failure to discharge its duty in reference to keeping its streets in repair. See, also, *Gathman v. City of Chicago*, 236 Ill. 9, 86 N. E. 152. It cannot, under the law of this state, be here held that the city, in operating the bridge, was acting in its governmental or public capacity.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(237 Ill. 584.)

PEOPLE ex rel. WHITTOCK, County Treasurer, v. WILLISON et al.

(Supreme Court of Illinois. Dec. 15, 1908.  
Rehearing Denied Feb. 5, 1909.)

**1. MUNICIPAL CORPORATIONS (§ 304\*)—LOCAL IMPROVEMENTS—ESSENTIALS—ORDINANCE—CONTENTS.**

It is essential to the validity of a special tax for a local improvement that the ordinance providing for the improvement specify its locality, as well as describe it and specify its nature.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 811-818; Dec. Dig. § 304.\*]

**2. MUNICIPAL CORPORATIONS (§ 304\*)—SIDEWALK IMPROVEMENTS—ORDINANCE—SUFFICIENCY.**

Under Sidewalk Act (Hurd's Rev. St. 1908, c. 24, § 292) § 2, requiring a sidewalk improvement ordinance to define the location with reasonable certainty and to describe its width, etc., no more certainty is required as to location than is required in the other particulars to be provided for in the ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 812; Dec. Dig. § 304.\*]

**3. MUNICIPAL CORPORATIONS (§ 314\*)—LOCAL IMPROVEMENTS—LOCATION—IDENTIFICATION—MEANS.**

In fixing the location of a local improvement provided for by ordinance, a surveyor must look not only to the ordinance, but to any plats or maps properly part of the legal records, and resort may be had to physical monuments

and surroundings; but they cannot be used to contradict the ordinance or public records.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 814.\*]

**4. WORDS AND PHRASES—"PUBLIC SQUARE."**

The term "public square" signifies in law that certain property has been dedicated to public use. The public square of a county is of a public nature and held for governmental purposes.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 6, pp. 5823, 5824.]

**5. DEDICATION (§ 43\*)—PUBLIC SQUARES—EVIDENCE.**

Though there was nothing written on a village plat to indicate with certainty that a block left blank in the center thereof was intended to be dedicated as a public square, it may be inferred that such was the intention.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. § 84; Dec. Dig. § 43.\*]

**6. STATUTES (§ 181\*)—CONSTRUCTION—MEANING OF WORDS.**

Legislative intent must control the construction of a word used in a statute, though the word has been used inappropriately.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 261; Dec. Dig. § 181.\*]

**7. MUNICIPAL CORPORATIONS (§ 120\*)—ORDINANCE—CONSTRUCTION.**

Legislative intent must control the construction of a word used in an ordinance, though the word has been used inappropriately.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 120.\*]

**8. WORDS AND PHRASES—"ABUTTING."**

The word "abutting" means "joined to" or "adjoining," but does not necessarily imply that the things spoken of are in contact.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 1, pp. 50, 51.]

**9. MUNICIPAL CORPORATIONS (§ 304\*)—LOCAL IMPROVEMENT ORDINANCES—LOCATION OF IMPROVEMENT.**

In determining the meaning of a local improvement ordinance as to the location of the improvement, the whole ordinance must be considered together.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 304.\*]

**10. MUNICIPAL CORPORATIONS (§ 304\*)—SIDEWALK IMPROVEMENTS—LOCATION.**

An ordinance provided that the public square on the four sides thereof should be improved by the construction of sidewalks thereon in front of the lots, etc., abutting thereon, that the inside line of the walks should be within one foot of the property line, and that they should have a specified slope toward the street. The plat of the village showed a blank space in the center equal to a block surrounded by streets, and showed streets extending to such space. Extrinsic evidence showed that the blank space includes the public square. *Held*, that the ordinance was not invalid for uncertainty as to the location of the sidewalks, and that they were intended to be, as they were actually, constructed in front of the lots abutting upon the square and one foot from the property line, and not on the side of the traveled way surrounding the square nearest its center.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 812; Dec. Dig. § 304.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

11. MUNICIPAL CORPORATIONS (§ 568\*)—SIDEWALK IMPROVEMENTS — LOCATION — EVIDENCE.

In an action involving the validity of assessments levied for the cost of the sidewalks, the property owners could show under their claim that the ordinance was void for uncertainty in describing the location of the sidewalks, the width of the traveled way surrounding the square, and that the square was a small park approximately eight rods square, containing trees and a band stand and surrounded by hitching racks.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 568.\*]

Appeal from Vermillion County Court; Isaac A. Love, Judge.

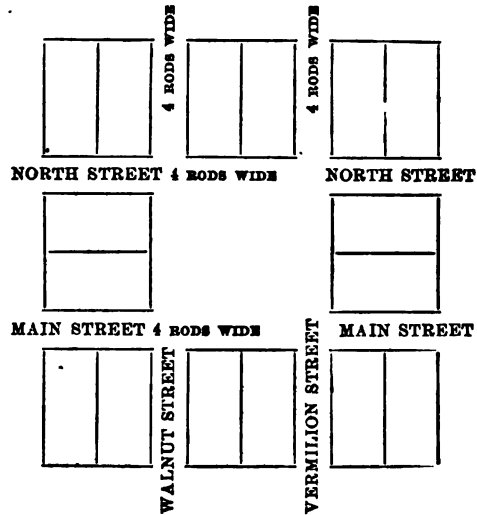
Application by the People, on the relation of H. H. Whittock, County Treasurer, against E. B. Willison and others, for delinquent special assessments. From a judgment for defendants, the People appeal. Reversed and remanded, with directions.

J. W. Keeslar, State's Atty. (Rearick & Meeks, of counsel), for the People. Ray F. Barnett and Acton & Acton, for appellees.

CARTER, J. This is an appeal from a judgment of the county court of Vermillion county refusing judgment, on the application of the county collector, for five delinquent special assessments (against five different owners, apparently consolidated into one case), amounting to \$175.34, for sidewalks, levied under the act of 1875 (Hurd's Rev. St. 1908, p. 366, c. 24), by the village of Indianapolis, in said county.

In March, 1907, an ordinance was passed by said village which provided that the public square, on the four sides thereof, "be improved by the construction of concrete walks thereon in front of the lots, tracts and parcels of land abutting thereon, in manner and form as hereinafter set forth, which sidewalks are hereby declared to be a local improvement, and that the entire cost thereof shall be paid by a special taxation of the lots, blocks and parcels of land abutting on said street along the line of said improvement, in proportion to frontage. \* \* \* The inside line of the walk shall be laid to grade and within approximately one foot of the property line. The walks shall have a slope toward the street of one-fourth an inch to the foot." On the hearing a plat of the original town (then called Chillicothe) made in 1836 was introduced, which showed a blank or unplatted space in the center of the village but nothing to indicate for what purpose this space was left unplatted. The following is a copy of the central part of the plat of Chillicothe, as shown in the record, and the words which are in or at the edge of the vacant space are in the same relative position on this plat as shown in the plat in the record. The words toward the edge of the plat here shown, particularly "Walnut" and "Vermillion," are nearer the center than they

are on the original plat, and the outlying blocks on the original plat, which do not affect the question at issue, are here omitted:



The sole question on this hearing is whether the ordinance in question, taken in connection with the plat, sufficiently indicated the locality of the sidewalk; the argument of the objectors being that it is a fair inference from this plat that the four streets in question extend across the unplatted space, and that therefore the public square proper is bounded on the four sides by these four streets, and in order to have the sidewalk built on the four sides of the public square it must be constructed on the side of the street, in each case, nearest the center of the square, that it could not be on the public square and be constructed approximately within one foot of the lot lines, as the ordinance provides, and that therefore the ordinance is so uncertain and indefinite as to the locality of the improvement that it does not authorize its construction. A stipulation in the record shows that the sidewalks in question have been actually constructed in front of and approximately one foot from the lot lines. No question is raised in this proceeding as to the ordinance being sufficient to authorize the construction of the improvement in all other particulars.

It is essential to the validity of a special tax that the ordinance providing for the proposed local improvement should not only provide for the nature, character, and description of such improvement, but its locality as well. *City of Carlinville v. McClure*, 156 Ill. 492, 41 N. E. 169. A substantial compliance with the law, however, is sufficient. *People v. Burke*, 206 Ill. 358, 69 N. E. 45; *People v. Patton*, 223 Ill. 379, 79 N. E. 51. Section 2 of the sidewalk act (Hurd's Rev. St. 1908, c. 24, § 292) provides that the ordinance "shall define the location" "with reasonable certain-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ty," and "shall prescribe its width, the materials," etc. Manifestly, under this wording no more certainty is required as to location than is required in the other particulars to be provided for in the ordinance. We have held that the description of the locality in an ordinance is sufficient if a competent surveyor could by it fix the locality of the improvement. *Lamm v. City of Danville*, 221 Ill. 119, 77 N. E. 422; *Village of Auburn v. Goodwin*, 128 Ill. 57, 21 N. E. 212. Necessarily, the surveyor must not only look to the ordinance, but to any plats or maps which are properly a part of the legal records, in order to determine the locality of the local improvement. Has he a right to take into consideration any of the fixed monuments, such as buildings, sidewalks, etc., or the physical situation of the public grounds or streets in the neighborhood of the improvement, to assist in fixing its location?

It is not necessary for an ordinance to state the width of the street to be paved in order to allow the proper estimate of the cost to be made when the width of the street may be easily ascertained from the surroundings. An ordinance requiring the pavement of a street will not be construed to require the improvement of an existing sidewalk. *County of Adams v. City of Quincy*, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155; *People v. Markley*, 166 Ill. 48, 46 N. E. 742; *Woods v. City of Chicago*, 135 Ill. 582, 26 N. E. 608. The location of 36 feet of pavement in a street may be made certain by testimony as to the width of the street and sidewalk space. *Chicago, Burlington & Quincy Railroad Co. v. City of Quincy*, 136 Ill. 563, 27 N. E. 192, 29 Am. St. Rep. 334; *Harrison Bros. v. City of Chicago*, 163 Ill. 129, 44 N. E. 395. The width of the pavement need not appear in the ordinance. The width of the street is as fixed and permanent and as well known as the existence of the street itself. *Dickey v. City of Chicago*, 164 Ill. 37, 45 N. E. 537. This last case discussed and distinguished *Gage v. City of Chicago*, 143 Ill. 157, 32 N. E. 264, wherein it was proved that the paving was to be done upon a prairie, where there were no houses on the line of the street proposed to be improved and no sidewalk line established by the ordinance. The city contended that the roadway was to be 30 feet in width, while it was shown that the commissioners had estimated a street 40 feet in width. It was held that the ordinance was invalid for indefiniteness. The termini of a pavement are sufficiently described as street railway rights of way; the limits to such rights of way, under the ordinance in question, being held to be the tracks. *Rawson v. City of Chicago*, 185 Ill. 87, 57 N. E. 35. The height of manholes under a sewer ordinance can be determined by the difference in elevation between the sewer and the surface of the ground. *Bickerdike v. City of Chicago*, 185 Ill. 280, 56 N. E. 1096. The width of the wings to be paved in a local improvement need not appear in

the ordinance, as this is a matter of easy ascertainment. *Givins v. City of Chicago*, 188 Ill. 348, 58 N. E. 912; *Houston v. City of Chicago*, 191 Ill. 559, 61 N. E. 396; *Topliff v. City of Chicago*, 196 Ill. 215, 63 N. E. 692. An ordinance for a 14-foot sidewalk from the lot line to the curb, where the space on account of a building being slightly over the line was only 13 feet, was held not void, as the person estimating the cost, as well as the bidder, could see what was to be done and would be presumed to act upon the rule that the curb line would control. *Hyman v. City of Chicago*, 188 Ill. 462, 59 N. E. 10. An ordinance for paving need not state, in detail, where filling is necessary or where the foundation must be compacted, as it would be perfectly apparent to a contractor or engineer where such filling was necessary to bring the foundation up to subgrade and where it ought to be compacted. *Gage v. City of Chicago*, 203 Ill. 26, 67 N. E. 477. It is a valid objection, on confirmation of a sewer assessment, that a street named did not exist; the land having been in the objector's exclusive possession for over 40 years. *Dempster v. City of Chicago*, 175 Ill. 278, 51 N. E. 710. Extrinsic evidence cannot be offered to show that a street is commonly known by a certain name where another name has been fixed in accordance with the law, as shown by the plat of the city. *Lamm v. City of Danville*, *supra*.

Under these authorities, we think that physical monuments and the physical situation of the surrounding territory may aid and supplement the ordinance in fixing the locality of a local improvement, but that such fixed monuments or physical surroundings cannot be used to contradict the ordinance or public records. As we have seen, there is nothing in the ordinance or in the platting of the town that positively names the unplatted space as a public square. We think, however, that the name "public square" has acquired a legal meaning, indicating that certain property has been dedicated to the public use. *Guttery v. Glenn*, 201 Ill. 275, 66 N. E. 305. The public square of a county is of a public nature and held for governmental purposes. *Lowe v. Howard County Com'rs*, 94 Ind. 553. While there is nothing written on this plat in question to indicate with certainty that it was intended to be dedicated as a public square, we think that is a fair inference from the plat. This court has held that in their ordinary acceptance the words "public square" will be understood to be the platted ground devoted to public purposes, and not the territory of the streets adjoining the sides of the public square (*County of De Witt v. City of Clinton*, 194 Ill. 521, 62 N. E. 780); but we stated in that decision that, if the streets surrounding a plat of ground on which the courthouse was located should be marked and designated on said plat as the "public square," such designation might be a sufficiently definite

description of such territory occupied by the streets. The highest degree of accuracy is not always attained or to be expected in the framing of statutes or city ordinances. If such accuracy in the use of language was applied by the courts in construing ordinances, the purposes for which many of them are passed would doubtless be defeated. As was said in *City of Springfield v. Green*, 120 Ill. 269, 275, 11 N. E. 261, 263: "Whenever the meaning of a word, as used in a statute or ordinance, becomes the subject of controversy in a legal proceeding, the ascertainment of its strict primary signification is not a matter of so much importance as it is to discover the sense in which it was used by the legislative body, for the latter must control, although the word has been used without proper regard to its appropriate and primary meaning."

While, under the authority of *Guttry v. Glenn*, supra, we would be inclined to hold from this plat that the streets were intended to extend and run along the four sides of the public square, yet it is also quite plain that in that decision the words "public square" were used not only to designate the property inside of the inner boundary line of the four streets in question, but also to include the streets as well. It is very evident, however, from the connection in which the words "public square" were there used, what meaning, in each instance, was intended to be conveyed. The ordinance here provides that the sidewalks shall be in front of the lots "abutting thereon," plainly meaning, from the connection, abutting on the "public square." Further along it is said that the lots "abutting on said street along the line of the improvement" shall pay for the assessment. Manifestly, the same lots are referred to in one clause as abutting on the public square and in the other as abutting on the street. The word "abutting" means joined to or adjoining, but does not necessarily imply that the things spoken of are in contact. *Richards v. City of Cincinnati*, 31 Ohio St. 506. This court has held in *City of Springfield v. Green*, supra, that a lot the side of which bounded on a street to be paved was to be regarded as abutting upon the same, as well as a lot one end of which was so bounded by the street, but that lots are not abutting upon a street which do not border upon the street in question. In order to find the meaning of this ordinance as to the location of the improvement, all parts of it must be considered together. *Northwestern University v. Village of Wilmette*, 230 Ill. 80, 82 N. E. 615; *McChesney v. City of Chicago*, 173 Ill. 75, 50 N. E. 191. Following this rule, in *Steele v. Village of River Forest*, 141 Ill. 302, 30 N. E. 1034, it was held that the use of the word "fall" should be construed to mean "rise," in order to prevent an absurd consequence. We

hold that the ordinance is not invalid because of the uncertainty of the location of the improvement therein, and that, properly construed, it required the sidewalks in question to be constructed as they were in front of, the lots and approximately one foot from the property line.

While the conclusions we have reached make it unnecessary to decide further on the admission of evidence, we are disposed to hold that the evidence offered by appellees to prove the width of the traveled way on the four sides of the square in question, and that the inside thereof was a small park, approximately eight rods square, containing trees and a band stand, and surrounded by hitching racks, should have been admitted.

The judgment of the county court will be reversed, and the cause remanded to that court, with directions to overrule the objections and enter judgment.

Reversed and remanded, with directions.

(237 Ill. 592)

**BALL v. EVENING AMERICAN PUB. CO.**

(Supreme Court of Illinois. Dec. 15, 1908.

Rehearing Denied Feb. 4, 1909.)

**1. LIBEL AND SLANDER (§ 124\*) — ACTIONS — INSTRUCTIONS**

In an action for libel, consisting of a derogatory statement concerning a person bearing a name other than that of plaintiff, but accompanied by plaintiff's photograph, in which the declaration alleged that the libel was published of and concerning plaintiff, and to which declaration defendant filed a general issue, an instruction declaring defendant liable if it published such article, but omitting the element that it was published of and concerning plaintiff, was erroneous, and was not cured by a further instruction requiring the jury to find that the defendant published the photograph of the plaintiff in connection with the statements as to the other person as charged in the declaration.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 365; Dec. Dig. § 124.\*]

**2. LIBEL AND SLANDER (§ 19\*) — CONSTRUCTION OF LANGUAGE.**

A libelous publication must be interpreted in the sense in which readers would understand it.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 98, 99; Dec. Dig. § 19.\*]

**3. LIBEL AND SLANDER (§ 105\*) — PERSON DEFAMED — EVIDENCE.**

In slander suits, testimony of the hearers of the defamatory utterance as to the sense in which they understood the words, and that such hearers understood the words as referring to plaintiff, though plaintiff's name was not used, is admissible.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 294; Dec. Dig. § 105.\*]

**4. LIBEL AND SLANDER (§ 123\*) — PERSON DEFAMED — QUESTION FOR JURY.**

Where the libelous words are ambiguous or equivocal in meaning, the questions as to the meaning to be ascribed to them, and whether they were spoken of and concerning the plaintiff, are for the jury, while the question as to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs 1907 to date, & Reporter Indexes

whether any particular meaning is libelous is for the court.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-360; Dec. Dig. § 123.\*]

**5. LIBEL AND SLANDER (§ 21\*)—PERSON DEFAMED.**

Where defendant newspaper company, in connection with plaintiff's photograph, the procurrence of which was the result of mistake, published an article derogatory of the character of a person bearing the same family name, but a different Christian name from that of the plaintiff, the liability of defendant depended on whether the article was calculated from its intrinsic quality to lead persons reading it to believe that it referred to plaintiff, and not on the question whether it did or did not refer to plaintiff.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 103; Dec. Dig. § 21.\*]

**6. TRIAL (§ 296\*)—INSTRUCTIONS—ERRONEOUS INSTRUCTION—CURE BY OTHER INSTRUCTION.**

An erroneous instruction which directs a verdict on proof of a certain state of facts is not cured by another instruction correctly stating the law as applied to the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-717; Dec. Dig. § 296.\*]

**7. LIBEL AND SLANDER (§ 100\*)—UNAUTHORIZED USE OF PHOTOGRAPH—PLEADING.**

In an action for libel consisting of the publication of a derogatory statement concerning a person bearing a name different from that of the plaintiff, but accompanied by plaintiff's photograph, plaintiff cannot recover on the sole ground that defendant published her photograph without her consent, where the only ground of recovery alleged in the declaration was that the article was published of and concerning plaintiff.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 246-248; Dec. Dig. § 100.\*]

**8. LIBEL AND SLANDER (§ 104\*)—EVIDENCE OF OTHER PUBLICATIONS.**

In an action for libel, other publications concerning plaintiff subsequent to the publication on which the action is based, but which are not copies of the first publication, and containing different matter, are not admissible as repetitions.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 286-289; Dec. Dig. § 104.\*]

**9. LIBEL AND SLANDER (§ 104\*)—EVIDENCE OF OTHER PUBLICATIONS.**

In an action for libel, other publications subsequent to the publication complained of in the declaration, and which relate to the same subject-matter, though varying as to details, are admissible on the issue of malice.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 286-289; Dec. Dig. § 104.\*]

**10. LIBEL AND SLANDER (§ 124\*)—ACTIONS—INSTRUCTIONS—OTHER PUBLICATIONS.**

In an action for libel, in which the declaration set up a particular publication, and alleged generally that defendant in subsequent articles repeated the libelous quotation "amplifying, illustrating, and embellishing said libel," it was error to instruct the jury that "if you find from the evidence that defendant as charged in the declaration published anything, the necessary tendency of which was to expose the plaintiff to hatred, contempt, or ridicule," you will find for plaintiff, was erroneous, as it tended to authorize the jury to return a verdict for plaintiff on the subsequent publications,

though they may have regarded the original publication as not libelous.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 373; Dec. Dig. § 124.\*]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; R. S. Tuthill, Judge.

Action by Rose Ball against the Evening American Publishing Company. From a judgment of the Appellate Court, affirming a judgment of the circuit court in favor of plaintiff, defendant appeals. Reversed and remanded.

The declaration, which was filed on October 4, 1901, after alleging that plaintiff was a person of good name, credit, and reputation, and deservedly enjoyed the esteem and good opinion of her neighbors before the committing of the grievances complained of, avers that the defendant wickedly and maliciously intending to injure the plaintiff and bring her into public scandal, infamy, and disgrace, on or about the 29th day of August, 1901, in Chicago, wickedly and maliciously did compose, print, and publish, and caused to be composed, printed, and published, of and concerning the plaintiff, a certain false, scandalous, malicious, and defamatory libel, the same being in words and figures following:

"Deep Mystery Now Shrouds Facts of Pretty Girl's Death.—Persons and Scenes Connected with Mysterious Death of Pearl Ball.

"The build and dress of the mysterious man who accompanied Pearl Ball to the Calumet Café are shown, as described by Manager Barry. Below is the route taken by cabman Jordan, who took the girl from the café to her home, No. 2 Forty-Seventh place, which is shown in black. The house, in black, on Madison avenue, is the home of Dr. Lewis, the Ball family physician. To the left is the latest photograph of Miss Ball. Below is a sketch of the wine-room at the Calumet Café, where she sat with the mysterious stranger. To the right is the photograph of Miss Jeannette Farrar, friend of Miss Ball, who was with her until nine o'clock the night of her death. Below it is a sketch of cabman Jordan's vehicle, in which Miss Ball was taken home.

"Death of Miss Ball leads to suspicion.—No clew to identity of the man who was with her.—Statement of two friends.—Miss Jeannette Farrar fears that the girl committed suicide.

"There are a dozen reasons for the activity of the police in tracing the movements of Miss Pearl Ball, the pretty Hyde Park girl who died from poison yesterday. It is doubtful whether she administered the poison herself or whether it was given to her by another. The key to the mystery is the name of the man with whom the girl sat in a wine-room at the Calumet Café. While

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

they were in the room there was a scuffle and the girl cried for help. She asserted, when help came, that the man had insulted her. The man was then ejected from the place and the girl sent home in a cab. Inspector Hunt believes that J. C. Barry, manager of the café, knows who the mysterious stranger was. He believes that if the man is once caught he can explain why it was that Miss Ball died soon after reaching home when she left the café.

"Story of Dr. Lewis.—Dr. Denslow Lewis, the family physician of the Ball family, who was an intimate friend of the girl and often took her to places of entertainment, made a statement to a reporter for the American this morning. In it was a significant point. At one o'clock Wednesday morning, he said, 'I was called up by the manager of the Calumet Café, whom I know, and told that a young woman there, who gave the name of Belle Lewis, had asked to have me called. She had been insulted by the man who was with her, Barry said. I did not go because I thought it was none of my affair. I had not been out with the girl. Instead I gave Barry the address of Miss Ball and told him to have her sent home.' How the young woman happened to give the name of Belle Lewis instead of her own, and how he recognized the name, Dr. Lewis did not explain.

"Miss Farrar surprised.—Miss Jeannette Farrar, with whom Miss Ball was until after nine o'clock on the night of her death, said she could not conceive of the reason for such action on the part of her friend.

"By Dr. Denslow Lewis.—'Regarding my movements and the possibility of my having been with the unfortunate young woman on the fatal night, I would say that I left my home about seven o'clock and arrived at Randolph street, by way of the Illinois Central, a few minutes later. I then went to the home of Eugene Praeger, 2835 Hermitage avenue, where professional duties occupied my time until late. I reached Randolph street station in time to make the 12:40 a. m. train and arrived home about 1 o'clock. While preparing for bed the telephone bell rang, and a man named Barry, who said he was manager of the Calumet Café, told me that a woman giving the name of Belle Lewis wanted me. As she had not been out with me I told Barry to secure a trusty cabman and send the girl home at my expense. I believe he did say a man had insulted her and had been thrown out of the place. Yes, I knew who was meant by Belle Lewis, but can give no further explanation now. I am her family physician, you know, and cannot talk. Miss Ball was of rather pronounced Bohemian instincts, but I do not believe that her character could be attacked. I can say no more now.'

"By Miss Jeannette Farrar.—'On the night of the tragedy Miss Ball visited Ferris Wheel Park, and as I had an engagement to spend the night with a woman friend on the

North Side, I left her at the car and she said she was going directly home. I cannot imagine who this unknown man is, neither can I say how a girl of such a good character could visit such a place. She might have contemplated suicide and gone to the Calumet Café to procure drink enough to nerve herself to the deed. Lately she has exhibited symptoms of extreme depression at times, yet perhaps the next day she would sing and be as happy as a lark. To be connected with such a terrible case is dreadful and I am utterly prostrated. If we could only obtain some clew regarding the identity of the man perhaps the mystery would soon be solved. I do not believe she bought a large bottle of morphine, and if a robber murdered her, why did he not take away all her rings? She would never have entered the place with a stranger, and I heard one story to the effect that there were two men and two girls in the party when it entered the café. This is all I know about the terrible affair.'"

The declaration then alleges that the defendant, in its said newspaper, repeated the printing and publication of said false, scandalous, malicious, and defamatory libel, and so continued to repeat said libel in divers issues of said paper on and during August 30, 1901, amplifying, illustrating, and embellishing said libel and printing and publishing the same upon the first or initial page of said newspaper; alleges that at the head of said defamatory article or articles, and as part thereof, in large and conspicuous style and manner, in each of the several editions of said paper, was printed and published the picture or likeness of a woman; that said picture or likeness was ostensibly and by the defendant published as the picture or likeness of the woman mentioned in said article and named Miss Ball, but plaintiff states that said picture or likeness then and there printed and published by the defendant was not the picture or likeness of the woman mentioned in the said article and named Miss Ball, neither does it in any way resemble or correspond to the likeness or picture of said woman, but that said picture or likeness then and there printed and published by defendant as the likeness of the woman who was said to have committed suicide was and is a true and correct picture or likeness of plaintiff, and that she is not the person mentioned in said article, although her picture appeared in connection therewith and was printed and published as such person and was by the public believed and taken to be such person. The declaration further alleges that said picture or likeness then and there printed and published by the defendant was made from a negative for which the plaintiff was and is the subject; that said picture or likeness was printed and published by the defendant without the knowledge or consent of plaintiff, her family, representatives, or agents, and plaintiff says that the public understood and ac-

cepted and gave the aforesaid articles the meaning which on their face they conveyed—that is to say, the public understood and believed that the woman whose picture was then and there printed and published by defendant and the woman mentioned in said articles, and named Miss Ball, were one and the same person, and not otherwise, and that many and divers persons, friends, and acquaintances of the plaintiff, both in this and in other states, understood, from seeing and reading said articles, that she, the plaintiff, had committed suicide, and had been and was guilty of drunkenness, lewdness, unchastity, and infamous conduct, and had been and was guilty of consorting with low and wicked persons, and had been found in and was accustomed to go into and frequent vile and disreputable resorts, and had done and committed the things and had been a party to and a sharer in the scenes mentioned and described in said article, by the means of which she has been greatly injured in her good name," etc.

To the declaration defendant interposed the general issue. At the close of all the evidence the court denied defendant's motion for a directed verdict. The motions of defendant for a new trial and in arrest of judgment were overruled. In support of the declaration the court permitted the plaintiff to introduce in evidence, over the objection of the defendant, the copy of the issue of *Hearst's Chicago American* containing the account of the death of Pearl M. Ball as set out in the declaration, and containing, in connection therewith, the picture of the plaintiff, which was designated as Pearl Ball, and the pictures of various persons and scenes described in the article set out in the declaration. Over the defendant's objection copies of later publications of this paper containing further articles relating to the death of Pearl M. Ball were also introduced in evidence. It is urged by appellant that the Appellate Court should have reversed the judgment of the circuit court.

Darrow, Masters & Wilson (Edgar L. Masters, of counsel), for appellant. Simmons, Mitchell & Irving, for appellee.

SCOTT, J. (after stating the facts as above). The refusal of the court to direct a verdict for the defendant at the close of all the evidence is assigned as error. It was contended in support of that motion that the article was not libelous. Without entering at length into a discussion thereof, we are satisfied that, if the publication set out in the narr. was published of and concerning the plaintiff, an action lies for libel. It is also urged that the motion should have been allowed because there was a variance between the proof and the declaration, in this: that the declaration averred that the article in question was published of and concerning the plaintiff, while the proof shows, without contradiction, that it was not so published, but

was published of and concerning a person other than the plaintiff. It is to be observed that the declaration charges not only that the picture or likeness published as that of Pearl M. Ball was in fact that of the plaintiff, but also that the printed words were published of and concerning the plaintiff. In considering the question of the alleged variance, it seems appropriate also to consider a question raised as to the propriety of an instruction given on the part of the plaintiff; the determination of the questions turning somewhat upon the same matters. The instruction so referred to was No. 4 given at the request of the plaintiff, and is in the words following: "The court instructs the jury as a matter of law that if you find, from a consideration of the evidence and the law as stated in these instructions, the publication in question is as to the plaintiff untrue and was made by the defendant, it is libelous, and the plaintiff is entitled to such damages as shall afford a reparation for all the injury, including mental suffering and humiliation, which has naturally and approximately resulted from the publication, if any, shown by the evidence."

It is to be observed that this instruction omits the element that the alleged libelous words were published of and concerning the plaintiff, and it is in this respect that the instruction is criticised. The plea of the general issue alone was filed. There was no contention that the words were true as to the plaintiff, and the instruction, standing alone, was an instruction to find for the plaintiff, because it advised the jury that the publication was libelous and eliminated the only other defense relied upon, viz., that the words were not spoken of and concerning the plaintiff. Where the words published or spoken do not refer to the plaintiff by name, the proper practice is, as was done here, to aver that they were spoken of and concerning the plaintiff, and the plea here filed put this averment in issue. It is elementary that an alleged libelous publication must be interpreted in the sense in which readers would understand it, and in this state it has been held in slander suits that the testimony of the hearers as to the sense in which they understood the words spoken is admissible. *Nelson v. Borchanius*, 52 Ill. 236. This rule applies to a statement of the witness to the effect that he understood the alleged slanderous words were spoken with reference to the plaintiff, where the plaintiff's name was not used. *Dexter v. Harrison*, 146 Ill. 160, 34 N. E. 46. Where the words are ambiguous or equivocal in meaning, the question of the meaning to be ascribed to them is for the jury, although the question as to whether or not any particular meaning is libelous is, of course, for the court. Where, as here, there is a controversy as to whether or not the words were published of and concerning the plaintiff, the question whether they were so spoken is for the jury. In each of the cases of *Van Vechten v. Hopkins*, 5 Johns. (N. Y.)

211, 4 Am. Dec. 339, *Miller v. Butler*, 6 Oush. (Mass.) 71, 52 Am. Dec. 768, *Goodrich v. Davis*, 11 Metc. (Mass.) 478, *Prosser v. Callie*, 117 Ind. 105, 19 N. E. 735, *Stokes v. Morning Journal Ass'n*, 66 App. Div. 569, 73 N. Y. Supp. 245, and *Palmer v. Bennett*, 83 Hun, 220, 81 N. Y. Supp. 567, the words complained of did not name the plaintiff, and it was held that the question whether they were of and concerning the plaintiff was one of fact to be determined by the jury. The defendant contends that the law is so, and the plaintiff, in effect agrees, as she states by her brief that the "rule for interpretation of an alleged libel is what the world would generally understand it to mean," and "whether the article was published of and concerning the plaintiff is a question for the jury."

Plaintiff contends that the case is to be regarded as one where the defendant published libelous words of and concerning a woman, and then, exhibiting a likeness of the plaintiff, states, in effect, "this is the picture of the woman of whom the words are published"; while, on the other hand, the position of the defendant is that, so far as the printed words are concerned, the entire article applied only to Pearl M. Ball, as appears from a reading thereof, and that there is no evidence which indicates that any part of the publication was of and concerning the plaintiff. We do not regard either position as tenable. A little reflection will show that it does not necessarily follow from the publication of the picture that the words in the article had reference to the plaintiff. If, for example, a newspaper should publish a statement to the effect that a female child (naming her) had died of cholera infantum, and that her picture appeared at the foot of the article, while at the place indicated there appeared a likeness, not of a child, but of a bearded and aged man, with the name of the babe printed thereunder, it would be at once evident, whatever the rights of the subject of that picture were, that the words in reference to the death, and the cause thereof, were not spoken of and concerning him. As stated above, the publication must be given the same meaning that would be attached thereto by the readers, and, in determining what that meaning was, it was proper for the jury to take into consideration the facts and circumstances surrounding these two women and the facts and circumstances attendant upon the death of Pearl M. Ball. There is no pretense that the printed words were untrue in reference to Pearl M. Ball, other than the statement that the picture published was her likeness, and, excluding the picture, there is no contention that anything was said in print of and concerning Rose Ball, the plaintiff, so that no application of the article to Rose Ball would be apparent to any person reading it, except such persons as would be able, by their acquaintance with her or knowledge of her, to recognize the picture published as her likeness.

The plaintiff lived at or near Charlotte, Iowa, until she came to Chicago, in 1898, when she was about 18 years of age. Her family still resided in Iowa in 1901, and seem to have been people in very moderate circumstances. Prior to coming to Chicago she had studied stenography. A young lady, also a resident of Iowa, came with her. The two resided for a time with a married lady with whom they were acquainted before they came, and later lived in a rooming house or boarding house until the young lady who accompanied the plaintiff married a man by the name of Rowe. After that for a time the plaintiff lived with this couple. For about two years after coming to the city she seems to have been employed only occasionally, but after that she was usually employed as a stenographer. According to her testimony, her circle of acquaintances in Chicago was not an extensive one. About three years after she came to Chicago she left the Rowes, and thereafter lived in various boarding houses. During the last five years she was in Chicago she was in the employ of a publisher, and did regular stenographic work in his office. In December, 1900, she returned to her home in Iowa, where she remained for a month or so, and after that went to Helena, Mont., upon the suggestion of the Rowes, who then resided at that place. She was there employed in a dry goods store until the latter part of September, 1901. During the time she was in Chicago she had several photographs made at a studio owned and conducted by a man by the name of Godfrey.

Pearl M. Ball, an unmarried woman, died suddenly in Chicago at her father's home, where she lived, on the evening of August 28, 1901. On the next morning, newspaper reporters, representing the defendant's paper, the Chicago Record-Herald, the Chicago Tribune, and the Chicago Chronicle, all newspapers published in Chicago, called at the residence of the father to ascertain the facts in connection with the death of his daughter. The representatives of the four papers named were there at the same time, and asked, among other things, whether the father would let them take a picture of the daughter for publication. The father told them that Godfrey had made photographs of his daughter and had the negatives, and that he (the father) would not object if Godfrey saw fit to give them a picture. At least two of the reporters went to Godfrey's, and sooner or later all obtained from him copies of a picture of the plaintiff, although they were seeking a picture of Pearl M. Ball. Godfrey kept a register and an index of his negatives, and in examining the list for the purpose of locating the negative of Pearl M. Ball he overlooked her name upon his records, although it was there, and stated to the only reporter who was then present, in substance, that he had no negative of Pearl M. Ball, but that he had a negative of Rose Ball. The evidence tends to show that this reporter then stated to him

that Rose Ball and Pearl M. Ball were one and the same, that Pearl M. Ball sometimes went by the name of Rose Ball, and that he would recognize the negative of Pearl M. Ball. Godfrey then exhibited the negative of Rose Ball and the reporter stated that it was the negative of Pearl M. Ball. Just exactly what occurred there at the studio is somewhat in doubt, owing to the fact that neither Godfrey nor any of the reporters who talked with him testified. It is certain, however, that Godfrey, following the conversation just detailed, printed photographs from the negative of Rose Ball, and furnished each of the newspapers named above with a copy. Each of the newspapers published an account of the death of Pearl M. Ball, and with it, as a picture of Pearl M. Ball, published the likeness of the plaintiff. Copies of some of these publications were sent to Rose Ball at Helena, Mont., where she was then living, by a friend in Chicago, and during the month of September, 1901, she returned to Chicago and shortly thereafter instituted several suits on account of these publications. Pearl M. Ball had lived in Chicago all her life, and at the time of her death was 24 years of age. She was widely known in musical circles. She was an accomplished pianist, and was a composer. Her father was Charles H. Ball, and she lived with him at his home at No. 2 in Forty-Seventh Place. He had been engaged in the piano business for a number of years in the Auditorium Building.

In determining what meaning would be put upon the publication by the readers thereof in order to decide whether the words printed were printed of and concerning the plaintiff, as against the fact, on the one side, that plaintiff's picture was published as that of Pearl M. Ball in connection with the article, it was the duty of the jury to consider, on the other side, the fact that the person named in the article was Pearl M. Ball; that Rose Ball then lived at Helena, Mont.; that the subject of the article, as therein stated, lived in Forty-Seventh Place, Chicago; that the plaintiff was a stenographer, and the dead woman, as appeared from the publication, was a pianist and composer of music; that the plaintiff's family had never resided in Chicago; that the family of the dead woman, as stated by the article, resided in Chicago, and her father was engaged in business there; that the family of the dead woman had a family physician in Chicago according to the article; that the family of the plaintiff never resided in Chicago and in the usual course of events would not have had a family physician there.

We conclude, therefore, that the question whether there was a variance depends upon the meaning which, under the evidence, the jury would find would be ascribed to the publication by the readers thereof, and that for this reason the motion for a peremptory instruction could not be allowed upon the

ground of the existence of a variance. We are also of the opinion that the question whether the article was published of or concerning the plaintiff was improperly eliminated from the instruction which is above set out.

It is contended by plaintiff, however, that the instructions as a whole state the law correctly, and that the missing element in this instruction is supplied by plaintiff's given instruction No. 2. That rule does not obtain where, as here, the erroneous instruction directs a verdict upon proof of certain facts. Moreover, we find upon examination that the plaintiff's instruction No. 2 does not supply the missing element. That instruction merely required the jury to find "that the defendant published the portrait of the plaintiff, Rose Ball, in connection with the story of Pearl Ball, as charged in the declaration." The instruction contains no requirement in reference to finding that the written part of the publication was of and concerning the plaintiff. On the other hand, the court refused instruction No. 4 asked by the defendant, which correctly stated the law in this regard. Plaintiff then states that the third instruction asked by the defendant assumed that the publication was made of and concerning the plaintiff, and that the question whether it was so made has by that assumption been eliminated from the realm of contest. We find that this instruction contains no assumption whatever that can be regarded as applying to the words of the publication. The alleged assumption pointed out is only in regard to the portrait.

It is also contended by plaintiff that the mere publication of the picture of another without the consent of that person is a violation of the right of privacy; that plaintiff was entitled to recover in this case irrespective of the publication of any words. Whether this be a correct statement of the law is immaterial. The declaration does not seek to recover for a violation of the right of privacy. The declaration sought, and the instructions permitted, the recovery of damages for the words printed as well as for the publication of the likeness. The motion for a directed verdict was properly refused. The giving of the instruction above set out was reversible error. There is no evidence whatever in the record indicating that Pearl M. Ball was ever known or called by the name of Rose Ball, and there is no competent evidence in the record indicating which newspaper the reporter represented who made statements to Godfrey to that effect. Nor is there in the record any evidence that Rose Ball was ever known by any name other than her own.

The publication for which the suit was brought was made in an evening edition of the newspaper published on August 29, 1901. For the purpose of proving repetitions of the libel, the plaintiff, over the objection of the

defendant, was permitted to introduce in evidence three articles published in editions of the paper subsequent to that in which the article counted upon appeared. One of these subsequent publications was in a late edition published on August 29, 1901, and the other two were published on the next day. The publication made in the later edition on August 29th was identical with the one counted upon, and was properly admitted in evidence as a repetition. As to the articles published on the 30th, however, while each was accompanied by the likeness of the plaintiff purporting to be a picture of Pearl M. Ball, both were materially different, and neither could be regarded as identical with the articles published on the 29th. Both give the results of later investigations made for the purpose of ascertaining the cause of the death of Pearl M. Ball, and both contained statements not contained in the articles of the 29th, which, if made of and concerning the plaintiff, would in the light of the testimony in this record be libelous. A material alteration makes a different libel, for which a suit may be maintained or upon which a count may be joined.

Defendant insists that the alleged libelous statements found in the articles of the 30th which were not in the article counted upon render the publications of the 30th inadmissible. Whether subsequent publications of independent libels differing in character from the first, not connected therewith and not counted upon, may be proven for the purpose of showing malice of the defendant, is a question in reference to which the authorities are in conflict. It has never been passed upon by this court. The defendant, in this connection, relies principally upon the case of *Root v. Lowndes*, 6 Hill (N. Y.) 518, 41 Am. Dec. 762. Plaintiff says that case has been repudiated and discredited by a discussion found in *Wigmore on Evidence*. The judgment in that case was the pronouncement of able judges. To their professional knowledge, theoretical in character, had been added wisdom acquired by long experience in the actual practice and administration of the law in the courts. We do not regard the force of that adjudication as an authority as at all weakened by Prof. Wigmore's unfavorable criticism of the court's views.

We are of opinion, however, that the publications of the 30th cannot be regarded in this case as independent of the publication counted upon. On the contrary, they were connected therewith. They are like unto the later installments of a serial story. They form a continuation of the relation of the alleged facts relative to the death of Pearl M. Ball, and of the circumstances surrounding that event, as those facts and circumstances had been ascertained to exist after the first publication, and they carry the recitation down to the time of her funeral. Being so connected with the original publication and bearing upon the same matter as that

publication, they were by the great weight of authority admissible in evidence as tending to show malice on the part of the defendant. The cases on the subject are collated at pages 496 and 497 of 25 Cyc. Whether the later publications would be admissible if they charged a libel wholly independent of, having no connection with and differing in character from the original publication, is not here to be decided. The publications of the 30th, however, could not upon the declaration filed in this case be made the basis in and of themselves of a verdict for the plaintiff.

With the proof in this condition the court gave to the jury the first instruction requested by the plaintiff, which reads as follows: "The court instructs the jury that any publication the necessary tendency of which is to expose a person to the hatred, contempt, or ridicule of his or her fellow men is a libel, and if you find from the evidence that defendant, as charged in the declaration in this case, published anything the necessary tendency of which was to expose the plaintiff to hatred, contempt, or ridicule, you will find the issues for the plaintiff." The instruction is somewhat awkwardly drawn. It is to be perceived, however, that it permits a recovery for the publication of any libel of the plaintiff by the defendant which was charged in the declaration. No publication except the original one was counted upon, but the declaration charges that the defendant repeated the publications of the libelous article in subsequent issues of the paper, "amplifying, illustrating, and embellishing said libel." We think the jury would consider the subsequent publications as having been charged by the declaration, and that the instruction just set out was erroneous because it would be regarded by the jury as authorizing them to return a verdict in favor of the plaintiff upon the theory that the later publications were libelous, even if they did not regard the defendant as having been guilty of libel in making the publication counted upon. Instructions in reference to which an analogous question arose have heretofore been held by this court to be erroneous. *Chicago & Alton Railroad Co. v. Rayburn*, 158 Ill. 290, 38 N. E. 558; *Ratner v. Chicago City Railway Co.*, 233 Ill. 169, 84 N. E. 201; *Hackett v. Chicago City Railway Co.*, 235 Ill. 116, 85 N. E. 320.

In his final argument to the jury counsel for the plaintiff made a statement in reference to what occurred in the Appellate Court in the trial of the case brought by the plaintiff against the Tribune Company. The court sustained the objection, and said that the statement was one which the jury should not consider. Defendant insists this did not cure the error. The statement was improper. Counsel for plaintiff will no doubt refrain from making it upon another trial.

The plaintiff, having sought damages by a declaration which states a good cause of ac-

tion for alleged libelous printed words which, standing alone, apparently concerned the life and death of Pearl M. Ball, and having asked instructions (which were given) directing the jury, in the broadest terms, to return a verdict in her favor if they found that said printed words were untrue as to the plaintiff, now insists that the publication of the picture, in connection with the article, as the picture of Pearl M. Ball was libelous, and, that such publication of the likeness not being denied and being clearly proven, the judgment should not be disturbed. Had the declaration been framed averring that the printed account of the death of Pearl M. Ball, setting it out literally or stating its substance, was published by the defendant, and that in connection with that article defendant published the portrait of the plaintiff as the likeness of Pearl M. Ball, and containing further apt language necessary to charge libel in publishing the picture in connection with the article, and not charging that the publication of the words in and of itself constituted a libel, a very different case would be presented from that now before us. The course just suggested was not pursued, but instead the plaintiff charged, and was permitted to recover on the theory, that all of the printed words contained in the article were of and concerning her. It follows that we cannot, under the declaration filed, affirm the present judgment merely because it is clearly proven, and not denied, that the picture is that of plaintiff.

Alleged errors not above referred to have been discussed. We deem it unnecessary to consider them.

The judgment of the Appellate Court and the judgment of the circuit court will be reversed and the cause will be remanded to the latter court for further proceedings consistent with the views hereinabove expressed.

Reversed and remanded.

(237 Ill. 610)

**MARTIN EMERICH OUTFITTING CO. v. SIEGEL, COOPER & CO.**

(Supreme Court of Illinois. Dec. 15, 1908.

Rehearing Denied Feb. 4, 1909.)

**1. CONTRACTS (§ 309\*) — CONSTRUCTION — IMPLIED CONDITION.**

In contracts to the performance of which the continued existence of a particular person or thing is necessary, a condition is implied that the death or destruction of the person or thing shall excuse performance.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1444; Dec. Dig. § 309.\*]

**2. CONTRACTS (§ 309\*) — CONSTRUCTION — IMPLIED CONDITION—DESTRUCTION OF BUILDING—NONPERFORMANCE—EXCUSE.**

Defendants, who operated a department store, agreed that plaintiff might have the entire third floor of its main store building in which to operate a furniture department in accordance with certain conditions as to operation, at a price depending in some degree on the sales,

to continue for five years from September 1, 1890, with the privilege to the defendants to cancel the same on notice. Held, that such agreement, while not a lease, yet concerned the occupation of certain space in the building, and was subject to the implied condition of the continued existence thereof, so that on the total destruction of the building by fire the contract was terminated, and plaintiff was not entitled to be allowed space in a different building in which defendant obtained a new location.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1444; Dec. Dig. § 309.\*]

Error to Appellate Court, First District, on Error to the Municipal Court of Chicago; R. W. Clifford, Judge.

Action by the Martin Emerich Outfitting Company against Siegel, Cooper & Co. Judgment for defendant was affirmed by the Appellate Court, and plaintiff brings error. Affirmed.

Newman, Northrup, Levinson & Becker and Arthur B. Schaffner for plaintiff in error. Augustus Binswanger, for defendant in error.

DUNN, J. In an action of assumpsit the court directed a verdict for the defendant, on which judgment was rendered in its favor, which was affirmed by the Appellate Court. A writ of error is prosecuted to reverse the judgment of affirmance.

In 1890 the Martin Emerich Outfitting Company, the plaintiff in error, was engaged in the retail furniture business at 261 and 263 State street, in Chicago, occupying six floors and the basement at those numbers. On July 12, 1890, it entered into a written contract with Siegel, Cooper & Co., the defendant in error, whereby, after reciting that the plaintiff in error was desirous of offering for sale in the premises of defendant in error, in the following described space, viz., the entire third floor of the buildings known as 211, 213, and 215 State street, and the south 25 feet front of the third floor of the main building, corner State and Adams streets, being 25x80 feet, more or less, a full line of furniture, mattresses, springs, and all articles strictly appertaining to such a business, and the defendant in error was willing to grant the use of said space to the said party of the second part on certain terms and conditions, it was agreed that the defendant in error should set apart for the use of the plaintiff in error the space above mentioned, for the sale by the plaintiff in error of furniture, mattresses, springs, and articles strictly appertaining to the furniture business, and that the plaintiff in error should use said space for said purpose; should keep it in like clean and good condition as other parts of the building at all times; should carry at all times a first-class stock of furniture, and sell the same for cash, and at as low a price as the same quality should be sold by any other merchant

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

or dealer in the same line within a radius of two miles, but should not at any time be compelled to sell any article below cost price; should conduct the business in a business-like manner; should employ such help only as should be satisfactory to the defendant in error, which help must comply with and be subject to the regulations governing the general employes of defendant in error; should enter into no contracts nor incur any liabilities in the name of the defendant in error; should not erect any signs or make any display distasteful to the defendant in error; should report at the office of defendant in error each business day the gross sales of said department; should keep account of all the transactions of the department in books which should always be open to the inspection of defendant in error; should pay for all expenses of said furniture department, and furnish a cashier, who should receive all moneys for sales made in said furniture department, and should turn them over to the defendant in error at the close of each business day. Settlement was to be made each week for all sales during the preceding week, at which time a statement of receipts and expenses was to be rendered. Plaintiff in error agreed to furnish all wagons and horses needed in the delivery and handling of the goods sold in said furniture department, the wagons to be of uniform color and bear the name of "Siegel, Cooper & Co.—Furniture Department," in lettering like that used on all the delivery wagons of the defendant in error; to deliver promptly and free of charge, within the city limits, all furniture sold in the department, and to advertise the department in the daily papers in the name of Siegel, Cooper & Co. to the extent of not less than \$5,000 during the first year of the agreement, and a like amount, or more, during each year thereafter, all advertisements to be submitted to and approved by the defendant in error. The advertising was to be paid for with the advertising bills of the defendant in error, and charged to the plaintiff in error at same rate as paid by the defendant in error. The plaintiff in error agreed to pay the defendant in error for the use of said space, on the first day of each month, beginning with September 1, 1890, the sum of \$500 per month. Should the gross sales in the department after September 1, 1891, exceed \$75,000 during any year, then the plaintiff in error agreed to pay, in addition to the monthly rental, 5 per cent. of the amount of sales in excess of \$75,000 at the end of the fiscal year. The plaintiff in error further agreed to purchase from the defendant in error all the furniture, and all articles pertaining to the furniture department, then in the premises of the said defendant in error. It was further agreed, that in case of death or the dissolution of the plaintiff in error, the defendant in error should have the right and power to cancel the agreement on giving 30 days'

notice to the legal representative of the plaintiff in error. The defendant in error agreed to furnish, in connection with said space, like heat, light, and elevator service as it furnished in the regular course of business to its other departments. The agreement was to continue in force for five years from the 1st day of September, 1890, with the privilege on the part of the defendant in error to cancel it and retake possession of said space at any time when the plaintiff in error, in the opinion of the defendant in error, should fail to fulfill any of its agreements, but the agreement was not to be canceled nor possession of said premises taken by the defendant in error until after written notice to the plaintiff in error in what manner the agreement had been violated, in order to enable the plaintiff in error to rectify any act of omission or commission in or connected with said furniture department business. A failure, after such written notice, to immediately rectify such an act of omission or commission, or a willful repetition of such or similar acts, should authorize the cancellation of the agreement by the defendant in error upon giving the plaintiff in error 30 days' notice of its intent to cancel this agreement. From September 1, 1890, the plaintiff in error occupied the space designated for several months, at the expiration of which time a change was made, whereby the plaintiff in error gave up a part of the space on the north and received space on the south somewhat greater, and the monthly payment of \$500 was increased to \$615. On August 3, 1891, the buildings mentioned in the contract were totally destroyed by fire. The defendant in error in a few days moved into other quarters at the corner of Wabash avenue and Adams street, and later moved to the corner of State and Van Buren streets, where it continued to conduct its business. Plaintiff in error requested to be allowed to occupy space in the new location, but was refused, the defendant in error claiming that the destruction of the building had put an end to the contract, and this is the vital question in the case.

In contracts to whose performance the continued existence of a particular person or thing is necessary, a condition is always implied that the death or destruction of that person or thing shall excuse performance. Thus, contracts for the performance of personal services terminate upon the death of the party by whom the services are to be performed. *Smith v. Preston*, 170 Ill. 179, 48 N. E. 688. A covenant by a lessee of a coal mine to work the same for the period of 10 years under his lease is discharged by the exhaustion of the mine. *Walker v. Tucker*, 70 Ill. 527. Under a contract to place certain machinery in a particular building, the building and the machinery having been destroyed by accidental fire before the completion of the contract, it was held that both parties were excused from further performance of

the contract. *Appleby v. Myers*, L. R. 2 C. P. 651; *Siegel, Cooper & Co. v. Eaton & Prince Co.*, 165 Ill. 550, 46 N. E. 449; *Huyett & Smith Manf. Co. v. Chicago Edison Co.*, 167 Ill. 233, 47 N. E. 384, 59 Am. St. Rep. 272. A contract to let at a stated daily price a music hall for giving a series of concerts was held to be conditional upon the continued existence of the hall, and was put an end to by the destruction of the hall by fire. *Taylor v. Caldwell*, 3 B. & S. 826. A lease of rooms in a building is terminated by the destruction of the building by fire (*Kerr v. Merchants' Exchange Co.*, 3 Edw. Ch. [N. Y.] 333; *Alexander v. Dorsey*, 12 Ga. 12, 56 Am. Dec. 443; *Winton v. Cornish*, 5 Ohio, 477), and, in case a new building is erected having a similar space in the same location as in the old building, the tenant is not entitled to occupy it (*Stockwell v. Hunter*, 11 Metc. [Mass.] 456, 45 Am. Dec. 220).

The plaintiff in error contends, however, that this contract was not for the occupation of any particular space in a specified building, but was rather for the conducting of a department of the business of the defendant in error. It may be conceded that the relation of the parties was not that of landlord and tenant, but their agreement concerned the occupation of certain space in the building. The plaintiff in error had the right to occupy that space, and no other. The defendant in error had no right to demand that the plaintiff in error should conduct the business elsewhere. When the contract was entered into, *Siegel, Cooper & Co.* was engaged in business at the corner of State and Adams streets, and the plaintiff in error had a large store and warerooms not far away, on State street. The parties, for their mutual benefit, contracted that the plaintiff in error should take charge of the furniture department of the defendant in error. Their motives and intentions can only be known from the writing to which the contract was reduced. By that writing it is recited that the plaintiff in error desired to offer for sale in certain specified parts of the premises of the defendant in error a line of furniture, etc., and it was the use of these particular premises for this purpose which defendant in error granted. No other space in the building or in any other building was contemplated. The defendant in error would have had no right to require plaintiff in error to change to the fourth floor or the second. The plaintiff in error had the right, for five years, to insist upon occupying that particular space, and the defendant in error had no right to require it to go to another. The parties apparently did not contemplate any change of location. The defendant could not voluntarily have removed to another location and required the plaintiff in error to carry on the furniture business in the new location.

The plaintiff in error insists that the contract must be construed in the light of the circumstances surrounding the parties and

of the objects they had in view, and that the primary object in view was the carrying on the furniture business by the plaintiff as a part of the business of the defendant. This is an assumption contrary to the language of the instrument, which provides in the last clause only that the privilege of the plaintiff in error to conduct said furniture department should be exclusive of any other like department in said premises. It is manifest that the idea of a change of location was not in the minds of the parties in making the agreement. It was supposed the business would continue at the same place during the whole term of the agreement. The burning of the building and its effect upon the rights of the parties were not in their minds. The difficulties of providing either for such contingency or the case of a voluntary removal are manifest. If the building and the stock of defendant in error were totally destroyed, would it be required to start in business again? Could it start on a much smaller scale, or would it be required to carry as large a stock and occupy as extensive quarters as before the fire? Would the plaintiff in error be obliged to follow it wherever it might choose to go? Within what distance should it relocate its business, and how far would the plaintiff in error have to follow? What proportion of the reduced or increased space would the plaintiff in error be entitled to and would it be obliged to pay for? All these questions would necessarily have to be decided, but the contract made no provision for them. If they were thought of by the parties, they were intentionally omitted because of the difficulty of providing for them.

If the contract was, as we hold, a contract for the conduct of the business in a particular place, then it could not be substantially performed by carrying on the business in another place. To require the plaintiff in error to conduct the business, or to require the defendant in error to permit it to be conducted, at a place and under conditions different from those mentioned in the agreement, would not be a substantial performance of the contract they had entered into, but an imposition of terms to which they had not agreed. The continued existence of the building was a necessary condition to the performance of the agreement, and its destruction relieved the parties from further obligation to perform the contract.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

#### Additional Opinion.

Subsequently, upon consideration of the petition for a rehearing, the following additional opinion was filed:

The plaintiff in error, in a petition for a rehearing, calls our attention to the statement in the original opinion that the vital question in the case is whether the destruction of the building put an end to the con-

tract, in connection with the alleged fact that the principal building in which the plaintiff in error was conducting the furniture business under its contract with the defendant in error was not destroyed by the fire. The cause was decided here upon the record made in the trial court, and was tried in that court upon the case made by the pleadings. The two original counts did not mention the fire, but declared upon the refusal of the defendant in error to set apart to the plaintiff in error the portion of the premises described in the contract between them. Two additional counts, after averring the taking possession by the plaintiff in error of the premises described in the contract, alleged their destruction by fire, the occupation of other premises by the defendant in error, and its refusal thereafter to set apart, for the use of the plaintiff in error in carrying on said furniture business, any space in the premises then occupied by the defendant in error. No mention is made in the pleadings of any right of plaintiff in error before the fire to occupy any premises other than those mentioned in the contract or of its occupation of any other premises; nor is any such right made the basis of any claim against the defendant in error. Naturally, therefore, no such right could be considered either by the trial court or by this court.

It is also said that the defendant in error collected and retains the payment specified in the contract for the month of August, 1891, though the fire occurred on the 3d day of that month, and that the defendant cannot retain this payment and the contract at the same time be regarded as canceled as of the date of the fire. The destruction of the building terminated the contract. Whether or not the plaintiff in error could recover the overpayment is a question which does not arise, as the declaration is not based upon such claim.

Rehearing denied.

(237 Ill. 620.)

#### HENSAN v. COOKSEY.

(Supreme Court of Illinois. Dec. 15, 1908. Rehearing Denied Feb. 3, 1909.)

#### 1. CONTRACTS (§ 322\*)—CONTRACT FOR SUPPORT—BREACH—EVIDENCE.

Evidence held to show a breach by a son of an agreement with his mother to care for her and provide her a comfortable home.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 322.\*]

#### 2. DEEDS (§ 19\*)—SETTING ASIDE—FAILURE OF CONSIDERATION—CONTRACT FOR SUPPORT—BREACH.

A conveyance of land by a parent to a child in consideration of an undertaking to furnish the parent a comfortable home during life will be set aside upon the parent's application, where the child, after receiving the conveyance, fails to keep his agreement.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 38; Dec. Dig. § 19.\*]

#### 3. DEEDS (§ 72\*)—VALIDITY—FIDUCIARY RELATION.

Where a mother was old and feeble when she made a deed to her son, and had been rendered so exhausted and nervous by a railroad trip that she could not have been capable of serious mental effort, and the son had managed her business affairs, she relying on him whenever complications arose, a fiduciary relation existed between them, and they were not dealing at arm's length in the transaction.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 191; Dec. Dig. § 72.\*]

#### 4. WORDS AND PHRASES—"FIDUCIARY RELATION."

A "fiduciary relation" exists when confidence is reposed on one side and there is resulting superiority and influence on the other, and the relation and duties involved in it need not be legal, but may be moral, social, domestic, or merely personal.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, p. 2761.]

#### 5. CONTRACTS (§ 99\*)—TRANSACTIONS BETWEEN PERSONS IN FIDUCIARY RELATIONS—ABSENCE OF UNDUE INFLUENCE—BURDEN OF PROOF.

The existence of a confidential relation creates a presumption of influence, which imposes upon a person receiving a benefit from one to whom he sustains such a relation the burden of proving the absence of undue influence by showing that the person acted upon competent and independent advice of another, or such facts as will show that the dealing was at arm's length, or was had in the most perfect good faith on his part, and was equitable and just between the parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 448; Dec. Dig. § 99.\*]

#### 6. DEEDS (§ 72\*)—VALIDITY—PARENT AND CHILD—UNDUE INFLUENCE.

Where a son who transacted all the business matters of his aged mother, who relied entirely on him, induced her to take a journey with him, which he represented to the other members of the family was to the World's Fair, and obtained from her a deed of all her property in return for a promise to pay her a small sum and support her for life, of which he gave her no written evidence, allowing her no competent and independent advice and keeping the transaction secret from the rest of the family, he did not act in good faith, and the transaction was not equitable and just between him and his mother.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 191; Dec. Dig. § 72.\*]

#### 7. APPEAL AND ERROR (§ 1056\*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In a suit to set aside a deed from a mother to her son as obtained in violation of their fiduciary relation, the exclusion of evidence of the cordial relations between mother and son for many years, his faithful services to her in the past, and her statement that he had saved her farm for her and also a large sum of money, if error, was not prejudicial, it not being claimed that the services were part of the consideration for the deed or were considered when it was made, and, even if evidence of the services was admissible to show the relation of the parties and the mother's motive in making the deed, the transaction not being sustainable as a gift on account of the services, and the proposed testimony having no tendency to qualify the fiduciary relation or establish the validity of the deed in spite of the relation.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1056.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**S. CANCELLATION OF INSTRUMENTS (§ 37\*)—  
CONDITIONS PRECEDENT—RESTORATION OF  
FORMER STATUS—NECESSITY FOR RETURN OF  
CONSIDERATION.**

In a suit by a mother to set aside a deed of her farm to her son, executed on his promise to support her for life, where the rental value of the farm and the proceeds of personal property the son had received equaled what he had disbursed for the mother, her bill was not defective because it failed to offer to restore him to the condition in which he was before the execution of the deed.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 73; Dec. Dig. § 37.\*]

Appeal from Circuit Court, Madison County; B. R. Burroughs, Judge.

Bill by Ann M. Hensan against John B. Cooksey. Decree for complainant, and defendant appeals. Affirmed.

C. H. Burton, for appellant. E. B. Glass and E. G. Hill, for appellee.

DUNN, J. This is an appeal from a decree setting aside a deed, and the principal question in the case is the sufficiency of the evidence.

Ann M. Hensan, the appellee, is the mother of the appellant, John B. Cooksey. At the time of the conveyance, November 28, 1904, she was 74 years old. The property conveyed was a farm of 90 acres, which had been her home, but for several years had been rented and not occupied by her. She owned no other property except some grain and hay on the farm, which was taken by appellant, and some money which she claimed appellant held for her, and which he denied holding. She had been twice married, but was a widow having four children—the appellant and three married daughters. For some years Mrs. Hensan had lived for the most part with her daughter Mrs. Harris, near Alhambra, in Madison county, though she frequently made long visits elsewhere. Her daughter's husband, John B. Harris, rented her farm until 1905, and his family and Mrs. Hensan formerly lived there together, but more recently resided upon a farm in the vicinity owned by Harris. The appellant, who was about 50 years old at the time of the conveyance, had married before he was 21 and moved to Kansas, where he had ever since resided. He was a farmer and cattle raiser. He had been back and visited his mother several times, and she had also visited him. He had assisted her in her business affairs and in some litigation in which she had been involved, and their relations seem always to have been cordial and affectionate. During the World's Fair of 1904 appellant made three visits to his relatives near Alhambra. On the second of these visits, in October, his wife accompanied him. His mother was intending to return to Kansas with them, but when the day came did not feel able to undertake the journey. In the morning, before starting, he went into her room where she was in bed, told her he

had a little surprise for her, and asked her how she would like to have him come back on the old place, fix it up and come back to live. She expressed great delight at the idea, and he said, very well, if he could make arrangements back there. The next month he came back, ostensibly to see the President at the World's Fair, but really to get from his mother a lease of the farm, which he had prepared and brought with him from Kansas. This was a statement that she leased the farm to him, without stating for what time, the consideration to be thereafter determined. He took his mother in Harris' buggy and they drove over the farm. On this trip he told her he had a little article showing that he had some right to come in on the farm next summer, and at his request she signed it. He says that at this time she said that she would have deeded the place to him long ago if it had not been for one or two things; that if it had not been for him she would have been penniless, and, after mentioning his various services to her, that he was the one that ought to have the farm, and that she would make him a deed to it.

Mrs. Hensan had been quite seriously ill during the spring and summer of 1904, and part of the time was under the care of a physician. She was nervous and weak and was troubled with insomnia. The day before the deed was executed, appellant said that he wanted to take his mother to the World's Fair. Mrs. Harris objected on account of their mother's physical condition, but he persisted, and the next morning the trip was undertaken. Mrs. Hensan was very weak and had to be assisted to the carriage. Alhambra is 14 miles from Edwardsville, and on the train appellant suggested that they stop at Edwardsville and she make the deed to the farm there. They got off the train and went to a hotel near the station, where she lay down on a bed while he went to have the deed prepared. On his return with Mr. Wheeler, a lawyer whom he had employed to prepare the deed, she executed to him a warranty deed of the farm for an expressed consideration of natural love and affection and \$500. No money was then paid or note given. Appellant and Mrs. Hensan went on to East St. Louis on an afternoon train, and he took her to the house of Mrs. Florence Gregory, while he went to James Roseberry's house for the night. The next morning he made a short call at Mrs. Gregory's house, and then went to his home in Kansas. Mrs. Hensan remained at Mrs. Gregory's until the next April, when she went to Arkansas with her daughter Mrs. Thimming.

Mrs. Hensan denies the conversation testified to by appellant in which he says she said she would make him a deed for the farm, and says the first mention of a deed was made by him just before the train reached Edwardsville. She was tired and exhausted, and re-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

members little of the conversation. Her son was to come back to the place, fix it up, take care of her, and add another room for her convenience. Both the lease and the deed were kept secret from the other members of the family until the arrival of appellant and his family the next July. They were not informed of the deed until it was filed for record, in August, 1906.

Appellant came back to Alhambra the next summer with his family and took possession of the farm, telling his sister he had rented it. His mother lived with him a short time and then went away. She spent part of the time at Mrs. Harris', part of the time at East St. Louis, and at intervals remained with the appellant for short periods. In the two years and a half before the filing of the bill she spent less than six months in the old home, to which she had been so anxious to return. To secure a home there for the rest of her life was the supposed chief motive for making the deed to appellant. The room which she says was to be added for her use was never built. Her son says he never agreed to build it. She says that her treatment in the family was such that she could not stay; that when strangers or visitors were present everything was pleasant and she was treated kindly, but when no one was there her treatment was harsh and unkind. The greater part of her complaint is directed against Mrs. Cooksey, and she testifies to specific instances of abuse and ill treatment. There is very little corroborative evidence, and in the nature of the case very little is possible, for she states that when others were present she was well treated. A number of witnesses who were at the home occasionally for short periods testify that she was treated kindly, but as to her treatment when the family were alone the case rests substantially on her testimony and that of the appellant, his daughter, and his 14 year old son. The treatment which makes the life of an old woman in the family of a son comfortable or miserable is difficult to describe. Many of the things which make it kind or unkind are intangible and hardly noticeable to an observer or possible to narrate. The evidence was heard in open court, and the judge who heard the cause had advantages which we do not possess in determining the value to be given to the testimony of the various witnesses. From a reading of the evidence in the record we are inclined to agree with his finding that the treatment accorded to appellee was such as to constitute a breach of the agreement to care for her and provide her a comfortable home on the farm. The \$500 was never paid, nor was any note given for it. Appellant produced on the trial his note for \$500, with 6 per cent. interest, dated November 26, 1904, and payable to the order of his mother 12 months after date. It bears indorsements of the payment of the interest annually, to November 26, 1907. This note, appellant says, he wrote immediately upon his return to Kansas after getting the

deed, and kept it for his mother. It was never delivered to her, and she knew nothing about it.

A conveyance of real estate made by a parent to a child in consideration of an undertaking to furnish the parent a comfortable home during life will be set aside upon the application of the parent, where the child, after receiving the conveyance, fails to keep his agreement. *Fabrice v. Von der Brelle*, 190 Ill. 460, 60 N. E. 835; *McClelland v. McClelland*, 176 Ill. 83, 51 N. E. 559; *Cooper v. Gum*, 152 Ill. 471, 39 N. E. 267.

The relation between appellant and appellee was of a fiduciary character. While the evidence does not show a want of mental capacity on the part of Mrs. Hensan, it does show that she had recently been quite ill. She was old and feeble. Her physical condition was very much reduced, and on the day she executed the deed she was so nervous, weak, and exhausted that she could not have been capable of serious mental effort. Her son had managed her business affairs when they required attention. She relied upon him when complications arose in connection with them, and she believed that his efforts had saved her property for her. He had himself proposed returning to the farm, to fix it up and live there. She had leased it to him upon a consideration to be afterward determined. Their relation was one of confidence reposed by her, and is inconsistent with the idea that they were dealing at arm's length. A fiduciary relation exists in every case "in which there is confidence reposed on one side and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal; it may be moral, social, domestic, or merely personal." *Irwin v. Sample*, 213 Ill. 160, 72 N. E. 687; *Walker v. Shepard*, 210 Ill. 100, 71 N. E. 422; *Roby v. Colehour*, 135 Ill. 800, 25 N. E. 777.

The existence of the confidential relation creates a presumption of influence which imposes upon the one receiving the benefit the burden of proving an absence of undue influence by showing that the party acted upon competent and independent advice of another, or such facts as will satisfy the court that the dealing was at arm's length, or that the transaction was had in the most perfect good faith on his part and was equitable and just between the parties, or, as some of the authorities say, that it was beneficial to the other party. *Thomas v. Whitney*, 186 Ill. 225, 57 N. E. 808; *Fish v. Fish*, 235 Ill. 396, 85 N. E. 662. Here the son took from his aged mother a deed for all of her property in return for a promise to pay her \$500 and support her during her life, of which he gave her no written evidence. Instead of seeing that she had competent and independent advice, she was taken away from the other members of the family, who were led to believe her journey was for another purpose, and the transaction carefully kept secret. Appellant has not sustained the burden which

the law casts upon him of showing that the dealing was at arm's length, that he acted in good faith, or that the transaction was equitable and just.

It is objected that the court refused to hear evidence of the relations of appellant and the appellee for many years, and the faithful service of appellant to his mother in the past, and her statement that he had saved her farm for her and also some \$3,600 in money at the time of the death of her son. It is not claimed that these services were any part of the consideration for the deed, or were taken into consideration when it was made. Even if they were admissible for the purpose of showing the relation of the parties and Mrs. Hensan's motive in making the deed, the deed could not be sustained as a gift on account of such services, and the facts proposed to be proved have no tendency to qualify the fiduciary relation or establish the validity of the deed in spite of such relation.

It is argued that the appellee did not offer by her bill to restore appellant to the condition in which he was before the execution of the deed. Appellee received nothing from appellant except her board for the few months she lived in his family, some doctors' bills paid, and \$52 in money. In addition to this, appellant claims to have expended \$600 or \$700 in improvements on the farm. He occupied the farm for two years and received the proceeds of it, and received \$182 for grain and hay on the place belonging to Mrs. Hensan when he went there. The court found that the rental value of the farm and the \$182 received from the personal property were sufficient to meet all of appellant's disbursements for appellee, and the evidence sustains such finding. Mrs. Hensan is under no liability to reimburse him for the loss, if any, which he sustained in the sale of his cattle. The sale of his cattle was no part of the consideration for the deed. He has the \$500 note, which has never been out of his possession.

The decree of the circuit court will be affirmed.

Decree affirmed.

(237 Ill. 628)

#### REED v. ENGEL.

(Supreme Court of Illinois. Dec. 15, 1908. Rehearing Denied Feb. 4, 1909.)

#### 1. PARTNERSHIP (§ 17\*) — CREATION — INTENTION.

A partnership is never created by implication or operation of law, apart from an express or implied intention and agreement to constitute the relation.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 3; Dec. Dig. § 17.\*]

#### 2. PARTNERSHIP (§ 20\*) — JOINT ENTERPRISE — SHARING PROFITS.

A partnership as between the parties does not necessarily result from an agreement to enter into a joint enterprise and share the profits.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 20.\*]

#### 3. PARTNERSHIP (§ 17\*) — CONTRACT — CONSTRUCTION—INTENTION.

An agreement that plaintiff should assist defendant in the sale of land, and receive one-half the profits after deducting the necessary expenses for any land sold to buyers brought to defendant directly or indirectly through plaintiff's efforts, did not indicate an intention on the part of either to form a partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 3; Dec. Dig. § 17.\*]

#### 4. ACCORD AND SATISFACTION (§ 20\*)—FRAUD.

Where plaintiff, before consenting to accept defendant's check in settlement for profits on certain land transactions, requested to be informed by defendant whether the check represented all he was entitled to receive, and was deceived by defendant as to the amount of profits to which plaintiff was entitled, the cashing of the check was not an accord and satisfaction.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. § 140; Dec. Dig. § 20.\*]

#### 5. ACCORD AND SATISFACTION (§ 27\*)—RECEIPT—QUESTION FOR JURY.

Where the cashing of a check by plaintiff for profits on certain transactions was pleaded as an accord and satisfaction, whether plaintiff received the check in settlement, after being deceived as to the amount to which he was entitled, *held* for the jury.

[Ed. Note.—For other cases, see Accord and Satisfaction, Dec. Dig. § 27.\*]

#### 6. JOINT ADVENTURES (§ 5\*) — SETTLEMENT — TENDER—ACTION.

Where, when plaintiff received a check from defendant for the amount of his profits in a joint adventure, plaintiff was deceived by defendant as to the amount he was entitled to receive, plaintiff was not required to return the check before suing for the balance; it being sufficient that such amount was credited to defendant's account.

[Ed. Note.—For other cases, see Joint Adventures, Dec. Dig. § 5.\*]

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, La Salle County; S. C. Stough, Judge.

Action by Frank O. Reed against Antoine Engel. Judgment for plaintiff affirmed by the Appellate Court, and defendant appeals. Affirmed.

James F. McCormick and Butters, Armstrong & Ferguson, for appellant. Henry M. Kelly, for appellee.

CARTER, J. This is an action in assumpsit in the circuit court of La Salle county brought by appellee, against appellant, in relation to the division of the profits of certain real estate sales. On the trial in that court a judgment for \$2,000 was rendered, which, on appeal to the Appellate Court for the Second District, was affirmed, and a further appeal has been prosecuted to this court.

Appellant was a resident of Whiteside county, and for a few years previous to this litigation had been engaged in buying and selling farm property in that vicinity. Appellee resided and was widely known in La Salle county. Appellee's proof tended to show that he was employed by appellant to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

assist in the sale of land on the agreement that he was to receive one-half of the profits, after deducting necessary expenses, for any land sold to buyers brought to appellant, directly or indirectly, through his efforts. Appellant contended that he had only agreed to pay appellee \$1 per acre for such sales, with perhaps extra pay, at Engel's option, in case of a good trade being made.

Appellant contends that the testimony of appellee proved, if anything, a partnership, and therefore the action should have been brought in equity and not in a court of law. Neither party claimed that there was a partnership in the sale of these lands. A partnership is never created between parties by implication or operation of law, apart from an express or implied intention and agreement to constitute the relation. *Bushnell v. Consolidated Ice Machine Co.*, 138 Ill. 67, 27 N. E. 596. Even where the parties agree to enter into a joint enterprise and share in the profits, a partnership, as between themselves, does not necessarily result. The intention of the parties always controls. *Grinton v. Strong*, 148 Ill. 587, 36 N. E. 559; *National Surety Co. v. Townsend Brick Co.*, 176 Ill. 156, 52 N. E. 938. While a different rule might prevail on this evidence as to the creditors seeking to hold defendants as partners, it is very clear from this record that neither appellant nor appellee intended a partnership. The court was warranted in refusing the instructions as to partnership, complained of here by appellant, because there was no proof upon which to base such instructions, and for the further reason that they did not take into account the intention of the parties.

The further contention is made that there was a settlement between appellee and appellant, which would bar recovery. The testimony shows that March 30, 1906, a few days before this suit was begun, appellant sent a check to appellee for \$423, accompanied by a letter stating that it was in settlement of balance on commissions due Reed on account of land sales made by him. Before cashing this check appellee visited appellant at his home and said he wanted a settlement. Appellant replied: "You got a settlement, didn't you? Didn't I send you a statement?" To which appellee replied, "Did you consider that draft a full settlement with me?" and appellant replied, "Yes; I was figuring it over yesterday, and find I sent you more than was coming to you." Appellee then replied, "If that is so, all right," and turned around and went away. This is appellee's testimony. The appellant's testimony on this point agrees in substance. Appellee thereafter cashed the check. It is contended that in so doing he knew it was claimed to be a full settlement, and therefore it must be held to be a complete defense to an unliquidated claim. It appears from the record that appellee kept no books of his trans-

actions, and did not know at what prices the lands sold were listed, or what the expense of sale was, and had no means of learning the details except from appellant, who did possess them. If the jury believed that appellee, before he consented to accept the check in question, was deceived by appellant as to the amount of one-half the profits from the sale of the lands, then the cashing of this check cannot be held to be an accord and satisfaction of the claim. That was a question for the jury. 1 Cyc. 338; *Hefter v. Cahn*, 73 Ill. 296. The cases of *Papke v. Hammond Co.*, 192 Ill. 631, 61 N. E. 910, and *Jackson v. Security Life Ins. Co.*, 233 Ill. 161, 84 N. E. 198, and similar authorities, to the effect that a release under seal cannot be impeached, except in a court of equity, unless fraud has entered into the actual execution of the instrument, are not in point. No release of any kind was signed in this case.

Appellee was not required to return the check before beginning this suit. It is sufficient that the amount of the check was credited to appellant's account. *Farmers' & Mechanics' Life Ass'n v. Caine*, 224 Ill. 590, 79 N. E. 956; *Pawnee Coal Co. v. Royce*, 184 Ill. 402, 56 N. E. 621; *Hefter v. Cahn*, *supra*.

The instructions on accord and satisfaction were properly refused by the trial court, as they did not take into consideration that the alleged settlement was claimed to have been obtained by a misstatement of facts known only to the party relying on such accord and satisfaction.

The contention of appellant that the evidence does not justify the amount of the verdict was a controverted question of fact, which cannot be inquired into by this court on this record. *First Nat. Bank v. Miller*, 235 Ill. 135, 85 N. E. 312; *Chicago City Railway Co. v. Martensen*, 198 Ill. 511, 64 N. E. 1017.

We find no reversible error in the record, and the judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

(237 Ill. 633)

#### WARD v. CHICAGO CITY RY. CO.

(Supreme Court of Illinois. Dec. 15, 1908.

Rehearing Denied Feb. 4, 1909.)

#### 1. CARRIERS (§ 303\*)—INJURIES TO PASSENGER—SETTING DOWN PASSENGER—DEFECTS IN STREET.

Though a city is responsible for the existence of snow and ice in the street near a street railroad track, the street railroad company will be liable for injuries to a passenger received while alighting from one of its cars, where, owing to negligence in operating its car, such passenger slipped on the snow and ice, and was run over by the car.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 303.\*]

\*For other cases see SAME topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

## 2. EVIDENCE (§ 478\*)—CONCLUSIONS OF WITNESS—INTOXICATION.

Where, in an action by a passenger against a carrier for injuries, defendant has introduced evidence that plaintiff had taken one or more drinks during the evening of the accident, it was not error to permit plaintiff to testify that he was not under the influence of liquor at the time of the injury, and defendant's contention that plaintiff's testimony should have been confined to the quantity of liquor drank was not well taken.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2244; Dec. Dig. § 478.\*]

## 3. TRIAL (§ 260\*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

A party cannot complain of the refusal of the court to give a requested instruction where the subject-matter of such instruction is included in the charge as given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; Ben M. Smith, Judge.

Action by Joseph P. Ward against the Chicago City Railway Company. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant appeals. Affirmed.

Watson J. Ferry (John R. Harrington, of counsel), for appellant. James C. McShane, for appellee.

VICKERS, J. Joseph P. Ward brought an action against the Chicago City Railway Company to recover damages for an injury, which necessitated the amputation of his left leg below the knee. He recovered a judgment in the circuit court of Cook county for \$4,000, which judgment has been affirmed by the Appellate Court for the First District. The Chicago City Railway Company has prosecuted an appeal to this court, and insists here upon a reversal for the reasons (1) the court refused to direct the verdict; (2) the court erred in admitting certain evidence; and (3) in refusing certain instructions asked on behalf of defendant below. The declaration consists of three counts. In the first count it is charged that appellant recklessly and negligently started its car suddenly forward without warning to the appellee, by means whereof appellee was thrown from the car to the ground and under the wheels of said car. The second count charges that appellant had negligently permitted snow and ice to accumulate and remain near its track, so that appellee, in attempting with due care to alight from the car, slipped upon the frozen ice and snow under the car, and was injured. The third count is not relied on to support the judgment and need not be noticed.

The accident in question occurred about 10:30 on the night of the 18th of February, 1905, at Thirty-First and La Salle streets, in the city of Chicago. Appellee was a passenger on appellant's car going east on Thirty-

First street. He stood in the body of the car near the door until the car passed Wentworth avenue. La Salle street, where he intended to get off, is the next street east of Wentworth. When the car was about midway between the two streets, he went out on the front platform, and told the motorman he wanted to get off at La Salle street. When the car reached the west side of La Salle street, it began to slacken its speed, and, when the front end of the car was near the east sidewalk, appellee stepped down on the step, supporting himself by holding to the handrails on either side of him. He was facing ahead, intending to leave the car when it stopped. When the front end of the car was a few feet east of the east line of the sidewalk on La Salle street, the car was moving about as fast as an ordinary walk. Appellee then raised his right foot, and was in the act of stepping off the car, when the car made a sudden lurch or jerk forward, which threw appellee off the car, and his foot slipped under the car and was caught under the wheels, and crushed so that it became necessary to amputate it. The evidence shows that there had been frequent snows during the month of February, prior to the accident, and that the weather had been below freezing continuously from the first day of February until the night of the accident. It also appears that appellant had by the use of snowplows plowed the snow off of its tracks, and left a sloping ridge of snow and ice just south of the south rail. This ridge sloped toward the rail, and the evidence tends to show that it was practically like ice.

Appellant's contention is in support of the first assignment of error that there is no evidence tending to prove that the sudden starting of the car which caused appellee to fall was the result of any negligent act of appellant. Appellee testifies that it was the sudden jerk of the car that threw him off. Besdick, a witness for appellee, testifies that he was on the car at the time of the accident, and that the car slowed down at La Salle street and then gave a jerk as if to go on forward. Felix Harrison testifies that he was on the northwest corner, on the night of the accident, of La Salle street and Thirty-First street; that he saw the car coming up and saw it slow up to a stop and make a quick start, and immediately he heard some one holler; that he heard the hollering just as the car started up. Eddie Myers was a passenger on the car, and he testifies that after the car came near a standstill it gave a sudden jerk. He also testifies that the motorman pulled the lever, and that it was at that time that Mr. Ward disappeared. He says also that appellee was on the steps when the lever was thrown. This evidence warranted the court in submitting the case to the jury under the first count.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

There was no error in denying appellant's motion for a directed verdict.

Appellant next contends that the court erred in permitting appellee, over its objection, to testify that he was not at the time of the accident in any degree under the influence of liquor. Evidence had been introduced showing that appellee had taken one or more drinks during the evening of the accident. The purpose of this evidence was presumably to show that appellee was intoxicated. Appellant contends that it was only proper for appellee to state the quantity of liquor drank, and let the jury determine whether he was drunk or sober. We think this is not the only evidence receivable on the question of intoxication. We think it was competent for appellee to testify that he was not under the influence of intoxicating liquors at the time of the accident. 17 Cyc. 185; Dimick v. Downs, 82 Ill. 570.

It is next insisted by appellant that the court erred in refusing to give instruction No. 41 asked on behalf of appellant. That instruction told the jury that appellee, under the circumstances stated in the instruction, assumed the risk of injury from the condition of the street. There was no error in refusing this instruction, since all that appellant was entitled to on that subject was embodied in instructions Nos. 13 and 14, which were given at its request by the court. Instruction 13, which was given told the jury that the plaintiff could not recover on the ground solely and only of the condition of the street, with respect to snow and ice, at the time and place in question. The court was not required to repeat the same matter that was stated in instructions given. The court did not commit any reversible error in refusing the other two instructions complained of.

No other reasons are urged why this judgment should be reversed. It is accordingly affirmed.

Judgment affirmed.

(237 Ill. 637)

#### AMBLER v. GLOS et al.

(Supreme Court of Illinois. Dec. 15, 1908.  
Rehearing Denied Feb. 5, 1909.)

#### 1. MUNICIPAL CORPORATIONS (§ 581\*)—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS—REDEMPTION—TENDER—"PURCHASER."

A tender of payment of a certificate of sale of property under a municipal special assessment to the "purchaser" under assignment of the certificate is insufficient, under Hurd's Rev. St. 1905, c. 120, § 215, providing that the receipt of the redemption money by any "purchaser" shall operate as a release of all claims to the real estate purchased at the tax sale, since the word "purchaser" in case of assignment of the certificate must be regarded as meaning "assignee."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1296; Dec. Dig. § 581.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 562-564; vol. 8, p. 7584.]

#### 2. MUNICIPAL CORPORATIONS (§ 581\*) — ASSESSMENTS FOR IMPROVEMENTS — SALE OF PROPERTY — REDEMPTION — PERSONS ENTITLED TO RECEIVE PAYMENT.

A tender of payment of a certificate of sale of property under a municipal special assessment assigned by the purchaser to his nephew, an employe, before the tender, made to the assignor who disclaimed title, in the absence of both the assignee and certificate, is insufficient, though the assignor accepted the tender.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1296; Dec. Dig. § 581.\*]

Appeal from Circuit Court, Cook County; Lockwood Honore, Judge.

Application by Mittie C. Ambler against Jacob Glos, August A. Timke, and others to register title to land. From the decree rendered, August A. Timke appeals. Reversed and remanded, with directions.

On December 26, 1906, Mittie C. Ambler, the appellee, made application in the circuit court of Cook county to register the title to the south half of lot 10, in block 25, in Carpenter's addition to the city of Chicago. The applicant averred that she was the owner in fee simple of the land, and that she was in possession thereof by her tenants. The application set out the names and addresses of a number of persons who had or claimed to have some interest in the land, among whom were Jacob Glos and August A. Timke. Both entered their appearance. Glos filed a demurrer to the petition, which was overruled. Timke answered, setting up a number of defenses. A replication was filed, and on February 9, 1907, the application was referred to Charles A. Farson, one of the examiners of titles for Cook county, to examine the applicant's title and report the substance of the proof taken by him with his conclusions. Upon a hearing the examiner reported, among other things, that the petitioner was the owner in fee simple of the premises in question at the time of the filing of her petition; that there were no liens or incumbrances upon said land; that said real estate was on October 6, 1903, sold by the treasurer of Cook county to Jacob Glos for a delinquent special assessment levied against said real estate by the city of Chicago, and that the total amount of said sale, including interest and costs to the date of sale, was \$43.50; that on December 1, 1905, said certificate was sold and assigned to August A. Timke, and that said Timke was at the date of the filing of the application herein the owner of said certificate; that on November 29, 1905, Jacob Glos notified the petitioner and Alice M. Dickson that he was the owner of the tax sale certificate, and requested an immediate settlement of the same; that one of the solicitors for the applicant met Glos on the street and spoke to him in reference to said certificate of sale, and asked him the price at which the same could be taken up,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and that Glos requested him to write him in regard to the matter, which he did on or about December 2, 1905; that, in reply to his inquiry, Glos wrote him, "Can get you 1903 sale certificate for \$500, provided same is taken up within a reasonable time"; that on December 26th or 27th the solicitor went to the office of Glos and tendered to him in writing, and paid to him, the sum of \$55, and that Glos disclaimed ownership of the certificate, but said he would take the money; that said tender was in all respects a formal and legal tender and payment to said Glos and to said Timke, who was an employé in Glos' office, of the full amount then due on said certificate of sale; and that the same operated to pay and satisfy the lien of the certificate and to satisfy the claim of Timke, the holder of the certificate. The examiner recommended that the appellee be awarded registration, that the tax sale certificate held by Timke be declared null and void, and that Timke be directed to surrender the same to the clerk of the court for cancellation, and that petitioner recover her costs from Timke. Objections were filed by Timke, and, when overruled, were renewed as exceptions in the circuit court, where they were not sustained. A decree was entered in accordance with the recommendations above mentioned. From that decree, Timke has prosecuted this appeal.

John R. O'Connor, for appellant. Bulkley, Gray & More, for appellee.

SCOTT, J. (after stating the facts as above). The first question presented has heretofore been determined adversely to the contention of appellant by this court in the case of *Glos v. Holberg*, 220 Ill. 167, 77 N. E. 80.

It is next said by Timke that the decree is erroneous for the reason that it did not provide that he should be reimbursed upon the cancellation of the certificate of purchase held by him. In answer to this the appellee contends, first, that a proper tender was made to and accepted by Jacob Glos, and that this was, in fact, a payment to Timke. The examiner reported, and the court by its decree determined, that the certificate of sale was sold and assigned to Timke on December 1, 1905. This finding of fact has not been challenged by the appellee by objection, exception, or assignment of cross-error, and it must therefore be regarded as not open to question. The tender and payment was made to Glos in his office in Chicago on December 26 or 27, 1905. At that time he disclaimed ownership of the certificate, but said he would accept the money, and it was paid to him. At that time the certificate was

not in Glos' possession nor in his office. Timke is a nephew of Glos, and was in his employ at the time of the tender, but was not present when the money was tendered and paid to Glos, and there is no evidence whatever to indicate that Glos was authorized to receive the money for Timke, or that the payment to Glos was a payment to Timke, or that the money paid to Glos was ever turned over to Timke. If there was any such evidence, however slight, the close and intimate relations of the two men would be a circumstance to give that evidence added weight, but the existence of those relations alone is not sufficient to show that this payment to Glos was a payment to Timke or that Timke ever received the money.

It is then contended by appellee that a payment to Glos, who was the original purchaser, was a good redemption, although he had sold and assigned the certificate to Timke, inasmuch as the assignment of the certificate was not made a matter of record. Reliance is placed upon that portion of section 215, c. 120, Hurd's Rev. St. 1905, which provides that the receipt of the redemption money by any purchaser shall operate as a release of all claim to the real estate purchased at the tax sale. Section 207 of that chapter provides that the certificate of purchase shall be assignable by indorsement, and that the assignment thereof shall vest in the assignee or his legal representatives all the right and title of the original purchaser. In a case where the original purchaser has sold and assigned the certificate, and the party desiring to redeem knows that the original purchaser no longer owns the certificate, the word "purchaser," as used in section 215, *supra*, must be regarded as meaning the "assignee." If Glos, at the time of the tender and payment to him, had not disclaimed ownership of the certificate, a different question would be presented. Under the circumstances shown by this record, the tender and payment was not made to the right person, and the decree is erroneous because it does not provide for Timke's reimbursement.

By his original brief and argument, appellant urges certain assignments of error questioning the action of the court in disposing of the costs. By his reply brief he withdraws those assignments.

The decree of the circuit court will be reversed and the cause will be remanded to that court, with directions to enter a decree in substance as that appealed from, except that it shall provide for the cancellation of the certificate only upon Timke's reimbursement precisely as though no tender or payment had been made to Glos.

Reversed and remanded, with directions.

(194 N. Y. 172)

**LAMPHEAR v. NEW YORK CENT. & H. R. R. CO.**

(Court of Appeals of New York. Jan. 26, 1900.)

**1. RAILROADS (§ 302\*)—CROSSINGS—INJURIES—CARE REQUIRED.**

Where a path across a railroad right of way not at a public place, street, or highway had been constantly used by the public for many years, and the railroad company at one time established turnstiles there, a person killed while crossing at that point was not a trespasser, but a person as to whom the railroad company was bound to exercise reasonable care.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 957; Dec. Dig. § 302.\*]

**2. RAILROADS (§ 345\*)—DEATH AT CROSSING—WARNINGS.**

Where, in an action for death while decedent was traversing a path over a railroad's right of way, defendant's counsel conceded that the path had been in constant public use for many years, such concession eliminated the question whether the evidence justified a finding of a public passageway and left only the question of the use by defendant's servants of reasonable care in giving suitable warning for the determination of the jury.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 845.\*]

**3. RAILROADS (§ 351\*)—DEATH AT CROSSING—ASSUMED RISK.**

Where decedent was killed while crossing a railroad track on a path used for many years by the public for that purpose, the court properly refused to charge that decedent had no license to walk on the tracks, and took the risks incident thereto, and that no duty rested on defendant except not to intentionally or wantonly injure him.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1197; Dec. Dig. § 351.\*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Nellie H. Lamphear, as administratrix, etc., against the New York Central & Hudson River Railroad Company. Judgment for plaintiff, affirmed by the Appellate Division (125 App. Div. 900, 109 N. Y. Supp. 1185), and defendant appeals. Affirmed.

L. B. Williams, for appellant. James E. Newell, for respondent.

GRAY, J. The deceased was struck by a train and killed, while attempting to cross the defendant's railroad tracks at a point where there was neither street nor highway, but only a footpath leading from one side to the other, through openings in the railroad fences. It was sought, upon the trial, to bring the case within the rule laid down in *Keller v. Erie R. R. Co.*, 183 N. Y. 67, 75 N. E. 965, where it was decided that whoever walks upon, or along, the tracks of a railroad, except when necessary to cross the same upon some street, highway, or public place, violates the law and is like a trespasser, and that the company's servants are under no other obligation than to refrain from wilfully or recklessly injuring him. In that case, section 53 of the Railroad Law (chapter 676, p. 1394, Laws 1892) was held

to be operative and to prohibit the use of a railroad track as a public way. It appeared that the public had been accustomed to make use of one of two intersecting railroad tracks, by walking upon it in order to reach and to cross the other, and in that way to make a short cut between streets. Such a practice, it was held, however long continued, could not create any right of user, by license, or by sufferance.

In the present case, there was evidence of the constant public use of the path for many years, and the defendant's counsel conceded the fact. The record, also, shows that the defendant had, at some time, put up turnstiles. The trial judge instructed the jurors that "it seems to be conceded that for a long series of years the public, with the acquiescence and with the permission and consent of the railroad company, had been accustomed to cross the railroad tracks at the point where this accident happened." To this no exception was taken, and when the instruction followed that the defendant was bound to use reasonable care to protect the persons from injury, whom it so permitted to cross at that point, the court was within the rule in such cases. *Barry v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 289, 44 Am. Rep. 377; *Byrne v. N. Y. C. & H. R. R. Co.*, 104 N. Y. 362, 10 N. E. 539, 58 Am. Rep. 512. In those cases there was, as in the present case, a conceded right of way, or public passageway. If the nature of this present path as a public passageway had been in dispute, a different question might be presented, and the necessity of proper instructions to the jurors would be apparent. The question of whether the evidence justified a finding of a public passageway and of its submission to the jury was eliminated in this case, and only that of the use by the defendant's servants of reasonable care in giving suitable warning was left for determination. Requests therefore to charge the jury that the deceased had no license to walk upon the tracks, that he took the risks incident thereto and of the dangers to which he might be exposed, and that no other duty rested upon the defendant than not to intentionally or wantonly injure him, were properly refused.

The trial judge left it to the jury to determine whether, on the conceded facts and the evidence upon the subject of showing a light, or of blowing a whistle, or of ringing a bell, the defendant had exercised reasonable care. We think that there was no error in the submission of the case.

No other question demands consideration, and the judgment should be affirmed.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. HISCOCK, J., not voting.

Judgment affirmed, with costs.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(194 N. Y. 165)

**FIRESTONE TIRE & RUBBER CO. v.  
AGNEW et al.**

(Court of Appeals of New York. Jan. 20, 1906.)

**CORPORATIONS (§ 252\*)—STOCKHOLDERS' LIABILITY—JUDGMENT AGAINST CORPORATION—EXCUSES—BANKRUPTCY.**

Under Laws 1892, p. 1841, c. 688, §§ 54, 55 (Laws 1901, p. 971, c. 354, § 54), providing that no action shall be brought against a stockholder to enforce his liability unless a judgment is first obtained against the corporation, and execution returned unsatisfied, in whole or in part, and the amount of the execution unpaid shall be the amount recoverable against the stockholder, and limiting the time to sue to two years, a stockholder's liability will be enforced, though no judgment is obtained against the corporation, as provided in the act, where the corporation within the time limited has become a bankrupt at the instance of other creditors, and the claim sought to be enforced has been allowed, but the assets are insufficient to pay the whole debt, and the corporation duly discharged, since, where the performance of a condition becomes impossible by the operation and effect of a statute, the performance is excused, and the rights of the parties will be preserved.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1020; Dec. Dig. § 252.\*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Firestone Tire & Rubber Company, in behalf of itself and other creditors of the Vehicle Equipment Company, against George B. Agnew and others to enforce stockholders' liability. From an order of the Appellate Division (112 N. Y. Supp. 907), sustaining a demurrer to the complaint, plaintiff, by permission, appeals. Reversed.

William M. Bennett, for appellant. Franklin Pierce, for respondents.

VANN, J. By this action the plaintiff, in behalf of itself and the other creditors of a bankrupt corporation known as the "Vehicle Equipment Company," sought to recover from the defendants, as stockholders thereof, pursuant to the provisions of section 54 of the stock corporation law (Laws 1892, p. 1841, c. 688), the balance unpaid on their stock subscriptions, to the extent necessary to satisfy the unpaid indebtedness of said corporation. Section 54 provides, among other things, that: "Every holder of capital stock not fully paid, in any stock corporation, shall be personally liable to its creditors, to an amount equal to the amount unpaid on the stock held by him for debts of the corporation contracted while such stock was held by him." Laws 1892, p. 1841, c. 688; Laws 1901, p. 971, c. 354, § 54. The question raised by the demurrer interposed to the complaint involves the failure of the plaintiff to allege that it had exhausted its remedy against the corporation, as required by section 55 of said act, which is as follows: "No action shall be brought against a stockholder for any debt of the corporation until judgment

therefor has been recovered against the corporation, and an execution thereon has been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable, with costs against the stockholder. No stockholder shall be personally liable for any debt of the corporation not payable within two years from the time it is contracted, nor unless an action for its collection shall be brought against the corporation within two years after the debt becomes due; and no action shall be brought against a stockholder after he shall have ceased to be a stockholder, for any debt of the corporation, unless brought within two years from the time he shall have ceased to be a stockholder." Laws 1892, p. 1841, c. 688, § 55. The excuse for noncompliance with this section, as set forth in the complaint, is, in substance, that within two years after the debt of the plaintiff was contracted and became due, the Vehicle Equipment Company was adjudged a bankrupt upon the petition of some of its creditors, not including the plaintiff, and effected a composition with all its creditors pursuant to the provisions of the bankruptcy law, under the direction of the federal court having jurisdiction in the premises, which confirmed the composition, distributed the assets of the company, and discharged it from its debts. Bankruptcy Law July 1, 1898, c. 541, §§ 12, 14, 30 Stat. 549, 550 (U. S. Comp. St. 1901, pp. 3428, 3427). The plaintiff proved its debt in the usual way, and it was allowed by the bankruptcy court at the sum of \$19,653.69. All the property of the bankrupt when converted into money was not enough to pay the dividend of about 8 per cent. required by the terms of the composition, and the balance came from outside sources. The plaintiff applied the proceeds of its part of the dividend upon its claim, and now seeks to recover the remainder from the defendant stockholders. The debt was provable under the bankruptcy act, and the bankrupt, by its discharge, was released from liability therefor. *Id.* § 1, subd. 12. The bankruptcy of a corporation does not release its stockholders "from any liability under the laws of a state or territory of the United States." *Id.* § 4, subd. b.

We think that the complaint sets forth a sufficient excuse for the failure to comply with section 55 of the stock corporation law. The object of that section is to protect stockholders from an action, by the creditors of the corporation to recover the balance unpaid upon their claims, until they have been liquidated by judgment, and so much thereof collected from the corporation as can be realized by execution. These purposes were effected by the proceedings in bankruptcy, but not in the manner provided by our statute. The stockholders, however, had the benefit of the substance, although the form was wanting. The claim of the plaintiff was es-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tablished by the decree of the federal court in bankruptcy, and is no longer open to contest. That decree, made by a competent court having jurisdiction of the subject and of all the parties to this action, was a final determination of all the matters involved, including the existence and amount of the claims of such creditors as proved their debts therein and had them allowed. The subject thus became *res adjudicata*. Moreover, all the property of the bankrupt was converted into money, and applied upon the claims of the creditors. Thus the stockholders are protected by lawful proceedings in a court of paramount jurisdiction in the premises as fully as they could have been by full compliance with our state law. In protecting stockholders from what might prove an unnecessary inconvenience the Legislature did not intend to release them from the liability imposed by the same act which affords the protection, provided the requirements cannot be complied with, owing to the intervention of paramount power. When the recovery of judgment and return of execution unsatisfied are rendered impossible by a law of the United States, and the action of its courts thereunder, compliance with those requirements does not come within the meaning of the statute. As was said by Judge Allen in *Shellington v. Howland*, 53 N. Y. 371, 374: "When the performance of a condition becomes impossible by the operation and effect of a statute—that is, becomes illegal—the performance is excused, and the rights of the parties will be preserved." Accordingly the court held that compliance with the requirements now under consideration was excused by the action of a bankruptcy court, which would have rendered such compliance illegal. So it was decided in a later case that lawful dissolution of the corporation dispensed with the condition, because performance thereof was impossible. *Hardman v. Sage*, 124 N. Y. 25, 33, 26 N. E. 354.

In *United Glass Co. v. Vary*, 152 N. Y. 121, 127, 46 N. E. 814, Chief Judge Andrews, after a careful review of the authorities, declared that: "The decisions thus far have dispensed with the condition precedent (1) where the corporation has been dissolved by judicial decree; (2) where, by final judgment in an action for sequestration, a perpetual injunction has been issued restraining suits by creditors; and (3) where, by statute, such suits are prohibited. In these cases there intervenes an impossibility, within the meaning of the law, which excuses the performance of the condition precedent. We think the courts should not extend the exception beyond its present limits, unless, in possibly a new case, clearly within the principle of the decisions already made." The case before us comes within the principle of these decisions, because, owing to the discharge of the bankrupt, it is no longer liable

for any debt contracted before the petition in bankruptcy was filed. A corporation may now be discharged from payment of its debts, although this was not permitted by the bankruptcy act of March 2, 1867 (14 Stat. 517, c. 176). Whether a discharge effects an extinguishment or merely a release, the result is the same so far as the question under consideration is concerned, because a debt that is released has no practical existence, and is but a moral obligation at the most. While it may support a promise, it cannot support an action. When the debt is gone, the right to recover judgment thereon is gone. Any judgment resting on a debt covered by the discharge must be canceled by the court in which it was rendered, upon application made pursuant to section 1268 of the Code of Civil Procedure.

Even if, by default of the bankrupt, the action which had been commenced against it could have been prosecuted to judgment, still no execution could have been lawfully issued thereon and returned unsatisfied, because it had been discharged from the debt, and all its property acquired before its discharge had been exhausted in the composition proceedings, and all acquired after its discharge belonged to it the same as if it was a new creation of law, and could not be seized by the sheriff to satisfy any of its old debts. If any property had been left after payment of the amount required to effect the composition, it would have belonged to the corporation the same as after-acquired assets, and would have been immune from the execution. As a discharge in bankruptcy excuses the creditor from commencing the primary action, so it excuses him from continuing it, because there is no foundation left for it. Moreover, if the sheriff found the bankrupt in possession of property, and attempted to take it, his action would at once be restrained upon application to the proper court. He could not therefore lawfully satisfy the execution, even if he found property, nor could he conscientiously return it unsatisfied. The recovery of judgment without issuing execution would be but partial compliance, and there is no use in going halfway upon a journey when one knows he cannot finish it. The Legislature did not intend, and the courts will not require, that useless and unwarranted action be taken, nor will speculation be indulged in as to what might have been done by default, when there was no right to do it, owing to the absolute release of the debt.

We think that the discharge in bankruptcy of a corporation is a sufficient excuse for noncompliance with section 55 of the stock corporation law. The order and interlocutory judgment should therefore be reversed, with costs in all courts, with leave to the defendants to withdraw demurrer and answer within 20 days, on payment of the costs, and

the question certified should be answered in the affirmative.

CULLEN, C. J., and EDWARD T. BARTLETT, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

Order reversed, etc.

(194 N. Y. 160)

**FINUCANE v. WARNER.**

(Court of Appeals of New York. Jan. 26, 1909.)

**1. PROCESS (§ 120\*)—EXEMPTION FROM SERVICE—NONRESIDENTS.**

A nonresident coming into this state for the sole purpose of being a witness is protected from the service of process while attending at court and while returning home, provided he returns with reasonable dispatch after the trial has ended, though, if he comes for the double purpose of attending court and attending to business having no connection with the trial, the privilege does not attach to him.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. § 150; Dec. Dig. § 120.\*]

**2. PROCESS (§ 158\*)—MOTION TO SET ASIDE—PRESUMPTIONS—BURDEN OF PROOF.**

On a motion to set aside the service of process on the ground that defendant was a nonresident who came into the state for the sole purpose of being a witness, the presumption was that the service was regular, and the burden was on defendant to establish the contrary.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. § 218; Dec. Dig. § 158.\*]

**3. APPEAL AND ERROR (§ 1024\*)—REVIEW—QUESTIONS OF FACT.**

The question whether defendant came into the state solely to be a witness was a question of fact, on which the opinion of the court below, on a motion to set aside the service of process, was conclusive.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4020; Dec. Dig. § 1024.\*]

Edward T. Bartlett, J., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Amella A. Finucane against Charles G. Warner. From an order of the Appellate Division (112 N. Y. Supp. 1129), affirming an order denying a motion to set aside the service of process on defendant (60 Misc. Rep. 336, 112 N. Y. Supp. 137) he appeals. Affirmed.

George R. Graves, for appellant. Ernest C. Olney, for respondent.

VANN, J. On the 13th of June, 1908, the defendant, formerly a resident of this state, but of late a resident of California, came here for the purpose of attending an Equity Term of the Supreme Court, which was to be held on the 22d of that month at Geneseo, in Livingston county. He alleges that his sole purpose was to be sworn as a witness in his own behalf, in an action to be then tried in which he was the defendant, and that he had no other business and came for no other reason. The trial of the action was commenced on the

22d, and ended on the 25th, of June, and between those dates, in the presence of his own counsel, the defendant was served with the summons in this action. He remained in this state until Sunday, July 12, 1908, when he left for California, where he has since remained. He moved to vacate said service as made in violation of his privilege as a witness, on an affidavit made by himself in this state on the 1st of July, 1908, although the notice of motion was not served until the night of July 11th. The motion, when heard on the 27th of July, was denied, and from the order of the Appellate Division affirming the order of the Special Term, two of the justices dissenting, this appeal was taken. In granting leave to appeal the Appellate Division certified the following questions: "(1) Was the defendant herein privileged and exempt from the service of summons at the time of said service? (2) Did the defendant by his acts waive his privilege and exemption from service of said summons?"

In opposition to said motion affidavits were presented, tending to show that the defendant had property in this state, and that while here, when not in attendance at court, he spent his time in transacting business connected therewith, and in visiting old friends and acquaintances; that on the 2d of July, 1908, he commenced an action in the Supreme Court to replevy certain personal property valued at the sum of \$2,000; that he swore to the complaint and an affidavit therein on the 1st of July, and furnished an undertaking executed by two sureties; that on July 8th, 9th, and 10th he moved said personal property from the house in which it had been kept, and stored it in several other places, hiring help for the purpose, and himself taking an active part in the removal; that he took away with him certain other chattels, and among them two family portraits; that after the motion papers were served, although search was made for him, he could not be found until Sunday morning; that he stated to one affiant before the trial that he did not come to this state simply to be a witness, but also for the purpose of adjusting all matters of difference between himself and the plaintiff, and if he could not effect a settlement, to take back to California with him certain heirlooms, keepsakes, and other personal property; that he stated to another affiant, shortly after his arrival in this state, that he came for the purpose of settling everything relating to his affairs. When a nonresident comes into this state for the sole purpose of being sworn as a witness, the privilege of exemption from the service of civil process is extended to him, not merely for his own convenience, but also to enable the courts to properly transact their business. As we have recently said: "It is not simply a personal privilege, but it is also the privilege of the court, and is deemed necessary for the main-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tenance of its authority and dignity, and in order to promote the due and efficient administration of justice." *Parker v. Marco*, 136 N. Y. 585, 589, 32 N. E. 989, 20 L. R. A. 45, 32 Am. St. Rep. 770. If he comes here for no purpose other than to be a witness, he is protected from the service of process upon him while coming into this jurisdiction, while remaining in attendance at court, and while returning home, provided he returns with reasonable dispatch after the trial has ended. If, however, he comes for the double purpose of attending court and attending to business having no connection with the trial, the privilege does not attach to him. While what he does and the time he spends here before the service is made is more important than the time spent and the acts done thereafter, still the latter are taken into account as reflecting upon his original intention.

We think the affidavits presented a question of fact as to the purpose for which the defendant came into this state. The presumption is that the service was regular, and the burden was upon the defendant to establish that it was not, his own affidavit, if uncontradicted, either specifically or by proof of conflicting circumstances, was sufficient for that purpose, but it was met by opposing affidavits, tending to show that he came here, not only to attend the trial, but also to transact private business. By the concurrent action of the courts below all the questions of fact have been settled in favor of the plaintiff beyond our power of review. The evidence warranted the conclusion, and we must presume from the record, of which the opinions form no part, that the Special Term found, and that the Appellate Division affirmed, the finding that the defendant did not come into this state solely for the purpose of becoming a witness. It follows that the order appealed from should be affirmed, with costs; that the first question certified should be answered in the negative, and that the second question should not be answered, since by the answer to the first it has become of no importance.

EDWARD T. BARTLETT, J. (dissenting). I dissent. The trial of the action, in which defendant came into the state of New York from California to testify as a witness, was commenced on the 22d, and ended on the 25th, of June, and between these dates he was served with a summons in this action. The fact that he remained in this state until July 12th following is not material as to the regularity of service. It was either a good or void service at the moment the summons was handed to the defendant. He had the right to assume that the question presented was the validity of the service at the time it was made. Possibly, under advice of counsel that the service was void, the defendant prolonged his tarry in the state of New York

to look after other business interests. The defendant had made a long trip across the continent in order to give his testimony in a pending litigation, and it was quite natural to avail himself of the opportunity to transact other business in this jurisdiction. He could not be legally served with process in this state until a reasonable time had elapsed in which to leave the jurisdiction. The plaintiff in this action, had she desired to make a valid service of the summons on the defendant, should have waited until the latter had been allowed a reasonable time to depart from the state. If the defendant had failed to avail himself of this opportunity afforded him by the law to depart the jurisdiction, he could then have been validly served with the summons. The plaintiff saw fit to attempt service of a summons at a time when it could not be legally made, and should take the consequences. The irregular service of a summons prematurely served cannot be rendered valid by the mere failure of defendant to leave the state within a reasonable time after the trial.

CULLEN, C. J., and WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur with VANN, J. EDWARD T. BARTLETT, J., reads dissenting opinion.

Order affirmed.

(194 N. Y. 556)

PEOPLE ex rel. COLLINS v. McLAUGHLIN, Warden of City Prison of Kings County.

(Court of Appeals of New York. Jan. 28, 1909.)

HABEAS CORPUS (§ 3\*)—WHEN PROPER REMEDY—OTHER REMEDY.

Except in rare cases where the facts before the court cannot be materially changed, qualified, or explained, the determination of important issues ought not to be made in a habeas corpus proceeding, as it is not calculated to thoroughly develop the facts as where a regular trial is had, witnesses examined, and cross-examined, alleged errors reviewed on appeal, and counsel present throughout, protecting the interest of both parties.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 8; Dec. Dig. § 8.\*]

Appeal from Supreme Court, Appellate Division, First Department.

Habeas corpus proceedings by the People of the State of New York, on relation of Melville Collins, against William McLaughlin, Warden of the City Prison of Kings County. From an order of the Appellate Division, First Department (113 N. Y. Supp. 188), affirming an order of the Special Term (113 N. Y. Supp. 306), respondent appeals. Appeal dismissed.

John F. Clarke, Dist. Atty. (Robert H. Elder, of counsel), for appellant. Joseph S. Auerbach, for respondent.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**PER OURIAM.** The relator is charged with violating section 351 of the Penal Code, as amended by chapter 507, p. 1873, Laws 1908, in that he did receive a certain sum of money, to wit, \$5, bet upon a certain horse race about to be run, and which was run on the Gravesend race track, in the borough of Brooklyn, N. Y. He was arrested, sued out a writ of habeas corpus, which was duly sustained by the Special Term and Appellate Division, and he is now at liberty.

The district attorney disclaims any responsibility for the preparation of the information upon which the warrant against the defendant was issued, and asserts that he is compelled to make this a test case relating to such important act against his protest. The defendant waived examination when brought before the magistrate, and there has been no oral examination of witnesses relating to the facts and circumstances involved. There is great doubt whether the facts in this case have been so carefully and thoroughly developed as to justify a determination of the important questions discussed by counsel in this proceeding. We are of the opinion that, except in rare cases where the facts before the court cannot be materially changed, qualified, or explained, the determination of important issues ought not to be made in a habeas corpus proceeding, as it is not calculated to thoroughly develop the facts as in the case when a regular trial is had, witnesses examined and cross-examined, alleged errors reviewed on appeal, and counsel present throughout, protecting the interests of both parties.

The Supreme Court of the United States has recently announced its adherence to this doctrine. In *Riggins v. United States*, 199 U. S. 547, 548, 26 Sup. Ct. 147, 148, 50 L. Ed. 303, Mr. Chief Justice Fuller states: "Ordinarily the writ will not be granted when there is a remedy by writ of error or appeal, yet in rare and exceptional cases it may be issued, although such remedy exists." See, also, *In re Lincoln*, 202 U. S. 178, 26 Sup. Ct. 602, 50 L. Ed. 984; *Urquhart v. Brown*, 205 U. S. 179, 27 Sup. Ct. 459, 51 L. Ed. 760.

This appeal must be dismissed, with costs.

**CULLEN, C. J., and EDWARD T. BARTLETT, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.**

Appeal dismissed.

(194 N. Y. 175)

**PEOPLE v. MORRISON et al.**

(Court of Appeals of New York. Jan. 26, 1909.)

**1. LARCENY (§ 55\*)—EVIDENCE—SUFFICIENCY.** Evidence held sufficient to justify a conviction of petit larceny.

[Ed. Note.—For other cases, see Larceny, Dec. Dig. § 55.\*]

**2. LARCENY (§ 55\*)—PROPERTY SUBJECT OF—CLAMS OR OYSTERS—"PERSONAL PROPERTY."**

When clams or oysters are reclaimed from nature and transplanted to a bed, which is so marked out by stakes as to show that they are in the possession of a private owner, they are "personal property," and may become the subject of larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 11; Dec. Dig. § 5.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5346-5358; vol. 8, p. 7763.]

**3. WITNESSES (§ 350\*)—IMPEACHMENT OF ACCUSED—CROSS-EXAMINATION.**

Accused cannot be asked on cross-examination whether he had been indicted; for an indictment is merely an accusation, and not evidence of guilt.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1146; Dec. Dig. § 350.\*]

**4. CRIMINAL LAW (§ 1043\*)—OBJECTIONS IN LOWER COURT—GENERAL OR SPECIAL.**

A general objection to improper cross-examination of accused will present a question for review where it is apparent that if the objection had been specific, it would have been well taken.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1043.\*]

**5. CRIMINAL LAW (§ 1169\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

Where a criminal case is tried before three justices, and incompetent prejudicial evidence is admitted, it cannot be determined what effect such evidence had on the minds of the justices. The admission of such evidence must be regarded as reversible error.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1169.\*]

Appeal from Supreme Court, Appellate Division, Second Department.

John Morrison and another were convicted of petit larceny, and they appealed to the Appellate Division. The judgment was affirmed (124 App. Div. 10, 108 N. Y. Supp. 262), and they appeal. Reversed.

Appeal from a judgment of the Appellate Division of the Supreme Court affirming a judgment rendered by the Court of Special Sessions in the borough of Brooklyn, convicting the defendants of the crime of petit larceny. The charge against the defendants was that "on the eleventh day of March, 1903, at the borough of Brooklyn, of the city of New York, in the county of Kings, [they] did willfully, knowingly, and unlawfully steal, take and carry away five bushels of hard clams and one-half bushel of oysters, of the total value of ten dollars, of the goods, chattels and personal property of H. W. Schmelke and Company, against the form of the statute in such case made and provided." The issue joined by the plea of not guilty was tried before three justices of said court, and resulted in the conviction of the defendants, with one dissenting vote. Thereupon the defendant Francisco was fined \$100 or 50 days in jail, and the defendant Morrison \$50 or 25 days in jail. Upon appeal taken by both defendants to the Appellate Division, the judgment of conviction was affirmed, and thereupon they appealed to this court.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Hector McG. Curren and Martin T. Mantton, for appellants. John F. Clarke, Dist. Atty. (Peter B. Smith, of counsel), for the People.

VANN, J. (after stating the facts as above). Upon the trial evidence was given tending to show that the firm of H. W. Schmelke & Co. for 20 years had been in the possession of a plat of land 200 feet long and 50 feet wide under the waters of Jamaica Bay. They had cleaned the ground "entirely up," and then transplanted upon it clams and oysters, which they had previously procured from other waters and planted on another plat belonging to them. The plat in question was staked out and marked according to custom, and the stakes replaced when shifted by ice or otherwise. There was no natural growth of clams upon it, although there was in other parts of the bay. Three days before the defendants are alleged to have taken the shellfish now under consideration, a member of said firm saw them taking clams from his plat, and, when he told them to stop, they promised they would. Three days later he found them digging clams and oysters from the same bed, and again told them to stop, but they said they would dig clams anywhere. They took away five bushels of hard clams and a half bushel of oysters, worth about \$8. They did it openly and in the daytime, claiming they had a right to, but the good faith of the claim involved a question of fact.

The evidence for the prosecution was sufficient, if believed, to justify the conviction of the defendants. When clams or oysters are reclaimed from nature and transplanted to a bed where none grew naturally, and the bed is so marked out by stakes as to show that they are in the possession of a private owner, they are personal property and may become the subject of larceny. Although in the nature of *ferre nature*, to which a qualified title may be acquired by possession, when reclaimed and transplanted, they need not be confined, for, as they cannot move about, they cannot get away, even when placed in the water, as they must be in order to live. They and their produce thus cease to be common property and belong exclusively to the one who transplanted them, and whoever takes them from the plat without his permission is a trespasser, and it may be a thief. *Fleet v. Hegeman*, 14 Wend. 42; *Decker v. Fisher*, 4 Barb. 592; *McCarty v. Holman*, 22 Hun, 53; *Sutter v. Van Derveer*, 47 Hun, 306; *Lowndes v. Dickerson*, 84 Barb. 586; *Post v. Kreisler*, 103 N. Y. 110, 8 N. E. 365; *Vroom v. Tilly*, 184 N. Y. 168, 171, 77 N. E. 24. It is a misdemeanor to

take and carry away oysters so planted. Laws 1868, p. 1635, c. 753.

We think, however, that the judgment of conviction cannot stand, because an error was committed upon the trial which requires a reversal. There was a strong conflict in the evidence, and several witnesses for the defendant, including the defendant Morrison, testified that the plat from which they took the clams and oysters was not staked out, and that there were no stakes surrounding it. Whether the plat was staked was a vital fact in the case, and hence the credibility of the witnesses who testified upon that issue was important. After the defendant Morrison had testified, that there were no stakes or boundary lines in the locality where he took the clams and oysters, he was asked during the cross-examination by one of the justices who presided at the trial certain questions, which, with the answers thereto given under objection and exception, are set forth in the record, as follows: "Q. Are you under indictment for taking oysters and clams? A. Not for oysters. Q. Well, for clams? A. For clams. Q. Are you really under indictment for taking clams or oysters from this bed? A. I guess it is on the same question, but I never took an oyster in my life. Q. Did you or did you not say you are under indictment—do you know whether there is or is not an indictment pending against you, charging you with taking clams? A. Yes, sir; from this very bed." We have recently held, and the law was well settled before, that "the defendant in an action either civil or criminal cannot be asked on cross-examination whether he has been indicted, for an indictment is merely an accusation and no evidence of guilt." *People v. Cascone*, 185 N. Y. 317, 384; 78 N. E. 287. See, also, *Van Bokkelen v. Berdell*, 130 N. Y. 141, 145, 29 N. E. 254; *People v. Crapo*, 76 N. Y. 288, 290, 32 Am. Rep. 802.

While the objection was general, still it is clear that, if it had been specific, it could not have been obviated, and hence we think the exception raised reversible error. The questions were asked by the court itself, and we cannot say what effect the answers had upon the minds of the justices who, but for this evidence, might all have believed, as one of them apparently did believe, the testimony of the defendant Morrison.

The judgment of conviction should be reversed and a new trial ordered.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, and HISCOCK, JJ., concur.

Judgment of conviction reversed.

## MEMORANDUM DECISIONS.

**ALDRICH, Appellant, v. ALDRICH, Respondent.** (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (117 App. Div. 919, 102 N. Y. Supp. 1126), entered May 28, 1907, affirming a judgment in favor of defendant entered upon the report of a referee in an action for divorce. Nelson J. Palmer, for appellant. Lester F. Stearns, for respondent.

**PER CURIAM.** Judgment affirmed, with costs.

**CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.**

**BEARDMORE, Appellant, v. BARRY, Respondent.** (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (118 App. Div. 834, 103 N. Y. Supp. 353), entered March 26, 1907, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term in an action to compel the specific performance of a contract to convey real estate. Saul E. Rogers and Gustavus A. Rogers, for appellant. Hugo Hirsch, for respondent.

**PER CURIAM.** Judgment affirmed, with costs.

**CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.**

**BERNSTEIN, Respondent, v. FLEET, Appellant.** (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (118 App. Div. 910, 103 N. Y. Supp. 1116), entered March 25, 1907, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for the alleged wrongful act of the defendant in conveying certain stocks held by him as broker. James C. Lenney, for appellant. A. S. Gilbert and Julius M. Mayer, for respondent.

**PER CURIAM.** Judgment affirmed, with costs.

**CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.**

**BETZ, Respondent, v. CITY OF NEW YORK, Appellant.** (Court of Appeals of New York. Oct. 23, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (119 App. Div. 91, 103 N. Y. Supp. 886), entered May 8, 1907, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury in an action to recover money erroneously paid for taxes. Francis K. Pendleton, Corp. Counsel (David Rumsey and Curtis A. Peters, of counsel), for appellant. Michael C. Gross, for respondent.

**PER CURIAM.** Judgment affirmed, with costs.

**CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.**

**BOCCIERI, Respondent, v. NEW YORK CONTRACTING & TRUCKING CO., Appellant.** (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (121 App. Div. 898, 105 N. Y. Supp. 1108), entered August 5, 1907, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for an alleged breach of contract. John Conway Toole and James A. Deering, for appellant. Andrew S. Fraser, for respondent.

**PER CURIAM.** Judgment affirmed, with costs.

**CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.**

**BUSHE et al. v. WRIGHT et al. (two cases). FISKE et al. v. SAME.** (Court of Appeals of New York. Nov. 17, 1908.) Two motions to dismiss the appeal in each of the above-entitled actions from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (118 App. Div. 820, 103 N. Y. Supp. 410; 118 App. Div. 368, 103 N. Y. Supp. 403), entered April 29, 1907, affirming a judgment in favor of plaintiffs entered upon the report of a referee. The motions were made upon the ground that the appellant had no standing in the cases which would entitle him to appeal therein. A. L. Humes, for the motions. O. J. Wells, opposed.

**PER CURIAM.** Motions denied, with \$10 costs in each motion.

**BUTLER, Respondent, v. BROOKLYN CITIZEN, Appellant.** (Court of Appeals of New York. Oct. 6, 1908.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (124 App. Div. 903, 107 N. Y. Supp. 1122), entered March 3, 1908, modifying, and affirming as modified, a judgment in favor of plaintiff entered upon a verdict and affirming an order denying a motion for a new trial in an action for libel. The motion was made upon the ground that the judgment was not appealable to the Court of Appeals; the decision of the Appellate Division having been unanimous and permission to appeal not having been granted. George B. Hargrave, for the motion. Henry E. Heistad, opposed.

**PER CURIAM.** Motion granted, and appeal dismissed, with costs and \$10 costs of motion.

**CHAPPELL, Appellant, v. CHAPPELL, Respondent.** (Court of Appeals of New York. Nov. 24, 1908.) Appeal by permission from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (125 App. Div. 127, 109 N. Y. Supp. 648; 126 App. Div. 925, 111 N. Y. Supp. 1114), entered March 3, 1908, which affirmed an order of Special Term granting a motion for a change of venue in an action for a partnership accounting. The following question was certified: "Under the facts and circumstances in this case, should the place of trial be changed from Niagara county

to Schenectady county?" G. D. Judson, for appellant. George F. Thompson, for respondent.

PER CURIAM. Order affirmed, with costs, and question certified answered in the affirmative.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

CLARKE, Respondent, v. LUYTIES, Appellant. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (120 App. Div. 880, 106 N. Y. Supp. 1111), entered July 29, 1907, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover a balance alleged to be due on a written contract of guaranty. Edward J. McGanney, for appellant. Nathaniel Cohen, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

In re CLEMENT, State Excise Com'r. (Court of Appeals of New York. Oct. 20, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (127 App. Div. 915, 111 N. Y. Supp. 1114), entered June 29, 1908, which affirmed an order of Special Term denying a petition for the revocation of a liquor tax certificate. Royal R. Scott and Russell Headley, for appellant. Henry C. Griffin, for respondent.

PER CURIAM. Order affirmed, with costs, on the authority of In re Peck, 167 N. Y. 391, 60 N. E. 775, 53 L. R. A. 888.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur.

COLUMBUS TRUST CO., Respondent, v. MOSHER, Appellant. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (113 App. Div. 912, 100 N. Y. Supp. 1111), entered June 23, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury in an action to recover on a contract of guaranty. Robert H. Barnett, for appellant. Walter C. Anthony, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

DOLAN et al., Respondents, v. CUMMINGS, Appellant. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (116 App. Div. 787, 102 N. Y. Supp. 91), entered January 22, 1907, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term in an action to set aside certain deeds of real property on the ground that they were induced by fraud. Martin P. Lynch and George Tompkins, for appellant. George C. Case and Wilnot Y. Hallock, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

DOLOBACS, Respondent, v. RITER-CONLEY MFG. CO., Appellant. (Court of Appeals of New York. Oct. 23, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (120 App. Div. 883, 106 N. Y. Supp. 1114), entered June 24, 1907, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence. Rutherford B. Meyer and Eugene Lamb Richards, Jr., for appellant. Thomas F. Curran and John F. Brennan, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

DUNHAM, Appellant, v. CITY TRUST CO. OF NEW YORK, Respondent. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (115 App. Div. 584, 101 N. Y. Supp. 87), entered November 16, 1906, sustaining defendant's exceptions ordered to be heard in the first instance by the Appellate Division and granting a new trial in an action to recover damages alleged to have been caused plaintiff through defendant's delay in transferring certain shares of stock. Peter B. Olney, for appellant. Albert B. Boardman, for respondent.

PER CURIAM. Order affirmed, and judgment absolute ordered against appellant on the stipulation, with costs in all courts.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

In re DUNLOP. (Court of Appeals of New York. Oct. 20, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (128 App. Div. 914, 110 N. Y. Supp. 1127), entered May 23, 1908, which dismissed an appeal from a final order of Special Term appointing committees of the person and estate of the incompetent herein. O. J. Wells, for appellant. Gilbert Ray Hawes, for respondent Hawes. Harold Swain and Hamilton C. Rickaby, for respondents Stern and others.

PER CURIAM. Appeal dismissed, without costs, on the ground that the appellant has no standing to appeal.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur.

DURKEE, Respondent, v. RETSOF MINING CO., Appellant. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (116 App. Div. 921, 101 N. Y. Supp. 1119), entered December 12, 1906, affirming a judgment in favor of plaintiff entered upon the report of a referee in an action to recover for alleged damages to plaintiff's riparian rights. Edmonds Putney, for appellant. Erwin E. Shutt and J. H. Egan, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

**ELECTRIC FIREPROOFING CO.,** Respondent, v. **SMITH et al.,** Appellants. (Court of Appeals of New York. Nov. 17, 1908.) No opinion. Motion for reargument denied, with \$10 costs. See 192 N. Y. 585, 85 N. E. 1109.

**ELLIS,** Appellant, v. **BUFFALO, L. & R. BY. CO.,** Respondent. (Court of Appeals of New York. Oct. 13, 1908.) No opinion. Motion for reargument denied, with \$10 costs. See 192 N. Y. —, 85 N. E. 1109.

**FORD,** Respondent, v. **ADAMS DRY GOODS CO.,** Appellant. (Court of Appeals of New York. Oct. 23, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (121 App. Div. 895, 105 N. Y. Supp. 1115), entered August 8, 1907, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence. **Frederick B. Fishel,** for appellant. **Maurice L. Heidenheimer, Emanuel Van Dernoot, and Louis J. Vorhaus,** for respondent.

**PER CURIAM.** Judgment affirmed, with costs.

**EDWARD T. BARTLETT, VANN, WILLARD BARTLETT,** and **CHASE, JJ.,** concur. **CULLEN, C. J.,** and **HAIGHT** and **WERNER, JJ.,** dissent.

**FRANCE,** Respondent, v. **NEW YORK CENT. & H. R. R. CO.,** Appellant. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (118 App. Div. 550, 102 N. Y. Supp. 991), entered March 6, 1907, sustaining plaintiff's exceptions ordered to be heard in the first instance by the Appellate Division, and granting a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence on the trial of which the complaint had been dismissed. **Charles A. Pooley,** for appellant. **Lincoln A. Groat** and **Alfred L. Becker,** for respondent.

**PER CURIAM.** Order affirmed, and judgment absolute ordered against appellant on the stipulation, with costs in all courts, on opinion below.

**VANN, WILLARD BARTLETT, HISCOCK,** and **CHASE, JJ.,** concur. **CULLEN, C. J.,** and **GRAY** and **WERNER, JJ.,** dissent.

**FURBER,** Respondent, v. **NATIONAL METAL CO.,** Appellant. (Court of Appeals of New York. Oct. 23, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (118 App. Div. 283, 103 N. Y. Supp. 490), entered March 22, 1907, reversing so much of a judgment in favor of plaintiff entered upon a verdict directed by the court as failed to award to him possession of certain shares of stock and granted a new trial in an action of replevin. **Samuel Riker, Jr.,** for appellant. **Arthur Furber,** for respondent.

**PER CURIAM.** Order affirmed, and judgment absolute ordered against appellant on the stipulation, with costs in all courts, on opinion of **CLARKE, J.,** below.

**CULLEN, C. J.,** and **EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT,** and **CHASE, JJ.,** concur.

In re **GRIFFIN'S WILL.** (Court of Appeals of New York. Oct. 13, 1908.) Appeal from an order of the Appellate Division of the

Supreme Court in the Second Judicial Department (126 App. Div. 986, 110 N. Y. Supp. 1130), entered May 12, 1908, which affirmed a decree of the Suffolk County Surrogate's Court admitting to probate a paper propounded as the last will and codicil of **Henry L. Griffin,** deceased. **Marvin Emory Parrott,** for appellant. **Timothy M. Griffing** and **Thomas Young,** for respondents.

**PER CURIAM.** Order affirmed, with costs to respondents payable out of the estate.

**CULLEN, C. J.,** and **EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, HISCOCK,** and **CHASE, JJ.,** concur.

In re **GROSVENOR'S ESTATE.** (Court of Appeals of New York. Nov. 24, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (126 App. Div. 953, 111 N. Y. Supp. 1121), entered June 26, 1908, which affirmed an order of the New York County Surrogate's Court declaring the estate of the decedent herein exempt from transfer taxation. **D. Cady Herrick** and **Charles P. Robinson,** for appellant. **Robert McC. Marsh** and **Charles P. Howland,** for respondent.

**PER CURIAM.** Order affirmed, with costs, on the authority of *Matter of King*, 71 App. Div. 531, 76 N. Y. Supp. 220, affirmed on opinion below in 172 N. Y. 616, 64 N. E. 1122.

**CULLEN, C. J.,** and **GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK,** and **CHASE, JJ.,** concur.

**GROTE,** Respondent, v. **GROTE,** Appellant. (Court of Appeals of New York. Oct. 23, 1908.) Appeal by permission from an order of the Appellate Division of the Supreme Court in the First Judicial Department (126 App. Div. 916, 110 N. Y. Supp. 1130), entered May 23, 1908, which affirmed an interlocutory judgment of Special Term sustaining a demurrer to the answer in an action to cancel and avoid a gift of real property. **William C. Rosenberg** and **Alfred Epstein,** for appellant. **Raphael Link,** for respondent.

**PER CURIAM.** The following question was certified: "Is the defense in the answer, that plaintiff had a full, adequate, and complete remedy at law, sufficient in law upon the face thereof?" Order affirmed, with costs, and question certified answered in the negative.

**CULLEN, C. J.,** and **EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, HISCOCK,** and **CHASE, JJ.,** concur.

In re **GUMAERD LEAD & ZINC CO.** (Court of Appeals of New York. Oct. 20, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (127 App. Div. 915, 111 N. Y. Supp. 1122), entered June 5, 1908, affirming a determination of commissioners appointed in the above-entitled proceeding. **Robert H. Southard, Hampton D. Ewing,** and **Joseph Coult, Jr.,** for appellants. **Henry Bacon,** for respondent.

**PER CURIAM.** Order affirmed, without costs.

**CULLEN, C. J.,** and **EDWARD T. BARTLETT, WERNER, HISCOCK,** and **CHASE, JJ.,** concur. **VANN, J.,** not sitting. **HAIGHT, J.,** absent.

**HAIRE,** Appellant, v. **HUGHES,** Respondent, et al. (Court of Appeals of New York. Nov. 17, 1908.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (111 N. Y. Supp. 892), entered July 8,

1908, which reversed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial and directed a dismissal of the complaint. The order was made upon the ground that the Court of Appeals had no jurisdiction to hear and determine the appeal. Charles Lex Brooke, for the motion. Harry Eckhard, opposed.

PER CURIAM. Motion denied, with \$10 costs.

HALL, Respondent, v. NEW YORK, O. & ST. L. R. CO., Appellant. (Court of Appeals of New York. Nov. 24, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (119 App. Div. 919, 105 N. Y. Supp. 1119), entered May 28, 1907, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence. Evan Hollister, for appellant. Nelson J. Palmer, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, WERNER, and WILLARD BARTLETT, JJ., concur. GRAY and HISCOCK, JJ., dissent.

HASELL, Appellant, v. BUCKLEY, Respondent. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (118 App. Div. 356, 103 N. Y. Supp. 377), entered April 15, 1907, reversing a judgment in favor of plaintiff entered upon the report of a referee in an action to recover commissions alleged to be payable under a contract between the plaintiff's testator and the defendant. The Special Term held that the defendant was chargeable with such commissions from March 12, 1900, to July 31, 1905. The Appellate Division held that he was chargeable with such commissions only from March 12, 1900, to April 9, 1903. The difference in these results depended upon the proper construction of the contract. H. H. Snedeker, for appellant. Henry J. Wehle and John H. Judge, for respondent.

PER CURIAM. Judgment of the Appellate Division reversed, with costs in both courts, and judgment of the Special Term reinstated, on the ground that under the proper construction of the contract in suit the defendant was chargeable with commissions, as found by the Special Term. Judgment accordingly.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

HAWKINS v. RUDOLPH et al. (Court of Appeals of New York. Nov. 17, 1908.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (120 App. Div. 887, 105 N. Y. Supp. 1120), entered June 18, 1907, affirming a judgment in favor of defendants other than the defendant appellant herein entered upon a decision of the court on trial at Special Term. The motion was made on the ground that the return presented no question which the Court of Appeals had jurisdiction to review. A. Berton Reed, for the motion. Gilbert W. Minor, opposed.

PER CURIAM. Motion denied, with \$10 costs.

HINCKLEY, Appellant, v. SCHWARSZ-CHILD & SULZBERGER CO. et al., Respondents. (Court of Appeals of New York.

Oct. 6, 1908.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (107 App. Div. 470, 95 N. Y. Supp. 357), entered November 1, 1905, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term (45 Misc. Rep. 176, 91 N. Y. Supp. 893), in an action to restrain the defendant from issuing preferred stock. The motion was made, under section 1296 of the Code of Civil Procedure, upon the ground that the appellant had died and that no order of substitution had been made within three months. Miller, King, Lane & Trafford, for the motion.

PER CURIAM. Motion granted, and appeal dismissed, with costs and \$10 costs of motion.

HINMAN, Respondent, v. CLARKE et al., Appellants. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (121 App. Div. 105, 105 N. Y. Supp. 725), entered July 17, 1907, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term (51 Misc. Rep. 252, 100 N. Y. Supp. 1068), in an action for an injunction. Francis D. Culkin, for appellants. E. J. Misen and D. P. Morehouse, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

H. KOEHLER & CO., Appellant, v. CLEMENT, Excise Com'r, Respondent. (Court of Appeals of New York. Oct. 20, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (125 App. Div. 886, 111 N. Y. Supp. 151), entered May 22, 1908, which affirmed an order of Special Term denying an application for a peremptory writ of mandamus to compel the defendant to issue an order for the payment of a rebate on a surrendered liquor tax certificate. Charles Goldzier, for appellant. Herbert H. Kellogg, for respondent.

PER CURIAM. Order reversed, and motion for peremptory writ of mandamus granted, on the authority of *People v. Fabian*, 192 N. Y. 443, 85 N. E. 672, with costs in all courts.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur.

HOAG, Respondent, v. SOUTH DOVER MARBLE CO., Appellant. (Court of Appeals of New York. Nov. 17, 1908.) No opinion. Motion for reargument denied, with \$10 costs. See 192 N. Y. 412, 85 N. E. 687.

ISAACS, Appellant, v. COMMERCIAL CO. OF SALONICA, Limited, Respondent. (Court of Appeals of New York. Oct. 6, 1908.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (127 App. Div. 915, 111 N. Y. Supp. 1125), entered June 9, 1908, affirming a judgment in favor of defendant entered upon verdict in an action to recover for services alleged to have been rendered by plaintiff's assignor to the defendant. The motion was made upon the ground that the decision of the Appellate Division was unanimous and permission to appeal had not been granted. William H. Fain, for the motion. Maxwell C. Katz, opposed.

PER CURIAM. Motion denied, with \$10 costs.

**ISRAELS et al., Appellants, v. MacDONALD, Respondent.** (Court of Appeals of New York. Oct. 6, 1908.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (123 App. Div. 63, 107 N. Y. Supp. 826), entered January 22, 1908, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover on a contract for services. The motion was made upon the ground that the decision of the Appellate Division was unanimous and permission to appeal had not been granted. Frank W. Arnold, for the motion. Theodore T. Baylor, opposed.

**PER CURIAM.** Motion granted, and appeal dismissed, without costs.

**JANUSZEWICZ, Respondent, v. LEICHT, Appellant.** (Court of Appeals of New York. Oct. 23, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (120 App. Div. 895, 105 N. Y. Supp. 1122), entered July 10, 1907, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to compel the defendant to sign and acknowledge a satisfaction of a certain chattel mortgage. Charles W. U. Sneed and C. L. Waring, for appellant. David C. Scott, for respondent.

**PER CURIAM.** Judgment affirmed, with costs.

**CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WIL-LARD BARTLETT, and CHASE, JJ., concur.**

**In re KEOGH.** (Court of Appeals of New York. Oct. 13, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (126 App. Div. 285, 110 N. Y. Supp. 868), entered May 12, 1908, which affirmed a decree of the Westchester County Surrogate's Court judicially settling the accounts of the trustees herein and directing distribution of the trust estate. Barclay E. V. McCarty, for appellants. James L. Bishop, Charles M. Cannon, and Wilfrid N. O'Neil, for respondents.

**PER CURIAM.** Order affirmed, with costs to respondents payable out of the estate.

**CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, HIS- COCK, and CHASE, JJ., concur.**

**In re KEOGH et al.** (Court of Appeals of New York. Oct. 13, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (126 App. Div. 937, 110 N. Y. Supp. 871), entered May 12, 1908, which affirmed a decree of the Westchester County Surrogate's Court judicially settling the accounts of the trustees herein and directing distribution of the trust estate. See, also, 126 App. Div. 285, 110 N. Y. Supp. 868. Barclay E. V. McCarty, for appellants. James L. Bishop, Charles M. Cannon, and Wilfrid N. O'Neil, for respondents.

**PER CURIAM.** Order affirmed, with costs to respondents payable out of the estate.

**CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, HIS- COCK, and CHASE, JJ., concur.**

**KING, Respondent, v. WILL J. BLOCK AMUSEMENT CO., Appellant.** (Court of Appeals of New York. Oct. 20, 1908.) Appeal by permission from an order of the Appellate Divi-

sion of the Supreme Court in the First Judicial Department (126 App. Div. 48, 111 N. Y. Supp. 102), entered May 20, 1908, which reversed an order of Special Term granting a motion to vacate an order of attachment on the ground that it was procured within four months of a petition in bankruptcy against defendant and while it was insolvent. The following questions were certified: "(1) The attachment against the property of the defendant having been discharged by the defendant giving an undertaking as provided for by sections 687 and 688 of the Code of Civil Procedure, was the Supreme Court required, on motion of the defendant, to vacate the attachment upon the subsequent adjudication of the defendant as a bankrupt within four months of the granting of the original attachment? (2) Did the adjudication in bankruptcy avoid an undertaking given to discharge an attachment under section 688 of the Code of Civil Procedure, which had been issued within four months of the filing of the petition in bankruptcy?" I. M. Dittenhoefer, David Gerber, and Henry J. Goldsmith, for appellant. Paul N. Turner, for respondent.

**PER CURIAM.** Order affirmed, with costs, and questions certified answered in the negative.

**CULLEN, C. J., and EDWARD T. BARTLETT, VANN, WERNER, and CHASE, JJ., concur. HAIGHT and HISCOCK, JJ., not voting.**

**KIRK, Appellant, v. CRYSTAL, Respondent.** (Court of Appeals of New York. Oct. 23, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (118 App. Div. 32, 103 N. Y. Supp. 17), entered March 19, 1907, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action for conversion. James E. Duross and William Steele Grey, for appellant. Harold Swain, for respondent.

**PER CURIAM.** Judgment affirmed, with costs.

**CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WIL-LARD BARTLETT, and CHASE, JJ., concur.**

**KNICKERBOCKER TRUST CO., Respondent, v. O'ROURKE ENGINEERING CONST. CO., Appellant.** (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (120 App. Div. 880, 105 N. Y. Supp. 1125), entered July 2, 1907, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover rent alleged to be due under a certain lease. L. Lafin Kellogg and Franklin Nevius, for appellant. Herbert Barry and Julian C. Harrison, for respondent.

**PER CURIAM.** Judgment affirmed, with costs.

**CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WIL-LARD BARTLETT, and HISCOCK, JJ., concur.**

**KORN, Appellant, v. CAMPBELL, Respondent.** (Court of Appeals of New York. Oct. 23, 1908.) No opinion. Motion for reargument denied, with \$10 costs. See 192 N. Y. 490, 85 N. E. 687.

**LAWRENCE v. CHRISTLIEB et al.** (Court of Appeals of New York. Nov. 25, 1908.) Motion for judgment by default, with costs and a penalty for delay, on appeal from a

judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (120 App. Div. 891, 105 N. Y. Supp. 1128), entered June 17, 1907, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for goods sold and delivered. Morris J. Hirsch, for the motion.

PER CURIAM. Motion granted, and judgment affirmed, with costs by default, with 10 per cent. damages, under subdivision 5 of section 3251 of the Code of Civil Procedure.

LEVIN v. HILL et al. (Court of Appeals of New York. Oct. 23, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (117 App. Div. 472, 102 N. Y. Supp. 890), entered February 11, 1907, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to recover an amount paid as consideration for the assignment of a contract for the sale of certain real property. Benjamin G. Paskus, for appellant William R. Rose. William Goldsticker and Henry M. Flateau, for respondent Harry Levin.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

LITE, Respondent, v. FIREMEN'S INS. CO. OF NEWARK, NEW JERSEY, Appellant. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (119 App. Div. 410, 104 N. Y. Supp. 484), entered May 17, 1907, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and granting a new trial in an action to recover on a policy of fire insurance. William D. Murray, for appellant. Benjamin Patterson and George Bell, for respondent.

PER CURIAM. Order affirmed, and judgment absolute ordered against appellant on the stipulation, with costs in all courts.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

LOWERY, Appellant, v. HUNTINGTON LIGHT & POWER CO., Respondent. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (121 App. Div. 245, 105 N. Y. Supp. 852), entered August 2, 1907, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for personal injuries alleged to have been received through defendant's negligence. Herbert C. Smyth, Frederick C. Scofield, and P. Henry Dehanty, for appellant. Alfred A. Wheat and Frank A. Gaynor, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur. EDWARD T. BARTLETT, J., not voting.

In re McMILLAN. (Court of Appeals of New York. Nov. 24, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (126 App. Div. 155, 110 N. Y. Supp. 622), entered

May 8, 1908, which reversed a judgment of the Livingston County Court settling the accounts of Lana A. McMillan, as committee, and directing distribution of the estate of the incompetent herein. Edwin A. Nash, Kidder M. Scott, and George W. Atwell, for appellants. George B. Adams and Lockwood R. Doty, for respondents.

PER CURIAM. Order affirmed, with costs, on opinion of Spring, J., below.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

In re MANSKE. (Court of Appeals of New York. Nov. 17, 1908.) Motion to dismiss appeals from orders of the Appellate Division of the Supreme Court in the Second Judicial Department (121 App. Div. 919, 106 N. Y. Supp. 1136; 124 App. Div. 915, 108 N. Y. Supp. 1140), entered, respectively, October 18, 1907, and January 17, 1908, which modified, and affirmed as modified, a decree of the Kings County Surrogate's Court settling the accounts of the administratrix herein. The motion was made upon the grounds that the notices of appeal were defective and that the parts of the orders attempted to be appealed from were not appealable to the Court of Appeals. Joseph Ullman, for the motion. Edward C. Graves, opposed.

PER CURIAM. Motion granted, and appeals dismissed, with costs and \$10 costs of motion.

METTLER et al., Respondents, v. WUNDERLICH, Appellant. (Court of Appeals of New York. Oct. 23, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (120 App. Div. 888, 105 N. Y. Supp. 1181), entered June 7, 1907, which affirmed a judgment in favor of plaintiffs entered upon the report of a referee in an action to recover for labor and materials furnished. Rolland Read Rasquin, for appellant. Edwin Blumenstiel, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

MILLER, Respondent, v. CAR TRUST INV. CO., Appellant. (Court of Appeals of New York. Oct. 20, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (120 App. Div. 442, 105 N. Y. Supp. 5), entered June 20, 1907, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury in an action to recover on a written contract. H. V. Rutherford and James Dunne, for appellant. John A. Dutton, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

MILLER, et al., Appellants, v. HARRIS, Respondent. (Court of Appeals of New York. Nov. 17, 1908.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (125 App. Div. 922, 110 N. Y. Supp. 1138), entered in April, 1908, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term. The motion was made upon the grounds

that no question of law is involved and the only exceptions appearing in the record are frivolous. Ezekiel Fixman, for the motion. Otto C. Wierum, Jr., opposed.

PER CURIAM. Motion denied, with \$10 costs.

In re MILLS et al. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (125 App. Div. 730, 110 N. Y. Supp. 314), entered May 18, 1908, which modified, and affirmed as modified, an order of the Special Term directing the disposition of certain securities in the possession of the assignee of the bankrupt firm of Mills Bros. & Co. Herbert Noble, for appellant Henck. Theodore F. Humphrey, for appellant Townsend. Willard U. Taylor, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur.

MOEST et al., Appellants, v. CITY OF BUFFALO et al., Respondents. (Court of Appeals of New York. Oct. 20, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (118 App. Div. 657, 101 N. Y. Supp. 996), entered December 28, 1906, which reversed a judgment in favor of plaintiffs entered upon a verdict and an order denying a motion for a new trial and granted a new trial in an action to recover for the death of plaintiffs' intestate alleged to have occurred through the negligence of the defendants. Walter F. Hofheins, for appellants. Nathaniel W. Norton and Louis E. Desbecker, for respondents.

PER CURIAM. Order affirmed, and judgment absolute ordered against appellants on the stipulation, with costs in all courts, on opinion below.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur. VANN, J., not voting.

NEWELL, Respondent, v. NEWELL et al., Appellants. (Court of Appeals of New York. Oct. 6, 1908.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (123 App. Div. 912, 108 N. Y. Supp. 1141), entered January 8, 1908, which affirmed an interlocutory judgment of Special Term setting aside a will and deed and directing a sale of certain real property. The motion was made upon the grounds that the order appealed from does not finally determine the action, but is interlocutory only, and, therefore, not appealable; permission to appeal not having been obtained. William S. Stearns, for the motion. Robert J. Cooper, opposed.

PER CURIAM. Motion granted, and appeal dismissed, without costs.

NIAGARA WOOD WORKING CO., Respondent, v. JUMEL REALTY & CONSTRUCTION CO. et al., Appellants. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (119 App. Div. 922, 105 N. Y. Supp. 1133), entered May 28, 1907, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial in an action to recover for goods sold and delivered. J. Charles Weech-

ler and Sol Rothschild, for appellants. G. D. Judson, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

O'CONNOR, Appellant, v. BURGARD, Respondent. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (117 App. Div. 918, 102 N. Y. Supp. 1144), entered January 16, 1907, sustaining defendant's exceptions ordered to be heard in the first instance by the Appellate Division and granting a motion for a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence, the trial of which had resulted in a verdict for plaintiff. Frank C. Ferguson, for appellant. Charles Diebold, Jr., for respondent.

PER CURIAM. Order affirmed, and judgment absolute ordered against appellant on the stipulation, with costs in all courts.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

O. J. GUDE CO., Appellant, v. REISER, Respondent. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (117 App. Div. 910, 102 N. Y. Supp. 1144), entered January 28, 1907, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term in an action to restrain the defendant from interfering with certain alleged advertising privileges of the plaintiff on certain premises. A. S. Gilbert, Julius M. Mayer, and Francis Gilbert, for appellant. Paul Armitage, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

O'NEILL et al., Respondents, v. CAMPBELL, Appellant, et al. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (118 App. Div. 64, 103 N. Y. Supp. 150), entered May 17, 1907, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term in an action to foreclose an attorney's lien. William J. Moran and Frank Verner Johnson, for appellant. Thomas J. O'Neill and Joseph A. Shay, in pro. per.

PER CURIAM. Judgment reversed, and new trial granted, costs to abide event, on dissenting opinion of Ingraham, J., below.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

PACIFIC COAST BORAX CO., Respondent, v. WARING, Appellant. (Court of Appeals of New York. Nov. 24, 1908.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (112 N. Y. Supp. 458), entered October 13, 1908, affirming a judgment in favor of plaintiff entered upon a verdict and an

order denying a motion for a new trial in an action for conversion. The motion was made upon the grounds that the Appellate Division had unanimously directed that the verdict was supported by the evidence and that no questions of law were presented for review; the exceptions being frivolous. Godfrey Goldmark, for the motion. Herbert H. Gibbs, opposed.

PER CURIAM. Motion denied, with \$10 costs.

PARAGON PLASTER CO., Respondent, v. CRUCIBLE STEEL CO. OF AMERICA, Appellant. (Court of Appeals of New York. Oct. 6, 1908.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (126 App. Div. 925, 111 N. Y. Supp. 1133), entered May 27, 1908, which reversed an order of Special Term granting an additional allowance. Charles W. Andrews, for appellant. F. T. Miller, for respondent.

PER CURIAM. Appeal dismissed, with costs. CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur.

PENN AMERICAN PLATE GLASS CO., Respondent, v. RUGG, Appellant. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (121 App. Div. 893, 105 N. Y. Supp. 1135), entered July 15, 1907, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term, a jury having been waived, in an action to recover on a promissory note. John D. Lynn, for appellant. Willard W. Saperston, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

PEOPLE, Respondent, v. BLAKE, Appellant. (Court of Appeals of New York. Oct. 20, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (121 App. Div. 613, 106 N. Y. Supp. 819), entered October 25, 1907, which affirmed a judgment of the Court of General Sessions of the Peace in the County of New York rendered upon a verdict convicting the defendant of a violation of sections 364, 438, and 438a of the Penal Code. James W. Osborne and Charles J. Nehrbaas, for appellant. William Travers Jerome, Dist. Atty. (Robert C. Taylor, of counsel), for the People.

PER CURIAM. Judgment of conviction affirmed, upon the ground that no question as to the statute of limitations was sufficiently raised upon the trial.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

PEOPLE, Appellant, v. DUFFY-McINNERNEY CO., Respondent. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (122 App. Div. 336, 106 N. Y. Supp. 878), entered January 4, 1908, in favor of defendant upon the submission of a controversy under section 1279 of the Code of Civil Procedure as to whether the original issue to subscribers of stock of a corporation is liable to tax under the stock

transfer tax law. William S. Jackson, Att'y. Gen. (Timothy I. Dillon, of counsel), for the People. James Breck Perkins, for respondent.

PER CURIAM. Judgment affirmed, with costs, on opinion below.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

PEOPLE v. KNICKERBOCKER TRUST CO. (Court of Appeals of New York. Nov. 17, 1908.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (111 N. Y. Supp. 2), entered June 5, 1908, which modified, and affirmed as modified, an order of Special Term fixing provisionally the compensation of the temporary receivers herein. The motion was made upon the grounds that the Court of Appeals has no jurisdiction to review the order appealed from, that the said order was discretionary, and that no question of law was involved that could be reviewed. Charles P. Williams and Charles H. Tuttle, for the motion. Alton B. Parker, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with costs and \$10 costs of motion, on the ground that the orders of the Special Term and Appellate Division are provisional only, without intimating any opinion on the question whether the order of the Appellate Division would in any aspect be appealable to this court.

PEOPLE ex rel. AMERICAN AGRICULTURAL CHEMICAL CO., Appellant, v. POLICE COURT OF CITY OF ROCHESTER et al., Respondents. (Court of Appeals of New York. Oct. 20, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (127 App. Div. 945, 111 N. Y. Supp. 1135), entered July 7, 1908, which affirmed an order of Special Term denying an application for a writ of prohibition to restrain the police court of the city of Rochester from trying a criminal proceeding pending in that court against the relator. Horace McGuire, for appellant. W. W. Webb, Corp. Counsel (John M. Stull, of counsel), for respondents.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur.

PEOPLE ex rel. BEAUDOIN, Respondent, v. BEAUDOIN et al., Appellants. (Court of Appeals of New York. Oct. 20, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (126 App. Div. 505, 110 N. Y. Supp. 592), entered May 23, 1908, which reversed an order of Special Term dismissing a writ of habeas corpus obtained by the plaintiff in a proceeding to obtain possession of her infant son. Lyman Jenkins and J. A. Kellogg, for appellants. J. D. Trumbull and J. Edward Singleton, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur. HAIGHT, J., absent.

PEOPLE ex rel. CONSOLIDATED GAS CO. OF NEW YORK, Appellant, v. WELLS et al., Respondents. (Court of Appeals of New York. Oct. 20, 1908.) Appeal from an order

of the Appellate Division of the Supreme Court in the First Judicial Department (128 App. Div. 944, 111 N. Y. Supp. 1185), entered June 12, 1908, which affirmed an order of Special Term (64 Misc. Rep. 822, 105 N. Y. Supp. 1006) confirming assessments of real property of the relator for purposes of taxation. John A. Garver, for appellant. Francis K. Pendleton, Corp. Counsel (David Rumsey and Curtis A. Peters, of counsel), for respondents.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur.

PEOPLE ex rel. DOLE, Respondent, v. TOWN BOARD OF TOWN OF HAMBURG, Appellant. (Court of Appeals of New York. Oct. 20, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (127 App. Div. 948, 111 N. Y. Supp. 1185), entered July 7, 1908, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendant to commence condemnation proceedings against the relator. Edward Hance Letchworth, for appellant. Thomas R. Stone, for respondent.

PER CURIAM. Order affirmed, with costs, on the opinion of Haight, J., in *Smith v. Boston & Albany R. Co.*, 181 N. Y. 132, 73 N. E. 679.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur.

PEOPLE ex rel. ECKERSON, Respondent, v. BOARD OF SCHOOL EDUCATION AND TRUSTEES OF SCHOOL DIST. NO. 1 OF TOWN OF HAVERSTRAW et al., Appellants. (Court of Appeals of New York. Oct. 13, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (126 App. Div. 414, 110 N. Y. Supp. 769), entered May 13, 1908, which reversed on certiorari the proceedings of the defendant trustees in refusing to audit certain claims of the relator and directed them to reconvene and to audit such claims. William McCauley, for appellants. Ralph B. Prime, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur.

PEOPLE ex rel. GORMAN, Appellant, v. BELL et al., Police Com'rs, Respondents. (Court of Appeals of New York. Oct. 13, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (125 App. Div. 205, 109 N. Y. Supp. 90), entered March 19, 1908, which confirmed an order of the defendants dismissing the relator from the police force of the city of Yonkers. William A. Walsh, for appellant. Thomas F. Curran, for respondents.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur.

PEOPLE ex rel. HEALEY, Appellant, v. BINGHAM, Police Com'r, Respondent. (Court of Appeals of New York. Oct. 20, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (126 App. Div. 946, 111 N. Y. Supp.

1186), entered June 12, 1908, which dismissed a writ of certiorari and affirmed the proceedings of the defendant in reducing the relator from the rank of sergeant to that of patrolman in the police force of the city of New York. Julius M. Mayer and A. S. Gilbert, for appellant. Francis K. Pendleton, Corp. Counsel (Theodore Connolly and Royal E. T. Egge, of counsel), for respondent.

PER CURIAM. Order affirmed, without costs.

CULLEN, C. J., and EDWARD T. BARTLETT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur. HAIGHT, J., absent.

PEOPLE ex rel. HEFFERNAN, Respondent, v. DEALY, Mayor, Appellant. (Court of Appeals of New York. Oct. 20, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (127 App. Div. 933, 111 N. Y. Supp. 1136), entered June 23, 1908, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendant to sign a certain warrant on the city treasurer in favor of relator. A. M. Mills and J. H. Dealy, for appellant. Charles S. Nisbet, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur.

PEOPLE ex rel. JAMAICA WATER SUPPLY CO. v. STATE BOARD OF TAX COMMISSIONERS. (Court of Appeals of New York. Nov. 17, 1908.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (112 N. Y. Supp. 892), entered October 7, 1908, which reversed an order of Special Term, confirming an assessment against the relator's special franchises and directed a reassessment. The motion was made upon the ground that the order of the Appellate Division was not appealable to the Court of Appeals. F. H. Van Vechten, for the motion. Francis K. Pendleton, Corp. Counsel (David Rumsey and Curtis A. Peters, of counsel), opposed.

PER CURIAM. Motion denied, with \$10 costs.

PEOPLE ex rel. LALLY et al., Respondents, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Court of Appeals of New York. Nov. 24, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (111 N. Y. Supp. 1189), entered June 9, 1908, which affirmed an order of Special Term granting a motion to amend a final order on an application for an alternative writ of mandamus by adding thereto a provision allowing the relator costs and disbursements. George H. Walker and Ira A. Place, for appellant. Lavinia Lally, for respondents.

PER CURIAM. Appeal dismissed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

PEOPLE ex rel. MCCARREN, Respondent, v. DOOLING et al., Appellants. (Court of Appeals of New York. Oct. 13, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (128 App. Div. 1, 112 N. Y. Supp. 71), entered July 28, 1908, which reversed an order

of Special Term (60 Misc. Rep. 132, 112 N. Y. Supp. 67) denying a motion for a peremptory writ of mandamus to compel the defendants to select and appoint election officials from the list filed by the petitioner as chairman of the executive committee of the Democratic county committee of Kings county, and granted such motion. James C. Church, for appellants Delaney and others. Francis K. Pendleton, Corp. Counsel (Theodore Connolly and Terence Farley, of counsel), for other appellants. Isaac M. Kapper, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur. HAIGHT, J. absent.

PEOPLE ex rel. NEW YORK CENT. & H. R. R. Co. v. PUBLIC SERVICE COMMISSION OF SECOND DISTRICT et al. (Court of Appeals of New York. Nov. 24, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (126 App. Div. 938, 110 N. Y. Supp. 1140), entered May 16, 1908, which confirmed an order of the Board of Railroad Commissioners granting the application of the respondent herein for a certificate of public convenience and necessity under section 59 of the railroad law (Laws 1895, p. 317, c. 545). Alfred L. Becker, for appellant. Daniel J. Kenefick, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

PEOPLE ex rel. PRICE, Appellant, v. BINGHAM, Police Com'r, Respondent. (Court of Appeals of New York. Oct. 20, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (125 App. Div. 722, 110 N. Y. Supp. 136), entered April 24, 1908, which reversed an order of Special Term granting a motion for an alternative writ of mandamus directing the defendant to restore the relator to duty on the police force of the city of New York or to show cause for his failure to do. Edmund F. Driggs, for appellant. Francis K. Pendleton, Corp. Counsel (James D. Bell, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur. HAIGHT, J., absent.

PEOPLE ex rel. REITH, Respondent, v. HAYES, Fire Com'r, Appellant. (Court of Appeals of New York. Oct. 20, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (127 App. Div. 6, 111 N. Y. Supp. 270), entered June 5, 1908, which annulled on certiorari a determination of the defendant dismissing the relator from the fire department of the city of New York and restored said relator to his former position, with back pay and interest thereon. Francis K. Pendleton, Corp. Counsel (James D. Bell, of counsel), for appellant. Jacob Rouss and Louis J. Grant, for respondent.

PER CURIAM. Order affirmed, with costs.

EDWARD T. BARTLETT, HAIGHT, WERNER, HISCOCK, and CHASE, JJ., concur. CULLEN, C. J., and VANN, J., dissent as to allowance of interest.

PERRY, Respondent, v. LOVELL, Appellant. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (119 App. Div. 916, 104 N. Y. Supp. 1137), entered May 13, 1907, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to compel performance of an alleged contract for the sale of real property. C. A. Norton, for appellant. Ernest C. Olney, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

PERRY, Respondent, v. VAN NORDEN TRUST CO., Appellant. (Court of Appeals of New York. Oct. 20, 1908.) No opinion. Motion for return of remittitur and for reargument denied, with \$10 costs. See 192 N. Y. 189, 84 N. E. 804.

PITTSBURGH AMUSEMENT CO., Appellant, v. FERGUSON, Respondent. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (115 App. Div. 241, 101 N. Y. Supp. 217), entered November 14, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term in an action to compel defendant to execute and deliver to plaintiff a certain lease. Walter S. MacGregor, Herman Fromme, and Arnold Gross, for appellant. Frank E. Blackwell and James K. Symmers, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

POOL, Appellant, v. BENTS, Respondent. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (119 App. Div. 919, 105 N. Y. Supp. 1138), entered May 24, 1907, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover on contract. I. R. Breen, for appellant. Delos M. Cosgrove and John Conboy, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

REYNOLDS, Appellant, v. BINGHAM, Police Com'r, Respondent. (Court of Appeals of New York. Oct. 13, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (123 App. Div. 289, 110 N. Y. Supp. 520), entered May 1, 1908, which reversed an order of the Special Term granting a motion for a peremptory writ of mandamus to compel the defendant to reinstate the petitioner in the position of captain in the police department of the city of New York. Frank B. York, for appellant.

Francis K. Pendleton, Corp. Counsel (James D. Bell, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur.

RIDGELY, Respondent, v. TALBOT, J. TAYLOR & CO., Appellant, et al. (Court of Appeals of New York. Nov. 17, 1908.) Motion to dismiss an appeal from a judgment entered May 5, 1908, in favor of plaintiff upon an order of the Appellate Division of the Supreme Court in the Second Judicial Department (128 App. Div. 803, 110 N. Y. Supp. 885), which reversed an order of the court at a Trial Term setting aside a verdict in favor of plaintiff and granting a new trial, and reinstated said verdict. The motion was made upon the ground that the Court of Appeals had no jurisdiction to entertain the appeal. I. B. Oeland, for the motion. Robert W. Candler, opposed.

PER CURIAM. Motion denied, with \$10 costs.

RILEY, Respondent, v. CONTINUOUS RAIL JOINT CO. OF AMERICA, Appellant. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (110 App. Div. 787, 97 N. Y. Supp. 283), entered January 12, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover damages alleged to have been caused by the removal of the lateral support to certain land. Samuel Foster, for appellant. John P. Curley, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur. CHASE, J., not sitting.

RISTAU, Respondent, v. E. FRANK COE CO., Appellant. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (120 App. Div. 478, 104 N. Y. Supp. 1059), entered June 7, 1907, which reversed a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and granted a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence. Henry M. Earle, Alden S. Crane, and William A. Jones, Jr., for appellant. Martin S. Lynch, for respondent.

PER CURIAM. Order affirmed, and judgment absolute ordered against appellant on the stipulation, with costs in all courts.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

RUTZLER, Respondent, v. GEORGE A. FULLER CO., Appellant. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (120 App. Div. 893, 105 N. Y. Supp. 1141), entered June 27, 1907, affirming a judgment in favor of plaintiff entered upon the report of a referee in an action to recover on contract. Watson B. Robinson and Richard

G. Babbage, for appellant. Frederick Hulse, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

SAGEHOMME, Respondent, v. PAUL B. FUGH & CO., Appellant. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (113 App. Div. 905, 99 N. Y. Supp. 1148), entered June 8, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to restrain the defendant from building certain walls on plaintiff's lands. Selden Bacon and Hugh S. Mack, for appellant. James S. Darcy, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

SALOMON, Respondent, v. SPERB, Appellant. (Court of Appeals of New York. Oct. 23, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (120 App. Div. 875, 105 N. Y. Supp. 1141), entered June 19, 1907, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to enforce a covenant against building on a certain plot of land. C. N. Bovee, for appellant. William Allan Hoar, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

SCHLICHTER et al., Respondents, v. GUARANTEE CONST. CO., Appellant. (Court of Appeals of New York. Oct. 23, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (118 App. Div. 906, 103 N. Y. Supp. 1141), entered April 3, 1907, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover on contract. Rollin Tracy and Charles E. F. McCann, for appellant. George H. Francoeur and Warren Leslie, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

SCHNEIDER, Respondent, v. RATNER, Appellant, et al. (Court of Appeals of New York. Oct. 20, 1908.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (127 App. Div. 918, 111 N. Y. Supp. 1143), entered June 10, 1908, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for services. The motion was made upon the

grounds that the judgment of the Appellate Division was not appealable, and of failure to perfect the appeal by filing the required return. Abraham B. Schleimer, for the motion. A. H. Spiglegass, opposed.

**PER CURIAM.** Motion granted, with costs, and \$10 costs of motion, unless appellant obtains and enters the order mentioned in the memorandum of Justice Stapleton, quoted in the motion papers herein, and complies therewith, and also files and serves the printed cases on appeal within 30 days, in which case motion denied, without costs.

**SERGEANT, Appellant, v. LIVERPOOL & L. & G. INS. CO., Respondent.** (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (120 App. Div. 904, 105 N. Y. Supp. 1142), entered August 6, 1907, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover upon a policy of fire insurance. Andrew G. Washbon, for appellant. Charles D. Thomas, for respondent.

**PER CURIAM.** Judgment reversed, and new trial granted, costs to abide event, on authority of same case (155 N. Y. 349, 49 N. E. 885).

**CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur. GRAY, J., not voting.**

**SHEEHAN, Appellant, v. BOARD OF EDUCATION OF CITY OF NEW YORK, Respondent.** (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (120 App. Div. 557, 104 N. Y. Supp. 1002), entered July 13, 1907, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover an amount claimed to be due plaintiff for services as teacher in a public school. Ira Leo Bamberger and Sidney Lowenthal, for appellant. Francis K. Pendleton, Corp. Counsel (Theodore Connolly, Stephen O'Brien, and Thomas F. Noonan, of counsel), for respondent.

**PER CURIAM.** Judgment affirmed, with costs, on opinion below.

**CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.**

**SIENBIDA, Respondent, v. TONAWANDA BOARD & PAPER CO., Appellant.** (Court of Appeals of New York. Oct. 23, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (121 App. Div. 70, 105 N. Y. Supp. 613), entered July 16, 1907, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's negligence. Clinton B. Gibbs, for appellant. George H. Kennedy and Elbert S. Boughton, for respondent.

**PER CURIAM.** Judgment affirmed, with costs.

**EDWARD T. BARTLETT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur. CULLEN, C. J., and HAIGHT, J., dissent.**

**In re SPENCER'S ESTATE.** (Court of Appeals of New York. Oct. 20, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (126 App. Div. 854, 111 N. Y. Supp. 1145), entered June 23, 1908, which affirmed an order of the New York County Surrogate's Court assessing a transfer tax on the estate of Sarah J. G. Spencer, deceased. Charles J. Hardy and Thomas Emmet Fitzgerald, for appellant. Perry D. Trafford and Henry H. Man, for respondents.

**PER CURIAM.** Order affirmed, with costs.

**CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur.**

**SULLIVAN, Respondent, v. BURGARD-WISE CONST. CO., Appellant.** (Court of Appeals of New York. Oct. 23, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (119 App. Div. 921, 105 N. Y. Supp. 1145), entered May 31, 1907, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence. Hugh J. O'Brien, Simon Fleischmann, and Carlisle J. Gleason, for appellant. Isaac S. Signor and Charles G. Signor, for respondent.

**PER CURIAM.** Judgment affirmed, with costs.

**CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.**

**SWARTS, Respondent, v. R. M. WILSON MFG. CO., Appellant.** (Court of Appeals of New York. Oct. 23, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (115 App. Div. 739, 100 N. Y. Supp. 1054), entered November 21, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence. Frederick G. Fincke, for appellant. Frank O. Sargent and Jerry F. Connor, for respondent.

**PER CURIAM.** Judgment affirmed, with costs.

**CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.**

**TAYLOR, Respondent, v. BANKERS' LOAN & INVESTMENT CO., Appellant.** (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (118 App. Div. 27, 102 N. Y. Supp. 1029), entered April 4, 1907, modifying, and affirming as modified, a judgment in favor of plaintiff entered upon the report of a referee in an action to recover on certain certificates of stock in a building and loan association. John C. Ten Eyck, for appellant. Edmund S. Hopkins and W. E. Kisselburgh, Jr., for respondent.

**PER CURIAM.** Judgment affirmed, with costs.

**CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.**

**TROMBLY v. TURNER et al.** (Court of Appeals of New York. Oct. 23, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (116 App. Div. 74, 101 N. Y. Supp. 27), entered January 23, 1907, which affirmed a judgment of Special Term directing the foreclosure of a mortgage, but excluding certain lands from the lien of the mortgage. C. J. Vert, for appellant. William S. Jackson, Atty. Gen. (George P. Decker, of counsel), for the People.

**PER CURIAM.** Judgment affirmed, with costs.

**CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.**

**UNITED STATES, Respondent, v. PAVEK et al., Appellants.** (Court of Appeals of New York. Oct. 20, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (125 App. Div. 908, 109 N. Y. Supp. 1149), entered March 13, 1908, which affirmed an order of Special Term, confirming the report of commissioners of appraisal in condemnation proceedings. Truman H. Baldwin and Howard Thornton, for appellants. Henry Bacon and Henry L. Stimson, for the United States.

**PER CURIAM.** Order affirmed, with costs.

**CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur.**

**VAN NOSTRAND et al., Respondents, v. VAN NOSTRAND, Appellant, et al.** (Court of Appeals of New York. Oct. 8, 1908.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (126 App. Div. 926, 110 N. Y. Supp. 665), entered August 26, 1908, which dismissed on appeal from an order amending a judgment of Special Term construing the will of John J. Van Nostrand, deceased. The motion was made upon the grounds that the appeal was not taken from an actual determination of the Appellate Division within the meaning of section 190 of the Code of Civil Procedure, that the appeal to the Appellate Division was dismissed for the reason that it was not taken in time, that such dismissal cannot be reviewed by the Court of Appeals, and that the original order is not reviewable by the Court of Appeals. See, also, 125 App. Div. 718, 110 N. Y. Supp. 142. Alfred Jaretski, for the motion. Henry Hirschberg, opposed.

**PER CURIAM.** Motion granted, and appeal dismissed, with costs and \$10 costs of motion.

**VAN ORDEN, Respondent, v. MacRAE, Appellant.** (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (121 App. Div. 143, 105 N. Y. Supp. 600), entered July 12, 1907, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to recover for labor performed and materials furnished. D. Cady Herrick and Percy S. Dudley, for appellant. Timothy M. Griffing, for respondent.

**PER CURIAM.** Judgment affirmed, with costs.

**CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.**

**In re WATSON.** (Court of Appeals of New York. Oct. 20, 1908.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (126 App. Div. 948, 111 N. Y. Supp. 1120), entered June 12, 1908, which affirmed an order of Special Term granting a motion to strike the name of James J. Gaffney from the enrollment book of the Twenty-Fifth election district of the Fifteenth assembly district of the county of New York. Francis K. Pendleton, Corp. Counsel (Theodore Connolly and Terence Farley, of counsel), for appellant. Henry W. Mack and Charles W. Lefter, for respondent.

**PER CURIAM.** Orders of Special Term and Appellate Division reversed, and proceedings dismissed, without costs in any court, on the ground that the name of Gaffney is sought to be stricken from the enrollment of 1907, which enrollment had become functus officio prior to the commencement of this proceeding in February, 1908. If the petitioner meant the enrollment made in 1907 for the year 1908, he should have explicitly stated so in his moving papers.

**CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur.**

**WEILER, Respondent, v. SYRACUSE RAPID TRANSIT RY. CO., Appellant.** (Court of Appeals of New York. Oct. 20, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (119 App. Div. 917, 106 N. Y. Supp. 1149), entered May 21, 1907, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through the defendant's negligence. Charles E. Spencer, for appellant. Walter W. Magee and Denison Richmond, for respondent.

**PER CURIAM.** Judgment affirmed, with costs.

**CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.**

**WELLS, Appellant, v. BROOKLYN UNION ELEVATED R. CO. et al., Respondents.** (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (121 App. Div. 491, 106 N. Y. Supp. 77), entered October 9, 1907, modifying, and affirming as modified, a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to enjoin the operation of defendants' railroad and for damages. Cyrus V. Washburn and Andrew F. Van Thun, Jr., for appellant. Charles L. Woody and George D. Yeomans for respondents.

**PER CURIAM.** Judgment affirmed, with costs.

**CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.**

**WRIGHT v. KENYON PAPER COMPANY et al.** (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (121 App. Div. 894, 105 N. Y. Supp. 1150), entered July 16, 1907, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover damages arising from the flooding of lands alleged to have been occasioned by the

placing of flush boards on a dam. Le Roy B. Williams, for appellants. William L. Barnum, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

YALE WONDER CLOCK CO., Respondent, v. SURMAN, Appellant. (Court of Appeals of New York. Nov. 10, 1908.) Appeal from a judgment of the Appellate Division of the Su-

preme Court in the Third Judicial Department (120 App. Div. 904, 105 N. Y. Supp. 1151), entered July 2, 1907, affirming a judgment in favor of plaintiff entered on the report of a referee in an action to recover for goods sold and delivered. Daniel J. Dugan, for appellant. John A. Stephens, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

END OF CASES IN VOL. 86.









